



MEMORANDUM

Date: December 11, 2015

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator

A handwritten signature in black ink, appearing to read "CHH", is written over the printed name "C.H. Huckelberry".

Re: **Select Development Litigation Related to La Cañada Drive**

As you may recall, the County, for the first time ever, terminated a contract with a company for the provision of major highway improvements when we terminated the contract with Select Development for the Magee Road Improvement Project.

Select Development also had ongoing improvements underway on La Cañada Drive. The County made an extraordinary effort to retain Select Development on the project even though their progress was unsatisfactory. The project was completed, but with considerable delays and citizen complaints.

Select Development has now filed suit against Pima County alleging a number of claims that are itemized in the attached pleadings. The County denies all of the claims and will vigorously defend the lawsuit.

CHH/anc

Attachment

c: John Bernal, Deputy County Administrator for Public Works
Priscilla Cornelio, Director, Department of Transportation
Charles Wesselhoft, Deputy County Attorney

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8 Attorneys for Plaintiff

9 SUPERIOR COURT OF ARIZONA

10 COUNTY OF PIMA

11 SELECT DEVELOPMENT &
CONSTRUCTION, INC., an Arizona
corporation,

12 Plaintiff,

13 vs.

14 PIMA COUNTY, a political subdivision of
15 the State of Arizona,

16 Defendant.

No.
COMPLAINT

18 For its Complaint against Pima County (the "County"), Plaintiff Select
19 Development & Construction, Inc. ("Select") alleges as follows:

20 **Parties and Jurisdiction**

- 21 1. Select is an Arizona corporation authorized to transact business in Arizona.
22 At all times relevant to the claims asserted herein, Select was duly licensed by the Arizona
23 Registrar of Contractors in accordance with A.R.S. § 32-1101, et. seq.
- 24 2. The County is a political subdivision of the State of Arizona.
- 25 3. The County has caused events to occur in Pima County, Arizona, which give
26 rise to this action.

1 10. During performance of its work on the Project, Select encountered multiple
2 problems caused by the County, which delayed Select's work on the Project. These
3 problems included the County's delay in responding to Requests for Information ("RFIs"),
4 significant unidentified site conditions encountered during performance of the work, third
5 party utility conflicts, and design errors and omissions in the Project plans and
6 specifications.

7 11. According to Pima County, Select achieved substantial completion of the
8 Work on February 9, 2015 and final completion of the Work on July 23, 2015.

9 12. The County-caused delays impacted Select's performance of the work and
10 added an additional 114 working days through substantial completion of the Project.

11 13. Select submitted its final application for payment to the County for the
12 construction phase on or about June 30, 2015, and Select requested release of retention on
13 July 30, 2015.

14 14. Select has submitted all documents required by the Contract for final
15 payment, except for those lien releases and waivers from subcontractors with whom Select
16 has disputes. For those subcontractors, Select's surety, Western Surety Company, has
17 provided the County with written assurances that it will indemnify the County for any
18 claims brought by such subcontractors.

19 15. Nevertheless, the County has failed and refused to make final payment to
20 Select of the sum that is requested in the final applications for payment and that is due and
21 owing to Select for work performed on the Project in the amount of \$75,975.52 plus
22 retention in the amount of \$894,225.59.

23 **A. The County Delayed Select's Work on the Project with Untimely Responses to**
24 **RFIs.**

25 16. Throughout the Project, the County took longer than permitted to respond to
26 Select's RFIs.

1 17. The County's delay in responding to Select's RFIs was primarily caused by
2 the County's coordination difficulties, plan revisions, value engineering, and delayed third
3 party utility approvals. Select was not responsible for any of these issues.

