EXHIBIT D.04a

Arkansas
State Claims Commission

APR 30 2019

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Please print in ink or type

BEFORE THE STATE CLAIMS COMMISSION

Of the State of Arkansas

☐ Mr.
☐ Mrs.
☐ Ms.
☐ Miss

FLYNCO, INC., **Claimant**

vs.

State of Arkansas, Respondent

Do Not Write in These Spaces

Claim No. _____

Date Filed _____ (Month) (Day) (Year)

Amount of Claim $ _____

Fund _____

COMPLAINT

FLYNCO, INC. (Name), **the above named Claimant, of** 7711 DISTRIBUTION DRIVE, LITTLE ROCK (Street or R.F.D. & No.) (City)

AR (State) 72209 (Zip Code) (501) 565-1228 (Daytime Phone No.) **County of** PULASKI **represented by** DAVID A. GRACE (Legal Counsel, if any, for Claim)

of 500 MAIN ST., STE. A, NORTH LITTLE ROCK, AR 72114 (501) 378-7900 (501) 376-6337 **days:**
(Street and No.) (City) (State) (Zip Code) (Phone No.) (Fax No.)

State agency involved: ARKANSAS TECH UNIVERSITY **Amount sought:** Not less than $292,868.30

Month, day, year and place of incident or service: APRIL 30, 2018 - NOVEMBER 2, 2018

Explanation:

AS MORE SPECIFICALLY EXPLAINED IN THE ATTACHED EXHIBIT "A", ARKANSAS TECH UNIVERSITY WRONGFULLY TERMINATED TWO CONTRACTS WITH CLAIMANT AND CAUSED CLAIMANT TO SUFFER DAMAGES IN AN AMOUNT TO BE PROVED AT A HEARING, WHICH DAMAGES ARE ALLEGED TO EXCEED $292,868.30. CLAIMANT ALSO SEEKS TO RECOVER ITS REASONABLE ATTORNEY'S FEES AND COSTS INCURRED IN CONNECTION WITH THIS ACTION.

As parts of this complaint, the claimant makes the statements, and answers the following questions, as indicated: (1) Has claim been presented to any state department or officer thereof? YES (Yes or No); when? 4 (Month) 19 (Day) 2019 (Year); to whom? BERNADETTE HINKLE AND JESSICA HOLLOWAY WITH ARKANSAS TECH UNIVERSITY (Department); and that the following action was taken thereon: NO RESPONSE

and that $ -0- was paid thereon: (2) Has any third person or corporation an interest in this claim? NO ; if so, state name and address

(Name) (Street or R.F.D. & No.) (City) (State) (Zip Code)

and that the nature thereof is as follows: _____

_____ ; and was acquired on _____, in the following manner:

THE UNDERSIGNED states on oath that he or she is familiar with the matters and things set forth in the above complaint, and that he or she verily believes that they are true.

FLYNCO, INC.
(Print Claimant/Representative Name)

_____
(Signature of Claimant/Representative)

SWORN TO and subscribed before me at Little Rock (City) AR (State)

(SEAL) on this 26 (Date) day of April (Month), 2019 (Year)

Debra L. Ferren
(Notary Public)

My Commission Expires: July (Month) 01 (Day) 2021 (Year)

DEBRA L. FERREN
COMM. EXP. 7-1-2021
No. 12382644
SALINE COUNTY
NOTARY PUBLIC - ARKANSAS

SF1- R7/99

EXHIBIT "A"

BEFORE THE STATE CLAIMS COMMISSION
OF THE STATE OF ARKANSAS

FLYNCO, INC. CLAIMANT

VS.

STATE OF ARKANSAS RESPONDENT

COUNT I

(1) On April 30, 2018, Claimant contracted with Arkansas Tech University ("ATU") to perform work and provide improvements in connection with the construction project generally described as "Williamson Building Remodel" in consideration for a total payment in the amount of $739,700.00 ("Williamson Remodel Contract"). A true and correct copy of the Williamson Remodel Contract (*sans* the "Contract Documents," which are voluminous and already in the possession of ATU, but will be produced at a hearing, or earlier, upon request) is attached hereto as Exhibit "1".

(2) The Williamson Remodel Contract was modified by one change order which is attached hereto as Exhibit "2".

