

COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, : BEFORE THE BOARD OF CLAIMS  
STATE SYSTEM OF HIGHER EDUCATION, :  
BLOOMSBURG UNIVERSITY :  
 :  
 :  
VS. :  
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 :  
KILLIAN CONSTRUCTION COMPANY AND :  
SAFECO INSURANCE COMPANY : DOCKET NO. 4074

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**FINDINGS OF FACT**

1. Bloomsburg University of Pennsylvania of the State System of Higher Education (“BU” or “University”) is a constituent part of the State System of Higher Education located at 400 East Second Street, Bloomsburg, PA 17815. (Ex. 406; Complaint at ¶ 1)

2. Killian Construction Company (“Killian”) is a construction management firm based in Springfield, MO that provides project management services on large-scale commercial construction projects. (N.T. 622, 1534; Exs. 406 at ¶ 2, 407 at ¶ 2)

3. Safeco Insurance Company of America (“Safeco”) is a corporation with a principal place of business in Seattle, Washington that sells insurance products including, but not limited to, payment and performance bonds. (Exs. 406, 407)

4. The design professional for the Project was RAL Architecture + Design, Inc. (formerly Lack + Strosser Architecture, Inc.) (primarily Robert A. Lack) (hereinafter the “Architect”) and the structural engineer was the firm of QproQ, Inc. (primarily James Kerns). (N.T. 176, 351, 421; Ex. 3)

5. On or about December 7, 2010, the University issued a notice to contractors inviting sealed bids for work on, and renovation of, Elwell Residence Hall (“Project” or “Elwell Project”). (Ex. 1)

6. Elwell Hall is the largest residence hall on BU’s campus, housing approximately 800 freshmen students. (N.T. 916-917)

7. Separate bids were solicited for the Project for: 1) general prime contractor; 2) electrical prime contractor; 3) HVAC prime contractor; and 4) plumbing prime contractor. (N.T. 58-59)

8. The Project consisted of four phases. Phase 1 was for the renovation of the East Residential Wing intended to house approximately 400 students. Phase 2 involved, among other things, the demolition of an existing lobby, construction of a new structure between the East and West Wings expanding existing elevator lobbies, and completing a new building façade on floors

three through seven. Phase 3 consisted of creating basement and ground floor utility spaces for the new structure and installing new electrical, heating, cooling and emergency generator systems for all of the building renovations. Phase 4 was for the renovation of the West Wing, which was also intended to house 400 students. (N.T. 62-71; Ex. 3, Drawing G1.6)

9. Killian submitted the low bid of \$5,595,000 for the general prime contractor's scope of work for the Project; Killian's bid was \$404,000 lower than that submitted by the next lowest bidder, Quandel Construction Group, Inc. ("Quandel"). (N.T. 1175-1176; Exs. 9, 10)

10. On or about January 31, 2011, the University entered into a Standard Form of Agreement Contract ("Contract") with Killian as the prime general contractor on the Elwell Project. (Ex. 1)

11. On January 31, 2011, Safeco issued a Contract Bond on behalf of its principal, Killian, with the University as obligee, providing that Safeco would "indemnify and save harmless the State System of Higher Education . . . from any expense incurred through the failure of [Killian] to complete the work as specified and for any damages growing out of the manner of performance of said contract by [Killian] or his Subcontractors . . . ." (Ex. 406 (University's Complaint at ¶ 8, Ex. 2); Ex. 407 (Killian's Answer, New Matter and Counterclaim at ¶ 8, Ex. A))

12. The Contract documents specified Project completion dates of August 14, 2011 for Phase 1; March 31, 2012 for Phase 2; August 1, 2012 for Phase 3; and August 13, 2012 for Phase 4. (N.T. 62-71; Ex. 3, Drawing G1.6)

13. The Contract explicitly stated that time was of the essence. (Ex. 1 at p. 1)

14. Timing under the Contract was determined, in large part, by the need to achieve certain benchmarks which would allow students to fully occupy Elwell Hall from the beginning to the end of each academic year. (N.T. 264, 405, 442, 643, 711-713, 754-756, 916-918, 1103-1104; Exs. 17, 165, 238)

15. The need to have all the dorm rooms (for all 800 students) in Elwell Hall available for occupancy in time to house incoming students for the Fall 2012 semester was both essential and known to all parties on the Project. (N.T. 264, 405, 442, 643, 711-713, 754-756, 916-918, 1103-1104; Exs. 17, 165, 238)

16. On March 22, 2011, BU issued a notice to proceed to Killian. (N.T. 76-77; Ex. 18)

17. Killian's responsibilities under the Contract included overall coordination of the work, sequencing and scheduling for the Project, and substantially all of the activities to build and complete the Project excluding only the installation of the electric, plumbing and HVAC systems. (N.T. 59, 90, 597, 1190, 1210-1211, 1249, 1776-1779)

18. Despite its position as general contractor, Killian itself performed only project management services. It subcontracted out to other subcontractors of its choice all of the physical labor in Killian's scope of work, which included framing and drywall, foundation work, erection of structural steel and planking, asbestos abatement, and masonry work. (N.T. 45-46, 84-85, 131-137, 565, 584-585, 622, 1542-1548; Ex. 61)

19. Killian substantially underbid the Project because it needed the work and also because Killian's bid team missed several items in preparing the bid. (N.T. 558-560; Ex. 27)

20. In 2011 and 2012, Killian employed somewhere between 40 to 50 people. That was approximately half the number that it employed before the recession beginning in 2008. (N.T. 1544, 1574)

21. At the time it submitted its bid, Killian expected that it would lose approximately \$50,000 on the Project. (N.T. 559; Ex. 27)

22. Several months before the start of work on the Project, in January 2011, Killian predicted that it would lose \$431,600 on the Project. (N.T. 559; Ex. 7)

23. As work on the Project progressed, Killian estimated on March 17, 2012, and May 16, 2012, respectively, that its losses on the Project would be \$459,830 and \$543,465. (N.T. 561-562; Exs. 123, 215)

24. At the time the Project was bid, John Bryant was vice president for Killian. His duties included overseeing project management for all Killian projects, including the Elwell Project. (N.T. 557-559)

25. Mr. Bryant had never worked on a project with multiple prime contractors before the Elwell Project. He was unaware that the Elwell Project was a multiple prime project until after Killian was awarded the Contract. (N.T. 624)

26. On jobs which are similar in size and scope to the Elwell Project, Killian generally will employ a project executive, a dedicated project manager, a project superintendent, and a senior project superintendent. (N.T. 562-563, 1573-1574)

27. Because Killian had underbid the Elwell Project, it did not assign a dedicated project manager or a senior superintendent to the Project to begin with. (N.T. 562-563)

28. Killian's initial project management team assigned to the Project consisted of Greg Miller as project executive, Frank Klush as part-time project manager, and Joe Goodlavage as project superintendent. (N.T. 90-91, 1179-1180)

29. In approximately July 2011, Mr. Klush began working on the Project full-time. This was more than three months after the University's Notice to Proceed. (N.T. 76-77, 1181-1182; Ex. 18)

30. In September 2011, the initial Project superintendant, Joe Goodlavage, was laid off for some unspecified “improprieties.” (N.T. 564-565; Ex. 60)

31. Also in September 2011, the initial Project executive, Greg Miller, was terminated by Killian for poor performance. (N.T. 564-565; Ex. 61)

32. After Mr. Goodlavage and Mr. Miller left the Project, Mr. Klush was Killian’s only supervisor assigned to the Project. (N.T. 564)

33. As of October 4, 2011, Mr. Klush assumed dual roles as Killian’s project superintendent and project manager for the Project. (N.T. 564-565)

34. From the commencement of the Project, Killian and the other prime contractors understood that completing the Project on schedule was necessary to ensure that 800 students could be housed in Elwell Hall by the beginning of each academic year. (N.T. 711-713, 754-755, 916-918; Ex. 7)

35. Occupancy of all of Elwell Hall was conditioned upon each phase of the Project being completed on time in accordance with the Project schedule. (N.T. 755-757)

36. Pursuant to the Contract, Killian was responsible for, inter alia, scheduling the entire Project. (Ex. 1 at ¶ 3.8.100)

37. With regard to the Contract schedule, the Contract General Conditions provided at Paragraph 3.8.102 as follows:

The Contractor shall complete portions of the work in such order of time as may be stated in the specifications or as required in the progress charts as approved by all prime Contractors and the System. The System may require the Contractor to apply additional resources to maintain the project schedule, if the Contractor negligently fails to process the work according to the approved project schedule, at no additional cost to the System. If the Contractor shall refuse or fails to proceed as directed by the System, the System may find the Contractor in breach of his contract and/or declare the Contractor in default.

(N.T. 78-79; Ex. 1, General Conditions at ¶ 3.8.102)

38. Killian created a baseline schedule for the Project on March 28, 2011. (N.T. 79, 1190; Ex. 20)

39. Killian’s baseline schedule identified work to be performed on Phase 2, which included asbestos abatement, demolition of a portion of the existing lobby structure, removal of the existing foundation and footers between the two residential wings, and construction of a new lobby structure comprising seven floors (including a new foundation, structural steel work, and a new brick façade). (N.T. 66, 71-73, 80-81; Ex. 20)

40. Killian's March 28, 2011 baseline schedule provided for completion of Phase 2 by March 30, 2012. (Ex. 3, Drawing G1.6, Ex. 20)

41. During the Project, job conferences were typically held every two weeks. These were attended by all prime contractors and representatives from the University, including a representative from the Residence Life office, which was the "end user" of the Project and had a vested interest in making sure that the Project was completed on time. (N.T. 88-89)

42. The Project Architect (typically in the person of Robert Lack) also attended the job conferences and recorded what was discussed at each job conference. (N.T. 88-89; Exs. 4, 17, 19, 24, 25, 44, 52, 65, 69, 70, 73, 79, 84, 95, 96, 110, 133, 134, 162, 172, 201, 223, 232, 260, 286, 311, 347)

43. Phase 1, comprising renovations to student rooms and reconstruction of restrooms in the east wing of Elwell Hall, was substantially completed on time (August 14, 2011), with the exception of certain punch list items.<sup>1</sup> (N.T. 93-94, 337-338; Ex. 44)

44. As noted above, Killian's Phase 2 work included asbestos abatement, demolition of a portion of the existing lobby structure, removal of the existing foundation and footers between the two residential wings, and construction of a new lobby structure comprising seven floors (including a new foundation, structural steel work, and a new brick façade. (N.T. 66, 71-73, 80-81; Ex. 20)

45. Phase 2 work commenced on May 11, 2011, the same day as Phase 1. (N.T. 66; Ex. 20)

46. On July 7, 2011, Killian's subcontractor, Bartholomew Concrete and Excavating Co., Inc. ("Bartholomew") encountered an underground electrical duct bank that contained medium voltage equipment while it was performing foundation demolition work for Phase 2. (N.T. 94-96; Ex. 35)

47. Neither the University, the Architect nor Killian were aware of the duct bank prior to its discovery by Bartholomew because it was not identified on any as-built drawings for Elwell Hall when it was originally constructed in 1968. (N.T. 94-96, 361-362)

48. The electrical duct bank was located outside the original structure in the area where the new lobby addition was to be built. (N.T. 104-105; Ex. 3 at Drawing S-1.0)

49. To remediate the duct bank issue, the University brought in the electrical prime contractor, the Howard Organization. They removed the duct bank and redistributed the medium voltage to new switchgear. (N.T. 60, 96-98)

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<sup>1</sup> The University presented evidence that at least one Phase 1 punch list item was not completed until June 2012, but the University is not making any claims relating to Phase 1. (University's Proposed Findings of Fact at ¶¶ 95-97; N.T. 110, 153-154, 281-282, 338; Exs. 255, 263).

50. The foundation demolition work was delayed for approximately eight weeks, until August 28, 2011, the point in time when the medium voltage was redistributed through the electrical system on site. (N.T. 97-98)

51. The University was closed for 11 days (from September 7 to September 18, 2011) due to heavy rains caused by Tropical Storm Lee. (N.T. 374, 76; Ex. 48)

52. While some interior work was performed during the time that the University was closed for Tropical Storm Lee, no work on demolition of the existing foundation was performed from September 6 through September 15, 2011. (N.T. 112-117, 374, 761; Exs. 48, 417)

53. At the job conference held on September 27, 2011, the University expressed its concerns over Killian's slow progress on certain work items of Phase 2. These work items included demolition of the old lobby, placing of the new lobby concrete pad, and the placement of concrete piles.<sup>2</sup> (N.T. 18-121; Ex. 52)

54. On September 30, 2011, Colin Reitmeyer, the University's Assistant Director of Facilities in the Planning and Construction Office, sent an email to Killian's John Bryant requesting a meeting to discuss Project delays and Killian's initial Project executive, Greg Miller, leaving the Project. (Ex. 56)

55. On October 3, 2011, the University issued to Killian the first of a series of Non-Compliance Forms identifying items behind schedule on Phase 2. These items included Killian's work on foundation demolition, construction of the building lobby pad and the CFA test pile, as well as issues related to Killian's asserted failure to make the existing building weather tight around demolition and other work areas. (N.T. 121-122, 633; Ex. 57)

56. Killian's daily job reports show that no foundation demolition work was performed from September 20, 2011 through September 30, 2011. (N.T. 123-126; Ex. 417)

57. On October 4, 2011, a meeting was held (as requested by the University's Mr. Reitmeyer in his September 30, 2011 email) to discuss the University's concerns over Killian's staffing changes and perceived lack of progress on the Phase 2 work. (N.T. 127-128, 759-761; Ex. 61)

58. At the October 4, 2011 meeting, Killian formally advised the University that Mr. Klush would be assuming responsibilities as both project manager and superintendent going forward. (N.T. 127-128, 759-761; Ex. 61)

59. The University expressed its concern over the ability of a single individual to perform the duties of both project manager and superintendent. (N.T. 127-128, 759-761; Ex. 61)

60. Also discussed at the October 4, 2011 meeting were the University's concerns that the Project was behind schedule based on Killian's latest "recovery schedule"; that Killian

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<sup>2</sup> The University also noted at the September 27, 2011 job conference its concern over late completion of one remaining item from Phase 1. (N.T. 119-120; Ex. 52).

did not yet have all its subcontractors under contract; and that the portion of the site where the new lobby adjoined the existing building was not weather tight, resulting in water entering the building. (N.T. 131-135; Ex. 61)

61. At the October 4, 2011 meeting, Killian agreed, inter alia, to remedy weather proofing issues on the building exterior, complete subcontractor agreements, and provide a detailed activity schedule with the assurance that the overall schedule would be recovered through December 2011. (N.T. 135-137, 761-762; Ex. 61)

62. The University agreed at the October 4, 2011 meeting that an enlargement of time to account for the duct bank relocation was warranted. (N.T. 761; Ex. 61)

63. Killian made no complaint at the October 4, 2011 meeting that its schedule was delayed due to foundation work being performed in the Fall rather than the Summer of 2011, nor did it submit a change order request (“COR”), a request for information (“RFI”) or any other claim asserting that its work was delayed simply because foundation work was shifted from the Summer to the Fall due to the duct bank issue. (N.T. 461-462, 761-762; Ex. 61)

64. Foundation demolition work was performed by one worker on October 5, 11, 12 and 17, 2011, and by two workers on October 13 and 18, 2011. No foundation demolition work was performed on October 6, 7, 10 or 14, 2011. (N.T. 138-132; Ex. 417)

65. On October 11, 2011, Killian submitted a schedule update that provided for completion of Phase 2 work on June 8, 2012. (N.T. 148-149, 1000; Exs. 66, 67)

66. The University affirmatively indicated its acceptance of Killian’s October 11, 2011 schedule at the job conference held October 12, 2011, thereby changing the scheduled Phase 2 completion date to June 8, 2012 in these minutes. This represented a 70 day overrun past the Phase 2 completion date stated in the Contract. (N.T. 143-147, 350, 382-383, 811-812, 1000; Ex. 65)

67. The University’s affirmative and explicit acceptance of Killian’s October 11, 2011 schedule, which showed the Phase 2 completion date to be June 8, 2012, was made without a change order or other formal request from Killian for an official extension of the Phase 2 completion date as prescribed by the Contract. (N.T. 143-147, 350, 380-383, 811-812, 1000, 1256-1257; Exs. 1, 65, 66, 396, 397)

68. The University subsequently explained its acceptance of Killian’s October 11, 2011 schedule and the new June 8, 2012 completion date for Phase 2 as accounting for the delay to Phase 2 work caused by the unanticipated electrical duct bank and by Tropical Storm Lee. (N.T. 144-146, 380-382, 811-812; Exs. 198, 396)

69. The October 11, 2011 schedule listed the finish date for demolition work as October 14, 2011, followed by construction of the building pad (part 1) starting on October 17 and finishing on October 18, 2011. (N.T. 149-150, 1004; Exs. 66, 396 at p. 20)

70. Next on the October 11, 2011 schedule were CFA test piles starting on October 19 and finishing on November 1, 2011, with installation of the CFA piles starting on November 2 and finishing on November 17, 2011. (N.T. 150, 1004; Exs. 66, 396 at p. 20)

71. Following the installation of the CFA piles, the critical path on Killian's October 11, 2011 schedule had Killian installing the building pad (part 2) from November 18-22, 2011; the pile caps from November 23-24, 2011; cast-in-place ("CIP") footings from November 18-24, 2011; followed by the CIP concrete walls and piers from November 25 to December 15, 2011. (N.T. 1004-1005; Exs. 66, 396 at p. 20)

72. Killian's October 11, 2011 schedule then had structural steel work beginning on December 13, 2011 and finishing on February 9, 2011. (N.T. 1004-1005; Exs. 66, 396 at p. 20)

73. Even though the University affirmatively accepted Killian's October 11, 2011 Schedule, which indicated a 70 day overall delay to Phase 2 completion, it also expressed its concern that Killian was already falling further than that behind in several of its critical early tasks like building demolition, laying new concrete pads and installing new concrete piles. (N.T. 145-152; Exs. 49, 65, 66)

74. For instance, the October 11, 2011 schedule showed a start date of May 23, 2011 for old lobby demolition with a finish date on October 14, 2011. (Ex. 66, line 420). However, an earlier schedule update dated September 13, 2011, also showed a start date of May 23, 2011 for demolition, with a finish date of September 23, 2011, three weeks earlier than the demolition finish date shown on the October 11, 2011 schedule. To the University, this represented additional delay of three weeks to this work item over and above that caused by the electrical duct bank and Tropical Storm Lee because the September 13, 2011 schedule had already accounted for these problems by adding 79 calendar days for this work to the baseline March 28, 2011 Schedule. Similar adjustments were made to laying of the concrete pads and installing new concrete piles while other follow-on work was shortened to keep the overall Phase 2 completion date within the 70 days of delay accepted by the University. (Exs. 20, 49, 66; Board Finding)

75. On January 26, 2012, Killian submitted another revised schedule that provided for a completion of Phase 2 work on June 11, 2012. (N.T. 172-173, 767-768; Ex. 90)

76. Pursuant to Killian's January 26, 2012 schedule, the critical path followed slab-on-grade concrete ("SOG") (to occur February 10-14, 2012) and structural steel (starting February 13, 2012 and finishing March 6, 2012), followed by enclosures and interior work. (Exs. 90, 396 at p. 27)

77. On March 8, 2012, the University issued its second and third Non-Compliance Forms to Killian. (Exs. 116, 117)

78. In its second Non-Compliance Form, the University identified critical path activities that had fallen behind schedule, specifically CIP SOG concrete for the basement level addition, structural steel, hollow core plank and hollow plank CIP topping. (N.T. 192, 634-635, 773-774; Ex. 116)



79. Killian responded that delay to the Phase 2 work on the new Project schedule was due to structural steel design issues it attributed to the Project Architect and/or engineer, specifically certain steel “beams rotating at the plank bearing on the 1<sup>st</sup> and 2<sup>nd</sup> floors.” (N.T. 192-193, 774-776; Exs. 116, 119)

80. The University’s third Non-Compliance Form related to the University’s continuing concern over the fact that weather protection of the existing building was not being maintained. (N.T. 193-194, 636; Ex. 117)

81. In attempting to weatherproof the existing building, Killian used 6 mil poly sheeting placed around the open area of the building. This thin poly sheeting reopened during storms, allowing rainwater to again enter the existing structure. (N.T. 193-198)

82. On March 12, 2012, representatives of the University and Killian met to discuss the two March 8, 2012 Non-Compliance Forms and Killian’s assertion that the problems with steel beams rotating were the result of inadequate drawings approved by the Project’s structural engineer. (N.T. 199-201; Ex. 129)

83. At the March 12, 2012 meeting, the parties noted their mutual conclusion that the steel beam rotation was caused by the absence of moment connections, which the structural engineer had addressed by instructions to Killian and its steel subcontractor (Powell) by the date of that meeting. (N.T. 200-201; Ex. 129)

84. Killian stated at the March 12, 2012 meeting that the overall Project schedule (as stated in the January 26, 2012 schedule) would not be adversely affected by the moment connection issue. (N.T. 201, 776-777, 1409; Exs. 120, 129)

85. On April 3, 2012, Killian advised the University of another management change: i.e. that Greg Floyd would replace David Pulse as project manager while Mr. Klush would continue on the Project with his “[m]ain focus on the new addition.” (N.T. 220-221; Ex. 147)

86. On April 6, 2012, Killian created another revised Project schedule that provided for a Phase 2 completion date of June 21, 2012.<sup>3</sup> (Exs. 152, 396 at p. 31)

87. At the April 11, 2012 job conference, Killian’s project manager, David Pulse, presented Killian’s April 6, 2012 schedule and announced that he would be leaving the Project effective April 24, 2012. He further indicated that Killian’s vice president, John Bryant, would then take over scheduling responsibilities for the Project. (N.T. 232-233; Ex. 162)

88. As of April 11, 2012, critical schedule concerns for the completion of Phase 2 included framing on the upper floors, setting steel, backfilling, and preparation for CIP concrete. (N.T. 232-235)

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<sup>3</sup> The April 6, 2012 schedule shows at line 419 a finish date for “Phase 2 – LOBBY” of 6/21/12, and at line 750 a Phase 2 Turnover date of 6/20/12. The University’s expert Mr. Nagata used the 6/21/12 finish date in his report and testimony. We agree with Mr. Nagata that the date work finishes, not the “turnover” date noted in this Schedule, is properly considered the completion date for the Phase 2 work. (Board Finding).

