

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ZACHRY HOLDINGS, INC., <i>et al.</i> ¹)	CASE NO. 24-90377 (MI)
)	
DEBTORS)	CHAPTER 11
)	
)	(Jointly Administered)
)	

**COMMONWEALTH ELECTRIC COMPANY OF THE MIDWEST’S REPLY IN
SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO
DEBTORS’ OBJECTION TO THE CLAIM OF COMMONWEALTH ELECTRIC
COMPANY OF THE MIDWEST**

Pursuant to Bankruptcy Rules 9014(c) and 7056, and Federal Rule of Civil Procedure 56, and LR 7.4, Commonwealth Electric Company of the Midwest (“CECM”) submits this Reply in support of its Motion for Partial Summary Judgment (Doc. 2953)² as to the affirmative defenses and claims for offset raised by Debtors in the Objection to the Claim of Commonwealth Electric Company of the Midwest (Claim No. 1003) (Doc. 2336) (the “Objection”).

INTRODUCTION

In the Claim Objection, Zachry argues that it is entitled to the affirmative defense of setoff or recoupment pursuant to Art 11.9, and 10.1.3 of the Service Agreement, and asks “the Court [to] reduce the Claim because [CECM] performed incomplete, defective, and/or unnecessary duplicative work not in accordance with the Service Agreement.” (Doc. 2336 ¶ 20, 22). Zachry does not dispute that it terminated the Service Agreement for its convenience under section 16.2. (Doc. 3074). Zachry does not dispute that it did not provide CECM with notice of any alleged

¹ The last four digits of Zachry Holdings, Inc.’ tax identification number are 6814. A complete list of each of the Debtors in these chapter 11 cases and the last four digits of their federal identification numbers may be obtained on the website of the Debtors’ proposed claims agent and noticing agent at www.veritaglocal.net/ZHI. The location of the Debtors’ service address in these chapter 11 cases is: P.O. Box 240130, San Antonio, Texas 78224.

² For the sake of brevity, CECM’s Motion for Summary Judgment is incorporated into this Reply Brief in its entirety, and all definitions and abbreviations therein will likewise be used here.



“incomplete, defective, and/or unnecessary duplicative work” before it terminated CECM for its convenience on May 15, 2024. *Id.*

Aside from a Rule 408 communication, Zachry does not offer any factual evidence to show that it notified CECM of the alleged “incomplete, defective, and/or unnecessary duplicative work” at any time following Zachry’s termination of the Service Agreement for its convenience.³ Nor is there any dispute that Zachry never informed CECM of any issues with its work and never gave CECM an opportunity to inspect the alleged defective work or an opportunity to correct or replace alleged defective work before Zachry utilized its own direct labor and subcontractors to perform work at its direction.

CECM and Zachry dispute whether the “incomplete, defective, and/or unnecessary duplicative work,” that Zachry claims it discovered following the termination for convenience was work that was actually performed by CECM, or whether it was work performed by Zachry’s own forces, or Zachry’s other electrical subcontractor, ISC Constructors. CECM and Zachry also dispute whether the “incomplete, defective, and/or unnecessary duplicative work,” that Zachry claims it discovered after the termination was in fact work that failed to comply with the Agreement Documents, or whether this additional work was due to changed or additional work Zachry received from OPPD after CECM was terminated. Finally, CECM and Zachry disagree about whether the alleged corrective or repair work that Zachry claims it performed was proper or

³ Zachry offers an email between counsel for Zachry and counsel for CECM in August of 2024 —three months after Zachry terminated CECM for its convenience—where Zachry asserted that “Zachry believes that it has available back charges related to Commonwealth’s work under the 115001-605028 Contract in the amount of up to \$300,000.” At the time of this communication, Zachry had already self-performed or hired a subcontractor to correct the alleged defective work. Zachry now asserts it is entitled to reduce CECM’s claim by \$2,594,743.86 for alleged “incomplete, defective, and/or unnecessary duplicative work” that it claims CECM performed prior to termination. There is no factual dispute that (1) CECM was never given an opportunity to complete its work-in-progress before termination, (2) Zachry never notified CECM of alleged issues with its work-in-progress or completed work before termination, and (3), CECM was not allowed to inspect, document and repair or replace any alleged defective work after or before termination.

necessary, and whether the costs Zachry alleges it incurred were commercially reasonable, and whether the alleged damages are adequately supported by invoices, time and material tickets, or other documentation to support the costs allegedly incurred by Zachry.

However, the issue before the court on CECM's Motion for Summary Judgment is limited to whether the Service Agreement and common law preclude Zachry from now alleging an offset or reduction to CECM's claim, when Zachry (1) terminated CECM's subcontract for convenience, preventing CECM from completing any of its work in progress, and (2) failed to provide CECM with notice and opportunity to cure or remedy any alleged incomplete or defective work before Zachry allegedly self-performed or hired a replacement subcontractor to perform corrective or repair work.

There are no material facts in dispute with regard to Zachry's termination or Zachry's failure to provide notice or opportunity to cure before or after termination. Accordingly, this issue is ripe for summary judgment. *Mack v. John L. Wortham & Son, L.P.*, 541 F. App'x 348, 353–54 (5th Cir. 2013) (“[i]f the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue for trial and summary judgment is proper.”) (quoting *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 272 (5th Cir. 2000)).

