

1 Mark J. Rice (SBN 124934)
2 **MCNEIL, SILVEIRA, RICE & WILEY**
3 55 Professional Center Parkway, Suite A
4 San Rafael, CA 94903
5 Telephone: (415) 472-3434
6 Facsimile: (415) 472-1298
7 E-mail: markjrice@msrwlaw.com

8 ARBITRATOR

9 STATE OF CALIFORNIA
10 OFFICE OF ADMINISTRATIVE HEARINGS
11 PUBLIC WORKS CONTRACT ARBITRATION

12 BAY CITIES PAVING & GRADING, INC.

13 Petitioner,

14 vs.

15 STATE OF CALIFORNIA, DEPARTMENT OF
16 TRANSPORTATION

17 Respondent,

Case No.: A-0023-2020

**RULING ON PETITIONER'S
MOTION FOR AWARD OF
INTEREST, COSTS, ATTORNEYS
FEES INCLUDING UNDER PWCA
1392**

Motion Hearing: February 14, 2023

Time: 9:00 a.m.

Location: (via Zoom Conference)

State Contract No: 03-0F3514

18 **PWCA RULE 1392 RULING**

19
20 1. Following the Arbitrator's Initial Decision on the Merits, in favor of Petitioner
21 Bay Cities Paving and Grading ("Petitioner," "Contractor" or "Bay Cities") associated with
22 Caltrans Contract 03-0F3514, Petitioner timely filed its motion for award of pre-award interest,
23 for costs of arbitration, and for Attorney's fees and Expert fees pursuant to Public Contract Code
24 Section 10240.13. Respondent filed Opposition, and Petitioner filed a Reply and with additional
25 billing detail regarding the claimed attorney's fees, paralegal fees and costs. A hearing was held
26 February 14, 2023 on the motion, in which both parties were heard in their arguments.
27
28

1 2. On February 10, 2023, in advance of the hearing on Petitioner’s motion, the
2 Arbitrator issued a Tentative Ruling is to afford the parties an opportunity to tailor their
3 arguments at hearing toward the tentative ruling considerations and reasoning of the Arbitrator.
4 There was no requirement of calling or emailing to contest the tentative ruling. Per the Rules, a
5 final ruling along with a Final Decision on the Merits pursuant to PWCA 1393 that will include
6 The Decision on Costs under PWCA Rule 1392 after hearing. This Ruling and Order pertains to
7 the Motion for interest, costs and attorney’s fees under PWCA Rule 1392; a separate Final
8 Award will be filed forthwith under Rule 1393 following this Ruling and Order.
9

10 **Summary of Ruling Followed by Reasoning**

11 3. **Attorney’s Fees.** To summarize the adjustments from the Tentative Ruling to this
12 Ruling and Order on Fees, interest and Costs: After hearing from both of Petitioner’s counsels of
13 record, Mr. Copeland and Mr. Manqueros, as to efforts to avoid duplication of effort, and the fact
14 Mr. Manqueros’ overall number of billed hours was substantially less than Mr. Copeland, and
15 the review by the Arbitrator of their itemized billings and reflecting actual brief drafting by Mr.
16 Manqueros, legal research and the like, the Arbitrator is limiting the deduction for potential
17 duplication of effort, to 25 hours, rather than per the tentative ruling, where the Arbitrator
18 indicated a deduction of 50 of Mr. Manqueros’ hours. The Arbitrator considered the listed hours
19 as incurred and the Respondent Department did not in Opposition so much criticize the hours by
20 the larger claimed lodestar rates. As a result and given the forthright elucidation of their
21 avoidance of duplication and assignment of tasks between them, at the determined reasonable
22 hourly rate of \$415 per hour for Mr. Manqueros, his incurred hours of 193.10 hours as itemized,
23 only 20 hours are deducted, for an award of attorneys fees with respect to Mr. Manqueros of
24 173.10 hours multiplied by \$415 per hour, for a total of \$71,421.50. The attorneys fees awarded
25 for Mr. Copeland’s fees remain at the determined rate of \$505 per hour and determined hours of
26 \$150,237.50 in attorney’s fees, and \$20,000 in paralegal fees and costs, total \$170,237.50; for
27
28

1 then a combined total of attorneys fees and paralegal fees awarded to Plaintiff, **\$241,659**. The
2 Arbitrator agreed with the Department that the higher end lodestars or hourly rates sought by
3 Plaintiff which involved a claim of \$ was not reasonable and not market rate for the niche of
4 Public Works Construction Law and Claims, which his highly competitive and which in the
5 Arbitrator's experience and market awareness, is much lower in rate and in the ranges awarded.
6 The Arbitrator found all counsel on both sides to be efficient, no-nonsense practitioners with
7 proper focus on important issues to be developed and decided.

8
9 4. **Expert Fees.** The award of expert fees for Dr. Perri's expert work and time in
10 testimony of \$41,099.84 is awarded.