89. On April 17, 2012, the University's Director of Procurement and Operations, Jeffrey Mandel, sent a letter to Killian's surety, Safeco, expressing the University's concerns that the Project may not be completed on time, outlining events, and explaining the University's concerns, particularly with respect to the necessity of having all of Elwell Hall available to house students before the beginning of the Fall 2012 semester. (N.T. 235, 639-644, 873-875; Ex. 165)

90. On April 24, 2012, Mr. Dinan prepared a list of 21 Phase 2 items that he identified as behind schedule based on the start and/or finish dates provided in Killian's latest April 6, 2012 schedule. (N.T. 237-239; Ex. 171)

91. Mr. Dinan presented the information from his April 24, 2012 list at the job conference held on April 25, 2012. (N.T. 237-241; Ex. 172)

92. On May 8, 2012, the University issued a Notice to Cure letter ("Cure Notice") to Killian's president, John Ghirardelli. (Ex. 198)

93. The University set forth in its Cure Notice numerous particulars in which, according to the University, Killian had failed to comply with its contractual obligations stemming, inter alia, from Killian's failure to provide a proper work force, sufficient labor and work hours, adequate weather protection, proper project supervision and, ultimately, Killian's ongoing failure to prosecute the work in a timely fashion. (Ex. 198; Board Finding)

94. The Cure Notice gave Killian until July 9, 2012 to complete Phase 2, excepting the installation of the elevators, which was to be completed by August 1, 2012. (Ex. 198)

95. In the Cure Notice, the University noted its prior agreement to move the original March 30, 2012 Phase 2 completion date to June 8, 2012 (noting the unanticipated underground electrical duct bank), and stated additionally that its setting of Phase 2 completion dates of July 9, 2012 (with elevator work to be completed by August 1, 2012), "is based upon informal, but reluctant acceptance by the University, of Killian's revised project schedule submission dated 4/5/12."<sup>4</sup> (Ex. 198)

96. By its express language in the Cure Notice, the University agreed to provide Killian a second enlargement of time of 31 days (to July 9, 2012) for Killian to complete Phase 2 following Killian's April 6, 2012 Project schedule revision. (Ex. 198; Findings of Fact ("F.O.F.") 94, 95; Board Finding)

97. Additionally, the University directed Killian to provide a specific response to the Cure Notice detailing, inter alia: how Killian intended to meet the Cure Notice completion dates (including provision of a recovery schedule to meet the July 9 and August 1 completion dates); how it intended to provide adequate supervision for the remainder of Phase 2 and beyond; and "a staffing plan that demonstrates sufficient manpower to meet the required completion date." (Ex. 198)

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<sup>4</sup> The University's mention of a "4/5/12" Project schedule is an apparent reference to Killian's April 6, 2012 schedule which shows a finish date of June 21, 2012. See F.O.F. 86.

98. On May 9, 2012, immediately subsequent to the issuance of the Cure Notice, the University suspended work on Phase 4. (Ex. 200)

99. The University's decision to suspend Phase 4 was made to address its concern that Killian would not be able to complete the entire Project on time and to allow Killian to focus on completing Phase 2 by the dates set forth in the Cure Notice. (N.T. 223-224, 644, 650)

100. The completion of Phase 2 by the dates set forth in the Cure Notice was of paramount importance to the University because, under the overall Project plan, this completion was necessary to allow students to occupy both wings of Elwell Hall for the beginning of the Fall 2012 semester. (N.T. 644, 649-652, 875-877, 924; Exs. 1, 198, 200)

101. Following the issuance of the Cure Notice, back-and-forth communication ensued between Killian and the University. (N.T. 664-672, 720, 824-825, 892-897; Exs. 209, 210, 212, 216, 217, 219, 222, 223, 226, 236, 238, 246)

102. Killian formally responded to the Cure Notice in a letter dated May 14, 2012, in which it proposed a Phase 2 completion date of August 15, 2012. (Exs. 209, 210)

103. Killian also submitted a schedule dated May 15, 2012 with a Phase 2 finish date of August 15, 2012. (Ex. 212)

104. The University promptly rejected Killian's proposal to complete Phase 2 by August 15, 2012, insisting on the completion dates set forth in the Cure Notice. (Ex. 216)

105. Additional dialog ensued as Killian sought a Phase 2 completion date later than July 9, 2012 that would be acceptable to the University. (N.T. 664-672, 720, 824-825, 892-897; Exs. 217, 219, 222, 223, 226, 236, 238, 246)

106. Approximately a month before it issued its Cure Notice, the University had begun to contemplate a contingency plan which would entail completing just the Phase 2 work needed to secure a temporary occupancy permit from the Department of Labor and Industry ("L&I") for Elwell Hall so the dormitories could be used for the full 2012-13 academic year. (N.T. 222-232, 240, 396-397, 406-409, 786-787, 812-815, 819-820, 824-825; Exs. 162, 172)

107. The reason why the University explored obtaining a temporary occupancy permit was its growing concern that Killian would not be able to complete Phase 2 in time for the beginning of the Fall 2012 semester. (N.T. 222-232, 240, 786-787)

108. At the April 11, 2012 job conference, the University's project manager, James Dinan, requested a separate meeting with the Project Architect "to address the alternatives for a temp[orary] occupancy permit application" to L&I, which would allow all 800 students to have access to both the east and west wings of Elwell Hall if Phase 2 was not completed timely. (N.T. 222-232, 240; Ex. 162)

109. At the April 25, 2012 job conference, Mr. Dinan directed the Project Architect to proceed with the preparation of a temporary occupancy plan for submission to L&I. (N.T. 240, 406-407; Ex. 172)

110. On May 24, 2012, the University's Colin Reitmeyer, in an email to Killian's President, John Ghirardelli, requested that Killian provide the Project Architect with scheduling input for completion of the work required for temporary occupancy by August 1, 2012, so that the Architect could submit the temporary occupancy plan to L&I. (N.T. 794, 827-830; Ex. 224)

111. The University formally presented the Project Architect's temporary occupancy plan to Killian and the other prime contractors at the June 20, 2012 job conference. (Ex. 311)

112. At that job conference, the University's Mr. Dinan directed Killian and the other primes to concentrate on the work needed for the temporary occupancy permit, "Specifically, all corridors, stairs, hallways, and egress pathways needed to achieve occupancy approval from L&I by August 1, 2012." (Ex. 311)

113. Also on June 20, 2012, the University's attorney, William Clifford, sent a letter to Safeco (with a copy to Killian) requesting a meeting with Killian and its surety to discuss the temporary occupancy permit plan "in order to determine whether a workable solution can be developed . . . ." (Ex. 312).

114. The temporary occupancy permit plan under discussion had Killian and the other prime contractors concentrating on all work needed for the temporary occupancy permit. This included work on both elevators, elevator lobbies on all floors, student lounges on floors 3 to 7, corridor access to student rooms on all floors of both wings, ADA building access, and all life safety systems on all floors. (N.T. 814; Exs. 311, 312)

115. More back-and-forth communication between the University and Killian occurred relating to the temporary occupancy permit plan after June 20, 2012. This included production of a "partial occupancy schedule" prepared by Killian on June 28, 2012. This schedule was then presented at the meeting requested by the University to discuss Killian's plan to complete the work necessary for the temporary occupancy permit occurring on June 29, 2012. (N.T. 426-430, 679-680, 779-800; Exs. 316, 328, 330, 340, 347, 353)

116. Following the June 29 meeting and some limited work performed during the ensuing weekend, the University concluded not only that Killian would be unable to meet the Phase 2 completion dates set forth in the Cure Notice but, given Killian's performance to date, that Killian would not be able to complete the limited work needed to achieve temporary occupancy permit approval from L&I by August 1, 2012. (N.T. 888-889, 899-900, 930-933)

117. Accordingly, the University terminated Killian on July 2, 2012, citing, *inter alia*, Killian's failure to cure the defects specified in the May 8, 2012 Cure Notice. (Ex. 365)

118. The University's scheduling/delay expert, Mark Nagata of Trauner Consulting Services, testified that, based on his analysis of the Phase 2 completion dates contained in the

numerous Project schedules prepared by Killian, and comparing the original baseline schedule completion date of March 30, 2012, with the August 8, 2012 completion date in Killian's last schedule (the June 28, 2012 schedule also referred to as the "partial occupancy" schedule), Phase 2 was delayed by a total of at least 131 days as of June 27, 2012 (March 30, 2012 to August 8, 2012).<sup>5</sup> (N.T. 1089-1096, 1115-1123, 1133; Ex. 396 at pp. 10-45)

119. The Board is in substantial agreement with Mr. Nagata and finds that Phase 2 was delayed by a total of at least 131 days as of June 27, 2012 (March 30, 2012 to August 8, 2012). (N.T. 1089-1096, 1115-1123, 1133; Ex. 396 at pp. 10-45; F.O.F. 118; Board Finding)

120. The Contract General Conditions provide that extensions of time may only be granted by a written change order pursuant to a written request from the Contractor. (Ex. 1 at §§ 4.2.101 and 14.1)

121. The evidence is clear that no written change orders extending the Phase 2 completion date pursuant to a written request from Killian were ever issued by the University. (N.T. 169-170, 302-303, 660, 671-674, 707-708, 1032-1035; Ex. 396; Board Finding)

122. The evidence is equally clear the University agreed to two postponements of the Phase 2 completion date: first by affirmatively accepting at the October 12, 2011 job conference Killian's October 11, 2011 revised schedule (moving the scheduled completion date back 70 days from March 30, 2012 to June 8, 2012) and second, by explicit reference in the Cure Notice (moving the scheduled completion date back an additional 31 days to July 9, 2012) based on Killian's April 6, 2012 schedule. (N.T. 143-149, 350, 382-383, 811-812, 1000; Ex. 65, 66, 67, 198; F.O.F. 62, 65-68, 93-96; Board Finding)

123. The parties' frequent use of the term "extension" to describe the two agreed upon postponements of the Phase 2 completion deadline is employed in the generic sense as an enlargement of time, not as the term "extension" was defined or used in the Contract here at issue, since no formal written change order was made to the contractually mandated Phase 2 completion date of March 31, 2012.<sup>6</sup> (N.T. 133-134, 144-146, 169-170, 379-383, 609, 616-617, 660, 671-674, 707-708, 761, 891, 1000-1001, 1122-1158, 1257, 1352, 1681-1683, 1753-1755; Board Finding)

124. In agreeing to the two postponements of the Phase 2 completion date noted above, the University did not "extend" the Phase 2 completion date as explicitly set forth in the Contract, but, in essence, excused Killian for 101 of the days of delay experienced on Phase 2

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<sup>5</sup> Although Mr. Nagata characterizes August 8, 2012 as the completion date identified in the June 28, 2012 Schedule, the schedule itself identifies August 13, 2012 as the last day of contractor activity on Phase 2, a point we will return to later in this Opinion.

<sup>6</sup> At hearing, both parties and their experts referenced the originally scheduled Phase 2 completion date of March 30, 2012 as the date from which to calculate overall delay to the Project. For this reason, we use this date in the agreed upon baseline schedule to discuss the overall changes/delay to Phase 2 work, as all subsequent schedules related back to this baseline. We do note, however, that the contractually mandated completion date for Phase 2 was March 31, 2012, one day later. This one day discrepancy does not materially alter our analysis or the outcome of this case. (N.T. 111, 144, 350, 382-383, 574-575, 672, 891, 971, 974, 979-980, 1119, 1123, 1133, 1137, 1418, 1757; Exs. 3, 20, 396, 397).

work. (N.T. 143-149, 350, 382-383, 811-812, 1000; Exs. 1, 65, 66, 67, 198; F.O.F. 62, 65-68, 93-96, 122; Board Finding)

125. Mr. Nagata testified that Phase 2 was delayed by 54 days due to the underground electrical duct bank encountered on the Project in July 2011, which Mr. Nagata found to be a differing site condition attributable to the University. He also testified that 12 days of delay to Phase 2 was caused by Tropical Storm Lee, which Nagata attributed to neither the University nor Killian. (N.T. 986-990; Ex. 396)

126. The Board agrees with Mr. Nagata and finds that Phase 2 was delayed by 54 days due to the underground electrical duct bank encountered on the Project in July 2011 (which Mr. Nagata found to be a differing site condition attributable to the University) and that 12 days of delay to Phase 2 was caused by Tropical Storm Lee. (N.T. 986-990; Ex. 396; Board Finding)

127. The 70 day postponement of Phase 2 completion to June 8, 2012, agreed to by the University at the October 12, 2011 job conference, fully accounted for any and all delay to Phase 2 work caused by the electrical duct bank and Tropical Storm Lee. (N.T. 143-149, 350, 382-383, 811-812, 1000; Exs. 65, 396; F.O.F. 46-68; Board Finding)

128. In addition to the Project delay attributed to the electrical duct bank and Tropical Storm Lee, Killian asserts that inclement weather in the form of rain during the last two weeks of September (and into October 2011) caused an unspecified amount of additional delay to the critical path foundation work. (Killian's Proposed Findings of Fact and Conclusions of Law at ¶ 89; N.T. 1235-1236; Exs. 417, 567, 568)

129. On January 25, 2012, Killian's David Pulse also wrote a letter to the University's James Dinan identifying seven days between December 21, 2011 and January 23, 2012, where he claimed work on Phase 2 was delayed because of rain and/or snow. (Ex. 88)

130. According to Killian's daily logs, work was performed on 7 of the 8 days specified in Killian's January 25, 2012 letter, including foundation work performed by Bartholomew on six of those days. (N.T. 1430-1431; Ex. 417)

131. The Contract General Conditions at ¶ 3.3.103 provide that inclement weather "shall not be considered an excuse for non-performance of work" under the Contract. (Ex. 1 at ¶ 3.3.103)

132. Paragraph 4.2.101 of the General Conditions provides that, if the contractor makes a claim for additional time because of weather conditions, the Contractor must substantiate that the weather adversely affected the schedule and that "such a claim shall be documented by data from a recognized weather authority substantiating that weather conditions were abnormal for the period and could not have been reasonably anticipated." (Ex. 1 at ¶ 4.2.101)

133. In outlining the delay claim for the December-January period in Mr. Pulse's January 25, 2012 letter, Killian acknowledged that the "weather delays are not excusable" for the Project falling behind schedule. (N.T. 1417; Ex. 88)

134. Killian made no attempt to gather (and did not present) meteorological information to determine if the weather in September and October of 2011 was atypical, nor did Killian present evidence at hearing concerning whether the rain and snow in December 2011 and January 2012 was abnormal for the period and could not have been reasonably anticipated. (N.T. 1421)

135. Because Killian has not demonstrated that the weather conditions for which it now claims further delay were atypical, abnormal or could not have been anticipated as required for weather extensions of time under the Contract; and has not demonstrated that Phase 2 was actually delayed due to weather conditions in September, October or December 2011, and/or January 2012; and because Killian has elsewhere recognized that weather delays are not excusable, we find that additional weather delays to Phase 2 work now claimed by Killian are not substantiated by the evidence presented. (N.T. 1235-1236, 1417, 1421, 1430-1431; Exs. 1, 88, 417, 567, 568; F.O.F. 128-134; Board Finding)

136. The University directed that Killian refrain from performing work that created loud outside noises during final examinations weeks from December 14 through 18, 2011, and May 7-12, 2012. (N.T. 161-163, 257, 416-417, 593-595, 663; Exs. 76, 162, 163, 192)

137. The University's directive prohibiting loud outside work during the December 2011 final examination week was not communicated to Killian until the beginning of the week. (N.T. 384)

138. Prior to December 14, 2011, Killian's subcontractor, Bartholomew, had mobilized to perform critical path exterior work (i.e. pouring footers). (N.T. 384-385; Ex. 417)

139. As a result of the University's directive, Bartholomew was precluded from performing the outside work during the December final examination period. The University consequently approved a change order paying Bartholomew \$1,300 for demobilization and remobilization at a later date as a result of the no-loud-noise directive. (N.T. 161-163, 384-385; Ex. 76)

140. The only work performed on December 14, 15 and 16, 2011 was interior work by Killian's framing and drywall subcontractor, R&R Plaster & Drywall Co. (Ex. 417)

141. December 17 and 18, 2011, were a Saturday and a Sunday, during which no work was scheduled in any event. (Ex. 570 at p. 48)

142. During the final examination period from May 7-12, 2012, the University's Mr. Reitmeyer directed Killian that the only work permitted was some clean-up in areas approved by the University's Mr. Dinan, and he specifically directed that no metal stud framing or HM door frame installations could occur. (N.T. 1345; Ex. 192)

143. No work was scheduled by Killian on May 12, 2012, which was a Saturday. (Ex. 417)

144. As a result of the University's directives, substantially all construction work on the site was shut down during the final examinations periods noted above in December 2011 and May 2012. (N.T. 161-165, 257, 416-417, 593-595, 1345-1346; Exs. 76, 162, 163, 192, 417)

145. Killian's work on the Project was delayed, at most, by 3 days (excluding weekend days when no work was otherwise scheduled) due to the University's "quiet time" directive during the final examination period in December 2011 and for 5 days (excluding weekend days when no work was otherwise scheduled) due to the University's "quiet time" directive during the final examination period in May 2012. (N.T. 161-163, 257, 384-385 416-417, 593-595, 663, 1345; Exs. 76, 162, 163, 192, 417; F.O.F. 136-144)

146. Yannuzzi Incorporated, the plumbing prime contractor on the Project, was responsible, inter alia, for the installation of underground plumbing which was to be placed below the slab-on-grade ("SOG") concrete to be poured by Killian in Phase 2. (N.T. 60, 115, 1033-1034, 1044, 1775; Exs. 66, 90)

147. Given this relationship, Killian argues that Yannuzzi was 31 days late in completing this underground plumbing, and that this delayed Killian's start of its Phase 2 SOG installation. (N.T. 1774-1778; Killian's Proposed Findings of Fact and Conclusions of Law at ¶ 254).

148. The University disputes both Killian's assertion that Yannuzzi was late installing its underground plumbing and that this work in any way delayed overall Phase 2 completion. (University's Reply Brief at pp. 2-3)

149. Killian's expert, Mr. Devaney, testified that because the slab-on-grade work could not commence until the underground plumbing was complete, and because Yannuzzi was late in finishing the underground plumbing work, Yannuzzi (and not Killian) was responsible for delay to the Phase 2 slab-on-grade work. (N.T. 1774-1775; Ex. 397)

150. In his expert report, Mr. Devaney stated specifically that, under Killian's January 26, 2012 Schedule, the projected start date for the slab-on-grade installation was February 10, 2012, and that Yannuzzi's underground plumbing was not completed until one week later, on February 17, 2012. (Ex. 397 at pp. 6-7)

151. However, at the hearing, Mr. Devaney corrected himself and acknowledged that the underground plumbing work was, in fact, completed two weeks earlier than he presumed (i.e. by no later than February 3, 2012). (N.T. 1775)

152. At this point, Mr. Devaney changed his testimony to assert that the start of Killian's slab-on-grade work was instead delayed by 31 days. He justified this new analysis by basing it on Killian's October 11, 2011 Schedule (which had a December 26, 2011 completion date for Yannuzzi's underground plumbing work) instead of Killian's updated January 26, 2012



Schedule which provided for a Phase 2 completion date of June 8, 2012. (N.T. 1776-1777; Ex. 66)

153. In contrast, the University's expert, Mr. Nagata, showed that Killian's own weekly reports confirmed the underground plumbing work at issue was completed no later than February 3, 2012. He further testified that there was no delay to Killian caused by Yannuzzi's underground plumbing because it was done a full week before February 10, 2012, the date Killian's Phase 2 SOG work was scheduled to commence in accordance with Killian's January 26, 2012 Schedule. (N.T. 1045-1047; Exs. 90, 91)

154. According to Killian's January 26, 2012 schedule, the SOG concrete was scheduled to be installed on February 10, 2012. (N.T. 1044-1047; Ex. 90)

155. Yannuzzi had completed its underground plumbing work as of February 3, 2012, a week before the SOG concrete was to have been poured in accordance with the January 26, 2012 schedule. (N.T. 1045-1047; Exs. 90, 91)

156. The evidence does not show that Yannuzzi's underground plumbing work materially delayed Killian's SOG concrete work on Phase 2. Moreover Killian's own schedules confirm that Yannuzzi's underground plumbing work did not push Phase 2 completion past June 8, 2012, a date well before the July 9, 2012 completion date ultimately demanded by the University. (N.T. 1044-1047; Exs. 90, 91; F.O.F. 146-155; Board Finding)

157. On or about June 13, 2012, Killian encountered an unknown footer while performing limited work on a retaining wall, stairs and planters at Lycoming Hall, across the street from Elwell Hall. (N.T. 422-425, 1341-1342; Exs. 281, 282)

158. The limited work at Lycoming Hall was not on the critical path on any of Killian's schedules at the time, nor was it necessary for obtaining the temporary occupancy permit. (N.T. 296-297, 424-425, 1394-1395; Exs. 236, 353)

159. Killian offered no evidence that the discovery of unknown footers in the vicinity of Lycoming Hall delayed Phase 2 as a whole. (N.T. 1394-1395; Ex. 397)

160. The discovery of unknown footers in the vicinity of Lycoming Hall in June 2012 did not delay the completion of Phase 2. (N.T. 296-297, 422-425, 1394-1395; Exs. 236, 353; F.O.F. 157-159; Board Finding)

161. Phase 2 of the Project involved, inter alia, the demolition of an existing lobby area between the east and west wings of Elwell Hall and the construction of a new lobby which would tie into the existing structure. (N.T. 501-502)

162. Destructive testing to discover the precise location of places where the new lobby would tie into the existing structure prior to the design of the Project was not feasible because it would have required the complete demolition of the brick façade on the existing structure during

the design phase of the Project, well prior to the commencement of actual construction. (N.T. 542-543, 1051)

163. Because destructive testing during the design phase of the Project was not feasible, the exact dimensions on the plan for where the steel on the new construction tied into the existing structure sometimes differed from the actual conditions found to exist beneath the brick façade during construction. (N.T. 501-502, 540-544, 1202-1205, 1788-1789)

164. The structural drawings relating to where the new structure should tie into the existing building were prepared by Lack + Strosser (the Project Architect) with the best information available at the time and were believed by the Project design team to be accurate. (N.T. 1109-1200; Ex. 541, RFI 1)

165. Beginning in April 2011, before Phase 2 construction had begun, Killian submitted a series of RFIs seeking clarification of dimensions where the steel on the new construction tied into the existing structure. (N.T. 1199-1205; Ex. 541)

166. The structural engineer for the Project, Jim Kerns, responded by acknowledging that the structural drawings were prepared with information available at the time, and that any discrepancies should be verified by the Architect and by Killian as discovered. (Ex. 541)

167. Killian understood this to mean that Killian and its steel subcontractor, Powell, should verify existing conditions once the brick facing was removed and fabricate the steel at that time to align with the existing conditions. (N.T. 1202-1205)

168. When actual tie-in discrepancies were uncovered in the field, Killian's Mr. Klush would either prepare a formal RFI or email questions and photographs to the structural engineer, Mr. Kerns. (N.T. 540-543, 1307-1311)

169. RFIs 15, 17, 24, 25, 26, 27, 28, 29, 30, 34, and 35 all concerned the aforementioned tie-in issues (also referred to as "fit-up" issues) with the existing structure, and were necessary because information concerning the exact tie-in locations was not available when the Project drawings were created. (N.T. 1403; Ex. 541)

170. Mr. Kerns responded to each of Killian's fit-up/tie-in RFIs and email inquiries promptly, most within 1 to 2 days. Questions from Killian regarding tie-in issues sent with photographs by email were generally addressed immediately. (N.T. 540-544; Ex. 541)

171. The solutions to the fit-up/tie-in issues brought by Killian to Mr. Kerns were typical field adjustments which were relatively minor in scope and which were easily corrected by Killian and/or its steel subcontractor. (N.T. 540-544, 1050-1052; Ex. 541; F.O.F. 168-170; Board Finding)

172. According to Killian's daily job reports, RFI work on these tie-in/fit-up issues occurred on only two days, April 10 2012, and May 26, 2012. (N.T. 1406-1407; Ex. 417)

173. Paragraph 4.1.100 of the General Conditions allows for claims for concealed or unknown conditions encountered on the site “which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities” such as those governed by the Contract. (Ex. 1, ¶ 4.1.100)

174. The steel tie-ins did not differ materially from the Project design plans and were not of an unusual nature, which differed materially from those ordinarily found to exist and generally recognized as inherent in connecting new steel frame construction to older buildings as was done here in Phase 2 construction. (N.T. 501-502, 540-544, 1202-1205, 1540-1544, 1788-1789; Exs. 1, 417, 541; F.O.F. 161-173; Board Finding)