For the reasons articulated in CECM's Motion for Summary Judgment (Doc. 2953) and further explained herein, CECM respectfully requests that the Court find as a matter of law that Zachry's claims for backcharges and offsets for incomplete and/or defective work are in all parts denied, and that the Court enter summary judgment in CECM's favor on the affirmative defenses and claims raised by Debtors in their Objection to the Claim (Claim No. 1003), and for such other relief as is just and proper.

ARGUMENT

I. Section 16.3 of the Service Agreement does not grant Zachry greater rights and remedies than what Zachry is entitled to under Section 16.2

1. Zachry agrees the Service Agreement is governed by Nebraska law. (Doc. 3074, at ¶ 15). Zachry agrees the Service Agreement is unambiguous. (Doc. 3074, at ¶ 16). However, Zachry argues that its “rights and remedies for contractual breaches are the same whether it elected to terminate for cause or for convenience.” (Doc 3074, at ¶16). Zachry relies on section 16.3 to support this contention. *Id.*

2. Section 16.3 of the Service Agreement specifies certain actions that CECM must take in the event it is terminated by Zachry, regardless of whether it is terminated for cause or for Zachry’s convenience. (Ex. 2⁴, at § 16.3). Specifically, section 16.3 provides that once terminated, CECM “shall discontinue performance of the work as directed by Zachry.” *Id.* Section 16.3 then lists out the obligations that CECM may be directed by Zachry to perform in the event of a termination, including the obligation to (a) assist Zachry in preparing an inventory of all materials delivered, installed, or in storage; (c) assign to Zachry (or to any replacement contractor designated by Zachry) all downstream agreements necessary and useful for completion of the work by others and assign all warranties for Materials furnished or Work completed prior to termination; (e) deliver to Zachry all information reasonably requested by Zachry for completion of the work; and (f) deliver or make available to Zachry all work performed by Seller, as Zachry may request. *Id.*

3. Zachry has not alleged, nor is it alleging now, that it requested or directed CECM to perform any of the obligations listed in section 16.3 and that CECM refused or failed to do so.

⁴ All references to Ex. 2 within this Reply are to Exhibit 2 of CECM’s Motion for Summary Judgment at Docket No. 2953.

The phrase “without prejudice to any other rights or remedies available under the Agreement Documents or at law or in equity,” is only included in section 16.3 to clarify that Zachry is not limited to the requests identified in subparts a-f in the event of a termination. Rather, Zachry maintains other rights and remedies available under the Agreement Documents or at law or in equity.

4. The rights and remedies that are available to Zachry in the event of a termination for convenience are governed by section 16.2, since Zachry elected to terminate CECM for Zachry’s convenience.

5. Section 16.2—the only section that specifically governs termination for convenience—does not permit Zachry to allege an offset for incomplete or alleged defective work, after Zachry terminates the Service Agreement for convenience, nor does it contain the catch-all reservation of rights language of “without prejudice to any other rights or remedies available under the Agreement Documents or at law or in equity,” which is found in section 16.1. (Ex. 2, at § 16.2). (Compare with 16.1.2, which specifically provides that “if such refusal, failure, or default continues for seven (7) days after receipt of Notice from Zachry thereof (except that such seven (7) day cure period shall not apply with respect to clause (d) above), then, without prejudice to any other rights or remedies available under the Agreement Documents or at law or in equity, Zachry may terminate Seller’s right to perform all or any part of the Work.”).

6. This is also the only reasonable construction of sections 16.1-16.3. If Zachry’s rights and remedies under section 16.1 and 16.2 are the same, as Zachry now argues, then why does the Service Agreement require Zachry to provide CECM with two days written notice of default, and a 7-day “cure period,” before allowing Zachry to terminate for cause? The answer is in the text—a termination for cause pursuant to section 16.1 is “without prejudice to any other

rights and remedies available...” This language is not found in section 16.2. Zachry may unilaterally elect “to terminate the Agreement for its convenience in whole or in part any time without cause” upon two days notice of such termination to CECM. However, a termination for convenience under section 16.2 is not “without prejudice to any other rights and remedies.”

II. Section 10.1.3 does not grant Zachry the right to withhold payment from CECM after the Service Agreement has been terminated

7. Originally, Zachry argued that both section 11.9 and section 10.1.3 permit Zachry to reduce its obligations to CECM after a termination for convenience under section 16.2. (Doc. 2336 ¶ 22). As discussed in CECM’s Motion for Summary Judgment, neither Article 11 nor Article 10 survive termination of the Service Agreement. (Doc 2953, at ¶ 27, 32) (*citing* Ex. 2, at § 20.11).

8. Debtors do not discuss Article 11.9 and its limitations in their Response in Opposition. Instead, Debtors focus their argument on section 10.1.3 of the Service Agreement.

9. Zachry contends that CECM’s Motion for Summary Judgment fails to address the applicable language under section 10.1.3, which is the provision that governs when Zachry may “withhold payment on an invoice or a portion thereof in an amount and to such extent as may be reasonably necessary to protect Zachry from loss...”. (Doc 3074, at ¶ 18).