4 18. The following chart illustrates some of the County's delayed responses to
5 Select's RFIs:

RFI	Submitted	Answered	(Partial) Pima Response
020	06/14/12	3/20/2013	The county has decided to remove the rubber in the turnbays and revise the pavement sections as follows: The blue hatched area will go from 2" ARAC over 2.5" PAG #1 over 5" ABC to 2" PAG #2 over 2.5" PAG #1 over 5" ABC; The green hatched area will go from 2" ARAC over 2.5" PAG #1 over 5" ABC to 2.5" PAG #2 over 2.5" PAG #1 over 4.5" ABC.
061	10/02/12	3/26/2013	Due to the high cost of the shoring; the decision was made to acquire additional TCE in this area to complete the work. Attached you will find the copy of the right of entry and the new legal description for the expanded TCE in this area. Select shall stay with in the TCE requirements while performing the construction in this area.
118	02/01/13	4/18/2013	TEP has facilities that are in the process of being relocated on the Southwest corner of La Canada Place and La Canada Drive. The irrigation meter pedestal can be relocated to this location after TEP's improvements and per the following conditions:
120	02/08/13	4/8/2013	Revised Response: Attached please find the design received from HDR which is what we spoke of on our site visit last week, 4/3/13. Revised Response 6/10/13: The Cost Proposal attached has been approved. As stated above; Select shall notify Alfred, at least, 48 hours in advance such that he can coordinate with the homeowner.
122	02/14/13	3/13/2013	<u>Correction</u> On the TEP pole is a Riser that is for Comcast (Mike Ginn). Therefore Select shall coordinate with Comcast (Mike Ginn) such that Comcast can relocate their facilities as needed.
124	03/01/13	4/4/2013	The proposed location is in between the new water line and the existing sewer line. The location is on top of an abandoned waterline. The locations of existing utilities shall be verified through potholing. HDR noticed that the top of bank and toe of bank survey shots did not match the typical section and were around 6 FT off horizontally. The backs of curb shots were correct. Survey data is attached for your reference along with a plan sheet.
127	03/04/13	4/22/2013	The headwall was extended and the north wingwall was shorten [sic] to keep the inlet structure within the drainage easement and to avoid constructing the wingwall pass [sic] the end of the existing sewer line sleeve.
131	03/18/13	4/8/2013	Revised Response: 7/9/13 The attached cost estimate for the temporary signal at River Road and La Canada is acceptable and shall be paid for under bld item 9310001 Incidental Items.
132	03/25/13	4/9/2013	Metro Water would like to keep the water meter box in the location it is at and adjust once the grade is reached.

19. As reflected in the above chart, the County took extraordinary amounts of
time to respond to many of Select's RFIs:

- a. **Nine months** to respond to RFI 20;

- 1 b. **Six months** to respond to RFI 61;
2 c. **Two months** to respond to RFI 118;
3 d. **Two months** for the initial response to RFI 120; an additional two months
4 before the County provided its revised response; and
5 e. **More than one month** to respond to many other RFIs.

6 20. The County's untimely responses to many of Select's RFIs disrupted and
7 delayed Select's work. Additional examples of the County's delayed RFI Responses are
8 listed in the Mark Resolve, Inc. ("MRI") Report at pages 13-14, which is attached as
9 Exhibit B and incorporated here by reference.

10 **B. The County Delayed Select's Work on the Project with Sequencing Problems
11 and Third Party Utility Interference.**

12 21. Select bid the project to limit the number of mobilizations to ensure efficient
13 production on the Project. The County's multiple change orders/directives to Select and
14 the County's delayed responses to RFIs prevented Select from effectively mobilizing and
15 scheduling the Project and proceeding efficiently with the Work. These obstacles and
16 problems impacted nearly every item of work on the Project.

17 22. The initial sequencing as planned by Select would have allowed equipment
18 to work continuously from north to south as reflected in the accepted Project schedule.
19 Select incurred additional costs for mobilization as the Project was constructed out of
20 sequence and additional equipment had to be mobilized in order to work in several areas at
21 the same time.

22 23. For example, Select bid the mass excavation on the Project to follow the road
23 work progression in the original accepted Project schedule based on the required Contract
24 phasing plan. When the JUT was not completed in accordance with the Project Schedule
25 because of the County's changes and continued delays responding to RFIs, the initial
26 phasing was abandoned.

1 24. Because of the County’s delays, Select was forced to handle material
2 multiple times and stockpile material in areas that disrupted the schedule.