11 5. **Costs.** \$15,260.26 of the claimed "court costs" or filing fees, deposition costs, and
12 lodging was not contested and is awarded. The balance was taxed by Respondent as being the
13 Arbitrator's own fees which under the Rules are not recoverable. The parties conferred before
14 hearing and agreed on that court cost sum which is awarded.

15
16 6. **Mandatory Liquidated Damage Interest.** This denial in the Tentative was not
17 contested. it remains denied for the reasons set forth in the Tentative Ruling and again below.

18 7. **Discretionary Civil Code Section 3287(b) Interest at 6% per annum.** After
19 reflection following the parties argument, and as explained below, the Arbitrator finds that his
20 discretion in the interest of fairness is properly exercised by an award of pre-judgment interest.
21 There was a damage in terms of the time-value of money. While the exact sum that was due was
22 not known, the excess project costs were known, were tracked by force account tracking, and the
23 \$450,000 Offer to Compromise, as well as the Full and Final Claim Amounts and
24 subcomponents, where based on Force Account sums less line-item categories, were measurable.
25 It was largely in the drilling area, where the "bad bid" element made it difficult to quantify,
26 where the Arbitrator found it not possible to treat the claim as fully liquidated. But some areas
27 were measurable, even if subcomponents. It would have been helpful for both sides to have done
28

1 a “meet and confer” exercise after the DRB recommendation that the claim had merit and its
2 recommendations on pricing, or after service of the \$450,000 demand, to see if while disagreeing
3 on entitlement, a fine-tuned analysis of cost deltas (casings and tremie versus overdrilling) could
4 be assessed with more precision. That said, once the \$450,000 statutory offer came in, it alone
5 was a form of exact dollar statement. The amount upon which discretionary interest is awarded is
6 the sum of \$378,644.71, which is the portion or subparts of the claim sums the Arbitrator found
7 due without deduction. This portion was a simple “Force Account less pay item unit price per
8 bid” on bid items 41, 37 and 39 (Arbitration Exhibits 96, 125, 125A). It was the other items, the
9 rejected extra concrete cut off or lagging claim, and the “mixed bag” drilling measure of
10 damages, where the amounts were either not due or hard to pin down with precision due to issues
11 with the underlying drilling bid using drilling fluid, not allowed, instead of allowed casing and
12 tremie seals to control groundwater.

14 8. **The Date from Which 6% interest begins.** The Complaint in Arbitration was
15 filed November 17, 2020. The \$425,000 statutory offer under Public Contract Code Section
16 10240.13. was served on June 24, 2021 (Copeland Dec.). Either date would be a proper starting
17 date. The Arbitrator selects June 24, 2021 as the date from which pre-final award interest at 6%
18 per annum shall accrue, on \$378,644.71 of the total principal award of \$641,298.55. That results
19 in pre-final award 6% per annum interest at the rate, rounded off, of \$62.24 per day. As of March
20 7, 2022, the date of the anticipated filing of the final award, that represents (using the San Diego
21 County Superior Court judgment interest calculator online tool to calculate the number of days),
22 621 days or \$38,651.04. It is the Arbitrator’s finding that the Section 10240.13 Statutory offer,
23 being less than half of the total claim sum in principal, was a realistic “risk” number for serious
24 consideration. This was given the known force account and overall project costs, the admission
25 that there was a differing site condition in the July 30, 2018 letter, and DRB recommendation
26 that a differing site condition existed, deserved serious consideration, and mutual meet and
27
28

1 confer to avoid risk, and in recognition that given the admission of a DSC, and admittedly
2 materially higher groundwater as compared to the Contract Log of Test borings. Fighting the
3 claim presented a serious challenge to cut it below half and once things like the cost and fee shift
4 that might result if Petitioner secured a reasonably higher award as occurred. Even though the
5 Arbitrator did cut the claim down considerably for reasons given and found a DSC to exist
6 independent of the admission or the DRB finding using his own analysis, nonetheless they were
7 evidentiary events which along with the known total contractor costs in the soldier pile
8 operation, presented risks well in excess of the \$425,000 offer. Given the purposes for
9 discretionary award of pre-award interest, coupled with the Legislature’s objective of promoting
10 early settlements in OAH arbitrations via the vehicle of a Section 10240.13 offer and “side bet”,
11 the Arbitrator has on reflection found that it would be inequitable not to award some interest. In
12 particular, given these facts and evidentiary elements, and the Covid-type delays getting to
13 hearing in a case filed at this point 3.5 years ago. That is a long time to be without funds found
14 due for work done in 2018, 4.5 years ago.