10. CECM did not address subsections b or c of section 10.1.3 in its supporting Brief, because there is no evidence to show that Zachry withheld payment from CECM “in an amount” and “to such extent as may be reasonably necessary to protect Zachry from loss” under section 10.1.3 on any invoices that CECM submitted.

11. The undisputed material evidence shows that Zachry failed to make any payments to CECM for its March, April, and May pay applications. There is no evidence that Zachry was intentionally “withholding payment” on invoices due to “Seller’s failure to perform the Work in

accordance with the Agreement Documents,” or “third-party Claims, suits or liens arising out of or relating to Seller’s Work...” prior to terminating the Service Agreement for its convenience.

12. As discussed in Plaintiff’s Motion for Summary Judgment, the last two paragraphs of Article 10 further explain Zachry’s obligations should it choose to withhold payment on an invoice. The Service Agreement required Zachry, should it “dispute any particular invoice(s) rendered or amount(s) paid, [to] so Notify Seller in writing within ten (10) days receipt of the same.” (Ex. 2, p. 14, Art 10, paragraph 1). Further, Zachry agreed to “pay Seller on the undisputed balance where such amounts are clearly separable from disputed amounts.” *Id.*

13. If Zachry intended to withhold payment from CECM under article 10 of the Service Agreement, it was obligated to notify CECM that it disputed the invoice and pay undisputed amounts to CECM. There is no evidence that such notice was ever given.

14. If Zachry believed, at any point in time, that CECM was “in material breach of this Agreement,” CECM was entitled to ten (10) days written notice and an opportunity to “cure the same.” (Ex. 2, p. 14, Art 10, paragraph 2). There is no evidence that Zachry ever provided notice to CECM that it was in material breach of the agreement. Nor is there any evidence that CECM was given a chance to cure an alleged breach.

15. If Zachry was really withholding payment per Article 10, it was obligated to pay CECM the undisputed balance of each invoice. It made no payments toward CECM’s March, April, and May pay applications, which totaled more than \$5 million dollars, even though Zachry now contends that it is entitled to withhold \$2,594,743.86.

16. Further, section 10.1.3 did not survive termination of the agreement, and was therefore not a basis for Zachry to refuse to pay CECM after the Service Agreement was terminated.

17. While Zachry acknowledges that Article 10 does not explicitly survive termination, per section 20.11 of the Service Agreement. (Doc. 3075, at ¶ 19), Zachry takes the position that section 10.1.3(b) survived termination of the Service Agreement “by its nature.” *Id.* This is not a reasonable reading of the Service Agreement.

18. Article 10 governs partial payments and final payment, made in the regular course of the project. As discussed in the preceding paragraphs, it also limits when Zachry may withhold payments on an invoice or portion thereof. Zachry’s right to withhold payments on an invoice or a portion thereof is triggered upon Zachry’s receipt of the invoice. (“Should Zachry dispute any particular invoice(s) rendered or amount(s) paid, [to] so Notify Seller in writing within ten (10) days receipt of the same.” (Ex. 2, p. 14, Art 10, ¶ 1).

19. Zachry did not notify CECM that it was withholding payment under article 10 prior to terminating CECM, and there is no language in Article 10 to suggest that Zachry could unilaterally decide to withhold payment from CECM for pay applications submitted in March, April, and May, after it terminated the Service Agreement for convenience, and without notice to CECM of the same.

III. Zachry is not entitled to the Remedy provided under Section 12.2 for Breach of Warranty

20. Section 12 of the Service Agreement permits Zachry to redesign, repair, or replace the “Defective Work” at CECM’s expense, which may include the cost of a field service representative, repair materials, parts, labor, transportation, supervision, special tools, and supplies. (Ex. 2, at § 12.2.1). However, Zachry cannot invoke this remedy unless it has first given CECM notice and the opportunity to repair the Defective Work. *Id.* The Service Agreement defined “Defective Work” as “Work that fails to satisfy the requirements of this Agreement.” (Ex. 2, at pg. 5, DEFINITIONS).

21. The agreement also broadly defines “Warranty Work” as “all needed adjustments, repairs, additions, corrections, or replacements, which arise out of or are necessitated by Defective Work, including without limitation repairs or replacements of Materials and equipment.” *Id.*

22. There is no evidence that Zachry gave CECM notice of any Work that it believed failed to satisfy the requirements of the Agreement and an opportunity to repair such Work prior to Zachry’s replacement of the alleged defective work. Accordingly, although article 12 survived termination of the Agreement, Zachry may not recover from CECM for its alleged repair of defective work under this provision of the Service Agreement.

IV. Zachry Cannot Claim Setoff Because It Terminated the Contract for Convenience

23. If Zachry believed that CECM was in breach of the Service Agreement, it could have given CECM notice of such breach, and if the breach was not cured, Zachry could have terminated CECM for cause.⁵ Instead, Zachry made the unilateral decision to terminate the Service Agreement for its convenience. This termination stopped CECM’s ability to finish the work-in-progress, and deprived CECM of the opportunity to inspect and perform a final quality control or complete punch list work before turning its work over to Zachry.