175. A moment connection is a type of connection designed to provide additional rigidity between a beam and column to reduce flex or twisting of a beam and/or to transfer loads from a beam to a column. (N.T. 482)

176. Project engineer Jim Kerns prepared Project Drawing S-1.2 which identified locations where moment connections were to be located. (N.T. 482; Ex. 3, Drawing S-1.2)

177. Project Drawing S-1.2 also indicated that these moment connections were to be designed and provided by Killian’s steel fabricator, Powell. (N.T. 482-483, 1052-1053, 1407-1408; Ex. 3, Drawing S-1.2)

178. Moment connections are typically identified in this way on plans to allow steel fabricators leeway in their moment connection design since different steel fabricators utilize different types of acceptable moment connections in their fabrication. (N.T. 483)

179. Powell submitted an initial set of structural steel shop drawings to Mr. Kerns who, on September 1, 2011, informed Powell in an email that Powell’s shop drawings “can be approved as noted” with directions that Powell “will submit a record copy of the shop drawings.” (Ex. 45)

180. Killian’s Frank Klush testified that Killian and Powell both understood Mr. Kerns’ September 1, 2011 email to mean that the structural steel work was approved to proceed and that they would submit a record “as-built” copy of the shop drawings later. (N.T. 1302-1304)

181. Mr. Kerns testified that his email did not state that the drawings had been approved and did not mean that he had approved Powell’s shop drawings, which he described as “incomplete.” (N.T. 487-489)

182. The initial shop drawings which Powell submitted did not include moment connections as required by Contract Drawing S-1, and Mr. Kerns did not identify the lack of moment connections in communications with Powell subsequent to Powell’s shop drawing submittal. (N.T. 536-538)

183. In any event, Powell never submitted a final copy of its steel shop drawings and no such copy was ever stamped as approved by Mr. Kerns. (N.T. 536-538, 566, 1052-1053)

184. On or about March 7, 2012, Killian noticed that beams started to rotate after the first level of planks were set, and he immediately reported the problem to Mr. Kerns. (N.T. 1304-1305; Ex. 541)

185. Between March 7 and April 11, 2012, Killian submitted a series of RFIs pertaining to moment connections, each of which Mr. Kerns answered within a day or two by providing a design for the moment connections needed and a work sequence to resolve the rotation problems. (N.T. 200, 490-499, 1305-1307, 1335-1338, 1408-1409; Exs. 114, 129, 159, 160, 541; F.O.F. 168-170; Board Finding)

186. Killian assured the University at or about that time that the missing moment connections would not delay Phase 2. (N.T. 201, 776-777, 1409; Ex. 129)

187. Killian's Mr. Klush testified that the moment connection fixes provided by Mr. Kerns took very little time. (N.T. 1305-1306, 1408-1409)

188. Mr. Klush testified that Powell was responsible for the missing moment connections. (N.T. 1407-1408)

189. Paragraph 3.9.101 of the Contract General Conditions provides that the Project architect's or engineer's approval of shop drawings does not relieve the contractor from responsibility for errors or omissions in the shop drawings. (Ex. 1, Rider B ¶ 3.9.101)

190. Although Defendant's expert, Mr. Devaney, suggested that these moment connection and steel tie-in/fit-up issues contributed some 83 days of delay, Killian's daily job reports show Powell was not prevented from setting steel from the second half of February through April of 2012. Other evidence indicates Powell's absence from the jobsite from April 12 through its one day appearance on May 26, 2012 was due to a payment dispute between Powell and Killian, not unresolved design issues. Moreover, the vast amount of moment connection and steel tie-in problems occurred before Killian produced its April 5, 2012 schedule which showed a Phase 2 completion date of June 21, 2012. (N.T. 199-201, 242-243, 490-499, 645, 776-777, 1304-1307, 1335-1338, 1408-1409, 1798-1803; Exs. 114, 129, 159, 160, 397, 417, 541)

191. For all the foregoing reasons, we find the evidence of record does not support a finding that the University or its Project professionals caused any delay past the July 9, 2012 Phase 2 completion date due to the missing moment connections or the steel tie-in/fit-up issues, nor does it support any finding that Killian is entitled to any days of excusable delay on account of these issues. (F.O.F. 161-190; Board Finding)

192. The Phase 2 design for the new lobby called for six precast concrete columns, two large ones on the front of the new lobby entrance and two on each side of the new lobby entrance. (N.T. 1320-1321; Ex. 3)

193. Of these six precast columns, four were to hold up two canopies (one canopy and two columns on each side of the newly extended lobby entrance) and the two larger ones were to hold up a smaller canopy on the front of the new lobby entrance. (N.T. 316, 321, 1327-1330; Ex. 3)

194. Killian asserts that Phase 2 was delayed (for an unspecified number of days) by the eight months it took the University to approve shop drawings for the precast columns. (Killian's Proposed Findings of Fact at ¶ 261; Ex. 397 at pp. 14-16)

195. Shop drawings for the precast columns were initially submitted to the Project design team on or about November 4, 2011. (N.T. 1327-1330; Ex. 538)

196. The precast column shop drawings were returned to Killian on December 2, 2011, with noted markings. (N.T. 1267, 1327; Ex. 538)

197. On January 12, 2012, Killian submitted RFI 18, passing on 20 questions related to the precast columns from Sun Precast "(Sun)", the precast column fabricator and second-tier subcontractor of Killian's masonry subcontractor, Caretti. (N.T. 1290-1291; Exs. 409, 541)

198. The Project's structural engineer, Mr. Kerns provided answers to RFI 18 on February 29, 2012. Two of Mr. Kerns answers directed Sun to submit additional RFIs to the Project Architect. (N.T. 1290-1291; Exs. 426, 541)

199. On March 29, 2012, Killian submitted RFI 31 in which Sun requested load design parameters and roof reaction calculations for the precast columns. (N.T. 533, 1320-1321; Ex. 428)

200. Mr. Kerns provided his response to RFI 31 one day later on March 30, 2012. In this response he stated that he did not need load or roof calculations and engineered drawings for the precast columns so long as they complied with ACI minimum reinforcement recommendations for vertical reinforcing and lateral ties. (N.T. 533, 1320-1321; Ex. 536)

201. On April 2, 2012, Killian forwarded previously submitted "new RFI" questions to the Project Architect as Mr. Kerns had indicated in February concerning column cross sections, locations of entry column and slopes of coping pieces. (N.T. 1330-1331; Ex. 156)

202. The Architect's response to the "new RFI" questions (indicating that the Architect wanted 1'6" columns) was transmitted to Sun on April 9, 2012. (N.T. 1330-1331; Exs. 156, 158)

203. Following the Architect's response to the "new RFI" questions, Sun contacted the Architect directly by telephone on April 9, 2012, seeking direction as to whether it would be necessary to either move the locations of the precast columns or change the size of the columns. (Ex. 256)

204. In a May 1, 2012 email, the Architect directed Sun and Killian that the columns would need to be relocated 3” to align with the retaining wall. (Ex. 486)

205. On May 2, 2012, in response to the Architect’s May 1, 2012 email, Sun sent an email to the Architect asking if it could proceed to update its precast columns shop drawings. (Ex. 487)

206. On May 24, 2012, Sun submitted the final precast column drawings which also included precast coping designs for areas around the newly renovated main entrance to Elwell Hall. (Ex. 256)

207. On May 30, 2012, the Architect indicated that final approval of the precast columns submittals was awaiting review by the University’s engineer, HRG, and the Project’s structural engineer, Mr. Kerns. (Ex. 231)

208. The Project Architect approved the precast columns for fabrication (without final direction as to the color of the columns) on June 1, 2012.<sup>7</sup> (N.T. 1363-1364; Ex. 242)

209. Sun received the approved precast column drawings with all issues respecting the columns resolved on June 6, 2012.<sup>8</sup> (Ex. 257)

210. The precast columns were delivered to the Project site on July 5, 2012, approximately one month after the design was finalized and the shop drawings approved. (N.T. 1327-1328)

211. Between the submittal of the initial precast columns shop drawings on November 4, 2011, and the end of March 2012, long periods of time passed between submittals, reviews and/or responses, with the total time taken up by both the contractors and the University’s design team being about the same.<sup>9</sup> (N.T. 533, 1267, 1290-1291, 1327-1331; Exs. 409, 538, 541; F.O.F. 192-210)

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<sup>7</sup> Although Mr. Devaney, in his testimony and report, appears to suggest there was some design issue remaining unresolved until June 24, 2012, our review of the relevant documents shows this remaining issue did not involve the precast columns. (N.T. 1363-1364; Exs. 242, 256).

<sup>8</sup> Though Sun submitted a set of 8 additional questions to Caretti after receiving the approved precast columns drawings, Caretti responded on June 7, 2012, directing that the 7 questions which related to the precast columns could be addressed in the field. The only unresolved question posed by Sun related to dimensions of the retaining wall and not the precast columns. (Exs. 258, 269).

<sup>9</sup> Twenty-eight days passed between the initial shop drawings submittal on November 4, 2011, and the Project Architect’s response on December 2, 2011. An additional 40 days (from December 2, 2011 to January 12, 2012) lapsed before Killian submitted RFI 18 in response to the Architect’s December 2, 2011 notes, and it took the Project engineer 47 days (from January 12 to February 29) to answer the 20 questions posed in RFI 18. Thirty additional days (from February 29 to March 29) passed until Killian submitted RFI 31, requesting load design calculations, which was answered by Mr. Kerns in two days. Seven days passed from a submission by Killian regarding column cross sections, locations and slopes of coping pieces until a response from the Architect (April 2 to April 9). Twenty-three days elapsed (April 9 to May 1) from when Sun directly contacted the Architect with additional questions concerning the size and location of columns until an ultimate answer from the Architect. Twenty-two days elapsed (May 2 to May 24) until Caretti/Sun submitted their final precast drawings, and it took the

212. It took the Project Architect 23 days (from April 9 to May 1, 2012) to answer Sun's questions concerning whether it would be necessary to either move the locations of the precast columns or change the size of the columns. (Ex. 486; F.O.F. 202-204)

213. It took Sun 22 days (from May 2 to May 24) to submit its final precast columns shop drawings to the Project Architect. (Exs. 242, 256, 486; F.O.F. 205-206)

214. It took the Project Architect 13 days (from May 24 to June 6, 2012) to deliver the finalized precast columns design and approved shop drawings to Sun. (N.T. 1363-1364; Exs. 231, 242, 256; F.O.F. 206-209)

215. It took Sun 29 days (from June 6 to July 5, 2012) to fabricate the precast columns and have them delivered to the site. (N.T. 1327-1328; Ex. 257; F.O.F. 209-210)

216. The casual and unhurried manner in which all the parties handled the design and fabrication of the precast columns indicates that neither the University nor Killian considered the installation of the precast columns to be on the critical path of the Project's Phase 2 work. (N.T. 1267, 1290-1291, 1320-1330, 1363-1364; Exs. 156, 231, 242, 256, 409, 426, 428, 486, 487, 536, 538, 541; F.O.F. 192-215)

217. There was no credible testimony from any of the parties that installation of the precast columns was ever on the critical path of the Phase 2 work, nor was it shown to be so in any of Killian's schedules, including its final June 28, 2012 schedule (i.e. the "temporary occupancy" schedule). Additionally, the Board's own review of these schedules fails to convince us that the precast columns ever entered the critical path of Phase 2 work. (N.T. 1088-1089, 1720-1721; Exs. 212, 353, 585; Board Finding)

218. Because the installation of the precast columns does not appear to be on the critical path in any of Killian's schedules and because neither the University nor Killian treated the design and fabrication of the precast columns with any sense of urgency, we find that the delay in completing the design and fabrication of the precast columns was not a material cause of delay to the overall progress of Phase 2 at the time the University issued its Cure Notice nor did it become a material cause of delay preventing Killian's compliance with this Cure Notice.<sup>10</sup> (N.T. 1267, 1290-1291, 1320-1330, 1363-1364; Exs. 156, 231, 242, 256, 353, 409, 426, 428, 486, 487, 536, 538, 541, 574; F.O.F. 192-217; Board Finding)

219. Of the numerous delays to Phase 2 which Killian asserts are attributable to the University (or are otherwise not attributable or "excusable" to Killian), we find that, in addition

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Project design team an additional 13 days (May 24 to June 6) to communicate its final approval of the drawings. (See F.O.F. 192-210).

<sup>10</sup> Although Defendants may argue that the precast columns here at issue (like all tasks on a project) may eventually have come to be on the critical work path of Phase 2, the University's agreement with Killian to reduce the scope of Phase 2 work to that necessary to obtain a temporary occupancy permit for Elwell Hall and postpone the deadline to complete this work to August 1, 2012, as an alternate means for Killian to satisfy the outstanding Cure Notice (discussed infra) prevented the precast column work from ever attaining critical path status on the Project prior to Killian's termination. (Exs. 353, 574, 585; F.O.F. 192-210; Board Finding).

to the 54 days of delay attributable to the unanticipated underground duct bank and the 12 days of delay attributable to Tropical Storm Lee, at most, only the 3 days of delay resulting from the University's directives limiting work during the final examination period in December 2011 and the 5 days during final exams in May 2012 were caused by the University or otherwise caused by a factor listed in the Contract as excusable to Killian (i.e. an extraordinary weather event). (F.O.F. 122-217)

220. The University's first agreement to postpone the Phase 2 completion date 70 days (to June 8, 2012) fully accounted for and excused the delay to Phase 2 caused by the unanticipated underground duct bank and the effects of Tropical Storm Lee. The University's second agreement to further postpone the Phase 2 completion date an additional 31 days (from June 8, 2012 to July 9, 2012) noted in the Cure Notice covered delays through Killian's April 6, 2012 revised schedule and more than fully accounted for and excused the 3 days of delay caused by the University's December 2011 final examinations "quiet" directive. (Ex. 198; F.O.F 65-68, 92-96, 136-145; Board Finding)

221. Killian's response to the Cure Notice dated May 14, 2012, proposing an August 15, 2012 Phase 2 completion date, implicitly acknowledged that Killian could not meet the July 9, 2012 completion date required in the Cure Notice. (N.T. 256-258; Ex. 209)

222. At the May 23, 2012 job conference, Killian explicitly advised the University that it could not meet the July 9, 2012 Phase 2 completion date. (Killian's Proposed Findings of Fact at ¶ 173; N.T. 417, 719; Ex. 223)

223. Killian's proposed Phase 2 completion date of August 15, 2012 stated in its May 14, 2012 reply to the Cure Notice was 37 days beyond the July 9, 2012 completion date set forth in the Cure Notice. (Exs. 198, 209; F.O.F. 94, 102; Board Finding)

224. Killian subsequently generated schedules (dated May 15 and May 31) showing Phase 2 "turnover" dates of August 3 and August 1, 2012 (respectively) after the University flatly rejected Killian's August 15 completion date. These schedules still demonstrated that Killian expected to be between 22 to 37 or more additional days behind schedule on Phase 2 work even after two "agreed to" postponements to the Phase 2 completion date totaling 101 days. (Exs. 212, 236)

225. Even though the May 15 Schedule indicated a Phase 2 "turnover" date of August 3, it also showed Phase 2 work ongoing until August 15. As noted in Footnotes 3 and 5 above, several of Killian's schedules showed work continuing beyond the scheduled "turnover" dates and we accordingly find that the date work is to finish, not the "turnover" date, is properly considered the completion date. (Ex. 212; F.O.F. 86, 118; Board Finding)

226. The durations contained in Killian's May 31, 2012 schedule (showing an August 1 "turnover" date for Phase 2) were based on an assumption that nearly all of Killian's subcontractors would work multiple shifts, seven days per week. (N.T. 259-261, 282-283, 578, 1069-1071, 1361-1362, 1390-1391; Exs. 218, 219, 232, 260, 334)



227. At no time before or after the Cure Notice did Killian's subcontractors ever work multiple shifts, seven days per week.<sup>11</sup> (N.T. 260, 283, 578, 1070, 1390-1391; Exs. 219, 334, 417; Board Finding)

228. In mid-June 2012, the University contacted David Carll, at the time a senior project manager at Alexander Building Construction Company ("Alexander") to request that Alexander perform an assessment of Killian's May 31, 2012 schedule. This was done specifically to assess the reasonableness of the schedule, Killian's progress and make observations with regard to Killian's ability to meet the schedule. (N.T. 677-678, 800, 1462-1464)

229. Alexander sent a team, comprised of project manager Michael Stambaugh and project superintendant Steve Adams, to tour the Elwell Hall site to assess the level of completeness as compared to the May 31, 2012 schedule. (N.T. 1463-1464, 1466, 1508-1509)

230. Killian's May 31, 2012 schedule showed a Phase 2 completion date of August 1, 2012, and Alexander used that date in its analysis. (N.T. 1520-1521; Exs. 212, 236, 334)

231. Messrs. Stambaugh and Adams conducted their site visit on June 21, 2012, and prepared (on behalf of Alexander) a written evaluation which they sent to the University on June 25, 2012. (N.T. 1463-1464, 1466, 1508-1510, Ex. 334)

232. On June 21, 2012, Messrs. Stambaugh and Adams observed that certain critical path work regarding brick veneer, storefront windows and spray fireproofing was behind schedule and that brick veneer work did not start on time, which would also delay installation of storefront windows. (N.T. 1512-1515, 1529-1531; Ex. 334)

233. Messrs. Stambaugh and Adams observed on June 21, 2012, that no trades were working on the lobby areas for floors three through seven. (N.T. 1515; Ex. 334)

234. In its June 25, 2012 report to the University, Alexander concluded that Killian's scheduled activity duration for brick veneer work was too short and that the brick veneer work would take longer than planned. (N.T. 1516; Ex. 334)

235. Alexander's June 25, 2012 report concluded that Killian's May 31, 2012 schedule was not achievable due to insufficient resources and manpower, and that Killian would not be able to complete Phase 2 work by August 1, 2012, let alone by July 9, 2012.<sup>12</sup> (N.T. 801, 860-861, 1465-1466, 1516-1517; Ex. 334)

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<sup>11</sup> One or two of Killian's subcontractors did work on Saturdays after the Cure Notice, but this was substantially less than contemplated by Killian's May 31, 2012 schedule. (N.T. 259-261, 282-283, 578, 1069-1071, 1361-1362, 1390-1391; Exs. 218, 219, 232, 260, 334, 417; Board Finding).

<sup>12</sup> In the June 25, 2012 Alexander report, Mr. Stambaugh stated that the activity durations in Killian's May 31, 2012 schedule were "light" and the Project was not adequately manned to achieve the schedule durations. Mr. Stambaugh wrote:

We have been told that schedule update 5/31/12 was based on 2 shifts of indeterminate size and trade composition working until completion. Currently, there are not 2 shifts working; neither are resources specifically defined on the referenced schedule. Therefore, with the schedule logic in-

236. Killian's subsequent June 28, 2012 temporary occupancy schedule, which provided for significantly less work than that required for the completion of all of Phase 2, showed later start dates for at least ten activities than those included in Killian's May 31, 2012 schedule and only showed completion of this lesser amount of work by August 8, 2012. (Ex. 396 at pp. 40-45)

237. In view of the fact that Killian's May 15, 2012 schedule had work ongoing after its supposed August 3 turnover date and its May 31, 2012 schedule was based on the assumption that Killian's subcontractors would work multiple shifts, seven days per week; and because Killian's subcontractors never worked multiple shifts seven days per week, we find that the completion dates for all of Phase 2 proposed by Killian in its May 15 2012 and May 31, 2012 schedules were clearly not realistic or achievable. (N.T. 259-261, 282-283, 578, 1069-1071, 1390-1391; Exs. 212, 219, 334, 396; F.O.F. 224-236; Board Finding)

238. Based on the above, we find that, as of May 14, 2012 (the date of Killian's formal response to the Cure Notice), Killian's work on Phase 2 was at least 37 days late over and above the 101 days of delay for which Killian had been excused by the University at that time. (F.O.F. 224-237; Board Finding)

239. The 5 days of work stoppage to Phase 2 work caused by the May 2012 final examination period occurred from May 7 – May 11, 2012. This overlapped the Cure Notice and Killian's formal response to same. (F.O.F. 92-94, 102-103, 136, 142, 145)

240. These 5 days of additional delay occurring between the Cure Notice and Killian's May 14, 2012 response thereto were caused by the University and excusable to Killian. (F.O.F. 136-145, 238; Board Finding)

241. Based on the above, we find that, as of May 14, 2012 (the date of Killian's formal response to the Cure Notice), Killian was at least 32 days behind schedule on completing all of Phase 2 over and above the 101 days of delay for which Killian had already been excused by the University and the 5 additional days excusable to Killian as a result of the May 2012 exam shutdown. (F.O.F. 221-240; Board Finding)

242. None of these 32 additional days of delay were caused by the University or by circumstances identified as excusable to Killian. (F.O.F. 128-241; Board Finding)

243. The University's Mr. Dinan testified that, as early as September 2011, the University was concerned that Killian did not have sufficient supervision over the Project and was not providing adequate manpower to the Project. (N.T. 122-123)

244. In September 2011, Killian's original Project executive (Mr. Miller) and Project superintendant (Mr. Goodlavage) left the Project, and their respective duties were undertaken by Mr. Klush, who was also serving as Project manager. (N.T. 90-91, 564-565, 1181-1182)

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place, all remaining activity durations could essentially be doubles and the result would produce a more realistic and greatly extended phase 2 completion date. (Ex. 334 at p. 2).