15
16
17 **9. Purpose of Award of Discretionary Interest Met.** See above. The case law
18 cited in the moving papers are persuasive that discretion is equitable and not exercising it here
19 for some amount of interest pre-award, would be inequitable in the Arbitrator’s view. As argued,
20 “the purpose of prejudgment interest is to make the prevailing party whole by compensating it for
21 loss of use of the awarded funds during the prejudgment period. *Lakin v. Watkins Associated Indus.*
22 (1993) 6 Cal.4th 644, 663. Arbitrators and courts have *wide discretion* to award prejudgment interest
23 in a breach of contract claim as of *any date at or after the filing of the pleading alleging the breach*
24 *of contract even if the claim was unliquidated during that period of time.* Civil Code § 3287(b);
25 *Lewis C. Nelson & Sons, Inc. v. Clovis Unif. Sch. Dist.*, (2001) 90 Cal.App.4th 64, 72. BCPG’s
26 complaint was filed on November 17, 2020 [Ex. 306], the date from which the arbitrator should
27 assess prejudgment interest on the net award.” The Arbitrator used instead the later date of June 24,
28

1 2021, as the date of the \$425,000 statutory offer, as the date on which interest shall accrue. The
2 Arbitrator quotes from *Lewis C. Nelson & Sons, supra*, an “on point” public works claims case where
3 discretionary, Civil Code Section 3287(b) interest was awarded and affirmed on appeal, in how the
4 balance is to be struck:

5 By allowing an award of prejudgment interest, but only for a limited time period and only
6 if the trial court finds it reasonable in light of the factual circumstances of a particular
7 case, Civil Code section 3287, subdivision (b), seeks to balance the concern for fairness
8 to the debtor against the concern for full compensation to the wronged party. (See *Wisper*
9 *Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 960 [57 Cal.Rptr.2d
10 141]; *Chesapeake Industries, Inc. v. Togova Enterprises, Inc., supra*, 149 Cal.App.3d at
11 pp. 906-907.)

12 10. The Arbitrator adds, while the exact award was not precisely knowable nor in
13 which direction, the portions of the award involving mathematical Force Account calculations of
14 total costs within specific bid line items 41, 39 and 37 were known. While not all of the
15 Petitioner’s claim, a good portion of it was either liquidated or near liquidated, and hence, what
16 liability could be faced, judged for liability purposes within the usual risk ambits and gambits of
17 complex construction claims assessments, and with the \$425,000 statutory offer in hand.

18 **The Following Addresses the Remaining Reasoning, except as Amended Above.**

19 11. PWCA Rule 1392 provides:

20 **1392. Decision on Costs and Attorney's Fees**

21 (a) The cost of conducting the Arbitration shall be borne equally by the Parties and in no
22 case awarded to the prevailing Party. These costs shall include:

23 (1) The Arbitrator's fee. (2) The costs of recording and transcribing the proceedings. (3)
24 Any fees necessary to secure and maintain a hearing room. (4) Any fees for expert or technical
25 advisors requested pursuant to Section 1333.

26 (b) Other costs, including the filing fees, witness fees, costs of discovery, or any other
27 cost necessarily incurred by one Party, other than attorney's fees, may be awarded to the

1 prevailing Party in the Arbitrator's discretion on the same basis as is allowed in civil actions.

2 These costs shall be taxed as in civil actions.

3 12. Section 10240.13, similar to PWCA Rule 1392, states:

4 The cost of conducting the arbitration shall be borne equally by the parties. The filing fee,
5 witness fees, costs of discovery, or any other cost necessarily incurred by one party shall not be
6 shared by any other party, except that the arbitrator may allow the prevailing party to recover its
7 costs and necessary disbursements, other than attorney's fees, on the same basis as is allowed in
8 civil actions. These costs shall be taxed as in civil actions.

9 Interest may be recovered as part of the award as in a civil action. The arbitrator has the
10 same authority as a court in awarding interest and the commencement of the arbitration is
11 equivalent to the filing of an action under subdivision (b) of Section 3287 of the Civil Code for
12 the purpose of an award of interest.

13 If a party has made an offer of settlement and the award is less favorable than the offer,
14 then the party who has received the offer shall not recover any interest accruing from and after
15 the date on which the offer was made, nor costs of suit.

16 Reasonable attorney fees may be recovered according to any of the following:

17 (a) By a party who has made an offer under the circumstances set forth in the
18 preceding sentence but only as to those fees incurred from and after the time of making the offer.

19 (b) Against a party when substantial evidence establishes that the party has acted
20 frivolously or in bad faith in its demand for, or participation in, the arbitration.

21 13. The Interim Award of the Arbitrator in favor of Petitioner was the principal sum
22 of \$641,298.55 under PWCA Rule 1390 before consideration of any claim for costs or interest.

23 14. On June 24, 2021, Petitioner made and served a "CCP Section 998 Offer" under
24 Public Contract Code Section 10240.13 in the principal sum of \$425,000 to Respondent State of
25 California, Department of Transportation ("Department" or "Respondent") rejected by not
26 accepting it. Petitioner's moving Exhibit A. Its statutory purpose, as a form of "side bet" on the
27 outcome of the Arbitration, is to shift the cost of reasonable attorney's fees, if the party making
28 the non-accepted offer, achieves a result better than the offer.