24. Further, the Service Agreement was a time and materials subcontract, where CECM’s scope of work was only to “furnish qualified, experienced, and competent personnel and management knowledgeable and trained to perform electrical installation and other required electrical services as needed on a Time and Materials basis per Zachry design and/or as directed by Zachry management.” (Ex. 2, p. 25, at § [1].2.4). CECM’s pay apps for March, April, and May

⁵ There is no evidence that Zachry believed CECM was in breach of its obligations under the Service Agreement, or that Zachry ever provided notice to CECM that it believed it was in breach of its obligations.

were for the time that CECM's personnel performed work on site under Zachry's direction prior to the termination for convenience.

25. This is analogous to the following situation: A client hires a lawyer on an hourly basis to draft a brief. At some point the client, who hasn't paid its lawyer in months due to insolvency issues, demands that its lawyer immediately stop working on the draft brief. The client demands that the lawyer send him or her the work-in-progress brief. The lawyer does as directed, even though it did not have an opportunity to review, revise, and finalize the brief before it was sent to the client. The client then hires (and presumably pays) a second lawyer to finish the draft brief. Then, the client returns to the first lawyer and claims that it is not required to pay the first lawyer for its work on the brief before termination, or that it is entitled to a significant offset or adjustment on the first lawyer's invoice, because the draft brief was incomplete or "defective" when the lawyer was terminated.

26. As supported by the case law referenced in CECM's Motion, under these circumstances, courts have consistently recognized that a termination for convenience precludes the terminating party from later asserting claims for defects or additional costs, because the terminating party's actions prohibited the terminated party from checking and completing its work.

27. Zachry cites a few cases for the proposition that termination for convenience "does not necessarily foreclose suit." (Doc. 3074 ¶ 22-23). However, the cases cited by Zachry in support of this principle are distinguishable. In *Amour & Co*, the party that was terminated for convenience and later sued, was in breach of its contractual obligation prior to the termination for convenience. *Armour & Co. v. Nard*, 463 F.2d 8, 9 (8th Cir. 1972) (noting that termination that discharges both parties from their contractual duty to perform promises that are still wholly executory, but not discharging liability for breaches that have already occurred, so owner was not precluded from

recovering damages for delay which existed before termination). There is no evidence here to suggest that CECM was in breach prior to the termination for convenience.

28. In *Chinese Hosp. Ass’n*, an unreported case, the court declined to award summary judgment when the evidence supported a reasonable inference that the parties negotiated a termination of the Design Contract different from the termination for cause or termination for convenience options set forth in the Design Contract. *Chinese Hosp. Ass’n v. JacobsEng’g Group, Inc.*, No. 18-CV-05403-JSC, 2019 WL 4168949, at *2 (N.D. Cal. Sept. 3, 2019). Specifically, the parties entered into a formal written “Termination and License Agreement,” which contained an express reservation of the plaintiff’s right to sue the terminated party for damages *Id.* at *2-3.

29. Here, there is no evidence that CECM was in breach of the Service Agreement prior to being terminated for convenience. When Zachry terminated CECM for convenience, it did not identify or reference any events of default under section 16.1.2 of the Service Agreement. Instead, Zachry invoked its right to unilaterally terminate for convenience, and directed CECM to demobilize and submit an invoice for all of CECM’s work on the Project through May 17, and to fully turn over the site to Zachry by May 20, 2024. It is only because of Zachry’s termination that CECM was unable to complete, review, and finalize its work on site, thereby causing the alleged breach that Zachry now seeks to benefit from.

V. Zachry’s Failure to Timely Notify CECM of the Alleged Issues Has Prejudiced CECM in this Contested Matter

30. Citing a Rule 408 communication from Zachry’s counsel, Debtors contend that “Commonwealth has known for approximately nine months that Zachry found defects in Commonwealth’s work, intended to assert a backcharge for deficient work, and was actively investigating additional backcharges.... But Commonwealth never raised any concerns about

Zachry's correction of Commonwealth's defective work until Commonwealth filed its Motion for Summary Judgment." (Doc. 3074, at ¶ 31). This is not true.

31. On August 29, 2024, in CECM's response to the same 408 communication cited by Zachry, CECM specifically advised Zachry that CECM's "responses are preliminary and subject to supplementation and revision once CECM is provided an opportunity to inspect the site and review the areas of work that Zachry asserts were done improperly." (See Ex. 8, at p.1 ¶ 2).

32. After receiving CECM's response, Zachry proceeded to perform the bulk of the alleged repair work without any additional notices to CECM. Zachry did not provide notice to CECM of the work it alleged was defective to allow CECM to (1) inspect the alleged defects; (2) document the alleged defects; (3) determine a remedy or fix to address the alleged issues; and (4) perform the work to correct or address the alleged issues.

33. By the time Zachry notified CECM of the new amount of the "backcharges" in February 2025, which had now increased in value from \$300,000 to \$2,594,743.86, all of the alleged defective work had already been altered. In other words, with full knowledge of CECM's claims for payment, and CECM's notification that it would need to be "provided an opportunity to inspect the site and review the areas of work that Zachry asserts were done improperly," Zachry did not take steps to preserve evidence of the alleged defective work and did not give CECM an opportunity to inspect and investigate the then-existing conditions on the site.