245. At the October 4, 2011 special meeting with Killian representatives, the University expressed its concern over whether a single individual (Mr. Klush) would be able to handle the responsibilities of Project executive, Project superintendent, and Project manager, noting that Killian was already behind in submitting certain paperwork. (N.T. 127-128, 130-131, 759-761; Ex. 61)

246. In November 2011, Killian brought in David Pulse to supervise the Project. (N.T. 220-221, 232, 567, 1666-1667)

247. Mr. Pulse left the Project in April 2012 and was replaced by Greg Floyd, with Killian vice president John Bryant taking over responsibility for scheduling. (N.T. 220-221, 232-233; Exs. 147, 162)

248. Killian ultimately hired special consultant Kevin Hardy to schedule and manage the Project in June 2012, a few days before he developed the June 28, 2012 (temporary occupancy) Schedule. (N.T. 1590-1603; Ex. 353)

249. In all, there were seven changes in Project oversight and management by Killian over the course of 16 months on the Project. (N.T. 90-91, 120-131, 220-223, 567, 759-761, 1590-1603, 1666-1667; Exs. 61, 147, 162, 353, 585)

250. With respect to the University's concerns over Killian's inadequate manpower on the Project, Mr. Dinan testified, inter alia, that while the University was expecting that Killian would accelerate its work on Phase 2 after the underground duct bank and tropical storm delays, this did not occur. He specifically noted that no work on the demolition of the existing foundation was performed by Killian from September 20-30, 2011. The Board's own review of Killian's daily logs confirms Mr. Dinan's assessment. (N.T. 123-126; Ex. 417; Board Finding)

251. None of Killian's schedules included information as to the manpower Killian intended to provide to meet the schedule's work durations. (N.T. 962, 982-983; Exs. 20, 66, 90, 152, 212, 236, 353)

252. The University's scheduling expert, Mr. Nagata, testified that he would have expected to see acceleration of the manpower resources devoted to completing work with shorter durations as reflected in Killian's January 26, 2012 schedule, but that Killian's daily logs did not show such an acceleration or increase in Killian's manpower following issuance of this schedule. (N.T. 1014-1016; Ex. 90)

253. The Board's own review of Killian's daily logs causes us to agree with Mr. Nagata that there was no significant increase in Killian's manpower on the Project in February 2012. (Ex. 417; Board Finding)

254. The University's concern that Killian was not devoting sufficient manpower resources to the Project was a motivating factor behind Mr. Mandel's April 17, 2012 letter to Safeco, Killian's surety. (N.T. 640; Ex. 165)

255. On April 26, 2012, the University issued a non-compliance form to Killian citing the fact that, while steel work was behind Killian's schedule, Killian's steel subcontractor (Powell) was not on site performing the steel work. The Board's own review of Killian's daily logs show Powell Steel to be absent from the worksite from April 12, 2012 until a one day appearance on May 26, 2012. (N.T. 645-646; Exs. 175, 417; Board Finding)

256. The University's concern that Killian was not devoting sufficient manpower resources to the Project continued into May 2012, and was a reason for the University's May 8, 2012 Cure Notice. (N.T. 646-648; Ex. 198)

257. The University's Cure Notice noted, *inter alia*, Killian's failure to provide a proper work force and sufficient labor and work hours as particulars in which Killian was in default of its contractual obligations. The Cure Notice specifically directed that Killian "provide a staffing plan that demonstrates sufficient manpower" to complete Phase 2 by July 9, 2012. (Ex. 198)

258. In its responses to the Cure Notice, Killian never provided the University with a manpower staffing plan of any sort, let alone one showing adequate manpower to meet the July 9, 2012 completion date for Phase 2. (Exs. 198, 211, 209, 236, 353)

259. The University's decision to suspend Phase 4 of the Project on May 9, 2012, was made, *inter alia*, in recognition of the lack of manpower Killian had devoted to the Project up to that time. (N.T. 793-794)

260. From the beginning of construction on the Project up to the issuance of the May 8, 2012 Cure Notice, Killian produced four Project work schedules of significance showing later and later completion dates for Phase 2.<sup>13</sup> Often, these schedules would limit the amount of overall delay to the Project shown on these schedules by reducing (on paper) the planned duration of critical work items needed to be done in order to reach Phase 2 completion by the date indicated on the schedule. Despite repeated assurances by Killian to the University that it would be able to recover from delays to each previous schedule, Killian's actual work on Phase 2 of the Project failed to meet the overall Phase 2 work progress shown on any of these schedules. (N.T. 181-182, 211-213, 578, 762, 779-780, 1038-1040, 1055-1057, 1390-1391, 1409, 1431-1432, 1706-1710; Exs. 67, 88, 90, 108, 127, 129, 133, 141, 146, 152, 353, 396)

261. Despite 101 days of delay excused by the University and Killian's early and ongoing assurances that its performance on the Project would improve, work on Phase 2 of the Project had accrued at least 32 days of unexcused delay as of May 8, 2012. (N.T. 120-131, 181-182, 211-213, 220-223, 567, 640-646, 759-762, 779-780, 793-794, 962, 982-983, 1014-1016, 1038-1040, 1055-1057, 1409, 1431-1432, 1515, 1590-1606, 1666-1667, 1706-1710; Exs. 61, 67, 88, 90, 108, 127, 129, 133, 141, 146, 147, 152, 162, 175, 195, 198, 211, 209, 219, 334, 353, 396, 417, 585)

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<sup>13</sup> The four schedules we refer to are those dated March 28, 2011 (Baseline schedule); October 11, 2011 (Update); January 26, 2012 (Update); and April 6, 2012 (Update). We discuss the May 15, 2012 (Completion schedule); the May 31, 2012 (Update); and the June 28, 2012 (Partial Occupancy) schedules, which become significant after the issuance of the Cure Notice, in subsequent Findings.

262. In his June 20, 2012 letter to Killian and Safeco outlining the University's assessment of Killian's default, Mr. Clifford noted Killian's failure "to follow through on earlier promises to provide additional manpower in order to meet its own schedule." (Ex. 312)

263. The Board's own review of Killian's daily logs reveals that, even though Killian did eventually provide an additional increase in manpower to the Project through March and April 2012, the evidence is also clear that, as Mr. Clifford concludes, this modest increase in manpower was still insufficient for Killian to meet its own schedules. (Ex. 417; F.O.F. 260-262; Board Finding)

264. Because we have found that there was repeated and continued turnover of Killian's supervisory personnel on the Project, and that Killian was unable, despite its repeated assurances, to provide sufficient staffing on the Project to meet its own schedules for completion of Phase 2, we find that Killian's failure to employ adequate manpower and supervision on the Project was the cause of at least 32 days of unexcused delay to Phase 2 as of the date of the Cure Notice. (N.T. 84-85, 90-91, 148, 161-163, 257, 384-385 416-417, 561-565, 593-595, 622, 663, 916-918, 1178-1182, 1345, 1574-1575; Exs. 61, 76, 123, 162, 163, 192, 215, 417; F.O.F. 240-263)

265. Because of its concern that Killian would not be able to complete Phase 2 on time, the University investigated alternatives for housing students somewhere other than Elwell Hall for the 2012 Fall semester. (N.T. 875-877, 924)

266. The University's Assistant Vice President for Facilities Management, Eric Ness, testified that he conducted a search for alternative housing and found that hotel rooms in the area were simply not available in September because of the Bloomsburg Fair. The University also considered relocating students and faculty to Lock Haven University, targeted residential accommodations in the Bloomsburg area and/or hotel accommodations in Williamsport, Scranton and Wilkes-Barre along with busing these students back and forth between the University and these alternative accommodations. (N.T. 875-877, 924)

267. Following these investigations, the University concluded, and the Board agrees, that there were no reasonably viable alternatives for housing the students who were scheduled to occupy Elwell Hall in the Fall of 2012. (N.T. 875-877, 924)

268. Because the Contract provided that time was of the essence; because the parties were aware that the timing under the Contract was determined in large part by the need to complete work on certain phases in order to allow students to occupy Elwell Hall at the beginning of each academic year; because there were no viable alternatives for housing the approximately 800 students who were to otherwise occupy Elwell Hall in the event that Phase 2 was not completed for the beginning of the Fall 2012 semester (thereby depriving the University of a substantial benefit of the Contract for which it could not be adequately compensated); and because Killian had not, as of the date of the Cure Notice, exhibited a commitment of sufficient manpower or supervision to meet any of its prior schedules, the fact that Killian had caused at least 32 days of unexcused delay to the completion of Phase 2 as of May 8, 2012, was a material failure by Killian to meet the work performance requirements of the Contract. (N.T. 90-91, 264,

405, 442, 562-563, 643, 711-713, 754-757, 916-918, 1103-1104, 1179-1180; Exs. 1, 17, 165, 238; F.O.F. 6, 13-15, 97, 100, 235, 243-259, 265-267; Board Finding)

269. In addition to its admission that it would not be able to complete Phase 2 by July 9, 2012, Killian never produced a schedule in response to the Cure Notice which showed Phase 2 completion by July 9, 2012. (Exs. 211, 236, 353; F.O.F. 94, 97, 101-105)

270. At no time in response to the Cure Notice did Killian provide anything even close to a staffing/manpower plan to meet the July 9, 2012 completion date as required by the Cure Notice.<sup>14</sup> (Ex. 209; F.O.F. 94-97, 101-105, 221-225, 257-258; Board Finding)

271. Because Killian never agreed to complete Phase 2 (excepting elevators) by July 9, 2012, never produced a schedule showing a July 9, 2012 completion date, and never provided the University with a staffing plan showing adequate manpower to meet the July 9, 2012 completion date, Killian's response to the Cure Notice not only failed to show how it would correct its material failure to progress Phase 2 work to completion by July 9, 2012 but, in fact, confirmed that it would not. (Exs. 198, 211, 209, 236, 353; F.O.F. 6, 13-15, 35-36, 94-97, 100-105, 108, 221-225, 243-259, 269-270; Board Finding)

272. The evidence is clear that Killian could not and would not cure its material failure to meet the work performance requirements set forth in the Contract as prescribed by the May 8, 2012 Cure Notice. (F.O.F. 268-271; Board Finding)

273. Killian argues that the University, in communications subsequent to May 8, 2012, agreed to modify the requirements of the Cure Notice by reducing the scope of Phase 2 work to that needed to achieve a temporary occupancy permit for Elwell Hall and extending the deadline to accomplish this reduced scope of work to August 1, 2012. (Killian's Proposed Findings of Fact at ¶¶ 185-188, 203; Killian's Brief at pp. 2, 17-21)

274. Killian also argues that it complied with the University's directives regarding the temporary occupancy permit and that it demonstrated to the University that it could complete the work necessary to achieve the temporary occupancy permit by August 1, 2012, thereby satisfying the Cure Notice as amended. (Killian's Proposed Findings of Fact at ¶¶ 203, 205; Killian's Brief at pp. 2-3, 22)

275. The University denies that it ever agreed to extend the Phase 2 completion date beyond the dates specified in the Cure Notice (July 9, 2012, and August 1, 2012 for the completion of the elevator work). It asserts that discussions and its eventual directives concerning the temporary occupancy permit were merely efforts to mitigate damages which would result from Killian's anticipated inability to complete Phase 2 in time for students to occupy Elwell Hall for the Fall 2012 semester. (University's Proposed Findings of Fact at ¶¶ 495-501; University's Brief at pp. 21-22, 43-45)

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<sup>14</sup> Addressing "Staffing plan" in its May 14, 2012 response to the Cure Notice, Killian merely stated that all subcontractors and other primes were "brought into" Killian's latest schedule (with an August 15, 2012 completion date) and that "[m]anpower and staffing have all been planned carefully." (Ex. 209).

276. The University also argues that Killian was not able to demonstrate to the University that it could complete even the pared-down work required to achieve a temporary occupancy permit by August 1, 2012. (University's Proposed Findings of Fact at ¶¶ 524-552; University's Brief at pp. 28-30, 44-45)

277. While the University clearly rejected Killian's proposal (in the May 14, 2012 response to the Cure Notice) that the Phase 2 completion date be put off to August 15, 2012, the May 23, 2012 job conference minutes indicate that the University stated there that it "continues to seek a late July [or] early August completion date for Phase 2." (Ex. 223 at p. 8)

278. A subsequent (albeit self-serving) memo prepared by Killian's Benny Nale (reporting on a May 24, 2012 conference call with the University's Jeffrey Mandel and Eric Ness) noted that Mr. Mandel indicated the University was not requiring Phase 2 to be completed by July 9, but would accept a completion date between July 9 and August 15. (Ex. 223)

279. Killian's John Ghirardelli, in a letter to the University's Jeffrey Mandel dated May 31, 2012 (referencing the May 24, 2012 conference call and the May 30, 2012 job conference) reaffirmed Killian's commitment that "Phases 2 and 3 will be completed on or before the agreed target deadline of 8-1-12 [and that the University will] have the Certificate of Occupancy by that 8-1-12 date. . . ." (Ex. 238)

280. On the other hand, the University's Mr. Mandel testified that he does not recall discussing an extension of the July 9, 2012 Phase 2 deadline or stating that a later date would be acceptable to the University in the May 24 conference call. (N.T. 664-670)

281. Mr. Mandel also wrote a June 4 reply to Mr. Ghirardelli's May 31 letter in which Mr. Mandel referenced the Cure Notice while explicitly stating that he "cannot state that there is an 'agreement' from the University" for an August 1, 2012 completion date. (Exhibit 246; N.T. 671-674)

282. As noted above, even before the University issued its Cure Notice, it had directed the Project architect to explore the possibility of applying to L&I for a temporary occupancy permit which would allow students to access and use the Elwell Hall lobby elevators and dormitories for the Fall 2012 semester. The University had also directed the Project Architect to prepare the temporary occupancy plans, and requested that Killian provide the Project Architect with a schedule showing the completion of the temporary occupancy work by August 1, 2012, so the Architect could complete the temporary occupancy plan to submit to L&I. (N.T. 222-232, 240, 406-407, 794, 827-830; Exs. 162, 172, 224; F.O.F. 106-110)

283. A June 20, 2012 letter from the University's attorney (Mr. Clifford) in which the temporary occupancy permit was raised, included the express caveat that the University's pursuit of a temporary occupancy permit "was not intended in any fashion to waive" any of the University's rights under the Contract or surety bond. (Ex. 312)

284. Attorney's Clifford's letter begins by reasserting that Killian is in "substantial and material default" and describes in detail in the ensuing four pages Killian's failures under the

Contract which would justify immediate termination. It notes specifically that “Killian has failed/refused to cure [the defaults listed in the May 8, 2012 Cure Notice] or to even offer a plan that, if followed, would lead to a cure of these defaults.” (Ex. 312)

285. Attorney Clifford’s letter also stated that the University’s willingness to pursue the “contingency” temporary occupancy permit comprised “one last attempt to salvage this situation in order to mitigate what will undoubtedly be substantial costs and damages” resulting from Killian’s failure to timely complete Phase 2. (Ex. 312)

286. The June 20, 2012 job conference minutes continue to show a “Phase two completion deadline [of] June 8, 2012, (as per the 10.2.2011 GC schedule) [emphasis in the original].” (N.T. 849-850; Ex. 311)

287. Notwithstanding the foregoing, the June 20, 2012 job conference (JC#39) minutes also show the following entries as new discussions at the meeting:

The University:

- 1) Jim Dinan stated that “*we all know that the GC and all trades are working toward August 1 2012 occupancy*” of all the phase 2, Lobby related work..” With only 6 weeks to go at June 20<sup>th</sup>, the University is becoming concerned whether this goal can be achieved. As Jim explained, “there is no plan B” we must be prepared to occupy and house over 700 students comes early August.

To be safe, and certain, Jim has directed the GC and all primes, to “concentrate” on all the work needed for the temporary occupancy as per the Architects temp.-occ. plans shared with everyone at JC#39. Specifically, all corridors, stairs, hallways, and egress pathways need to achieve occupancy approval from L&I by August 1, 2012. All parties agreed.

Related to this, Jim and Colin Reitmeyer approved the temp.-occ. plans prepared by the Architect, to immediately send to L&I in Harrisburg. Plans were sent out the next day, Thursday June 21, 2012.

(Ex. 311)

288. Viewing the record in its entirety and assessing the testimony at hearing, we find that the University did agree to reduce the scope of Phase 2 work to that necessary to obtain a temporary occupancy permit for Elwell Hall and postpone the deadline to complete this work to August 1, 2012, as an alternate means for Killian to satisfy the outstanding Cure Notice. (N.T. 222-232, 240, 406-407, 794, 671-674, 827-830, 849-850; Exs. 162, 172, 224, 311, 312, 346; F.O.F. 106-116, 273-287; Board Finding)

289. Killian responded to the University’s presentation of the Project Architect’s temporary occupancy plan at the June 20, 2012 job conference and Mr. Clifford’s letter of that same date by naming a newly hired special consultant, Kevin Hardy, to immediately develop a



plan to achieve the work necessary for the temporary occupancy permit by August 1, 2012. (N.T. 1596-1603)

290. Mr. Hardy flew to Bloomsburg on June 26, 2012, and walked the site with Frank Klush, the superintendent who was then working on the Project for Killian. (N.T. 598-599)

291. Mr. Hardy and Mr. Klush proceeded to discuss with Killian's subcontractors and the other prime contractors what work they all needed to perform for the temporary occupancy permit, the manpower they could devote to the task, and how much time they needed. (N.T. 1599-1603, 1703)

292. On June 27, 2012, Mr. Hardy drafted a "partial occupancy schedule" which included only the work necessary for the temporary occupancy permit (referred to herein and by the parties as the "June 28 Schedule", the "temporary occupancy schedule" and/or the "partial occupancy schedule"). (N.T. 1599-1608; Exs. 353, 585)

293. On June 28, Messrs. Hardy and Klush met with the other prime contractors and all the subcontractors on the Project (with the exception of Powell Steel), all of whom, Mr. Hardy testified, agreed to provide the resources necessary to complete the temporary occupancy work in accordance with the new June 28 Schedule. (N.T. 1608-1610)

294. Mr. Hardy also testified that he told the subcontractors that Killian would, if requested, authorize "whatever . . . was necessary" to complete the work on time, including overtime, extra shifts and supplemental subcontractors if necessary. (N.T. 1609-1610)

295. Mr. Hardy, along with Mr. Klush and Killian's President, William Killian, met with University personnel on June 29, 2012. At this time they presented the June 28 Schedule to the University. (N.T. 682, 686, 928, 1374-1375, 1554-1555, 1612-1613)

296. At the outset of the June 29 meeting, the University stated that it was not the University's intent to terminate Killian but was seeking assurances that Killian would be able to "get across the finish line," to complete the temporary occupancy work. (N.T. 1613)

297. Mr. Hardy and Mr. Killian testified that, at this June 29 meeting, both emphasized their commitment, and that of the subcontractors, to complete the temporary occupancy work on time. (N.T. 1565-1568, 1612-1614)

298. Mr. Hardy testified further that, in addition to presenting the June 28, 2012 Schedule at the June 29 meeting, he also described his efforts in preparing the schedule to complete the temporary occupancy work by August 1, 2012. (N.T. 1608-1614)

299. At the June 29 meeting, Mr. Hardy also stated that the schedule had been prepared with input and ultimately agreements (i.e. "buy-ins") from the other prime contractors and Killian's subcontractors. (N.T. 1608-1614)

300. Both Messrs. Hardy and Killian emphasized Killian's commitment to complete the temporary occupancy work on time, specifically informing the University that Killian had committed to approve extra shifts and overtime for its subcontractors, if requested, to get the job done. (N.T. 1565-1568, 1608-1614)

301. Mr. Killian also testified that he had expressed his personal commitment to the University to complete the temporary occupancy work and his faith that it could be done at the June 29 meeting. (N.T. 1565-1568)

302. Killian's June 28, 2012 Schedule does not show an August 1, 2012 completion date for the temporary occupancy permit work, but rather a completion date 7 days later on August 8, 2012. (Exs. 353, 585)

303. Although Killian presented its June 28 Schedule as a plan to complete the necessary work for a temporary occupancy permit by August 1, and Mr. Hardy consistently stated that his goal was to complete the temporary occupancy work by August 1, this June 28 Schedule actually shows a completion date of August 8, 2012 at the earliest (or August 13 if one views the construction site clean-up responsibilities as precluding student occupancy).<sup>15</sup> (Exs. 353, 585)

304. Killian's June 28, 2012 Schedule included no labor load and no indication of the manpower planned for the individual work items needed to accomplish the schedule, as had been demanded in the Cure Notice. (N.T. 1730-1731; Exs. 353, 585)

305. At hearing, Mr. Hardy described the work which was performed by Killian's subcontractors over the weekend of June 30 and July 1 immediately following the June 29 meeting. He asserted, among other things, that Killian's masonry and insulation subcontractors were ahead of his June 28 Schedule for masonry and drywall insulation as of July 2, 2012. (N.T. 1643-1647)

306. The work performed by the masonry and insulation subcontractors over the weekend of June 30 and July 1, as described by Mr. Hardy, did not follow Mr. Hardy's own June 28 Schedule. Instead, the areas where Mr. Hardy said that work was ahead of schedule were the result of these subcontractors working out of order and did not reflect that the whole Project was ahead of schedule. (N.T. 1497-1504, 1715-1719; Exs. 353, 361, 585; Board Finding)

307. Although Mr. Hardy had sought commitments from three subcontractors to work over the weekend of June 30 and July 1 (i.e. subcontractors for drywall, masonry and insulation), only two of these subcontractors actually showed up to work. Specifically, Mr. Hardy testified that even though directed to work over the June 30-July 1 weekend and promised that it would be paid overtime, the drywall subcontractor, R&R, did not show up to work. (N.T. 1612, 1671, 1711-1713, 1731-1732)

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<sup>15</sup> The plan shows an August 8, 2012 turnover for Phase 2 temporary occupancy but also shows 2 days of site clean-up being done through August 13, 2012. Construction site clean-up is typically done by the contractor, casting some doubt on the viability of even the August 8, 2012 date. (Exs. 353, 585).

308. The foam insulation equipment belonging to the insulation subcontractor broke down on Saturday, June 30, preventing the subcontractor from finishing its work over the weekend. (N.T. 1716-1717)

309. Although Mr. Hardy testified that he had commitments (“buy-ins”) from all the subcontractors to meet the June 28 Schedule, he conceded on cross-examination that he did not have a buy-in from the structural steel subcontractor, Powell, who he was not able to contact prior to his June 28, 2012 meeting with subcontractors and primes. (N.T. 1608, 1723-1724)

310. Following Killian’s presentation to the University of its June 28 Schedule, the University requested that Alexander perform a follow-up site inspection and analysis focused on Killian’s ability to complete the reduced temporary occupancy work in accordance with the June 28 Schedule. (N.T. 803-804, 1467-1468)

311. On July 2, 2012, Alexander’s Mr. Carll, with the University’s Messrs. Reitmeyer and Dinan, visited the Project site with the June 28 Schedule and the temporary occupancy plans in hand. They did so to determine the level of completion on the Project and make conclusions regarding the completeness of activities on the June 28 Schedule as of July 2, 2012. (N.T. 1468-1469, 1471, 1473)

312. Following the July 2, 2012 site visit, Mr. Carll sent the University an email listing his observations which including the following:

- “Absolutely no sense of urgency” was observed;
- Subcontractors were not working in accordance with the June 28 Schedule;
- Though many areas of the site were available for critical path work, work was not being performed.

(Ex. 361)

313. Mr. Carll concluded that Alexander “saw nothing today on the Elwell Hall site that changes our opinion re Killian’s ability to complete in a timely fashion.” He further stated that the June 28 Schedule “and your occupancy date are unattainable with this level of effort.” (Ex. 361)

314. Because, inter alia: Killian’s June 28 Schedule does not show an August 1, 2012 completion date for the temporary occupancy permit work, but rather a completion date at least 7 days later on August 8, 2012; this schedule included no labor load and no indication of the manpower planned for the individual work items needed to accomplish the schedule; only two of the three subcontractors Killian requested to work over the weekend of June 30-July, 2012 actually showed up to work, and equipment problems prevented one of these two from completing its work over the weekend of June 30-July, 2012; the University observed a lack of urgency in the work of Killian’s subcontractors on July 2, 2012, and areas where critical work could have been performed were not being worked on; and because Killian did not follow its June 28 Schedule for work performed after it issued this schedule; and because Alexander concluded that Killian would not be able to complete the temporary occupancy work in

accordance with the June 28 Schedule; and because Killian had consistently failed to meet any of its prior work schedules throughout the course of construction on the Project despite assurances that it would make up for lost time, we find the University's conclusion that Killian had failed to demonstrate it would be able to complete the limited work needed to achieve temporary occupancy permit approval from L&I by August 1, 2012 to be correct and fully justified. (N.T. 888-889, 899-900, 930-933, 1612, 1671, 1711-1719, 1730-1731; Exs. 353, 361, 585; F.O.F. 260-261, 302-313; Board Finding)

315. Killian failed to demonstrate that it could complete even the reduced scope of Phase 2 work necessary to obtain a temporary occupancy permit for Elwell Hall by August 1, 2012, and accordingly, failed to meet the alternate means by which it could satisfy the outstanding Cure Notice. (N.T. 222-232, 240, 406-407, 794, 671-674, 827-830, 849-850, 888-889, 899-900, 930-933, 1612, 1671, 1711-1719, 1730-1731; Exs. 162, 172, 224, 311, 312, 346, 353, 361, 585; F.O.F. 260-261, 302-314; Board Finding)

316. The Contract provides for termination of the contractor for default at Paragraph 13.2.100. This provides, in relevant part, as follows:

If the Contractor persistently or repeatedly refuses or fails to supply enough properly skilled workmen . . . or fails to proceed as directed by the System, or performs the work unsuitably, . . . or otherwise is guilty of a substantial violation of a provision of the Contract Documents, then the System may, without prejudice to any of its other rights or remedies, give the Contractor and its Surety written notice that the Contractor has seven (7) days from the date of the System's notice to cure the default set forth in the notice.