15. In this case, Petitioner is the prevailing party.

16. In this case, the award amount of \$641,298.55 is greater than, and significantly
greater than, the rejected offer of \$425,000 which Petitioner by that offer indicated it was willing

1 to accept, as award, to avoid the further cost and attorney's fees anticipated through to
2 completion of the offer. Therefore, under Section 10240.13(b), the Arbitrator awards, reasonable
3 attorney's fees incurred by Petitioner incurred from and after the making of that Public Contract
4 Code Section 10240.13 offer. That analysis of the amount of fees is below.

5 17. For the same reason, and more generally under both Section 10240.13 and PWCA
6 Rule 1392, as prevailing party Petitioner is entitled to its recoverable court costs to the same
7 extent recoverable in a civil action, under CCP Section 1021 and 1033.5.

8 18. The Department correctly points out and Petitioner concedes in Reply that under
9 PWCA Rule 1392, fees paid to the Arbitrator are borne equally by the parties and are not
10 recoverable. So those are not awarded; that portion of the Department's Motion to Tax Costs is
11 granted. \$10,000 of the Memorandum of Costs (Moving Exhibit I) are therefore taxed on that
12 basis and not awarded as costs.

13 19. Petitioner's moving and reply briefs have equated Public Contract Code Section
14 10240.13's fee shifting language with CCP Section 998's shifting of the cost of expert fees, in
15 part since Section 10240.13 is based in spirit and concept under Section 998, and in part because
16 there is no published case law interpreting Section 10240.13, making Section 998 case law a
17 guidepost by default as a "cousin" statute. Usually, absent statute, expert fees involving party
18 experts (as opposed to experts not ordered by the Court) are not awardable as costs, except under
19 the cost-shifting of CCP Section 998. Under PWCA Section 1333 and 1392, fees to experts or
20 advisors retained by the Arbitrator are not recoverable. CCP Section 998 shifts expert fees and
21 post-offer court costs (but not attorney's fees). Under Section 10240.13, it expressly shifts
22 attorneys' fees but is silent on expert fees. Without the benefit of legislative history to explain
23 the difference, that could be poor legislative drafting, or an intended tradeoff decided by the
24 legislature, or an oversight.

1 20. In this circumstance, resort is made to the following language in both PWCA Rule
2 1392 and Public Contract Code Section 10240.13: “The filing fee, witness fees, costs of
3 discovery, or any other cost necessarily incurred by one party shall not be shared by any other
4 party, except that the arbitrator may allow the prevailing party to recover its costs and necessary
5 disbursements, other than attorney's fees, on the same basis as is allowed in civil actions.” This
6 then sends the Arbitrator back to what is allowed by way of costs in civil actions, which includes
7 CCP Section 998; meaning, CCP Section 998 is not excluded by Section 10240.13 so much as a
8 supplement to it.

9
10 21. The term “may allow” is interpreted to mean that expert fees as part of a Section
11 10240.13 may be awarded, whereas here, the later award is greater than the rejected 10240.13
12 offer, as costs, and treating CCP 998 as an overlay statute to Section 10240.13. No opposition to
13 the award of Dr. Perri’s expert fees costs was presented, and the Arbitrator found his work
14 professional, reasonable, and helpful to the Arbitrator as trier of fact, and amount, of \$41,099.84.
15 Those expert fees are tentatively awarded therefore as costs.

16
17 22. **Pre-Award Interest – Finding that the Claim was not Liquidated under Civil**
18 **Code Section 3287(a).** This is an area where argument is requested. Tentatively, the Arbitrator
19 declines to award interest either under Civil Code Section 3287(a), as not liquidated, or under
20 Civil Code Section 3287(b), in the trier of fact’s discretion. These Civil Code sections are
21 referenced in Public Contract Code Section 10240.13: “Interest may be recovered as part of the
22 award as in a civil action. The Arbitrator has the same authority as a court in awarding interest
23 and the commencement of arbitration is the equivalent to the filing of an action under
24 subdivision (b) of Section 3287 of the Civil Code for purpose of an award of interest.” This
25 ruling finds *against* an award of mandatory interest, on a liquidated basis under Section 3287(a),
26 but partial award of discretionary award under Section 3287(b) as stated above, of \$38,651.04
27
28

1 for the reasons stated above. As the Department correctly states, interest would be at 6% per
2 annum, pursuant to the Standard Specifications.