34. "A party's duty to preserve evidence comes into being when the party has notice that the evidence is relevant to the litigation or should have known that the evidence may be relevant." *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015). *Accord King v. Ill. Cent. R.R.*, 337 F.3d 550, 556 (5th Cir. 2003) (there is no bad faith in the destruction of evidence if, "at the time [the alleged spoliator] disposed of this potential evidence, it was unaware that it might be relevant

to [the plaintiff's] claims.”). Spoliation may be used as a factor in ruling on a summary judgment motion. *See Coastal Bridge Co. v. Heatec, Inc.*, 833 F. App'x 565, 572 (5th Cir. 2020).

35. Zachry’s failure to give the requisite notice under the Service Agreement amounts to an intentional refusal to allow CECM to inspect and investigate Zachry’s claims in real time, before the conditions were destroyed. It is undeniable that the alleged defective or incomplete work is relevant evidence for the claims in this case. A party suffers prejudice where it cannot present “evidence essential to its underlying claim.” 833 F. App'x at 575 (citing *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 532 (D. Md. 2010) (internal citation omitted)). CECM has been prejudiced by Zachry’s intentional failure to allow CECM to inspect and document relevant evidence, and Zachry should be estopped from now attempting to claim defective or incomplete work to reduce its liability to CECM in the Bankruptcy Proceeding.

CONCLUSION

Commonwealth Electric Company of the Midwest respectfully requests that the Court enter summary judgment in its favor as to Debtors’ Objection to the Claim (Claim No. 1003) and find that the Debtors Objection on the affirmative defense of offset must be overruled as a matter of law.

ANDREWS MYERS P.C.

/s/ T. Josh Judd
T. JOSH JUDD
SBN: 24036866
1885 Saint James Place, 15th Floor
Houston, TX 77056
Tel: 713-850-4200
Fax: 713-850-4211
jjudd@andrewsmyers.com

and

WOODS AITKEN LLP

Joel D. Heusinger, No. 18326, *admitted pro hac vice*

Audrey R. Svane, No. 25830, *admitted pro hac vice*

301 South 13th Street, Suite 500

Lincoln, Nebraska 68508

Telephone: (402) 437-8500

Facsimile: (402) 437-8558

jheusinger@woodsaitken.com

asvane@woodsaitken.com

**COUNSEL FOR COMMONWEALTH
ELECTRIC COMPANY OF THE MIDWEST**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 20, 2025, a true and correct copy of the foregoing Motion served via the Court's CM/ECF system on all parties requesting notice.

/s/T. Josh Judd

T. Josh Judd

EXHIBIT 8

From: Joel D. Heusinger
Sent: Thursday, August 29, 2024 4:01 PM
To: Stephen Loftin
Subject: RE: Zachry - Rule 408 Settlement Communication
Attachments: Response to Zachry Backcharge Claim - Final Clean Copy 08-29-24.pdf

Stephen,

Good afternoon. As a follow up to our earlier emails, I have attached the response by the CECM project team to the backcharges Zachry has presented. Please pass this response on to your client and let me know if they have any questions. Thanks

Joel

Joel D. Heusinger

Denver 303-606-6717

Lincoln 402-437-8517

Omaha 402-898-7404

woodsaitken.com

Download vCard



Denver | Lincoln | Omaha | Washington D.C.



From: Stephen Loftin <sloftin@hicks-thomas.com>
Sent: Tuesday, August 27, 2024 12:27 PM
To: Joel D. Heusinger <JHEUSINGER@woodsaitken.com>
Subject: RE: Zachry - Rule 408 Settlement Communication

Thank you Joel.

From: Joel D. Heusinger <JHEUSINGER@woodsaitken.com>
Sent: Tuesday, August 27, 2024 12:23 PM
To: Stephen Loftin <sloftin@hicks-thomas.com>
Subject: RE: Zachry - Rule 408 Settlement Communication

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Stephen,

I talked with the COO for Commonwealth and they are forwarding me their draft response to the B/C's today. I will review and we should have the response to you before the COB on Thursday.

Joel

Joel D. Heusinger

Denver 303-606-6717

Lincoln 402-437-8517

Omaha 402-898-7404

woodsaitken.com

Download vCard



Denver | Lincoln | Omaha | Washington D.C.



From: Stephen Loftin <sloftin@hicks-thomas.com>
Sent: Tuesday, August 27, 2024 9:54 AM
To: Joel D. Heusinger <JHEUSINGER@woodsaitken.com>
Subject: RE: Zachry - Rule 408 Settlement Communication

Joel,

Do you have an update? Again, time is really of the essence on my end. They need a response/counter as soon as possible or they will likely need to file something.

Stephen



Stephen Loftin
Partner
700 Louisiana, Suite 2300
Houston, TX 77002
713-547-9118 office
713-547-9150
sloftin@hicks-thomas.com
www.hicks-thomas.com
[Bio](#) | [vCard](#) | [LinkedIn](#) | [Map](#)

From: Joel D. Heusinger <JHEUSINGER@woodsaitken.com>
Sent: Wednesday, August 21, 2024 1:45 PM
To: Stephen Loftin <sloftin@hicks-thomas.com>
Subject: RE: Zachry - Rule 408 Settlement Communication

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Stephen,

Good afternoon. I am back in the office and have sent the information to the Commonwealth team for review. I will let you know their position on the b/c's and response to the offer.