\* \* \*

Should the Contractor fail to cure said default within the specified time, the System may terminate the Agreement between the System and the Contractor, and may take possession of the site and of all materials, equipment, tools, construction equipment and machinery which is owned by the Contractor, located on the property and may finish the work by whatever method it may deem expedient.

(Ex. 1 at ¶ 13.2.100).

317. The evidence in this case shows that: the University, in its May 8, 2012 Cure Notice, gave written notice to Killian that it was in default due to Killian's failure to persistently and repeatedly prosecute the work in a timely fashion, provide a proper work force, and/or to provide adequate project supervision; as of the date of the Cure Notice Killian had caused at least 32 days of unexcused delay to Phase 2 of the Project and that this was a material failure to meet its work performance requirements under the Contract; Killian failed to show that it could complete Phase 2 by July 9, 2012 as set forth in the Cure Notice. The evidence also shows that, even though the University subsequently agreed to reduce the scope of Phase 2 work to that necessary to obtain a temporary occupancy permit for Elwell Hall and move the deadline to complete this work to August 1, 2012 as an alternate means for Killian to satisfy the outstanding Cure Notice, Killian failed to demonstrate that it could complete the reduced the scope of Phase

2 work to that necessary to obtain a temporary occupancy permit for Elwell Hall by August 1, 2012. Accordingly, Killian failed to satisfy the original May 8, 2012 Cure Notice and failed to meet the alternate means by which it could satisfy the outstanding Cure Notice, and the University terminated Killian on July 2, 2012 pursuant to Paragraph 13.2.100 of the Contract. (N.T. 426-430, 664-672, 679-680, 720, 779-800, 824-825, 888-889, 892-900, 930-953; 1612, 1671, 1711-1719, 1730-1731; Exs. 162, 172, 198, 216, 217, 219, 222, 223, 224, 226, 236, 238, 246, 311, 312, 316, 328, 330, 340, 346, 347, 353, 361, 365, 585; F.O.F. 1-316; Board Finding)

318. Based on Killian's termination for default, the University seeks damages against Killian and Safeco in the amount of \$2,093,707. This amount represents its cost to complete Phase 2 and Phase 4, plus interest. (University's Proposed Findings of Fact at ¶¶ 646-661)

319. Killian argues that the University's damages should be limited to the liquidated damages set forth in the Contract Documents and that the University is not entitled to any damages related to the completion of Phase 4 of the Project because: (1) the University suspended Phase 4 for convenience in 2012; (2) the scope of work of the contractor retained to complete Phase 4 was not identical to Killian's scope of work under the Contract; and (3) the University did not comply with Paragraph 12.1.102 of the Contract relating to notice of a claim relating to a suspension for convenience. (Killian's Brief at pp. 36-40)

320. In the case of termination of a contractor for default, the Contract provides for the payment of damages at Paragraph 13.2.101, as follows:

In such case, the Contractor is not entitled to receive any further payment until the work is finished, at which time the Contractor shall be paid any excess remaining. If the unpaid balance of the Contract sum exceeds the cost of finishing the work, including compensation for the Professional's additional services and any other damages which the system has incurred in accordance with the Agreement, such excesses shall be paid to the Contractor. If such costs exceed the unpaid balance, the Contractor or the Surety or both shall pay the difference to the system.

(Ex. 1 at ¶ 13.2.101)

321. The liquidated damages provisions of the Contract, found in the Notice to Contractors, provide for liquidated damages in the amount of \$50 per day per student room and \$500 per day for the lobby for each day beyond the Contract completion dates each Phase was actually completed. (Ex. 1 at pp. 50-51)

322. Killian never completed either Phase 2 or Phase 4 of the Project (late or otherwise), but was instead terminated for default. (F.O.F. 91-116, 267-316)

323. Killian has not directed the Board to any provision of the Contract or any other requirement that indicates the liquidated damages provision supersedes the measure of damages for default provided at Paragraph 13.2.101. (Killian's Proposed Findings of Fact and Conclusions of Law, Killian's Brief; Ex. 1)

324. Because we have found that Killian was properly terminated for default (i.e. for materially breaching its work performance requirements under the Contract), the measure of damages that is set forth at Paragraph 13.2.101 of the Contract specifically addresses the facts of this case. (F.O.F. 92-117, 268-323; Board Finding)

325. Article 12 of the Contract addresses Suspension of Work for Convenience. (Ex. 1 at p. 35)

326. Paragraph 12.1.102 provides that “No claim under this clause [relating to Suspension of Work for Convenience] shall be allowed unless the claim . . . is asserted in writing as soon as practicable after the termination of the suspension [emphasis added].” (Ex. 1 at p. 35, ¶ 12.1.101)

327. By its own terms, Paragraph 12.1.102 relates only to claims asserted under the suspension for convenience clause. (Ex. 1 at p. 35, ¶ 12.1.101)

328. Because the University’s claim for damages is made under Paragraph 13.2.101 based on Killian’s termination for default, we do not see the provisions of 12.1.102 as applicable to limit an Paragraph 13.2.101 remedy. (Ex. 1 at p. 35; Board Finding)

329. The unpaid balance on the Contract was \$1,865,160. This represents the difference between the adjusted Contract amount of \$5,849,020 (original contract amount plus change orders) less amounts the University had paid to Killian prior to termination (\$3,234,142) and amounts paid by agreement with Killian after termination to Killian’s subcontractors (\$749,718). The accuracy of this amount was unchallenged. (University’s Proposed Findings of Fact at ¶¶ 647-652; N.T. 687-688, 692-699, 1105-1107; Ex 403; Board Finding)

330. On or about July 5, 2012, the University entered into a contract with Quandel Construction Group, Inc. (“Quandel”) to complete Killian’s work on Phase 2, for which it paid \$2,783,867. (N.T. 693, 1107-1108; Ex. 403)

331. The scope of work of the University’s contract with Quandel was the same as the scope of work remaining from Killian’s Contract relating to Phase 2. (N.T. 1107-1108; Exs. 1, 2, 403, 414; Board Finding)

332. On or about January 31, 2013, after rebidding Phase 4 of the Project, the University entered into a contract with Caldwell, Heckles & Egan, Inc. (“CH&E”) to complete Killian’s Phase 4 work plus some limited extra work that was beyond the scope of Killian’s Phase 4 work. (N.T. 694-695, 1108; Ex. 403; Board Finding)

333. The contract amount of the University’s contract with CH&E was \$1,360,000, of which \$1,175,000 was to complete Killian’s Phase 4 scope of work under its Contract with the University. (N.T. 694-695; Ex. 403)

334. Under the University's contract with CH&E for the completion of Killian's Phase 4 work alone, the University paid CH&E \$1,175,000. The accuracy of this amount was unchallenged. (N.T. 694-695, 1108; Ex. 403; Board Finding)

335. Although Killian argues that CH&E's Phase 4 completion contract amount was inflated because the work was performed in 2013 rather than 2012, and because CH&E's contract included a liquidated damages provision for late completion of Phase 4 that was substantially higher than under the Contract with Killian, Killian presented no evidence whatsoever to substantiate these two assertions. (Killian's Brief at p. 39)

336. In the absence of evidence that the Phase 4 completion cost paid to CH&E was higher than Killian's because of inflation and the parties' liquidated damages provision, and because we find that CH&E's scope of work for completion of Phase 4 (for which the University paid \$1,175,000) was substantially the same as the Phase 4 scope of work required of Killian under its Contract with the University, we find the completion costs for Phase 4 paid to CH&E to be reasonable and appropriate. (N.T. 694-695, 1108; Ex. 403; F.O.F. 332-335; Board Finding)

337. The University's cost to complete Phase 2 and Killian's portion of Phase 4 was \$3,958,867, comprised of \$2,783,867 paid to Quandel and \$1,175,000 paid to CH&E. (F.O.F. 329-335; Board Finding)

338. Subtracting the unpaid balance on the Contract (\$1,865,160) from the foregoing cost to complete results in \$2,093,707, the amount by which the University's completion costs exceeded its unpaid balance to Killian, and the amount of damages claimed by the University pursuant to Paragraph 13.2.101. (F.O.F. 329-337; Board Finding)

339. The Contract Bond issued by Safeco on January 31, 2011, executed by Killian (as principal and contractor) and Safeco (as surety) states in pertinent part as follows:

NOW, THEREFORE, the joint and several conditions of this obligation are such:

- A. That if the above bounden Principal as Contractor shall well and faithfully do and perform the things agreed by him to be done and performed according to the terms of said contract and general provisions, including the plans and specifications therein referred to and made part thereof, and such alterations as may be made in said plans and specifications as therein provided, and which are hereby made part of this bond the same as though they were fully set forth herein, and shall indemnify and save harmless the State System of Higher Education and all of its officers, agents and employees from any expense incurred through the failure of said Contractor to complete the work as specified and for any damages growing out of the manner of performance of said contract by said Contractor or his Subcontractors, or his or their agents or servants including but not limited to patent, trademark and copyright infringements, then this part of this obligation shall be void; otherwise, it shall be and remain in full force and effect.

(Ex. 406 (University's Complaint at ¶ 8, Exhibit 2); Ex. 407 (Killian's Answer, New Matter and Counterclaim at ¶ 8, Exhibit A))

340. Safeco offered no legal or factual defenses to the University's claim on the surety bond other than those defenses raised by Killian, defenses which we have found to be without merit. (N.T. 37; Board Finding)

341. Interest on the principal amount of judgment (\$2,093,707) at six percent per annum accruing from the date of Killian's termination (July 2, 2012) to the date of this Order amounts to \$ 449,490. (F.O.F. 338; Board Finding)



## CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear and adjudicate the University's claims in this matter because the University is a Commonwealth agency and the claims arise out of its contract with Killian for construction of the Project. 62 Pa.C.S. §§ 103, 1724(b)(1). The Board also has ancillary jurisdiction over Killian's counterclaim because it arises out of the same contract and series of transactions. 62 Pa.C.S. § 1725(d)(1); Ex. 1. See also Shovel Transfer & Storage v. Simpson, 565 A.2d 1153, 1155 (Pa. 1989), Dep't of Gen. Servs. v. Limbach Co., 862 A.2d 713, 719 (Pa. Cmwlt. 2004).

2. The Board is the ultimate finder of fact and is charged with determining the credibility and persuasiveness of witness testimony, including that of expert witness testimony. James Corp. v. N. Allegheny Sch. Dist., 938 A.2d 474, 495 n.21 (Pa. Cmwlt. 2007).

3. As the finder of fact, the Board is charged with the duty of determining the credibility of evidence and resolving conflicting testimony. It may believe all, or part, or none of the testimony of any witness. The Board's findings need not be supported by uncontradicted evidence, so long as they are supported by substantial evidence. Dep't of Gen. Servs. v. Pittsburgh Bldg. Co., 920 A.2d 973, 989 (Pa. Cmwlt. 2007); A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ., 898 A.2d 1145, 1155 (Pa. Cmwlt. 2006); Commonwealth v. Holtzapfel, 895 A.2d 1284, 1249 (Pa. Cmwlt. 2006); Miller v. C.P. Centers, Inc., 483 A.2d 912 (Pa. Super. 1984).

4. Under the basic principles of contract interpretation, the entire contract should be read as a whole and in a manner to give effect to all its provisions. See, e.g., Harrity v. Continental-Equitable Title & Trust Co., 124 A. 493, 494-495 (Pa. 1924); Pritchard v. Wick, 178 A.2d 725, 727 (Pa. 1962); Capitol Bus Co. v. Blue Bird Coach Lines, Inc., 478 F.2d 556, 560 (3d Cir. 1973).

5. The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties. Where the contract is free from ambiguity, the parties' intent is to be determined from the express language of the contract. LJL Transp., Inc. v. Pilot Air Freight Corp., 962 A.2d 639, 647 (Pa. 2009); Chester Upland Sch. Dist. v. Edward J. Meloney, Inc., 901 A.2d 1055, 1059 (Pa. Super. 2006).

6. Under Pennsylvania law, in order to recover on a breach of contract claim, the plaintiff must prove by a preponderance of the evidence: (1) the existence of a valid and binding contract to which plaintiff and defendant were parties; (2) the essential terms of the contract; (3) that plaintiff complied with the contract's terms; (4) that the defendant breached a duty imposed by the contract; and (5) that damages resulted from the breach. Tech. Based Solutions, Inc. v. Electronics College, Inc., 168 F. Supp. 2d 375, 381 (E.D. Pa. 2001); A.G. Cullen Constr., Inc., 898 A.2d at 1161.

7. In asserting a claim for recovery on a breach of contract, it is the asserting party's burden to show that the facts exist to support the requested recovery. Paliotta v. DOT, 750 A.2d 388, 390 (Pa. Cmwlt. 1999).

8. Only a material breach of a contract relieves the non-breaching party from any continuing duty of performance thereunder. LJL Transp., Inc. v. Pilot Air Freight Corp., 962 A.2d 639, 648 (Pa. 2009). Widmer Engineering, Inc. v. Dufalla, 837 A.2d 459, 467 (Pa. Super. 2003).

9. Factors to consider in determining materiality include:

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 that part of the benefit of which he will be deprived;

c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

d) the likelihood that the party failing to perform or offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

e) the extent to which the behavior of the party failing to perform or offer to perform comports with standards of good faith and fair dealing.

Int'l Diamond Imps, Ltd. V. Singularity Clark, L.P., 40 A.3d 1261, 1271 (Pa. Super. 2012) citing, Gray v. Gray, 671 A.2d 1166, 1172 (Pa. Super. 1996) and Jennings v. League of Civic Organizations, 119 A.2d 608, 611 (Pa. Super. 1956).

10. Determination as to the materiality of a given breach is a question of fact and can involve, inter alia, consideration of degree and custom in regard to the type of contract at issue in the case. Id. at 1272; Lane Enters. v. L.B. Foster Co., 700 A.2d 465, 471 (Pa. Super. 1997).

11. Parties may indicate if a breach is material or not by stipulation through express terms of the agreement or their conduct after the breach. Tolan v. O'Malley, 299 A.2d 229, 230 (Pa. 1973); Western Sav. Fund Soc. v. Southeastern Pennsylvania Transp., 427 A.2d 175, 181 (Pa. Super. 1981); Texas Energy Fuels Corp. v. Pemco Supply Co., 640 F. Supp. 2, 5 (M.D. Pa. 1985).

12. Time is of the essence in a contract when specifically stated or when the circumstances clearly indicate that it was the intent of the parties. Bogojavlensky v. Logan, 124 A.2d 412, 415 (Pa. Super. 1956).

13. If time is of the essence, an agreed upon extension of time for performance does not defeat the "essence" of the contract. Empire Props. v. Equireal, Inc., 674 A.2d 297, 303 (Pa. Super. 1996).

14. It has been held in Pennsylvania case law that when it is stated that “time is of the essence” in a contract, performance after the set time is not performance of the contract unless assented to by the other party. S.H. Benjamin Fuel & Supply Co. v. Bell Union Coal & Mining Co., 284 F. 227, 229 (3d Cir. Pa. 1922); Lichter v. Mellon-Stuart Co., 193 F. Supp. 216, 220 (W.D. Pa. 1961).

15. The Contract herein provides clearly and expressly that “time is of the essence” and that Phase 2 of the Project was to be completed by March 31, 2012. These are material terms of the Contract. Ex. 1 at p. 1; Ex. 3 at Drawing G1.6 Exs. 17, 165, 238.

16. A general contractor is responsible for delay caused by a subcontractor where the subcontractor was chosen by the general contractor. See e.g. A.G. Cullen Constr., Inc., 898 A.2d at 1157-1158.

17. Pursuant to the Contract, Killian was responsible for, inter alia, scheduling the entire Project. Ex. 1 at ¶ 3.8.100.

18. With regard to the Contract schedule, the Contract General Conditions provided at Paragraph 3.8.102 as follows:

The Contractor shall complete portions of the work in such order of time as may be stated in the specifications or as required in the progress charts as approved by all prime Contractors and the System. The System may require the Contractor to apply additional resources to maintain the project schedule, if the Contractor negligently fails to process the work according to the approved project schedule, at no additional cost to the System. If the Contractor shall refuse or fails to proceed as directed by the System, the System may find the Contractor in breach of his contract and/or declare the Contractor in default.

Ex. 1, Contract General Conditions at ¶ 3.8.102.

19. The Contract provides for termination of the contractor for default at Paragraph 13.2.100, which provides in relevant part as follows:

If the Contractor persistently or repeatedly refuses or fails to supply enough properly skilled workmen . . . or fails to proceed as directed by the System, or performs the work unsuitably, . . . or otherwise is guilty of a substantial violation of a provision of the Contract Documents, then the System may, without prejudice to any of its other rights or remedies, give the Contractor and its Surety written notice that the Contractor has seven (7) days from the date of the System’s notice to cure the default set forth in the notice.

\* \* \*

Should the Contractor fail to cure said default within the specified time, the System may terminate the Agreement between the System and the Contractor, and may take possession of the site and of all materials, equipment, tools, construction equipment and machinery which is owned by the Contractor, located on the property and may finish the work by whatever method it may deem expedient.

Ex. 1 at ¶ 13.2.100.

20. The University gave notice to Killian by way of its May 8, 2012 Cure Notice (“Cure Notice”) that Killian was in default of the Contract for failing to comply with its contractual obligations, stemming, *inter alia*, from Killian’s failure to provide a proper work force, sufficient labor and work hours, adequate weather protection, proper project supervision, and, ultimately, Killian’s ongoing failure to prosecute the work in a timely fashion. Ex. 198.

21. The Cure Notice also required Killian to complete Phase 2 by no later than July 9, 2012 and to provide the University with details regarding how Killian intended to meet the Cure Notice completion dates (including provision of a recovery schedule to meet the July 9 and August 1 completion dates); how it intended to provide adequate supervision for the remainder of Phase 2 and beyond; and “a staffing plan that demonstrates sufficient manpower to meet the required completion date.” Ex. 198.

22. Because the Contract provided that time was of the essence; because the parties were aware that the timing under the Contract was determined in large part by the need to complete work on certain phases in order to allow students to occupy Elwell Hall at the beginning of each academic year; because there were no viable alternatives for housing the approximately 800 students who were to otherwise occupy Elwell Hall in the event that Phase 2 was not completed for the beginning of the Fall 2012 semester; because Killian had not, as of the date of the Cure Notice, exhibited a commitment of sufficient manpower or supervision to meet any of its prior schedules; because Killian had caused at least 32 days of unexcused delay to the completion of Phase 2 as of May 8, 2012; and because the foregoing constitutes a material failure by Killian to meet the work performance requirements of the Contract, we conclude that Killian was in material breach and default of the Contract at the time the Cure Notice was issued. *Bogojavlensky v. Logan*, 124 A.2d 412, 415 (Pa. Super. 1956); *Empire Props. v. Equireal, Inc.*, 674 A.2d 297, 303 (Pa. Super. 1996); *S.H. Benjamin Fuel & Supply Co. v. Bell Union Coal & Mining Co.*, 284 F. 227, 229 (3d Cir. Pa. 1922); *Lichter v. Mellon-Stuart Co.*, 193 F. Supp. 216, 220 (W.D. Pa. 1961); Exs. 1, 17, 165, 238; Conclusions of Law (“C.O.L.”) 2-21.

23. The May 8, 2012 Cure Notice was properly issued. C.O.L. 2-22.

24. Because the University, in its May 8, 2012 Cure Notice gave written notice to Killian that it was in default due to Killian’s failure, *inter alia*, to persistently prosecute the work in a timely fashion, provide a proper work force, and/or to provide adequate project supervision; because Killian had caused at least 32 days of unexcused delay to Phase 2 of the Project as of the date of the Cure Notice and this was a material failure to meet its work performance requirements under the Contract; because Killian failed to show that it could complete Phase 2 by July 9, 2012 as prescribed by the Cure Notice; and because the University subsequently

agreed to reduce the scope of Phase 2 work to that necessary to obtain a temporary occupancy permit for Elwell Hall and move the deadline to complete this work to August 1, 2012, as an alternate means for Killian to satisfy the outstanding Cure Notice; and because Killian failed to demonstrate it could complete the reduced the scope of Phase 2 work to that necessary to obtain a temporary occupancy permit for Elwell Hall by August 1, 2012 and, accordingly, failed to meet the alternate means by which it could satisfy the outstanding Cure Notice, we conclude that Killian remained in material default and breach of the Contract from the time the Cure Notice was issued through to (and including) the date of its termination. We further conclude that the University properly terminated Killian on July 2, 2012 pursuant to Paragraph 13.2.100 of the Contract. Exs. 1, 162, 172, 198, 216, 217, 219, 222, 223, 224, 226, 236, 238, 246, 311, 312, 316, 328, 330, 340, 346, 347, 353, 361, 365, 585; C.O.L. 2-24.

25. Because we find that Killian was properly terminated for default pursuant to Paragraph 13.2.100 of the Contract, we find for the University and against Killian on their respective claims. C.O.L. 2-25.

26. The general measure of damages for breach of contract is that the aggrieved party should be placed as nearly as possible in the same position as it would have occupied had there been no breach. Commonwealth v. Brozzetti, 684 A.2d 658, 665 (Pa. Cmwlth. 1996); Pa. DOT v. James D. Morrissey, Inc., 682 A.2d 9, 14 (Pa. Cmwlth. 1996); Oelschlegel v. Mut. Real Estate Inv. Trust, 633 A.2d 181, 184 (Pa. Super. 1993).

27. In the case of termination of a contractor for default, the Contract provides for the payment of damages at Paragraph 13.2.101, as follows:

In such case, the Contractor is not entitled to receive any further payment until the work is finished, at which time the Contractor shall be paid any excess remaining. If the unpaid balance of the Contract sum exceeds the cost of finishing the work, including compensation for the Professional's additional services and any other damages which the system has incurred in accordance with the Agreement, such excesses shall be paid to the Contractor. If such costs exceed the unpaid balance, the Contractor or the Surety or both shall pay the difference to the system.

Ex. 1 at ¶ 13.2.101.

28. Because we have found that Killian was properly terminated for default (i.e. for materially breaching its work performance requirements under the Contract), the University is entitled to damages as provided at Paragraph 13.2.101 of the Contract. Ex. 1; C.O.L. 22-27.

29. Damages must be proved with reasonable certainty. The exact amount of damages need not be calculated with mathematical certainty, but proof of damages cannot be mere guess or speculation. Spang & Co. v. U.S. Steel Corp., 545 A.2d 861, 866-67 (Pa. 1988); James Corp. v. N. Allegheny Sch. Dist., 938 A.2d 474, 497 (Pa. Cmwlth. 2007).

30. Because we have found that the University has presented evidence sufficient to establish, with a reasonable degree of certainty, that its cost to complete Phase 2 and Phase 4 of the Project exceeded its unpaid Contract balance to Killian by \$2,093,707, the University is

entitled to judgment in this amount under the terms of the Contract, plus pre-judgment statutory interest running from the date of Killian's termination, July 2, 2012, to the date of this Order at the legal rate of six percent per annum. 62 Pa.C.S. § 1751; Ex. 1; C.O.L. 28-29.