3 **23. The Reason the Award does not involve a Liquidated Sum.** The Arbitrator's
4 decision not to award interest on the entire award and finding the total principal award of
5 \$641,298.55 is based on several factors. One, the dollar claims did jump around quite a bit in
6 terms of the claim. This reflects uncertainty in calculation on Petitioner's side. Mainly though,
7 the Arbitrator found there was some inherent uncertainty in the calculation of damages to any
8 final amount, until the Arbitrator's own decision as trier of fact, even if the fact of damages was
9 reasonably certain. This was laid out in detail in the Initial Decision on the Merits, and included
10 the challenges posed by separating out, base bid costs for expected groundwater in most of the
11 soldier pile holes, to some degree, and further, that no one did a cost delta analysis between the
12 bid line item for drilling, based on a planned subcontractor's bid price using drilling fluid, itself
13 admittedly less expensive than the bid cost had specified temporary casings and tremie seals
14 been priced in the drilling bid. The Disputes Resolution Board presented a matrix to segregate
15 compensable and non-compensable costs due to the differing site condition, but it was
16 unappealing to both parties or challenging to apply. The Arbitrator found it unworkable and in
17 part because though "Force Account" daily cost measurements were kept, allowing tracking of
18 total costs, there was no refined effort to separate out, costs per foot where groundwater was
19 expected by the Contract Log of Test Borings, and using casings and tremie seals, versus the
20 costs imposed by the Differing Site conditions or added constraints such as overdrilling the
21 soldier pile holes to 42 inches wide, and adding a slurry seal concrete phase, and second drilling
22 phase. In fact, the challenges with the uncertainty in pricing the Differing Site Condition can be
23 readily said to have been why Arbitration was resorted to, as a trier of fact question, and not
24 readily liquidated or certain in advance of the Arbitrator's decision on it.
25
26
27
28

1 billboards at the Seattle World's Fair: "The applicable test then is whether the exact sum found
2 to be due plaintiff was known to defendant in that it was certain or capable of being made certain
3 by calculation. (See *Gray v. Bekins* (1921) 186 Cal. 389, 399 [199 P. 767]; *Perry v.*
4 *Magneson* (1929) 207 Cal. 617, 623 [279 P. 650]).... It is noteworthy that in its original
5 complaint Conderback prayed for general damages in the sum of \$139,256.92; in its amended
6 complaint in the sum of \$171,026.80; in its bill of particulars in the same amount; and that
7 finally at the trial in June 1964, it amended its prayer to the sum of \$154,374.45, for which a
8 verdict was returned. We do not believe that under all the circumstances it can be said that the
9 exact sum due Conderback could have been readily ascertained by Standard. We conclude that
10 the allowance of interest prior to judgment was improper." The Arbitrator has reviewed
11 subsequent decisions citing *Conderback* and finds its logic still applicable here.

13 27. **Attorney's Fees, Paralegal Fees, and Lodestar.** The legal work by Petitioner
14 was considerable, and focused on areas a reasonable and experienced construction attorney in the
15 public works arena would explore as case theories, evidence and legal argument. That effort
16 resulted in success in a case which could have gone either way at a handful of levels of pivot
17 points; are the groundwater monitoring wells sufficiently called out to supplement a bidder's mix
18 of bid information and to discount reliance on the Contract Log of Test Borings; was there an
19 error in the elevations shown at ground level for the three Contract Log of Test Borings; how far
20 went the Department's letter acknowledging a differing site condition, at the outset of the work,
21 just to "dry holes" that became "wet holes" or all soldier pile holes which experienced materially
22 higher and more forceful groundwater; what to make of the partnering meetings, the contract
23 interpretations given or discussed at those meetings, as well as the fact Petitioner's drilling
24 bidder did not bid casings and tremie the specified methods for water control. This case had
25 complexity even if below the size of controversy in dollars as other cases. The DRB hearing, and
26 the DRB cost calculation recommendations themselves bespeak complexity. Both sides had their

1 hands full with complex, risky questions of fact and law. The Arbitrator found the case facts, and
2 application of the law to the facts, complex.

3 28. The Arbitrator has reviewed the itemized billing of Petitioner's counsel Steven
4 Copeland and found the post-offer hours claimed of 292.50 hours, including 7.5 hours unbilled,
5 as reasonable hours for the work involved. There is no dispute from Respondent that Mr.
6 Copeland is an experienced trial attorney handling complex public works construction claims
7 matters. While more detail could have been afforded in the itemized billings (Reply, Exhibit A),
8 the Arbitrator found them sufficient based on the Arbitrator's own experience in the normal
9 process of a case work up from gathering documents, pleading, discovery, working with experts,
10 trial or arbitration prep, arbitration, and post arbitration briefing.

12 29. The Arbitrator also finds that it is appropriate in seeking fees to include an
13 estimate of fees to prepare a reply and for any anticipated hearing on the motion for fees, as also
14 recoverable. Mr. Copeland estimates 6.8 hours for reply and 30 minutes for Oral Argument on
15 the Motion. 5.0 hours of those sums are awarded, for a total hours awarded based on Mr.
16 Copeland's legal services, of $292.50 + 5$ hours = 297.50 hours, from the date of the Section
17 10240.13 offer to end of the Arbitration and Final Award.

19 30. **Paralegal Fees are Awardable.** Most law firms use paralegals and bill their
20 clients for that service, to perform key tasks under the direction of a supervising attorney. A
21 document intensive case such as this, with hundreds of exhibits, is going to require use of a
22 paralegal in most instances. Here, the exhibits and documents needed to be downloaded and
23 uploaded and presented at trial digitally, both as a post-Covid measure with social distancing,
24 and for convenience of the parties and Arbitrator in handling such a volume of documents and
25 exhibits. *Green v. County of Riverside* (2015) 238 CA4th 1363, 1373-73 cited by Petitioner
26 presents a second and equally sound basis for such an award, as discretionary costs, or as within
27 usual, attorney fee service delivery:
28

1 Green contends that the court should not have awarded \$40,610.68 in “paralegal” costs
2 because there was no basis for awarding attorney fees as costs. However, these costs
3 reflected amounts defendants incurred for preparation and presentation of electronic
evidence, including videos of deposition testimony, exhibits and excerpts from audio
recordings, at trial.