Joel

Joel D. Heusinger

Denver 303-606-6717

Lincoln 402-437-8517

Omaha 402-898-7404

woodsaitken.com

Download vCard



Denver | Lincoln | Omaha | Washington D.C.



From: Stephen Loftin <sloftin@hicks-thomas.com>
Sent: Monday, August 19, 2024 8:20 AM
To: Joel D. Heusinger <JHEUSINGER@woodsaitken.com>
Subject: RE: Zachry - Rule 408 Settlement Communication

Joel,

I am told the back charge investigation is a work in progress, but the attached provides some information gathered to date. I understand that additional issues are being uncovered and it is likely this will be updated. For now, please treat this as governed by Rule 408. I understand your schedule, but hope you understand that Zachry needs to either get an agreement on a resolution soon or it will need to file something with the bankruptcy court.

I look forward to your client's response. Let me know if you have any questions.

Stephen



Stephen Loftin
Partner
700 Louisiana, Suite 2300
Houston, TX 77002
713-547-9118 office
713-547-9150
sloftin@hicks-thomas.com
www.hicks-thomas.com
[Bio](#) | [vCard](#) | [LinkedIn](#) | [Map](#)

From: Joel D. Heusinger <JHEUSINGER@woodsaitken.com>
Sent: Thursday, August 15, 2024 8:26 AM
To: Stephen Loftin <sloftin@hicks-thomas.com>
Subject: RE: Zachry

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Stephen,

Good morning. Thank you for your email and the general details of the proposal. I will send this to the client and will set up a time to follow up with them in the next week or so. I have depositions early in the week, so it will be after that. If you could forward the backcharges for the referenced contract, that would be helpful in our evaluation as well. Thanks.

Joel

Joel D. Heusinger

Denver 303-606-6717

Lincoln 402-437-8517

Omaha 402-898-7404

woodsaitken.com

Download vCard



Denver | Lincoln | Omaha | Washington D.C.



From: Stephen Loftin <sloftin@hicks-thomas.com>
Sent: Wednesday, August 14, 2024 11:31 AM
To: Joel D. Heusinger <JHEUSINGER@woodsaitken.com>
Subject: Zachry

Joel,

Thank you for your time earlier this week. As we discussed, Zachry is interested in exploring the resolution of Commonwealth's claims without the necessity of litigation in bankruptcy court and the attendant delay. While I focused on the amount due under the terminated contract, I think it probably makes sense to throw in all of the claims on all of the contracts to resolve everything. My understanding is that the total amount that Commonwealth claims is due under all 5 agreements for pre-petition work is \$5,145,659.78. As I discussed, Zachry believes that it has available back charges related to Commonwealth's work under the 115001-605028 Contract in the amount of up to \$300,000. Factoring in those back charges would make the total for the alleged amount due \$4,845,659.78. In return for critical vendor designation and the resultant prompt payment from the limited availability of critical vendor dollars, Zachry requests that Commonwealth agree to the same 25% discount that other contractors have been providing (\$1,162,212.42), which would result in a total payment of \$3,486,637.26 (along with full releases of course). As I mentioned, absent some agreement on the back charges and a discount for quicker payment, Zachry intends to prepare and file an adversary proceeding regarding the back charges and the proper amount due under the "028" contract.

Please inform you client of this offer and let me know their response. It should be obvious, but the sooner we can resolve this claim the better.

I look for forward to hearing from you.

Stephen



Stephen Loftin
Partner
700 Louisiana, Suite 2300
Houston, TX 77002
713-547-9118 office
713-547-9150 fax
sloftin@hicks-thomas.com
www.hicks-thomas.com
[Bio](#) | [vCard](#) | [LinkedIn](#) | [Map](#)



Commonwealth Electric Company

of the Midwest

4225 South 89th Street | Omaha, NE 68127 | (402) 331-1414

8/29/2024

Re: Zachry Final Billing Package – Back Charge for Work

Attn: Hunter Edmondson

This is Commonwealth Electric Company of the Midwest's (CECM) response to the Notification of backcharges by Zachry Industrial (Zachry) on Contract No. ZII#115001605028. CECM's contract with Zachry was a time and material reimbursable contract with no set scope of work. Zachry's on-site project team directed and managed the overall labor force provided by CECM. Throughout the course of the Project, Zachry was responsible for placing, directing, and inspecting the installation of the work performed by CECM's labor. At no time prior to the Termination for Convenience in May 2023, did Zachry ever indicate that the CECM workforce was not performing as directed. The first notice of any backcharge did not come until 3 months after CECM was off the Project.

CECM has responded to the individual issues raised by Zachry. These responses are preliminary and subject to supplementation and revision once CECM is provided an opportunity to inspect the site and review the areas of work that Zachry asserts were done improperly. Similar evaluation of all costs may also be needed. Based on the evaluation of the information provided, CECM rejects the backcharges presented for the reasons listed.