31. "Where there is a surety relationship, an obligee like the [University] is entitled to performance of a contractual duty by the principal or, alternatively, if the principal defaults, by the principal's surety. The surety therefore stands in the shoes of the principal and must complete any obligation due the obligee at the time of default." Kiski v. Mid-State Sur. Corp., 967 A.2d 368, 37-72 (Pa. 2008)(internal citations omitted).

32. The extent of a surety's obligation under a construction bond is limited to, and determined by, the language of the bond itself rather than the language set forth in the construction agreement. Downingtown Area Sch. Dist. v. International Fid. Ins. Co., 769 A.2d 560 (Pa. Cmwlth. 2001), appeal denied 786 A. 2d 991 (Pa. 2001).

33. The Contract Bond issued in this matter provides (at Paragraph A) that Killian and Safeco "shall indemnify and save harmless the State System of Higher Education . . . from any expense incurred through the failure of [Killian] to complete the work as specified and for any damages growing out of the manner of performance of said contract by [Killian] or his Subcontractors . . ." Ex. 406 (University's Complaint at ¶ 8, Exhibit 2); Ex. 407 (Killian's Answer, New Matter and Counterclaim at ¶ 8, Exhibit A).

34. Given the plain and express language of Paragraph A, the Contract Bond in the instant case is an indemnity bond. *See*: 4A Bruner & O'Connor on Construction Law §§ 12.13-12.20.

35. Under an indemnity bond, a surety's obligation is to reimburse the obligee up to the penal sum of the bond for the cost of completion of the bonded contract in excess of the unpaid contract balance. Within this limit, such bonds sometimes include broad indemnity language which "may be construed to require the surety to indemnify an obligee for a variety of consequential damages, including delay damages and lost profits." *See e.g.* Bossier Medical Properties v. Abbott & Williams Constr. Co., 557 So. 2d 1131, 1134 (La. Ct. App. 2d Cir. 1990); Bruner & O'Connor on Construction Law § 12.18.

36. In accordance with the terms of the Contract Bond, co-defendant, Safeco, is jointly and severally liable to the University for the same sums as Killian. Exs. 406, 407; C.O.L. 24-35.

37. Because we have found the University's termination of Killian to have been proper, Killian's counterclaim is hereby denied. C.O.L. 24-25.

## OPINION

### **INTRODUCTION**

On or about January 31, 2011, Bloomsburg University of Pennsylvania of the State System of Higher Education (“BU” or “University”) entered into a contract (“Contract”) with Killian Construction Company (“Killian”) as the prime general contractor on a project for the renovation of Elwell Residence Hall (“Project” or “Elwell Project”). The Project consisted of four phases. Phase 1 was for the renovation of the dormitory rooms in East Residential Wing intended to house approximately 400 students. Phase 2 involved, among other things, the demolition of an existing two-story lobby, construction of a new seven story structure connecting the East and West Wings, expanded elevator lobbies on all seven floors and completion of a new building façade for this connecting structure. Phase 3 consisted of constructing basement and ground floor utility spaces for the new structure to house all the electrical, heating, cooling and emergency generator systems supporting the building renovations. Phase 4 entailed renovation of the West Wing dormitory rooms, which were intended to house another 400 or so students.

On March 22, 2011, BU issued a notice to proceed to Killian. The Contract documents specified Project completion dates of August 14, 2011 for Phase 1, March 31, 2012 for Phase 2, August 1, 2012 for Phase 3, and August 13, 2012 for Phase 4. The Contract provided that time was of the essence, and it was clear to all that the timing of the four construction phases under the Contract was determined by the need to achieve certain benchmarks which would allow students to occupy Elwell Hall and both dormitory wings at the beginning of each semester. (N.T. 264, 405, 442, 643, 711-713, 756, 916-918, 1103-1104; Exs. 1 at p. 1, 165, 238).

Killian substantially completed Phase 1 on time. However, Killian failed to complete Phases 2, 3 or 4 by the original Contract completion dates. Despite some mutually agreed upon

construction schedule revisions, the University ultimately determined that Killian could not meet even these later deadlines and terminated Killian on July 2, 2012, for failure to prosecute the work needed to complete Phase 2 in an adequate and timely manner.

On February 11, 2013, BU filed a complaint against Killian and Safeco Insurance Company of America (“Safeco”), Killian’s surety, alleging that Killian had breached the Contract and seeking damages against Killian and Safeco as a result of Killian’s breach. Specifically, BU seeks damages of \$2,093,707 associated with its cost to complete Phase 2 and Phase 4 via a replacement contractor, plus interest. The University is not seeking damages with respect to Phase 1 or Phase 3. Killian, for its part, counterclaims against the University for wrongful termination in the amount of “no less than \$2,600,000.00,” plus interest and penalties.

## **THE PROJECT**

Killian’s responsibilities as prime general contractor for the Project included substantially all of the activities to build and complete the Project excluding only the installation of the electric, plumbing and HVAC systems assigned to three other prime contractors. It also included coordination of its work and the work of the other three prime contractors on the Project as well as responsibility for sequencing and scheduling the Project as a whole. Despite its position as prime general contractor, Killian, in essence, would provide only project management services and did not self-perform any construction work on the Project. Instead, Killian would subcontract out to other contractors all of the physical tasks in Killian’s scope of work, which included demolition, site excavation, foundation work, erection of structural steel and planking, asbestos abatement, masonry work, window installation, framing and drywall, as well as painting and finishing.



On March 22, 2011, BU issued a notice to proceed to Killian. Killian prepared a baseline schedule for the Project on March 28, 2011. This baseline schedule identified work to be performed on Phase 2, which included asbestos abatement, demolition of a portion of the existing lobby structure (including the foundation between the two residential wings) and construction of the new lobby structure including new foundation and structural steel work. The March 28, 2011 baseline schedule provided for completion of Phase 2 by March 30, 2012. (Ex. 20).

Work on Phase 2 was delayed in the Summer of 2011 by the unanticipated discovery in July of an electrical duct bank that contained medium voltage equipment, and by Tropical Storm Lee, which caused the closing of the BU campus from September 7 through 18, 2011. As the result of these delays, both parties agree that BU granted Killian a 70 day postponement of the Phase 2 completion date to June 8, 2012, as was reflected in an October 11, 2011 schedule update prepared and presented by Killian following these events (the "October 11 Schedule").

At the same time, BU expressed its concern that Killian was already falling behind the October 11 Schedule with respect to completion of such key early tasks as demolition of the old lobby, laying of a new concrete pad and installation of new concrete piles while shortening durations for other future tasks (Ex. 65). On January 26, 2012, Killian submitted another revised schedule which again reduced durations for some work and showed the anticipated Phase 2 completion date another three days later on June 11, 2012.

Killian submitted yet another revised schedule on April 6, 2012 (the "April 6 Schedule"). In this schedule, Killian sought to adjust, inter alia, for delays it believed to result

from structural steel issues which arose in Phase 2 of the Project. The April 6 Schedule proposed to extend the Phase 2 completion date an additional 10 days to June 21, 2012.<sup>16</sup>

At some point in time subsequent to the issuance of the April 6 Schedule, it appears the University determined that adherence to the April 6 Schedule for Phase 2 completion would not be achieved. Accordingly, on May 8, 2012, the University issued its Notice to Cure letter (“Cure Notice”) to Killian’s president, John Ghirardelli. In it, the University set forth numerous particulars in which Killian had failed to comply with its contractual obligations, stemming, inter alia, from Killian’s failure to provide a proper work force, sufficient labor and work hours, adequate weather protection, proper project supervision, and, ultimately, Killian’s ongoing failure to prosecute the work in a timely fashion. (Ex. 198; Board Finding).

The Cure Notice gave Killian until July 9, 2012 to complete Phase 2 (excepting installation of the elevators, which was to be completed by August 1, 2012). Additionally, the University directed Killian to provide a specific response to the Cure Notice detailing, among other things, how Killian intended to meet the Cure Notice completion dates (including provision of a recovery schedule to show compliance with the July 9 and August 1 completion dates), how it intended to provide adequate supervision for the remainder of Phase 2 and beyond, and a staffing plan to demonstrate sufficient manpower to meet these completion dates.

On May 9, 2012, immediately subsequent to the issuance of its Cure Notice, the University suspended work on Phase 4. This was done by the University to address its concern that Killian would not be able to complete the entire Project on time and to allow Killian to focus on completing Phase 2 by the dates set forth in the Cure Notice. This concern was paramount to the University because completion of Phase 2 was, according to the overall Project plan of

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<sup>16</sup> The April 6 Schedule shows Phase 2 Turnover on June 20, 2012, but does not show Phase 2 Lobby work complete until June 21, 2012. We use the latter date as most indicative of completion of the phase.

construction, a necessary prerequisite to occupancy of both dormitory wings and critical to housing some 800 incoming students at the beginning of the Fall 2012 semester.

Following the issuance of the Cure Notice, back-and-forth communication ensued between Killian and the University. Killian's initial response requested an August 15, 2012 completion date for all Phase 2 and 3 work. The University promptly rejected this request, insisting on the completion dates set forth in the Cure Notice. (Exs. 209, 216). Additional dialog ensued as Killian sought a Phase 2 completion date later than July 9 that would be acceptable to the University.

Around the time it issued its Cure Notice, the University also began to contemplate a contingency plan formulated by the Project architect. This contingency plan focused on completing just the Phase 2 work needed to secure a temporary occupancy permit from the Department of Labor and Industry ("L&I") for Elwell Hall so the dormitories could be used for the 2012-2013 school year. This was done because of the University's growing alarm that it would not be able to house its incoming freshman class in the Fall of 2012 if Elwell Hall could not be occupied and because of the lack of viable housing alternatives if this were to occur.

The temporary occupancy permit plan contemplated Killian and the other prime contractors completing this pared down version of Phase 2 work by no later than August 1, 2012 to allow sufficient time after the work was done to secure the occupancy permit and ready the building for incoming students. This work included completion of all elevators and elevator lobbies, student lounges on floors 3-7, ADA building access, corridor access to East and West wing student rooms for floors 1-7, all life safety systems on floors 1-7 and those additional corridors, stairs and hallways needed to secure a temporary occupancy permit for Elwell Hall.

Discussion of this alternative was also initiated with Killian personnel around this time in order to get their input on this idea.

A temporary occupancy permit plan of construction was eventually presented to Killian by the Project architect at the June 20, 2012 job conference meeting, and Killian was directed by the University to focus its efforts on effectuating this plan. More back-and-forth communication then ensued between BU and Killian relating to whether or not Killian could even achieve the temporary occupancy permit plan following this June 20, 2012 directive and how this would be accomplished. This discussion included production of a “partial occupancy schedule”<sup>17</sup> prepared by Killian dated June 28, 2012, and a meeting requested by the University to discuss Killian’s plan to complete the work necessary to achieve the temporary occupancy permit which took place on June 29, 2012. Following the June 29 meeting and some limited work performed during the ensuing weekend, the University concluded that Killian would be unable to satisfy the Cure Notice and terminated Killian on July 2, 2012.

## **SUMMARY OF THE PARTIES’ ARGUMENTS**

The University asserts that, almost from the beginning, Killian failed to fulfill its contractual obligations on the Project. The failures cited by the University include, failing to supply adequate manpower, performing slowly, responding inadequately to compliance issues, and failing to provide proper site management, all of which caused delay to the Project and prevented Killian from completing the Project (and Phase 2 in particular) pursuant to the Contract time limits. Among other things, the University points out that time was of the essence pursuant to express terms of the Contract and the need to assure adequate housing for incoming students; that Killian never agreed to complete Phase 2 by the dates set forth in the May 8, 2012

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<sup>17</sup> Although referred to in slightly different terminology by the parties at different points in the proceedings, the “temporary occupancy” and “partial occupancy” refer to the same thing.

Cure Notice (i.e. July 9, 2012 with an August 1, 2012 deadline for the elevators); that Killian otherwise failed to respond adequately to the Cure Notice; and that Killian's termination was therefore justified and proper.

Killian generally denies that it was in violation of any of the terms of the Contract and additionally asserts that the University wrongfully terminated Killian. Killian argues that the Project suffered many delays that were the fault of the University or, at the very least, were excusable delay for which Killian should not be held responsible. It also asserts that, in discussions subsequent to issuance of the May 8, 2012 Cure Notice, the University agreed to pare down Phase 2 work to only that needed to accomplish the temporary occupancy permit for Elwell Hall and extended Killian's deadline to complete this work to August 1, 2012, thereby reducing the scope of work and extending the deadline required to satisfy the Cure Notice. Killian further argues that it was prepared and able to complete the work necessary for the temporary occupancy permit by August 1, 2012, and that the University's termination of Killian on July 2, 2012 was therefore unjustified and improper. Accordingly, Killian asserts various breaches and seeks damages related to the University's improper termination of Killian.

The University, for its part, characterizes the discussions centering on the temporary occupancy permit as an attempt by it to mitigate damages caused by Killian's default, and asserts that it never agreed to relieve Killian from compliance with the July 9, 2012 completion deadline for Phase 2 (with an August 1 exception for the elevators) set forth in the Cure Notice. Moreover, the University asserts that Killian failed to demonstrate that it could complete even the pared down amount of Phase 2 work necessary to obtain a temporary occupancy permit for Elwell Hall by August 1, 2012.

Having carefully considered the evidence of record presented in this case, the Board finds itself unable to agree entirely with either party's version of events. However, we ultimately find ourselves in agreement with the University's conclusion that termination of Killian from the Project was justified and appropriate under the circumstances.

## **ISSUES PRESENTED**

It is without serious dispute that Phase 2 of the Project was not going to be completed by the time set forth in the May 8, 2012 Cure Notice (i.e. by July 9, 2012, with the elevator work to be completed by August 1, 2012) and that this was relatively clear to both parties as of the date Killian was terminated. What is disputed is the propriety of Killian's termination by the University. This dispute, in turn, requires we address the following issues: 1) how much of the delay to Phase 2 was attributable to Killian, how much to the University and/or how much was excusable to Killian; 2) the materiality of the delay attributable to Killian; 3) whether or not the University, by way of subsequent communications with Killian, modified the May 8, 2012 Cure Notice by agreeing to limit Phase 2 work to only that needed to obtain a temporary occupancy permit for Elwell Hall and extending the deadline for completion of this work to August 1, 2012; and 4) whether or not Killian established that it would accomplish the Phase 2 work needed to obtain a temporary occupancy permit for Elwell Hall by August 1, 2012.

## **PHASE 2 DELAY**

Killian's first defense to the propriety of its termination is its assertion that the delay experienced to the Phase 2 work on the Project was either A) not attributable to Killian or B) any delay attributable to Killian was not material. On this point, we begin with the testimony of the University's scheduling/delay expert, Mark Nagata of Trauner Consulting Services. Mr. Nagata's analysis of the Phase 2 delay was based primarily on the Phase 2 completion dates

contained in the numerous Project schedules prepared by Killian. Comparing the original baseline schedule completion date of March 30, 2012, with the August 8, 2012 completion date in Killian's last schedule (the June 28, 2012 "partial occupancy" schedule), Mr. Nagata concluded that, by June 27, 2012, Phase 2 was delayed by a total of at least 131 days (March 30, 2012 to August 8, 2012).<sup>18</sup>

We note, of course, that neither Mr. Nagata (for the University) nor Mr. John Devaney (Killian's scheduling/delay expert) prepared or presented a critical path delay analysis for this Project (or for Phase 2) that the Board typically sees when construction delay is the primary issue in a case. However, the Board found Mr. Nagata's approach, utilizing Killian's own Project schedules and updates to determine the minimum amount of delay experienced on Phase 2 of the Project to be both reasonable and persuasive. Moreover, Killian did not credibly dispute this minimum 131 day delay number reached by Mr. Nagata, although, as discussed below, it does assert that none of this delay was the fault of Killian.

### **Excused Delay**

To assess the amount of unexcused Phase 2 delay attributable to Killian out of the total delay experienced on Phase 2, we must first address Killian's assertion that the University itself excused Killian for 101 days of this delay by agreeing to "extend" the Phase 2 completion date, first to June 8, 2012 and then to July 9, 2012. Although the University appears to concede that it agreed informally to postpone the original completion date by 70 days (to June 8, 2012), it disputes agreement to the second postponement of 31 days (to July 9, 2012). It also points out that the completion dates identified in the Contract (March 31, 2012 for Phase 2) can only be

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<sup>18</sup> Although Mr. Nagata characterizes August 8, 2012 as the completion date identified in the June 28, 2012 Schedule, the schedule itself identifies August 13, 2012 as the last day of contractor activity on Phase 2, a point we will return to later in this Opinion.

changed by a written change order pursuant to a written request from the contractor, which did not happen here.

We agree with the University that there was no formal change (i.e. no extension) to the Phase 2 Contract completion date of March 31, 2012 (so there was at least 130 days of delay to Phase 2 and at least 131 days of delay from the baseline schedule completion date of March 30, 2012).<sup>19</sup> However, we also agree with Killian that, by way of two affirmative and well documented agreements to “accept” two postponements to the Phase 2 completion dates based on the October 11 Schedule and the April 6 Schedule, the University, in essence, excused Killian for 101 days of delay (to July 9, 2012) on Phase 2.<sup>20</sup>

The University itself concedes that it agreed to the first 70 day postponement based on Killian’s October 11 Schedule update because it accounted for the unanticipated discovery and removal of an underground electrical duct bank on the premises and the effects of Tropical Storm Lee, both occurring in the Summer of 2011. Additionally, while the University contests that it agreed to the second postponement to July 9, 2012 for completion of Phase 2, this is clearly set forth in the University’s May 8, 2012 Cure Notice letter.<sup>21</sup>

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<sup>19</sup> We utilize the agreed upon March 30, 2012 baseline schedule date in our delay discussion as did the parties. The one day discrepancy does not materially alter our delay analysis or the outcome of the case. See also, Finding of Fact 123, Footnote 6.

<sup>20</sup> Although both parties use the term “extension” to indicate an enlargement of time to complete Phase 2, the Contract explicitly identifies the term as relating to a formal procedure encompassing a written request to change the Contract completion date or dates for the various phases of construction, followed by a written change order changing the Contract mandated date(s). Because this did not occur, we consider the parties’ use of this term outside the written Contract to be employed in the generic sense, and we will refer to these Phase 2 “extensions” discussed generically by the parties as postponements. (Ex. 1; Board Finding).

<sup>21</sup> The May 8, 2012 Cure Notice states, in relevant part:

The completion and occupancy date for Phase 2 cannot be any later than July 9<sup>th</sup>, 2012 (with the exception of the elevators). This revised date from the original scheduled completion date of 03/30/12, plus and 8 week allowance for unanticipated underground electrical work, is based upon informal, but reluctant acceptance by the University, of Killian’s revised Project Schedule submission dated 4/5/12. [Emphasis added].

(Ex. 198)



Having established that it was “excused” by the University for 101 of the total 131 days of Phase 2 delay asserted by the University’s scheduling expert, Killian then appears to argue that 30 or fewer days of delay (no matter whose fault) is simply not long enough (in comparison to the length of the Project and/or the Phase 2 work period) to constitute a material breach of the Contract justifying its termination. It asserts that, instead, such a relatively small delay (i.e. a non-material breach) warrants only imposition of the more modest liquidated damages for delay stated in the Contract.

On this last point (i.e. the non-material nature of the unexcused delay experienced on the Project’s Phase 2 work), the Board disagrees emphatically with Killian. First of all, the Contract states explicitly that time was of the essence in its performance. Even more significantly, the need to have the dorm rooms in Elwell Hall (all 400) available for occupancy in time to house 800 or so incoming students for the Fall 2012 semester was both essential and known to all parties on the Project. Hence, the completion of Phase 2 work in time to allow such occupancy of the Elwell Hall dorm rooms was critical, and the margin for late completion slim to none. Accordingly, the materiality of any breach of the Contract’s timing requirements must be assessed in relationship to these circumstances rather than by a simple numerical comparison of total scheduled Project or Phase 2 work days to the total days of unexcused delay. For these reasons, we reject Killian’s argument that 30 or fewer days of unexcused delay to the agreed upon completion of Phase 2 work cannot be considered a material breach of the Contract justifying its termination.

### **Excusable Delay**

Killian, at trial, also presented evidence which it asserts demonstrates that there were a variety of problems which delayed the completion of Phase 2 work that were not Killian’s

responsibility because these problems were either caused by the University or excusable to Killian. Of course, Killian asserts initially that it is not responsible for delays caused by the discovery of the underground electrical duct bank which did not appear on design drawings or for the effects of Tropical Storm Lee in the late Summer of 2011. Killian notes further that, even though it was granted a 70 day extension to account for these two events (as it requested via its own scheduling revisions), it is now entitled to additional excusable delay days caused by other adverse weather conditions and slow progress from other prime contractors during this period.

Killian also argues that the University is responsible for numerous other delays which pushed Phase 2 completion past July 9, 2012 (the date set by the second “gratuitous” postponement from the University) and accounts for all the delay to Phase 2 experienced on the Project after the first 70 day postponement. These include delays caused by inadequate design drawings and delayed responses to RFIs relating to questions concerning these design drawings (including problems relating to moment connections, connecting steel to the existing structure (fit-up or tie-in issues), and delays in getting final plans for precast concrete columns around the main entrance to the new Phase 2 lobby). Killian asserts further that the University is responsible for delays caused by the University’s directives that restricted Killian’s work during final exam periods in December 2011 and May 2012. According to Killian, these delays, which were caused by the University and/or are excusable to Killian, account for the remainder of the delay experienced on the Project, and make Killian’s termination from the Project unjustified and improper. We address below each of the “delay” items raised by Killian.

#### **Underground Electrical Duct Bank and Tropical Storm Lee**

On or about July 6, 2011, Killian’s subcontractor, Bartholomew, while performing demolition of the old lobby foundation, encountered an underground electrical duct bank outside

the existing building's footprint, the existence of which was unknown to the University. (N.T. 95-96, 362, 1217). All Phase 2 work was stopped until the University brought in an electrical contractor to remove the duct bank and relocate the electrical lines. This relocation work was completed on or about August 28, 2011. (N.T. 97-98, 1215-1217). On or about September 7, 2011, Tropical Storm Lee caused flooding and power outages to the Bloomsburg area. This resulted in the University closing from September 7 to 18, 2011. (N.T. 48). As the result of these delay events (literally encompassing 66 days) Killian, on October 11, 2011, prepared and submitted a revised Project schedule which reflected a new Phase 2 completion date of June 8, 2012, in effect seeking a 70 day postponement to the original Phase 2 baseline schedule completion date of March 30, 2012. This 70 day postponement to June 8, 2012, granted by the University, fully accounted for any and all delay caused by the duct bank and Tropical Storm Lee.

### **Other Weather Delays**

In addition to the Phase 2 delay attributed to Tropical Storm Lee, Killian asserts that inclement weather in the form of rain in the last two weeks of September and into early October 2011 also caused an unspecified amount of delay to the critical path<sup>22</sup> foundation work thereby delaying Phase 2. (Killian's Proposed Findings of Fact and Conclusions of Law at ¶ 89; N.T. 1235-1236; Exs. 417, 567, 568). Killian also claims that more inclement weather in the form of rain and snow from December 21, 2011 through January 28, 2012, caused eight more days of excusable delay. (N.T. 1285-1290; Ex. 88)

With regard to Killian's arguments that it is entitled to additional excusable delay days due to weather, the University points first to the Contract General Conditions at ¶ 3.3.103. This

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<sup>22</sup> The critical path of a construction project is the sequence of activities on a project which must be completed on time for the project to complete on time. Not all work tasks on a project are critical.

paragraph provides that inclement weather “shall not be considered an excuse for non-performance of work” under the Contract. Additionally, ¶ 4.2.101 of the General Conditions provides that, if the contractor makes a claim for additional time based on weather delay, the Contractor must substantiate that the weather adversely affected the work schedule and that “such a claim shall be documented by data from a recognized weather authority substantiating that weather conditions were abnormal for the period and could not have been reasonably anticipated.”