4 These costs are neither specifically allowable under Code of Civil Procedure section
5 1033.5, subdivision (a) nor prohibited by subdivision (b). They may be awarded provided
6 they are “reasonably necessary to the conduct of the litigation rather than merely
7 convenient or beneficial to its preparation.” (Id. subd. (c)(2); see *Ladas v. California*
8 *State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774 [23 Cal.Rptr.2d 810].) Whether such
9 costs were reasonably necessary is a question of fact for the trial court and its decision is
10 reviewed for abuse of discretion. (*Ladas California State Auto. Assn.*, at p. 774, 23
11 Cal.Rptr.2d 810.)

12 Use of such technology, including a technician to monitor the equipment and quickly
13 resolve any glitches, has become commonplace, if not expected by jurors. (*Bender v.*
14 *County of Los Angeles* (2013) 217 Cal.App.4th 968, 990 [159 Cal.Rptr.3d 204].) The trial
15 court did not abuse its discretion in allowing these costs as reasonably helpful to aid the
16 jury. (*Ibid.*; see *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002)
17 96 Cal.App.4th 1017, 1057 [117 Cal.Rptr.2d 685].)

18 31. In a fee award, the court or arbitrator may also consider other factors, including
19 the results obtained and whether a party continues to litigate after a reasonable settlement offer.
20 (*Greene v. Dillingham Constr. N.A.* (2002) 101 Cal.App.4th 418, 426-427 [the trial court has
21 discretion to consider a variety of factors, including the results obtained]; *Meister v. Regents of*
22 *Univ. of Cal.* (1998) 67 Cal.App.4th 437, 452 [finding trial court may consider that a party
23 continued to litigate after a reasonable, albeit informal, settlement offer].) In addition, when an
24 attorney’s hourly rate is in the low range of the community standard, the trial court may increase
25 the lodestar. (See *Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 627-628
26 [finding the trial court had discretion to add 0.25 lodestar multiplier when rate was “in the low
27 range of fair and reasonable”].)

28 32. The Arbitrator does not here discount fees because not every theory or dollar
sought was secured at the end of the day, or because the ultimate recovery was 32% less than
what was sought overall; but can consider under case law that the result of \$641,298.55 is close
to 45% more than the rejected settlement offer of \$425,000 served June 24, 2021. That is the

1 nature of litigation; “shut outs” or “grand slams” are not required to be the prevailing party.
2 “[As] a practical matter, it is impossible for an attorney to determine before starting work on a
3 potentially meritorious legal theory whether it will or will not be accepted by a court.”
4 (*Sundance, supra*, 192 Cal.App.3d at 273.) “Litigation often involves a succession of attacks
5 upon an opponent’s case; indeed, the final ground of resolution may only become clear after a
6 series of unsuccessful attacks. Compensation is ordinarily warranted even for unsuccessful
7 forays.” (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1303.) “Litigants in good
8 faith may raise alternative legal grounds for a desired outcome, and the court’s rejection of or
9 failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what
10 matters.” The process of litigation is often more a matter of flail than flair; if the criteria of
11 section 1021.5 are met the prevailing flailer is entitled to an award of attorney fees.
12 (*Ibid.* [citing *Hensley v. Eckerhart* (1983) 461 U.S. 424, 435, fn. omitted]; see also, *Tipton-*
13 *Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 610. That said, this was serious
14 litigation and handled by counsel on all sides with due seriousness, and the claims which the
15 Arbitrator either “shot down” or found not met on a burden of proof basis, had plausible merit
16 and a reasonable attorney with duties of zealous, ethical advocacy would not reasonably seek to
17 pursue all potentially viable claims. Cases boil down to human factors, and some risk and
18 uncertainty on which claims or theories will succeed or fail. The Opposition does not suggest the
19 case was “over-litigated” and the Arbitrator’s observation was that it was not and that counsel on
20 all sides had a keen eye to making the case efficiently investigated, prepared and tried to a result.