EWO Number	CECM Rebuttal	CECM Status (Accepted/Rejected)
1	<p>1. Work on these cables was not completed due to the sudden request for departure by Zachry. CECM is not responsible for incomplete work.</p> <p>2. Cables were pulled through the PDC floor openings for routing and protection purposes and were to be organized later in the cable tray prior to cable termination. This ensures that the Roblox fit the cables as the openings in the Roblox were not clearly laid out by Zachry Engineering (see RFI submitted by CECM as well as this issue came up in electrical engineering coordination meeting).</p> <p>3. Please provide cable ID for damaged cable claimed to be pulled by CECM. Many cables were pulled to the manhole behind BOP PDC which was full of cables Zachry pulled and left in manhole prior to CECM coming on-site. Pictures of manhole will</p>	Rejected

Committed to Excellence | Customers, Employees, Character, Mastery

Columbus | Des Moines | Grand Island | Kearney | Lincoln | Omaha | Phoenix | Tucson



Commonwealth Electric Company

of the Midwest

4225 South 89th Street | Omaha, NE 68127 | (402) 331-1414

EWO Number	CECM Rebuttal	CECM Status (Accepted/Rejected)
	<p>be provided if needed. We are not liable for any damages to work that was previously completed and pulled in by Zachry or others.</p> <p>4. CECM was instructed to copy existing and on-going installation completed by Zachry and another electrical contractor on-site. Zachry, prior to CECM being on-site, removed bottom plates (shown in pictures as missing) and installed cables in conduits terminated to the top plate of the PDC's floor or through the roxblox openings without the roxblox. Zachry QA/QC also witnessed this installation process and never mentioned this was the incorrect installation practice. No drawings, or installation specs were shared regarding the back charged installation method for the PDC plates and if the bottom plates were to be used as well as the roxblox. CECM was directed to utilize this installation method without the plates and only using the roxblox by an authorized representative of Zachry who was assigned to direct our work.</p> <p>5. We will not be accepting the back charge for this EWO due to the reasons above.</p>	
2	<p>1. Work on these cables was not completed and labeled due to the sudden request for departure from Zachry. CECM is not responsible for incomplete work.</p> <p>2. Per our TO package, this cable was not pulled by CECM as we had not started that CTO package. If it was pulled, it was pulled by someone other than CECM. Cables 0LVB-266-RCP (per our last cable schedule is supposed to be a 600V-2-03-W/GND) and 0LOA-102-M is not on our schedule at all for CECM to pull in per our last cable schedule revision that was scoped out and issued to us by Zachry.</p> <p>3. We will not be accepting the back charge for this EWO due to the reasons above.</p>	Rejected
3	<p>1. CECM was instructed to copy existing and on-going installation completed by Zachry and another electrical contractor on-site. Zachry, prior to CECM being on-site, removed bottom plates (shown in pictures as missing) and installed cables in conduits terminated to the top plate of the PDC's floor or through the roxblox openings without the roxblox. Zachry QA/QC also witnessed this installation process and never mentioned this was</p>	Rejected

Committed to Excellence | Customers, Employees, Character, Mastery

Columbus | Des Moines | Grand Island | Kearney | Lincoln | Omaha | Phoenix | Tucson



Commonwealth Electric Company

of the Midwest

4225 South 89th Street | Omaha, NE 68127 | (402) 331-1414

EWO Number	CECM Rebuttal	CECM Status (Accepted/Rejected)
	<p>the incorrect installation practice. No drawings, or installation specs were shared regarding the back charged installation method for the PDC plates and if the bottom plates were to be used as well as the roxblox. CECM was directed to utilize this installation method without the plates and only using the roxblox by an authorized representative of Zachry who was assigned to direct our work.</p> <p>2. We will not be accepting the back charge for this EWO due to the reasons above.</p>	
4	<p>1. CECM was instructed to copy existing and on-going installation completed by Zachry and another electrical contractor on-site. Zachry, prior to CECM being on-site, removed bottom plates (shown in pictures as missing) and installed cables in conduits terminated to the top plate of the PDC's floor or through the roxblox openings without the roxblox. Zachry QA/QC also witnessed this installation process and never mentioned this was the incorrect installation practice. No drawings, or installation specs were shared regarding the back charged installation method for the PDC plates and if the bottom plates were to be used as well as the roxblox. CECM was directed to utilize this installation method without the plates and only using the roxblox by an authorized representative of Zachry who was assigned to direct our work.</p> <p>2. 0WDA-3E0014B-01-01 is not a cable that was assigned to CECM to pull or terminate.</p> <p>3. We will not be accepting the back charge for this EWO due to the reasons above.</p>	Rejected
5	<p>1. CECM was instructed to copy existing and on-going installation completed by Zachry and another electrical contractor on-site. Zachry, prior to CECM being on-site, removed bottom plates (shown in pictures as missing) and installed cables in conduits terminated to the top plate of the PDC's floor or through the roxblox openings without the roxblox. Zachry QA/QC also witnessed this installation process and never mentioned this was the incorrect installation practice. No drawings, or installation specs were shared regarding the back charged installation method for the PDC plates and if the bottom plates were to be</p>	Rejected

Committed to Excellence | Customers, Employees, Character, Mastery

Columbus | Des Moines | Grand Island | Kearney | Lincoln | Omaha | Phoenix | Tucson