In this case, Killian presented no evidence of the type required by the Contract that the inclement weather complained of during the noted time periods was abnormal or could not have been anticipated. It also failed to present persuasive evidence that these weather conditions actually delayed critical path work on Phase 2 of the Project. Among other things, Killian’s daily logs show work was performed on 7 of the 8 days specified by Killian as being delayed by weather in December and January, including foundation work by Bartholomew on six of those days. Killian’s October 11 Schedule also failed to seek any extension beyond the 70 days granted for the duct bank and Tropical Storm Lee even though these “other” weather events would have been known to Killian when it submitted this schedule revision. Killian itself, acknowledged at another point in time, that “weather delays are not excusable” for the Project falling behind schedule. (Ex. 88). Based on the evidence presented, we find that the additional weather delays now claimed by Killian for late September – early October 2011 and December – January of 2011-2012 are not excusable to Killian.

### **Final Examination Periods**

Killian argues that it was delayed a total of 11 days by the University’s directives to stop noise producing work during University final exam periods of December 14-18, 2011 and

May 7-12, 2012. Specifically, Killian asserts that, during the December 2011 period, exterior work by Killian's subcontractor Bartholomew was on the critical path and was adversely affected because Bartholomew had mobilized but was precluded from working during this period. (N.T. 385). Additionally, during the May 7-12, 2012 period, Killian was required to stop most all construction activity, including metal stud framing and HM door frame installation. Only limited clean-up work in areas approved by the University was permitted during the May 2012 finals week. (N.T. 1345-1347, 1793; Ex. 192).

The University argues: A) that December 17 and 18 were over a weekend and May 12 was a Saturday when no work was scheduled to be performed in any event and B) not all work was stopped during this period such as the indoor work performed by drywall subcontractor R&R on December 14-16. It further notes that the University granted a change order request which Killian submitted on Bartholomew's behalf for its mobilization/demobilization costs in December and that Killian did not request additional costs for itself or any other subcontractor due to the finals week shut-downs. Additionally, Killian did not request a time extension for these shut-downs when they occurred. (N.T. 161-164, 257, 384-385, 1146-1149; Exs. 76, 417).

Despite the University's contention to the contrary, we find that substantially all construction work on the site was shut down during the final examination periods in December 2011 and May 2012 by the University's "quiet" directive, and that progress on overall Phase 2 construction was delayed during these periods. Accordingly, these delays, totaling 8 days (excluding the weekends when Killian was not scheduled to work) are excusable to Killian.

### **Plumbing Prime Contractor Delays**

Yannuzzi Incorporated, the plumbing prime contractor on the Project, was responsible, inter alia, for the installation of underground plumbing which was to be placed below the slab-

on-grade concrete to be poured by Killian in Phase 2. (N.T. 60, 1044, 1775). Given this relationship, Killian argues that Yannuzzi was 31 days late in completing this underground plumbing, and that this delayed Killian's start of its Phase 2 slab-on-grade installation. (N.T. 1774-1778; Killian's Proposed Findings of Fact and Conclusions of Law at ¶ 254). The University disputes both Killian's assertion that Yannuzzi was late installing its underground plumbing and that this work in any way delayed overall Phase 2 completion.

Killian's expert, Mr. Devaney, testified that because the slab-on-grade work could not commence until the underground plumbing was complete, and because Yannuzzi was late in finishing the underground plumbing work, Yannuzzi (and not Killian) was responsible for delay to the Phase 2 slab-on-grade work. In his expert report, Mr. Devaney stated specifically that, under Killian's January 26, 2012 Schedule, the projected start date for the slab-on-grade installation was February 10, 2012, and that Yannuzzi's underground plumbing was not completed until one week later, on February 17, 2012. (Ex. 397 at pp. 6-7). However, at the hearing, Mr. Devaney corrected himself and acknowledged that the underground plumbing work was, in fact, completed two weeks earlier than he presumed (i.e. by no later than February 3, 2012). (N.T. 1775). At this point, Mr. Devaney changed his testimony to assert that the start of Killian's slab-on-grade work was instead delayed by 31 days. He justified this new analysis by basing it on Killian's October 11, 2011 Schedule (which had a December 26, 2011 completion date for Yannuzzi's underground plumbing work) instead of Killian's updated January 26, 2012 Schedule. (N.T. 1776-1777).

In contrast, the University's expert, Mr. Nagata, showed that Killian's own weekly reports confirmed the underground plumbing work at issue was completed no later than February 3, 2012. He further testified that there was no delay to Killian caused by Yannuzzi's

underground plumbing because it was done a full week before February 10, 2012, the date Killian's Phase 2 slab-on-grade work was scheduled to commence in accordance with Killian's January 26, 2012 Schedule. (N.T. 1045-1047; Ex. 91).

As noted above, neither Mr. Devaney nor Mr. Nagata made an independent critical path analysis regarding the delay impact of the underground plumbing installation or any other specific task on Phase 2 work and/or the Project as a whole. Mr. Devaney's initial analysis of delay caused by Yannuzzi presented in his expert report (Ex. 397) was based on the January 26, 2012 Schedule's start/finish dates but incorrectly identified a February 17, 2012 actual finish date for Yannuzzi's underground plumbing work. However, at hearing, when he acknowledged that Yannuzzi had actually completed the underground plumbing work by February 3, 2012, Mr. Devaney switched his analysis to utilize Killian's October 11, 2011 Schedule in order to find delay. Mr. Nagata, on the other hand, was both accurate in determination of Yannuzzi's underground plumbing work completion date and consistent in use of Killian's January 26, 2012 Schedule as the basis for his delay assessment.

Considering the testimony of the two experts and the evidence presented, we conclude that the completion of underground plumbing by Yannuzzi by February 3, 2012 was not a material cause of delay to Killian's Phase 2 work as a whole. In reaching our conclusion on this point, we note first that the October 11 Schedule showed an overall Project completion date of June 8, 2012 (the first agreed upon completion date postponement). The January 26, 2012 Schedule, which both experts used initially, moved Yannuzzi's underground plumbing deadline to February 10 before it would adversely impact Killian's slab-on-grade work and only showed an additional 3 days had been added to the overall Phase 2 completion date in the period following publication of the October 11 Schedule (i.e. Phase 2 completion by June 11, 2012). If

movement of the scheduled completion of Yannuzzi's underground plumbing work from December 26, 2011 to February 17, 2012 was the real cause of the 3 extra days of overall delay to Phase 2 (evidenced by comparing the October 11 Schedule to the January 26 Schedule) one would expect that completion of this plumbing work 7 days earlier than required by the January 26 Schedule (i.e. by February 3, 2012) would have eliminated the 3 additional days of delay to the overall Phase 2 work represented by these two schedules. This clearly did not happen. The evidence does not show that the plumbing prime contractor caused any actual delay to the completion of Killian's Phase 2 work. Moreover, the University's second postponement of the Phase 2 completion date (to July 9, 2012) eliminated any possible effect of this isolated plumbing issue on Killian's failure to meet the Cure Notice requirements, as we discuss later.

### **Unknown Foundation Footing**

Killian argues that three days of delay were caused when Killian encountered an unknown footer in performing some limited work on a retaining wall, stairs and planters at Lycoming Hall, across the street from Elwell Hall, in June 2012. (Killian's Proposed Findings of Fact at ¶254; N.T. 1341-1342, 1770-1771). Killian's expert, Mr. Devaney, testified that the footer was an unknown site condition, and would entitle Killian to a three-day time extension "if it impacted the critical path. [Emphasis added.]" (N.T. 1771). However, Mr. Devaney also acknowledged that he couldn't say whether the unknown footer impacted the critical path of the Phase 2 work as a whole. (N.T. 424-425).

In sum, Killian offered no credible evidence that this issue delayed Phase 2 as a whole. Moreover, given the nature and location of the work (across the street from Elwell Hall) and the absence of any indicator on the various Project work schedules prepared by Killian that this work



item was on the Phase 2 critical path at the time it arose, we find no overall delay to Phase 2 of the Project as a result of this issue.

### **Design Issues**

Killian asserts that it encountered numerous design issues on the Project attributable either to lack of detail or design discrepancies in the architectural and/or structural drawings. Each time Killian encountered one of these design issues, Killian asserts, it was required to submit a Request for Information (“RFI”) to the Architect or the structural engineer to resolve the issue, which caused delays to the Project. Killian characterizes these design problems as encompassing steel fit-up or tie-in issues, moment connection issues, and issues concerning the design of precast columns.

#### Steel Fit-Up/Tie-In Issues

The steel fit-up/tie-in issues raised by Killian refer generally to the lack of precision in the Project plans relating to where and how steel for the new construction would tie-in or connect to steel on the existing building. (N.T. 540-544, 1202-1205) These issues arise from the fact that the steel on the existing structure was covered by brick at the time the Project plans were prepared, so the plans were, of necessity, developed without benefit of the exact steel dimensions beneath the brick in the old building construction. This, of course, meant that exact dimensions on the plan for new construction would sometimes differ from what existed beneath the brick facing at the various points of intersection. (N.T. 540-541).

Beginning in April 2011, before Phase 2 construction had begun, Killian submitted a series of RFIs seeking clarification of dimensions where the steel on the new construction tied into the existing structure. (N.T. 1199-1205; Ex. 541) The structural engineer for the Project, Jim Kerns, responded that the plan drawings were prepared with information available at the

time, and any discrepancies should be verified by the Architect and by Killian. (Ex. 541). Killian understood this to mean that Killian and its steel subcontractor, Powell, should verify existing conditions once the brick facing was removed and fabricate the steel at that time to align with the existing conditions. (N.T. 1202-1205). Accordingly, when actual tie-in discrepancies were uncovered in the field, Killian's on-site superintendent would either prepare a formal RFI or email questions and photographs to the structural engineer (usually Mr. Kerns) who would then respond to the RFI or discuss the issue with Killian's superintendent by phone and provide a solution. (N.T. 540-543, 1307-1311).

Killian asserts that, collectively, these "numerous" steel fit-up issues resulted in an overall delay to Phase 2. (Killian's Proposed Findings of Fact at ¶ 110). These delays, Killian argues, were caused by the "hidden conditions" which existed underneath the existing structure's brick facing and therefore constituted a concealed or unknown condition pursuant to Paragraph 4.1.100 of the Contract General Conditions (Ex. 1). Killian's expert, Mr. Devaney, testified that these steel fit-up issues (together with the moment connection issues) delayed steel work on the Project a total of 83 days during the time when this steel work was on the Project's critical path. (N.T. 1798-1803; Ex. 397).

The University, in response to Killian's argument concerning these steel fit-up issues, argues that: 1) the precise steel tie-in dimensions underneath the brick facing of the existing structure were not unforeseen conditions under Paragraph 4.1.100 of the General Conditions but were instead the type of issues commonly experienced and expected when tying new steel into old covered construction; 2) the Project's structural engineer responded promptly with directions and solutions to Killian's emails and RFIs; and 3) no evidence was presented that these fit-up issues caused any appreciable delay to the critical path of the Project or the Phase 2 work.

According to the University, the tie-in/fit-up issues which arose on the Project were resolved promptly as they appeared. As noted, once the brick facing on the existing structure was uncovered and discrepancies were discovered, Killian reported the discrepancies to the Project's structural engineer, either through an RFI or informally by email. The Project engineer would discuss the issue with Killian and identify a solution to the particular tie-in problem, usually within a day or two and, on all but one minor occasion, within the time frame requested by Powell/Killian. Mr. Kerns testified that "there weren't that many" discrepancies which required re-engineering solutions, and the University describes these solutions as typical field adjustments which were easily accomplished with little additional work.

The Board agrees that destructive testing was the only way to discover exact dimensions of the existing steel prior to the design of the Project and that this was not feasible as it would have required demolition of most, if not all, of the brick façade of the existing structure while the building was in use. (N.T. 542-543, 1051). Further, the Board's own review of the relevant RFI's, emails and other evidence of record supports the University's version of these tie-in/fit-up issues. (Exs. 417, 544; N.T. 417, 544, 1406-1407). That is to say, we find that the discrepancies between the Project design plans for the new structural steel tie-ins to the old existing steel structure and the actual conditions found after demolition of the original brick façade were: 1) to be expected and were typical of those encountered whenever new construction is to tie-in to an existing steel sub-structure; 2) relatively minor in scope; 3) promptly responded to by the Project engineer; and 4) were readily corrected in the field. The actual conditions found with regard to the steel tie-ins did not "differ materially" from the Project design plans, and were not "of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent" in construction such as that involved in Phase 2. Accordingly, the steel

tie-in issues encountered on the Project were not concealed or unknown conditions as described in Paragraph 4.1.100 of the General Conditions and do not entitle Killian to credit for (or excuse Killian from) any delay which may have been caused by these tie-in/fit-up issues.

### Moment Connections

A moment connection is a type of connection designed to provide additional rigidity between a beam and column to reduce the flex or twisting of a beam and/or to transfer loads from a beam to a column. (N.T. 482). The Project's structural engineer (Jim Kerns) prepared Project Drawing S-1.2 which identified locations where moment connections were to be located. These same drawings also indicated that these moment connections were to be designed and provided by Killian's steel fabricator, Powell. (N.T. 482-483, 1407-1408; Ex. 3, Drawing S-1.2). At hearing, Mr. Kerns explained that steel moment connections are typically identified this way on plans to allow steel fabricators leeway in their design since different steel fabricators utilize different types of moment connections in their fabrication.

Powell submitted an initial set of structural steel shop drawings to Mr. Kerns who, on September 1, 2011, informed Powell in an email that Powell's shop drawings "can be approved as noted" with directions that Powell "will submit a record copy of the shop drawings." (Ex. 45). Killian's Project Superintendent, Frank Klush, testified that Killian and Powell both understood Kerns' September 1, 2011 email to mean that the structural steel work was approved to proceed and that they could submit an "as-built" copy of the shop drawings later for the record. (N.T. 1302-1304). Mr. Kerns testified that this did not mean he had approved Powell's shop drawings, which he described as "incomplete." (N.T. 487-489). The initial shop drawings which Powell submitted did not include moment connections as required by Contract Drawing S-1.2, and Mr. Kerns did not specifically identify the lack of moment connections in communications with

Powell subsequent to Powell's initial shop drawing submittal. (N.T. 536-537). In any event, Powell never submitted a final copy of its steel shop drawings, and no such copy was ever stamped approved by Mr. Kerns.

On or about March 7, 2012, Killian noticed during construction on site that certain steel beams started to rotate after the first level of planks were set, and immediately reported the problem to Mr. Kerns. (N.T. 1304-1305; N.T. 541). Between March 7 and April 11, 2012, Killian submitted multiple RFIs pertaining to moment connections to Mr. Kerns. Each of these RFI's were answered within a day by providing a design for moment connections and a work sequence to resolve the rotation and steel assembly problems identified. (N.T. 490-499, 1408-1409; Exs. 114, 159).

Although Killian assured the University that the missing moment connections from Powell's shop drawings would not delay Phase 2, and Mr. Klush testified that the moment connection fixes took very little time, Killian now asserts its Phase 2 work was delayed by these moment connection problems. In fact, Killian's expert, Mr. Devaney, testified that these moment connection issues, together with the steel tie-in/fit-up issues, delayed steel work on the Project a total of 83 days during the time when this steel work was on the Project's critical path. (N.T. 1798-1803; Ex. 397).

While Killian's expert testified that the moment connection issue was the fault of both Killian and the Project's structural engineer (Mr. Kerns), we find that any delay caused by the missing moment connections was Killian's responsibility alone. In spite of Killian's interpretation of Mr. Kerns' September 1, 2011 email, the Board must conclude that Mr. Kerns never actually approved Powell's shop drawings. Moreover, even if Mr. Kerns had approved the steel shop drawings which omitted the moment connections, Powell and Killian remain

responsible to comply with the Project plans and drawings under ¶ 3.9.101 of the General Conditions regardless of Mr. Kerns' failure to catch Powell's error. (N.T. 1408; Ex. 1, ¶ 3.9.101). This point is reinforced by Mr. Klush himself who acknowledged that the moment connections issue was the fault of Killian's steel subcontractor, Powell.

In addition to the foregoing, we are not persuaded by Mr. Devaney's testimony that the moment connection repairs and the steel tie-in/fit-up problems encountered actually caused anywhere near the 83 days of delay to the Project's Phase 2 work he suggested. In fact, Killian's daily job reports show that Powell was not prevented from setting steel as a result of the moment connection or the steel tie-in issues from the latter half of February through all of March and into April 2012.<sup>23</sup> Other evidence indicates that Powell's absence from the jobsite from April 12, 2012 to its one day appearance on May 26, 2012 (during the 83 day period noted by Mr. Devaney) was due to a payment dispute between Powell and Killian rather than unresolved design issues respecting moment connections or steel tie-ins. We also note that the vast majority of the moment connection and steel tie-in issues now complained of by Killian occurred before Killian produced its April 5 Schedule in which Killian pushed its Phase 2 completion date back to only June 21, 2012 (and pursuant to which the University granted Killian the second schedule postponement of 31 days to July 9, 2012).

To summarize our findings on the steel work design issues, the Board finds the missing moment connections to be the responsibility of Powell/Killian, not the University, and the steel tie-in/fit-up issues to be comprised of the normal and usual type of field adjustments to be expected on a steel job of this type. These steel tie-in/fit-up issues were not a condition which differed materially from the Project design plans, nor were they "of an unusual nature, which

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<sup>23</sup> Killian's daily reports indicate that Powell was on site and setting steel more or less consistently from February 21, 2012 through April 12, 2012. (Ex. 417).

differ materially from those ordinarily found to exist and generally recognized as inherent” in construction such as that involved in Phase 2. Moreover, the Board was provided no credible evidence that either of these issues caused actual delay of any significance to the overall progress of Phase 2 and certainly none which was not fully accounted for by the second (31 day) postponement of Phase 2 completion to July 9, 2012. For all the foregoing reasons, we find that the evidence of record does not support Killian’s contention that it is entitled to any excusable delay credit past the July 9, 2012 Phase 2 completion date due to the missing moment connections or the steel tie-in/fit-up issues of which it complains.

### Precast Columns

Finally, with respect to design issues, Killian asserts that Phase 2 was delayed (for an unspecified number of days) by the eight months it took Killian and its subcontractors to receive approval of shop drawings for six precast concrete columns located on the front and sides of the new extended lobby structure. Of these six precast concrete columns, four were to hold up two canopies (one canopy and two columns on each side of the newly extended lobby entrance) and two were to hold up a smaller canopy on the front of this new lobby entrance. (N.T. 316, 321, 1327-1330; Ex. 3).

In his report, Killian’s expert appears to place the entire blame for this eight month delay in approving the precast columns for fabrication on the Project Architect and/or structural engineer, and asserts that this delayed Killian’s ability to complete its Phase 2 work. However, while Mr. Devaney does assert that this precast column work would eventually need to be done in order to finish Phase 2 completely, at no time does he assert that the precast column work was ever actually on the Phase 2 critical path as the work progressed.<sup>24</sup> He also avoids any attempt to

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<sup>24</sup> The critical path of a project will change among particular tasks at different times over the life of a project depending on the timing and sequence in which various project tasks are actually performed.

quantify the amount of delay this issue caused to the overall progress of Phase 2 work. (Ex. 397 at pp. 14-17).

The University argues that the Project Architect and the structural engineer provided timely responses to each of the fabricator's inquiries as they were received. It also asserts that the installation of the precast columns was never on the critical path of Phase 2 and did not delay Killian's work on Phase 2. (N.T. 1088-1089, 1720-1721; Exs. 312, 353, 585; University's Brief at p. 28; University's Proposed Findings of Fact at ¶ 512).

Shop drawings for the precast columns at issue were initially submitted to the Project Architect on or about November 4, 2011. They were returned to Killian and/or the relevant subcontractors with markups on December 2, 2011. (N.T. 1267, 1327; Ex. 538). Between January 12, 2012 and May 24, 2012, Killian's masonry subcontractor Caretti, Sun Precast (the precast column fabricator), the Project Architect and the structural engineer engaged in an ongoing series of RFI's, responses, more questions and additional responses concerning, inter alia, the load requirements, dimensions, size, location, and color of the precast columns. (N.T. 1320-1321, 1327-1335; Exs. 242, 541).

The Project Architect eventually approved the precast columns for fabrication on June 1, 2012, and Sun Precast had these approved drawings for the columns in hand by June 6, 2012. Although Mr. Devaney, in his testimony and report, appears to suggest there was some design issue remaining unresolved until June 24, 2012, our review of the relevant documents shows this remaining issue did not involve the precast columns. (N.T. 1363-1364; Ex. 242). The columns were subsequently delivered to the site on July 5, 2012, approximately one month after the design was finalized and the shop drawings approved. (N.T. 1328).



The Board's own review of the foregoing shop drawings, RFI submittals, reviews and response time line with regard to the precast columns reveals that both Killian (and its precast column fabricator) and the University (and its design team) contributed equally to the delay in fabrication and delivery of the precast columns to the work site. From early November 2011 to late March 2012, there appears to be long time frames attributed to both sides in developing appropriate submittals and responses. In fact, almost to the day, they each expended the same amount of time in producing and responding to the other's submittals, reviews and/or responses. Again from early April 2012 through early June 2012, when the design and shop drawings for these columns were finalized, there are relatively long time frames for the contractors' submittals and design team's responses, and once again the amount of time taken up by each party is about the same.

More significantly, it clearly appears from the casual and unhurried approach to commencing and completing the design and fabrication of the precast columns here at issue by both sides, that none of the parties considered these columns to be on the critical path to the completion of Phase 2 either before or after the May 8, 2012 Cure Notice. The fact that it took a whole month to fabricate and deliver these six precast columns of relatively modest size and design is, to this Board, yet another indication that neither Killian nor the University saw these precast columns as attaining critical path work status at the time. Based on the evidence of record, we find no persuasive reason to disagree with this assessment. Accordingly, we conclude that the delay in completing the design and fabrication of the precast columns was not a material cause of delay to the overall progress of Phase 2 at the time the University issued its Cure Notice nor did it ever become a material cause of delay preventing Killian's compliance with this Cure Notice.

### **Other Factors Effecting the Merits of Killian's Delay Claims**

Based on our assessment of the numerous reasons proffered by Killian to deflect responsibility for the delay in completing Phase 2 of the Project from itself, our resulting determination is that, at most, the 8 days Killian's work on Phase 2 was shut down for the University exam periods are excusable to Killian. However, we also make note of our earlier finding that the University granted Killian a second postponement to Phase 2 work of 31 days (to July 9, 2012) following Killian's April 5 Schedule revision. Although it might reasonably be argued that this "gratuitous" grant of an extra 31 days by the University (which was not assigned to any particular cause) more than covers or subsumes the total 8 days of excusable delay we have found attributable to the two exam shutdown periods (and provides a wide margin of forgiveness for any other delay incurred to Phase 2 work), the Board will consider this second postponement as correcting only the 3 days of delay caused by the University's exam shutdown occurring prior to the April 5 Schedule adjustment (i.e. during the December exams). Accordingly, this leaves only 5 days of excusable delay to Phase 2 work on the Project for Killian to draw on at the time the Cure Notice was issued.