3 25. Because of the County’s delays, Select was required to rent additional
4 equipment to work in many different locations at the same time as the original phasing of
5 the project was abandoned.

6 26. The County’s problems with third party utility conflicts, design errors and
7 omissions in the Project plans and specifications, and delayed responses to RFIs impacted
8 Select’s ability to install the concrete curbing efficiently.

9 27. The concrete curb was bid to be installed using a machine that would install
10 long runs of curbing at one time to complete that scope of work efficiently. The plan was
11 to follow the road construction phasing to complete the work.

12 28. The Project was not built using the initial phasing because the JUT was not
13 completed according to the contract documents and because of the County’s continuing
14 delays responding to Select’s RFIs.

15 29. These delays caused the concrete curbing work to be completed in small
16 segments to accommodate traffic.

17 30. The delays also forced Select to complete many segments of the curbing
18 using hand forms because those areas could not be tied in on schedule. This was because
19 drainage structures could not be completed as a result of the County’s delayed responses to
20 RFI’s.

21 31. The County also delayed Select’s work as a result of its poor scheduling of
22 third party utility work.

23 32. Two months after Select submitted RFI 118, the County responded that
24 “[Tucson Electric Power] has facilities that are in the process of being relocated on the
25 Southwest corner of La Cañada Place and La Cañada Drive. The irrigation meter pedestal
26

1 can be relocated to this location after [Tucson Electric Power's] improvements."

2 (emphasis added).

3 33. During performance of its work on the Project, Select encountered many
4 County delays and third party utility conflicts, which significantly interfered with Select's
5 planned sequence of work.

6 **C. Select's Work was Delayed by Unknown Conditions.**

7 34. The removals, roadway grading and underground utility and drainage work
8 were substantially delayed by unknown site conditions.

9 35. For example, during construction, PCDOT Materials Laboratory discovered
10 silty material that was unsuitable for roadway construction.

11 36. Nearly four months after Select submitted an RFI on this issue, the County
12 responded, informing Select that the silty "material shall be removed and replaced with
13 "approved" native on-site material."

14 **D. Select's Work was Delayed by Design Changes and Errors in the Project Plans
15 and Specifications.**

16 37. Select also encountered multiple design errors and omissions in the Project
17 plans and specifications.

18 38. Because of the errors, the County made design changes in the middle of the
19 Project, which changes disrupted Select's work.

20 39. For example, the County's design originally called for installation of
21 Asphalt-Rubber Asphalt Concrete ("ARAC") for the entire roadway.

22 40. Relying on the original design, Select bid the Project so that the ARAC
23 would be installed using bottom dump trucks and an elevating pick up machine.

24 41. During the Project, Pima County changed the design of the roadway from
25 ARAC to Asphalt No. 2 at certain specified intersections and side streets. So, instead of
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1 being able to install ARAC from one end to the other without picking up the paver, Select
2 was now required to stop and start the paving work at every intersection.

3 42. This design change significantly changed the installation process from laying
4 material in front of the machine to dumping material directly into the machine. This
5 process is significantly less efficient and more time consuming. This, along with further
6 design changes and direction by Pima County, required changes to Select's means and
7 methods, which caused significant delays.

8 43. The County did not provide an adequate time extension for the additional
9 time to install the asphalt.

10 **E. The County Acknowledges Responsibility For the Delays.**

11 44. Select continually provided notice to the County of the delays the County
12 was causing to Select's work. Notice was included in Select's RFIs to the County and at
13 the regular project meetings attended by representatives of Select and the County.

14 45. Since the initial submission of Select's claim, the County has indicated it
15 would consider the claim and invited Select to submit additional information in support of
16 its claim which Select has done on numerous occasions.

17 46. The County has recognized its obligation to consider and fairly address
18 Select's claim under the applicable provisions of the Standard Specifications.

19 47. Indeed, the County requested additional information and stated that "delay to
20 the Project that can be clearly demonstrated to have been caused by the County will
21 support the argument for an extension of contract time and additional compensation." A
22 true and correct copy of the July 24, 2014 letter from Priscilla Cornelio with the County to
23 Brandon Neal with Select is attached as Exhibit C and incorporated here by reference.