Commonwealth Electric Company

of the Midwest

4225 South 89th Street | Omaha, NE 68127 | (402) 331-1414

EWO Number	CECM Rebuttal	CECM Status (Accepted/Rejected)
	<p>used as well as the roxblox. CECM was directed to utilize this installation method without the plates and only using the roxblox in the BOP PDC by an authorized representative of Zachry who was assigned to direct our work. (CECM also issued several RFI's regarding the roxblox installation and cable routing).</p> <p>2. We will not be accepting the back charge for this EWO due to the reasons above.</p>	
8	<p>1. CECM was instructed to copy existing and on-going installation completed by Zachry and another electrical contractor on-site. Zachry, prior to CECM being on-site, removed bottom plates (shown in pictures as missing) and installed cables in conduits terminated to the top plate of the PDC's floor or through the roxblox openings without the roxblox. Zachry QA/QC also witnessed this installation process and never mentioned this was the incorrect installation practice. No drawings, or installation specs were shared regarding the back charged installation method for the PDC plates and if the bottom plates were to be used as well as the roxblox. CECM was directed to utilize this installation method without the plates and only using the roxblox by an authorized representative of Zachry who was assigned to direct our work.</p> <p>2. We will not be accepting the back charge for this EWO due to the reasons above.</p>	Rejected
11	<p>1. Work on most of these cables was not completed due to the sudden request for departure from Zachry and no request to assist in the transition was wanted but was offered and refused by Zachry. CECM will not be responsible for incomplete work.</p> <p>2. CECM was instructed to copy existing and on-going installation completed by Zachry and another electrical contractor on-site. Zachry, prior to CECM being on-site, removed bottom plates (shown in pictures as missing) and installed cables in conduits terminated to the top plate of the PDC's floor or through the roxblox openings without the roxblox. Zachry QA/QC also witnessed this installation process and never mentioned this was the incorrect installation practice. No drawings, or installation specs were shared regarding the back charged installation method for the PDC plates and if the bottom plates were to be</p>	Rejected

Committed to Excellence | Customers, Employees, Character, Mastery

Columbus | Des Moines | Grand Island | Kearney | Lincoln | Omaha | Phoenix | Tucson



Commonwealth Electric Company

of the Midwest

4225 South 89th Street | Omaha, NE 68127 | (402) 331-1414

EWO Number	CECM Rebuttal	CECM Status (Accepted/Rejected)
	<p>used as well as the roxblox. CECM was directed to utilize this installation method without the plates and only using the roxblox by an authorized representative of Zachry who was assigned to direct our work.</p> <p>3. OWDA-1C3013-02-01, was not assigned to CECM to pull or terminate</p> <p>4. We will not be accepting the back charge for this EWO due to the reasons above.</p>	
12	<p>1. Work on most of these cables was not completed due to the sudden request for departure from Zachry and no request to assist in the transition was wanted but was offered and refused by Zachry. CECM will not be responsible for incomplete work.</p> <p>2. CECM was instructed to copy existing and on-going installation completed by Zachry and another electrical contractor on-site. Zachry, prior to CECM being on-site, removed bottom plates (shown in pictures as missing) and installed cables in conduits terminated to the top plate of the PDC's floor or through the roxblox openings without the roxblox. Zachry QA/QC also witnessed this installation process and never mentioned this was the incorrect installation practice. No drawings, or installation specs were shared regarding the back charged installation method for the PDC plates and if the bottom plates were to be used as well as the roxblox. CECM was directed to utilize this installation method without the plates and only using the roxblox by an authorized representative of Zachry who was assigned to direct our work.</p> <p>3. Cable management is completed once the cables are ready to be terminated. Since CECM was not ready to terminate and still pulling cables prior to our exit off site, we would not have started to manage the cable in its proper spot. We will not be accepting a back charge based on work that was not completed yet.</p>	Rejected
18	<p>1. Zachry QA/QC witnessed the terminations of these transformers and also filled out paperwork recording. Phasing and testing paperwork would not have been completed by CECM. This was completed by Shermco whom tested the MV cables and verified phasing during the testing. This is not work that would have been completed by CECM. Only the terminations would</p>	Rejected

Committed to Excellence | Customers, Employees, Character, Mastery

Columbus | Des Moines | Grand Island | Kearney | Lincoln | Omaha | Phoenix | Tucson



Commonwealth Electric Company

of the Midwest

4225 South 89th Street | Omaha, NE 68127 | (402) 331-1414

EWO Number	CECM Rebuttal	CECM Status (Accepted/Rejected)
	<p>have been completed by us. This package was also completed and accepted by Zachry which is why commissioning had the authority over these transformers.</p> <p>2. We will not be accepting the back charge for this EWO due to the reasons above.</p>	

Thanks,

Noah Thornton
 Senior Project Manager
 Email : nthornton@commonwealthelectric.com
 Direct (402) 677-8318
 4225 S 89th St. | Omaha, NE | 68127

Committed to Excellence | Customers, Employees, Character, Mastery

Columbus | Des Moines | Grand Island | Kearney | Lincoln | Omaha | Phoenix | Tucson