To continue our analysis of the excused, excusable and unexcused delay to Phase 2 work on the Project, we would next take note that, as of May 8, 2012 (the date of the Cure Notice), the unexcused delay to the Project appeared to range between 23 to 37 days beyond the July 9, 2012 date insisted upon by the University. This is convincingly evidenced, inter alia, by Killian's own assessment of its Phase 2 progress at that point. Specifically, Killian responded to the May 8, 2012 Cure Notice by first proposing an alternate Phase 2 completion date of August 15, 2012 (37 days later). When this was rejected, Killian subsequently prepared schedules dated May 15 and May 31 showing Phase 2 completion dates of August 3 and August 1, 2012 (25 and 23 days

later, respectively). Although these were also rejected by the University, these responses establish that, even by Killian's own reckoning, it could not meet the July 9, 2012 Phase 2 completion date set forth in the Cure Notice. It also establishes that, as of May 8, 2012, Killian was anywhere from 22 to 37 or more days behind schedule on Phase 2 completion even after two agreed upon postponements totaling 101 days.

It further appears from the totality of evidence presented that neither the August 1 or August 3 completion dates of these two later schedules were actually achievable, leaving the Board to conclude that Phase 2 work on May 8, 2012 was, realistically, at least 37 days behind schedule.<sup>25</sup> We also conclude, based on our above assessment of the various delay issues asserted by Killian, that only 5 of these 37 days of delay were excusable to Killian, making Killian responsible for 32 days of unexcused delay to Phase 2 as of the date of the University's Cure Notice.

### **Killian's Default**

After reviewing all of Killian's various arguments that it was not responsible for the delay which occurred on Phase 2 of the Project, we find that only the 5 days of delay from the May exam week shut-down (in addition to the 101 days of delay already excused by the University) were excusable to Killian. Based on the foregoing finding, and because of the substantial and persuasive testimony of various University employees, our own review of Project work records, and other evidence presented at hearing supporting the University's assertions that Killian failed to both manage and supervise the Project in an adequate manner, we find it was these failures by Killian which had caused at least 32 days of unexcused delay to the Phase 2 work on the Project at the time of the May 8, 2012 Cure Notice.

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<sup>25</sup> See, the Board's Findings of Fact at ¶¶ 220-237.

Killian's argument that a delay to Phase 2 work of 30 some days or less should not be considered material arises again at this point in our discussion, and we reject it again for much the same reasoning. More, specifically we note that, in addition to the contractual requirement that time was of the essence in the performance of this Project, the prospect of pushing the completion of Phase 2 back even further than the 101 days already excused, combined with the need for some lead time to prepare the dorm rooms for incoming students after completion of construction, the critical necessity of being able to house these students in Elwell Hall at the beginning of the Fall Semester in late August, and the fact that Killian, to date, had not exhibited a commitment of sufficient manpower or supervision to meet any of its prior schedules, among other things, was quite sufficient to consider these 32 some days of unexcused delay to be a material breach of the Contract. Accordingly, we agree that Killian was in default of the Contract on May 8, 2012, and find that the University's May 8, 2012 Cure Notice was fully justified and proper.

#### **KILLIAN'S RESPONSE TO THE CURE NOTICE**

As we alluded to early in this opinion, the record in this case makes it abundantly clear that Killian could not/would not complete Phase 2 by July 9, 2012. Moreover, it failed in multiple respects to respond adequately to the requirements of the Cure Notice. Killian never produced a construction schedule which showed completion of Phase 2 by July 9, 2012. It also failed completely to provide any semblance of a manpower/staffing plan for any of the schedules it did produce in any of its responses. For these reasons, we conclude that Killian's responses to the Cure Notice (as it was issued on May 8, 2012) was wholly deficient. Had there been no further changes or modifications to the requirements of the Cure Notice (as argued by the

University) this would be the end of our analysis. The evidence presented, however, does not lead us to this conclusion.

### **The Alternative Cure and Extension of the Cure Date**

Although the University's May 8, 2012 Cure Notice specified that Phase 2 was to be completed by July 9, 2012 (with an August 1, 2012 completion date for the elevators), Killian argues that the University, in subsequent communications, agreed to modify the Cure Notice by reducing the scope of Phase 2 work to that needed to achieve a temporary occupancy permit for Elwell Hall and "extending" the deadline to accomplish this work to August 1, 2012. Additionally, Killian asserts that it complied with this directive with respect to the reduced Project scope for the temporary occupancy permit and demonstrated to the University that it could meet the August 1 deadline for a temporary occupancy permit, thereby satisfying the Cure Notice.

The University denies that it ever agreed to extend the Phase 2 completion date beyond July 9, 2012 (with an August 1, 2012 completion date for the elevators) as provided in the May 8, 2012 Cure Notice. It argues, instead, that the discussions and eventual directive to pursue the partial occupancy permit plan were merely efforts to mitigate damages which would result from Killian's anticipated inability to complete Phase 2 in time for students to occupy Elwell Hall for the Fall 2012 semester. It also asserts that, even if the Board were to find that the University agreed to modify the Cure Notice as Killian asserts, Killian was not able to show the University that it could complete even the pared-down work needed for the temporary occupancy permit by August 1, 2012. Accordingly, the University maintains that Killian never satisfactorily responded to the May 8, 2012 Cure Notice.

In support of its contention that the University agreed to reduce the requirements of its Cure Notice by paring the scope of Phase 2 work to obtain a temporary occupancy permit and extending the deadline to August 1, 2012, Killian points to various discussions beginning with the May 23, 2012 job conference. While the University had clearly rejected Killian's proposal (in its May 14, 2012 response to the Cure Notice) that the Phase 2 completion date be put off to August 15, 2012, the May 23 job conference minutes indicate that the University stated it "continues to seek a late July [or] early August completion date for Phase 2." (Ex. 223 at p. 8). A subsequent memo prepared by Killian's Benny Nale (reporting on a May 24, 2012 conference call with the University's Jeffrey Mandel and Eric Ness) noted that Mr. Mandel indicated the University was not requiring Phase 2 to be completed by July 9, but would accept a completion date between July 9 and August 15. (Ex. 223). Killian's John Ghirardelli, in a letter to the University's Jeffrey Mandel dated May 31, 2012 (referencing the May 24, 2012 conference call and the May 30, 2012 job conference) reaffirmed Killian's commitment that "Phases 2 and 3 will be completed on or before the agreed target deadline of 8-1-12 [and that the University will] have the Certificate of Occupancy by that 8-1-12 date. . . ."

In contrast, the University's witnesses were in agreement that the University never expressly extended or postponed the July 9, 2012 Cure Notice completion date. Mr. Mandel testified that he does not recall discussing an extension of the July 9 Phase 2 deadline or stating that a later date would be acceptable to the University in the May 24 conference call. (N.T. 664-670). Mr. Mandel also wrote a June 4 reply to Mr. Ghirardelli's May 31 letter in which Mr. Mandel referenced the Cure Notice while explicitly stating that he "cannot state that there is an 'agreement' from the University" for an August 1, 2012 completion date. (Exhibit 246; N.T. 671-674).

In addition to the above communications, Killian notes that, even before the University issued its Cure Notice, it had directed the Project Architect to explore the possibility of applying to the Pennsylvania Department of Labor & Industry (“L&I”) for a temporary occupancy permit which would allow students to access the Elwell Hall lobby elevators and dormitories for the Fall 2012 semester. On April 25, 2012, the University directed the Project Architect to prepare the temporary occupancy plans. This temporary occupancy approach was subsequently discussed by the parties at both the May 23 and June 6 job conference. On May 24, the University’s Colin Reitmeyer, in an email to Killian’s John Ghiradelli, requested that Killian provide the Architect with a schedule for the completion of the temporary occupancy work by August 1, 2012, so that the Architect could complete the temporary occupancy plan to submit to L&I. (Ex. 224, N.T. 794, 827-830).

The evidence of record further indicates that the University actually presented the Architect’s temporary occupancy plan to Killian and the other prime contractors at the June 20, 2012 job conference. In the minutes for this job conference, the University’s Jim Dinan is reported as stating the following:

The University:

- 1) Jim Dinan stated that “*we all know that the GC and all trades are working toward August 1 2012 occupancy*” of all the phase 2, Lobby related work..” With only 6 weeks to go at June 20<sup>th</sup>, the University is becoming concerned whether this goal can be achieved. As Jim explained, “there is no plan B” we must be prepared to occupy and house over 700 students comes early August.

To be safe, and certain, Jim has directed the GC and all primes, to “concentrate” on all the work needed for the temporary occupancy as per the Architects temp.-occ. plans shared with everyone at JC#39. Specifically, all corridors, stairs, hallways, and egress pathways need to achieve occupancy approval from L&I by August 1, 2012. All parties agreed.

Related to this, Jim and Colin Reitmeyer approved the temp.-occ. plans prepared by the Architect, to immediately send to L&I in Harrisburg. Plans were sent out the next day, Thursday June 21, 2012.

(Ex. 311).

Subsequent to June 20, 2012, virtually all discussions between the University and Killian centered on completing the work necessary for the temporary occupancy permit.

The University, for its part, maintains that its pursuit of a temporary occupancy permit did not in any way alter the Phase 2 completion deadlines originally set forth in the Cure Notice. It insists that all the discussions and actions it engaged in regarding the temporary occupancy permit were focused entirely on mitigating the damages it would experience if Elwell Hall could not be occupied at the beginning of the Fall 2012 semester. The June 20, 2012 letter from the University's attorney (Mr. Clifford) in which the partial occupancy plan was raised supports this position by including the express caveat that the University's pursuit of the temporary occupancy permit "was not intended in any fashion to waive" any of the University's rights under the Contract or surety bond.<sup>26</sup> (Ex. 312) The University also asserts that, throughout these discussions concerning the temporary occupancy permit plan, the job conference minutes never showed explicit acceptance of an August 1, 2012 date for the completion of Phase 2 or any portion thereof. (Exs. 311, 347; N.T. 849-850)

Viewing the record in its entirety, we must agree with Killian and find that the University did agree to reduce the scope of Phase 2 work to that necessary to obtain a temporary occupancy permit for Elwell Hall and to postpone the deadline to complete this work to

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<sup>26</sup> Attorney Clifford's letter begins by reasserting that Killian is in "substantial and material default" and describes in detail in the ensuing four pages Killian's failures under the Contract which would justify immediate termination, noting specifically that "Killian has failed/refused to cure [the defaults listed in the May 8, 2012 Cure Notice] or to even offer a plan that, if followed, would lead to a cure of these defaults." The University's willingness to pursue the "contingency" temporary occupancy permit is described as "one last attempt to salvage this situation in order to mitigate what will undoubtedly be substantial costs and damages" resulting from Killian's failure to timely complete Phase 2.



August 1, 2012, as an alternate means for Killian to satisfy the outstanding Cure Notice. Accordingly, the Board must assess Killian's satisfaction of the Cure Notice and the propriety of Killian's termination based on the agreed upon alternative requirement that Killian demonstrate it would complete all Phase 2 work necessary to obtain a temporary occupancy permit for Elwell Hall by August 1, 2012. Finding as we do, we now turn our attention to whether or not Killian showed the University that Killian could and would complete that work by August 1, 2012.

### **Compliance with the Alternative Cure**

Killian responded to the University's presentation of the Architect's temporary occupancy plan and Mr. Clifford's June 20, 2012 letter by naming a newly hired special consultant, Kevin Hardy, to immediately develop a plan to achieve the work necessary for the temporary occupancy permit by August 1, 2012. Mr. Hardy flew to Bloomsburg on June 26, 2012, and walked the site with Frank Klush, the superintendent who was then working on the Project for Killian. Mr. Hardy and Mr. Klush proceeded to discuss with Killian's subcontractors (and the other prime contractors) what work they all needed to perform for the temporary occupancy permit, the manpower they could devote to the task, and how much time they needed.

On June 27, Mr. Hardy drafted a "partial occupancy schedule" which included only the work necessary for the temporary occupancy permit (hereinafter referred to as the "June 28 Schedule"). (N.T. 1603, 1608). On June 28, Messrs. Hardy and Klush met with the other prime contractors and all the subcontractors on the Project (with the exception of Powell Steel), all of whom, Mr. Hardy testified, agreed to provide the resources necessary to complete the temporary occupancy work in accordance with the new June 28 Schedule. At one of these meetings, Mr. Hardy testified, he also told the subcontractors that Killian would, if requested, authorize

“whatever . . . was necessary” to complete the work on time, including overtime, extra shifts and supplemental subcontractors if necessary. (N.T. 1609-1610).

Mr. Hardy, along with Mr. Klush and Killian’s President, William Killian, met with University personnel on June 29, 2012 to present the June 28 Schedule. At the outset of the meeting, the University stated that it was not the University’s intent to terminate Killian but was seeking assurances that Killian would be able to “get across the finish line,” to complete the temporary occupancy work. (N.T. 1613).

Mr. Hardy and Mr. Killian testified that, at this June 29 meeting, both emphasized their commitment (and that of the subcontractors) to complete the temporary occupancy work on time. Mr. Hardy testified further that, in addition to presenting this June 28 Schedule at the June 29 meeting, he also described his efforts in preparing the schedule to complete the temporary occupancy work by August 1, 2012. At the meeting, he stated that the schedule had been prepared with input and ultimately agreements (i.e. “buy-ins”) from the other prime contractors and Killian’s subcontractors. He further emphasized Killian’s commitment to complete the temporary occupancy work on time, specifically informing the University that Killian had committed to approve extra shifts and overtime for its subcontractors, if requested, to get the job done. Mr. Killian also testified at the hearing that he had expressed his personal commitment to completing the temporary occupancy work and his faith that it could be done timely at the June 29, 2012 meeting.

At hearing, Mr. Hardy described the work which was performed by Killian’s subcontractors over the weekend of June 30 and July 1 immediately following the June 29 meeting. Among other things, he asserted that Killian’s masonry and insulation subcontractors,

as of July 2, were ahead of his June 28 Schedule for masonry and drywall insulation. (N.T. 1643-1647).

The University, for its part, does not dispute the fact that Mr. Hardy presented his June 28 Schedule at this June 29 meeting, nor does it dispute that Mr. Hardy and/or Mr. Killian gave assurances the schedule would be met. It does point out, however, that the June 28 Schedule does not show on August 1, 2012 completion date for the temporary occupancy permit work, but rather a completion date 7 days later on August 8, 2012. The University also provided testimony and evidence that even this last June 28 Schedule was not being (and would not be) met by Killian.

Although Killian presented its June 28 Schedule as a plan to complete the necessary work for a temporary occupancy permit by August 1, and Mr. Hardy consistently stated that his goal was to complete the temporary occupancy work by August 1, this June 28 Schedule actually shows a completion date of August 8, 2012 at the earliest (or August 13 depending on how one views the construction site clean-up responsibilities).<sup>27</sup> (Exs. 353, 585). Further, the June 28 Schedule included no labor load and no indication of the manpower planned for the individual work items needed to accomplish the schedule as had been requested in the Cure Notice.

Through the weekend immediately following the June 29 meeting, other factors presented themselves which cast further doubt on Killian's ability to meet this June 28 Schedule. One of the three subcontractors Killian had asked to work over the weekend, the drywall subcontractor, did not show up for work. Another setback occurred over the weekend when the insulation subcontractor's equipment broke, causing a delay in that work. Additionally, as Mr. Hardy conceded, he had not been able to communicate with the steel subcontractor (Powell)

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<sup>27</sup> The plan shows an August 8, 2012 turnover for Phase 2 temporary occupancy but also shows 2 days of site clean-up being done through August 13, 2012. Construction site clean-up is typically done by the contractor, casting some doubt on even the August 8, 2012 date.

to confirm its buy-in to the June 28 Schedule. As a whole, these events reasonably caused continuing questions as to Killian's ability to ensure the sort of commitment required from all its subcontractors to achieve the June 28 Schedule.

Additionally, the University did not observe the number of people working on the Project interior on Monday July 2, 2012, which it would have expected from Killian's assurances. In fact, the work actually performed by Killian's subcontractors (including the masonry and insulation subcontractors) over the June 30-July 1 weekend did not follow Mr. Hardy's June 28 Schedule. The areas where Mr. Hardy said that work was ahead of schedule were the result of the subcontractors working out of order. In short, Killian's work over the last weekend did not, in the University's view, reflect that the Phase 2 work was even with, let alone ahead of, the June 28 Schedule. We agree with the University on this point.

Finally, and not unimportantly, the University's total experience with Killian on the Project over the preceding 15 months had included the issuance of multiple non-compliance notices, two significant postponements to Phase 2 completion and continuous failure to meet any of Killian's prior construction schedules, despite repeated assurances similar to the last ones given at the June 29 meeting. This served only to contribute, quite reasonably, to the University's skepticism that Killian would meet its latest June 28 Schedule. For all these reasons, we find the University's position that Killian failed to establish that it would complete work for the temporary occupancy permit by August 1, 2012 (the agreed upon alternative to satisfying the outstanding Cure Notice) to be correct. Accordingly, Killian's termination was fully justified and proper under the terms of the Contract.

## **MEASURE OF DAMAGES**

Based on Killian's termination for default, the University seeks damages against Killian and Safeco in the amount of \$2,093,707. This amount represents its cost to complete Phase 2 and Phase 4, plus interest. Killian counters that the University's damages should be limited to the liquidated damages set forth in the Contract Documents. Additionally, Killian argues that the University is not entitled to any damages related to the completion of Phase 4 of the Project because: (1) the University suspended Phase 4 for convenience in 2012; (2) the scope of work of the contractor retained to complete Phase 4 was not identical to Killian's scope of work under the Contract; and (3) the University did not comply with Paragraph 12.1.102 of the Contract relating to notice of a claim relating to a suspension for convenience.

In the case of termination of a contractor for default, the Contract provides for the payment of damages at Paragraph 13.2.101, which states as follows:

In such case, the Contractor is not entitled to receive any further payment until the work is finished, at which time the Contractor shall be paid any excess remaining. If the unpaid balance of the Contract sum exceeds the cost of finishing the work, including compensation for the Professional's additional services and any other damages which the system has incurred in accordance with the Agreement, such excesses shall be paid to the Contractor. If such costs exceed the unpaid balance, the Contractor or the Surety or both shall pay the difference to the system.

(Ex. 1 at ¶ 13.2.101).

The liquidated damages provisions of the Contract, found in the Notice to Contractors (Ex. 1 at pp. 50-51), provide for liquidated damages in the amount of \$50 per day per student room and \$500 per day for the lobby for each day beyond the Contract completion dates each Phase was actually completed.

We find Killian's argument that the University must be limited to collecting the relatively meager liquidated damages for delay set forth in the Contract to be without merit. For one thing, this argument is based primarily, if not wholly, on the premise that Killian's delay of Phase 2 was not a material breach. We have found to the contrary. Moreover, Killian points the Board to no contract or other requirement that the University select the lesser of two contractual remedies made available to it. Finally, Killian did not complete Phase 2 or Phase 4 late but, in fact, never completed this work as it was properly terminated. Accordingly, the University's claim for completion damages for Killian's default (under Paragraph 13.2.101) is appropriate.

At hearing, the University presented evidence that the unpaid balance on the Contract was \$1,865,160. This represents the difference between the adjusted Contract amount of \$5,849,020 (original contract amount plus change orders) less amounts the University had paid to Killian prior to termination (\$3,234,142) and amounts paid by agreement with Killian after termination to Killian's subcontractors (\$749,718). The University also presented evidence that it paid Quandel Construction Group, Inc. ("Quandel") \$2,783,867 to complete Phase 2, and \$1,175,000 to Caldwell, Heckles & Egan, Inc. ("CH&E") to complete Killian's Phase 4 work. Thus, the University's cost to complete Phase 2 and Killian's portion of Phase 4 was \$3,958,867. Subtracting the unpaid balance on the Contract (\$1,865,160) from the foregoing cost to complete results is \$2,093,707. This is the amount by which the University's completion costs exceeded its unpaid balance to Killian, and the amount of damages claimed pursuant to Paragraph 13.2.101.

Killian does not dispute the accuracy of the completion costs presented by the University beyond its assertion that the scope of Phase 4 work done by CH&E was not identical to the Phase 4 work required of Killian under the Contract. Specifically, Killian asserts that CH&E's Phase 4

completion contract amount was inflated because the work was performed in 2013 rather than 2012, and CH&E's contract included a liquidated damages provision for late completion of Phase 4 that was substantially higher than under the Contract with Killian. However, Killian presented no evidence whatsoever to substantiate either of these two assertions. Given that the work was unchanged and the accuracy of the amounts paid unchallenged, we find these costs to be both reasonable and appropriate.

Finally, we find no merit to Killian's argument that the University is not entitled to any Phase 4 completion costs because it first suspended Phase 4 for convenience before terminating Killian from the entire Project pursuant to Paragraph 13.2.101. Paragraph 12.1 addresses suspensions of work for convenience, and 12.1.102 provides that "No claim under this clause shall be allowed unless the claim . . . is asserted in writing as soon as practicable after the termination of the suspension." By its own terms, this provision relates only to claims asserted under the suspension for convenience clause. Since the University's claim for damages is properly made under Paragraph 13.2.101 based on Killian's termination for default, we do see the provisions of 12.1.102 as applicable to limit a Paragraph 13.2.101 remedy.

Because we find that Killian was properly terminated for default, we find for the University and against Killian on their respective claims. The University is entitled to damages as provided at Paragraph 13.2.101 of the Contract. We further find that the University has presented evidence to establish, with a reasonable degree of certainty, that its cost to complete Phase 2 and Phase 4 of the Project exceeded its unpaid Contract balance to Killian by \$2,093,707. Accordingly, the University is entitled to judgment in this amount under the terms of the Contract, plus pre- and post-judgment statutory interest.

Because we have found in favor of the University on its claims, we conclude that prejudgment interest in this case runs appropriately from the date of Killian's termination (i.e. July 2, 2012) to the date of this Order at the legal rate of six percent per annum. We further find that co-defendant, Safeco, is jointly and severally liable to the University for the same sums as Killian. This derives, inter alia, from the plain terms of the surety bond issued on the Project and the fact that Safeco offered no legal or factual defenses to the University's claim on the surety bond other than those defenses raised by Killian, defenses which we have found to be without merit.



**ORDER**

**AND NOW**, this 29<sup>th</sup> day of January, 2016, **IT IS ORDERED** and **DECREED** that judgment be granted in favor of the Commonwealth of Pennsylvania, State System of Higher Education, Bloomsburg University (“University”) against Killian Construction Company (“Killian”), in the sum of \$2,543,197. This sum consists of \$2,093,707, the net principal amount owed to the University for damages after resolution of the claims between the parties, and \$449,490 in prejudgment interest on that amount. No award is made to Killian on its claim.

**IT IS FURTHER ORDERED** and **DECREED** that judgment be entered in favor of the Commonwealth of Pennsylvania, State System of Higher Education, Bloomsburg University (“University”) against Safeco Insurance Company of America (“Safeco”) in the sum of \$2,543,197. This sum consists of \$2,093,707, the net principal amount owed to the University by Safeco as performance bond surety on the Project and \$449,490 in prejudgment interest on that amount.

The foregoing awards are several, not cumulative. The University is further awarded post-judgment interest on the outstanding amount of each judgment at the statutory rate for judgments (6% per annum) beginning on the date of this Order and continuing until said judgment is paid in full. Each party herein will bear its own costs and attorney fees.

**ORDER SIGNED**

**BOARD OF CLAIMS**

\_\_\_\_\_  
Jeffrey F. Smith  
Chief Administrative Judge

\_\_\_\_\_  
Harry G. Gamble, P.E.  
Engineer Member

\_\_\_\_\_  
Andrew Sislo  
Citizen Member