24 **F. The County Misclassified 18 Work Days.**

25 48. The County recorded 18 Zero Work Days for construction as: "Extra Work"
26 and "Adjustments exceeding bid qty – Water Valves."

1 49. Under the circumstances described above, the County's recording of Zero
2 Work Days is improper and appears to be an attempt to compel performance of Extra
3 Work by Select without being exposed to a time related cost.

4 50. The County should issue a Change Order to Select for 18 work days of
5 compensable delay.

6 **G. The Contract Requires a Time Extension and Equitable Adjustment of**
7 **Compensation to Select.**

8 51. Under Section 108-8 of the City of Tucson and Pima County Standard
9 Specifications for Public Improvements (2003) ("Standard Specs"), which are incorporated
10 into the Contract by reference, Select is entitled to a time extension:

11 If the contractor requests additional time in accordance with the procedures
12 set forth in Subsection 105-18 and if the Engineer finds that the work
13 activities controlling overall job progress and the projected completion date
14 were delayed because of conditions beyond the control and without the
15 fault of the contractor, the Engineer may extend the time for completion in
16 such amount as the conditions justify. The extended time for completion
17 shall then be in full force and effect the same as though it were the original
18 time for completion.

19 Standard Specs, 108-8.

20 52. Additionally, under the Contract, Select is entitled to an equitable adjustment
21 in compensation as a result of the County's delays and interference in the progress of
22 Select's work:

23 If alterations in the details of construction or increases or decreases in
24 quantities materially change the character of the work or the cost thereof, an
25 adjustment in compensation may, at the request of either party to the
26 contract, be made on the basis agreed to in advance of the performance of
the work or, in the event that no such basis has been previously agreed
upon, on a basis determined by the Engineer to be in accordance with the
following:

- Adjustments covering alterations in the character of the work shall apply only to the units of work actually altered and determined to be materially changed. The adjustment to be made shall be an increase or a decrease in the unit bid price commensurate with the cost of the alteration.

1 Standard Specs, 109-3.

2 **H. Select Incurred Significant Damages Because of the County's Delays.**

3 53. The parties agreed in Change Order 7 that Select's overhead costs totaled
4 \$3,502.34 per day.

5 54. The 114 work-day delay caused by the County that was not previously
6 accounted for, plus the 18-day misclassification of zero work days totals 132 days of delay
7 for which Select is entitled to be paid its daily overhead rate. Select has been damaged in
8 the amount of \$462,308.90 for extended overhead costs as a result of the County's failure
9 and refusal to recognize the 132 days for which Select is entitled to additional overhead.

10 55. Additionally, Select incurred significant additional costs because of the
11 County's disruptions and delays of Select's work on the Project. Select's additional costs
12 attributable to the County's delays and disruptions total \$5,123,953.37.

13 56. On August 7, 2015, Select served the Clerk of the Pima County Board of
14 Supervisors with a Notice of Claim, which seeks additional compensation in the amount of
15 \$5,586,244.27. The Notice of Claim is attached as Exhibit D and is incorporated here by
16 reference.

17 **COUNT ONE**

18 **(Material Breach of Contract)**

19 57. Select incorporates the allegations of paragraphs 1 through 56 as if they were
20 fully set forth here.

21 58. Select and the County entered into the Contract.

22 59. Select performed its obligations under the Contract, and all conditions
23 precedent for payment have been satisfied.

24 60. The County's willful failure and refusal to pay Select the amounts due and
25 owing on Select's Payment Application Nos. 37 and 38 and payment of retention, and its
26 failure to timely pay Select on other pay applications, was a material breach of Contract by

1 the County.

2 61. The County's failure to timely deliver full, complete and accurate plans and
3 specifications to Select was a material breach of the Contract by the County.