21
22
23
24 33. When it comes to the “Lodestar,” some care needs to be applied between
25 contingency and “public interest” statute cases and “paid fee” cases and where the litigation is
26 not a statutory based fee to vindicate a broad public interest right. A handful of “Lodestar” cases
27 reflect and state there is built into a lodestar, an incentive for attorneys to take on cases not
28 knowing whether they will be paid until the end of long, arduous litigation, and the public policy

1 of incentivizing attorneys to offer legal services to vindicate public rights whose value go beyond
2 the four corners of the dispute and parties at hand. In cases involving the enforcement of
3 statutory rights, ‘such fee enhancements may make such cases economically feasible to
4 competent private attorneys.’” (*Taylor, supra*, 222 Cal.App.4th at 1252 [quoting *Ctr. for*
5 *Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 899] [internal
6 citation omitted].) See *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579
7 [quoting *Ketchum, supra*, 24 Cal.4th at 1132].): “The delay in receipt of payment also supports
8 adjusting the lodestar. Per *Graham*, “[c]ourt-awarded fees [in contingency cases] normally are
9 received long after the legal services are rendered. That delay can present cash-flow problems for
10 the attorneys.” (*Id.*, at 583-584.) In fact, failing to account for the contingent risk in determining
11 the application of a multiplier is reversible error. (*Greene, supra*, 101 Cal.App.4th at 426.) “It
12 must be remembered that an award of attorneys’ fees is not a gift. It is *just compensation* for
13 expenses actually incurred in vindicating a public right. To reduce the attorneys’ fees of a
14 successful party because [she] did not prevail on all [her] arguments, makes it the attorney, and
15 not the defendant, who pays the cost of enforcing that public right. (*Sundance, supra*, 192
16 Cal.App.3d at p. 273.

17
18
19 34. Per *Graham*, at 579:

20 “Under *Serrano III*, the lodestar is the basic fee for comparable legal services in the
21 community; it may be adjusted by the court based on factors including ... (1) the novelty
22 and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the
23 extent to which the nature of the litigation precluded other employment by the attorneys,
24 (4) the contingent nature of the fee award. [Citation.] The purpose of such adjustment is
25 to fix a fee at the fair market ***352 value for the particular action. In effect, the court
26 determines, retrospectively, whether the litigation involved a contingent risk or required
27 extraordinary legal skill justifying augmentation of the unadorned lodestar in order to
28 approximate the fair market rate for such services. The ‘ “experienced trial judge is the
best judge of the value of professional services rendered in his court, and while his
judgment is of course subject to review, it will not be disturbed unless the appellate court
is convinced that it is clearly wrong.” ’ ” (*Ketchum, supra*, 24 C 4th at pp. 1131–1132,
104 Cal.Rptr.2d 377, 17 P.3d 735.)

1 35. Applying those factors, this case was not novel. Groundwater, differing site
2 conditions, bid and specification interpretations, delay analysis, and defective specification
3 claims are not groundbreaking, but are usual, garden variety public contract disputes. That said,
4 there was difficulty and risk in the case. It was not a contingency case and was not a public
5 interest or private attorney general case. Within those parameters and using the Arbitrator's own
6 experience and familiarity with the legal work in the case by counsel, the Arbitrator has
7 determined Mr. Copeland's market value of services in this case for this effort, to be \$505 per
8 hour. While Mr. Copeland may bill less, that is not alone a measure of market value. The range
9 of senior public works construction attorneys in Northern California run the gamut from \$350
10 per hour to \$600 per hour, with few above that unless involving very large projects and cases
11 with armies of attorneys. This was not that case.
12

13 36. Applying that lodestar to Mr. Copeland's earned fees of 297.50 post-offer, for Mr.
14 Copeland's legal services Petitioner is awarded \$150,237.50.
15

16 37. As to paralegal time, of 220.1 hours, they are discounted in the Arbitrator's
17 discretion to 160 hours and compensated at the rate of \$125 per hour. While the Arbitrator finds
18 use of a paralegal to be reasonably necessary for subsidiary legal tasks beyond that of word
19 processing and secretarial, inadequate detail was provided, and given that there were already two
20 attorneys staffed on the matter, the Arbitrator in applying discretion applied a discount. Much of
21 this work is "attorney hands-on work." The paralegal time is not itemized, nor is there an
22 indication of the experience level of the paralegal or paralegals, sufficient to award all the hours
23 sought, or the higher rate of \$180 sought. The paralegal work at hearing was valuable to the
24 proceedings, and ability to conclude it in less than three full days. So as to paralegal time,
25 \$20,000 is awarded.
26

27 38. As to Petitioner's in-house counsel Marlo Manqueros, he is an experienced
28 construction attorney with 30 years of experience and is a Corporate Officer with the weight of

1 that position and seniority to consider. The fact an attorney representing a client in litigation is
2 the employee of the client has been held by the Courts as not disqualifying as to a fee award, and
3 it is not here. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1093-94. Mr. Manqueros
4 attended the pre-merits hearing conferences, and from the Arbitrator’s review of Mr. Manqueros’
5 itemized legal services descriptions, performed more than as merely the “client point of contact”
6 for Mr. Copeland, but took per the descriptions in the itemization, took hand in legal research,
7 brief writing, attending depositions, even if acting in a “second chair” capacity at the merits
8 hearing to Mr. Copeland. Using discretion, the Arbitrator finds Mr. Manqueros’ time to have a
9 fair market value of \$415 per hour. After hearing and hearing from both Mr. Manqueros and Mr.
10 Copeland about their working coordination, the arbitrator finds some minor duplication may
11 have existed but by and large, both counsel were working in synch with minimal duplication, and
12 instead, with a high degree of efficiency. Of his claimed 193.10 in hours, 20 hours are deducted
13 as a combination of duplication of effort inherent in two-firm and two-attorney workups, and in
14 part, that as client “point of contact”, it’s not easily discernible from the legal services entries
15 how much time was spent where Mr. Copeland was consulting or advising Petitioner as client via
16 communication with Mr. Manqueros, versus their working in tandem as two attorneys. That was
17 not clear in the declarations. Two firm situations will have some inefficiency and duplication,
18 and the declarations did not address those sorts of issues. So \$415 per hour for 172.10 hours
19 totals \$71,421.50 which is awarded for Mr. Manqueros’ legal services, post-offer.

22 39. Also, when considering “market rate” for legal services, the case *In re Tobacco*
23 *Cases I*, (2013) 216 Cal.App.4th 570, 581 and finding \$500-\$625/per hour as market rate in San
24 Francisco in 2013, involved a very different sort of litigation, described by the court as “scorched
25 earth,” involving “big Tobacco” and advertng claims arising out of a consent decree and in which
26 the State Attorney General was facing multiple large law firms and litigation tactics and breadth
27 which the trial court took into account. Construction litigation, and especially in the public works
28

1 arena in California, is not comparable, and counsel as here have ongoing working relations across the
2 table, and are not involved in novel, “fight-to-the end, take no quarter” litigation involving large
3 conglomerates and world-wide implications.

4 40. As to the “Laffey” factors, they are not binding. The Arbitrator used his discretion
5 and weighted factors as outlined to arrive at the rates he considers market rates for these counsel,
6 on this case, with this skilled effort and efficiency, including from personal observation and
7 review of the itemizations. *Berry v. Chaplin* (1946) 74 Cal.App.2d 669, 679 lists the applicable
8 factors. Whether or not Mr. Copeland bills less per hour to long-term clients, while a billing rate is
9 often considered prima-facie evidence in case law as reasonable, is also held in case law as not a
10 ceiling where a market rate and for the specific case and industry niche is involved.
11

12 41. Therefore, the Tentative Award of Attorney’s Fees, Expert Fees as Costs,
13 paralegal fees within attorney’s fees, and other Costs, and non-award of interest are as follows:

14 A) While the sum awarded was only liquidated and certain by the Award, not
15 before, and not liquidated, under Civil Code Section 3287(b) discretionary interest is awarded at
16 6% per annum interest on of \$378,644.71 from June 24, 2021 to March 7, 2023, at the rate of
17 \$62.24 per day, in the overall sum of \$38,651.04.
18

19 B) Court costs other than Dr. Perri’s expert fees are awarded of \$15,260.47
20 with a request the parties confer that said sum includes the filing fee with OAH, as opposed to
21 Arbitrator Fee Deposits;

22 C) Dr. Perri’s expert fees are awarded of \$41,099.84;

23 D) Petitioner is awarded for the legal services of Mr. Copeland and his firm,
24 \$150,237.50 in attorney’s fees, and \$20,000 in paralegal fees and costs, total \$170,237.50; and
25

26 E) Petitioner is awarded for the legal services of Mr. Manqueros \$71,421.50.
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

The undersigned hereby declares that I am over eighteen (18) years of age and not a party to the above-entitled action. I am employed by the Law Offices of McNeil Silveira Rice & Wiley, and my business address is 55 Professional Center Parkway, Suite A, San Rafael, California 94903.

On the below-mentioned date, I served the document described as: **RULING ON PETITIONER'S MOTION FOR AWARD OF INTEREST, COSTS, ATTORNEYS FEES INCLUDING UNDER PWCA 1392**

[xx] BY E-MAIL I caused electronic copies of the above-referenced document(s) in PDF format to be transmitted from e-mail address nina@msrwlaw.com and/or from the Superior Court electronic service list to be transmitted to each known party at the e-mail address as indicated below.

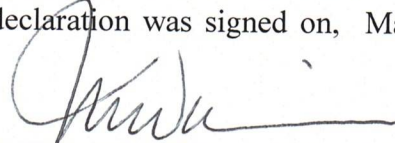
Steven Copeland, Esq.
Copeland Law Firm APC
19201 Sonoma Hwy., Suite 106
Sonoma, CA 95476
Email: sbc@copelandlawpc.com

Marlo Manqueros, Esq.
Bay Cities Paving & Grading, Inc.
1450 Civic Court, Bldg. B, Suite 400
Concord, CA 94520
Email: MManqueros@baycities.us

Brandon Reeves, Esq.
Dept. Of Transportation, Legal Div., MS 57
1120 N St.
Sacramento, CA 95814
Email: Brandon.Reeves@dot.ca.gov
Email: Sheleen.Haddad@dot.ca.gov

Office of Administrative Hearings
Email: PWCAFilings@dgs.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was signed on, March 6, 2023, at San Rafael, California.



NINA VALLINDRAS