4 62. The County's failure and refusal to negotiate with Select concerning delay
5 damages that Select experienced during performance of the Work due to delayed RFI
6 responses, unidentified or unknown conditions, third party utility conflicts and design
7 errors and omissions in the Project plans and specifications was a material breach of the
8 Contract by the County.

9 63. The County's failure and refusal to pay Select all sums due and owing to
10 Select for delays and disruptions to the Work either caused by the County or for which the
11 County is responsible and to grant Select an appropriate extension of the Contract Time is
12 a material breach of the Contract by the County.

13 64. The County's material breaches of the Contract directly and proximately
14 injured and damaged Select and caused monetary damages to Select in an amount to be
15 proven at trial.

16 **COUNT TWO**

17 **(Breach of the Duty of Good Faith and Fair Dealing)**

18 65. Select incorporates the allegations of paragraphs 1 through 64 as if they were
19 fully set forth here.

20 66. Implied in every contract including the Contract is a duty of good faith and
21 fair dealing.

22 67. The County's refusal to negotiate with Select concerning delay damages that
23 Select experienced due to the County's delayed RFI responses, unidentified and unknown
24 conditions, third party utility conflicts, and design errors and omissions in the Project plans
25 and specifications was a breach by the County of the duty of good faith and fair dealing.

26 68. The County's breach of the duty of good faith and fair dealing directly and

1 proximately injured and damaged Select and caused monetary damages to Select in an
2 amount to be proven at trial.

3 **COUNT THREE**

4 **(Breach of Implied Warranty of Suitability of Plans and Specifications)**

5 69. Select incorporates the allegations of paragraphs 1 through 68 as if they were
6 fully set forth here.

7 70. The incomplete and deficient drawings and specifications the County issued
8 and delivered to Select to construct the Project violated the County's implied warranty that
9 if the plans were adhered to, the Project could be satisfactorily completed.

10 71. The County's breach of the implied warranty of the suitability of the
11 drawings and specifications proximately and directly caused damage and extra costs to
12 Select in an amount to be proven at trial.

13 **COUNT FOUR**

14 **(Contractual Entitlement to Equitable Adjustment of
15 Contract Price and Performance Time)**

16 72. Select incorporates the allegations of paragraphs 1 through 71 as if they
17 were fully set forth herein.

18 73. Under the facts described above, the County should have granted Select an
19 equitable adjustment to the Contract price and time to reflect the many additional,
20 unanticipated costs Select incurred in connection with the changes and additions made by
21 the County and the delays to Select's work caused by the County and for which the County
22 is responsible. The additional compensation to which Select is entitled is at least
23 \$5,586,244.27, plus interest as allowed by the Contract and applicable law and an
24 appropriate extension of the Contract time.

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COUNT FIVE

**(Contractual Entitlement to Improperly Withheld
Progress Payments and Statutory Interest)**

74. Select incorporates the allegations of paragraphs 1 through 73 as if they were fully set forth here.

75. The County wrongfully and unlawfully refused to process and/or pay, in full or proper part, the amounts invoiced to the County by Progress Payment Application Nos. 37 and 38.

76. The sums due to Select pursuant to Progress Payment Application Nos. 37 and 38 accrued in Select's favor on the dates the amounts billed were "deemed" certified and approved pursuant to A.R.S. § 34-221(C).

77. The outstanding principal amounts unpaid and overdue from the County on Progress Payment Application Nos. 37 and 38 is \$970,201.11. The County was also late in making payments on several other Progress Payment applications during performance of the work.

78. The County is obligated to pay Select the sum of 1% per month (or fraction of a month) on each Payment Application from the date on which each such payment was due pursuant to A.R.S. § 34-221 (C) until each such progress payment is paid in full.

79. This claim and all claims asserted herein arise out of the Contract between Select and the County. Accordingly, if Select is the prevailing party herein, Select will be entitled to an award of reasonable attorneys' fees pursuant to the Contract or A.R.S. § 12-341.01.

WHEREFORE, Select requests that the Court enter judgment in its favor and against Pima the County as follows:

A. Awarding Select monetary damages fully compensating Select for the damages it has sustained as alleged herein in an amount to be proven at trial;