(3) Claimant performed the Williamson Remodel Contract, as modified by Change Order #1, in full compliance with applicable plans and specifications, until on or about November 2, 2018, at which time the Williamson Remodel Contract was wrongfully terminated by ATU, without cause or proper notice to Claimant or its surety after certification of default by the project architect.

(4) As a direct and proximate cause of ATU's wrongful termination of the Williamson Remodel Contract, as modified, Claimant has suffered damages in the amount of $255,716.30, as more fully set forth in the attached Exhibit "3".

(5) Demand has been made upon ATU for payment of Claimant's damages and such demand has been refused.

(6) In connection with its wrongful termination of the Williamson Remodel Contract, and in exacerbation of the damages suffered by Claimant as a result of such wrongful termination, ATU made demand upon Claimant's performance bond surety to complete the Williamson Remodel Contract.

(7) After investigating the merits of ATU's performance bond claim, Claimant's performance bond surety denied ATU's demand, but only after incurring substantial costs and attorney's fees in the course of its investigation.

(8) The amount of costs and attorney's fees incurred by Claimant's performance bond surety is presently unknown but, upon information and belief, is alleged to exceed $15,000.00.

(9) Claimant is liable to its performance bond surety to reimburse all costs and attorney's fees incurred during the course of the investigation of ATU's performance bond claim, which costs and attorney's fees are direct, foreseeable damages proximately caused by ATU's wrongful termination of the Williamson Remodel Contract and for which ATU is liable to Claimant.

(10) Claimant is entitled to an award of its reasonable attorney's fees incurred in bringing this action pursuant to *Ark. Code Ann.* §16-22-308.

(11) Claimant has exhausted its administrative remedies and all conditions precedent to the enforcement of this claim have been satisfied.

(12) Claimant is entitled to an award against the State of Arkansas and ATU in the amount of $255,716.30, plus damages in an amount to be proved at a hearing in this matter equal to the costs and attorney's fees incurred by Claimant's surety in investigating ATU's meritless claim against Claimant's performance bond, plus Claimant's reasonable attorney's fees and costs and all further relief to which it may be entitled.

COUNT II

(1) On October 24, 2018, ATU issued its Notice of Intent to Award a Contract to Claimant to perform work and provide improvements in connection with a construction project generally described as "Williamson Insulation Install" in consideration for a total payment in the amount of $63,250.00 ("Williamson Insulation Contract"). A true and correct copy of the Notice of Intent is attached hereto as Exhibit "4".

(2) In response to, and in acceptance of, ATU's October 24, 2018 Notice of Intent, Claimant executed and delivered the Contract and Grant Disclosure Form and a Restriction of Boycott of Israel Certification attached hereto as Exhibit "5" on October 25, 2018 and the Contract, Certificate of Liability Insurance and Payment and Performance Bonds attached hereto as Exhibit "6" on October 30, 2018.

(3) Claimant performed the Williamson Insulation Contract in full compliance with its plans and specifications until on or about November 2, 2018, at which time the Williamson Insulation Contract was wrongfully terminated by Respondent, without

cause or proper notice to Claimant and its surety after certification of default by the project architect by purporting to issue a notice of "no award."

(4) As a direct and proximate cause of Respondent's wrongful termination of the Williamson Insulation Contract, Claimant has suffered damages in the amount of $22,152.00, as more fully set forth in the attached Exhibit "7".

(5) Demand has been made upon ATU for payment of Claimant's damages and such demand has been refused.

(6) Claimant is entitled to an award of its reasonable attorney's fees incurred in bringing this action pursuant to *Ark. Code Ann.* §16-22-308.

(7) Claimant has exhausted its administrative remedies and all conditions precedent to the enforcement of this claim have been satisfied.

(8) Claimant is entitled to an award against Respondent in the amount of $22,152.00, its reasonable attorney's fees and costs and all further relief to which it may be entitled.

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

FLYNCO, INC. **CLAIMANT**

V. **CLAIM NO. 191111**

ARKANSAS TECH UNIVERSITY **RESPONDENT**

ORDER

Now before the Arkansas State Claims Commission (the "Claims Commission") is the claim of Flynco, Inc. (the "Claimant") against Arkansas Tech University (the "Respondent"). At the hearing on October 15, 2021, Claimant was represented by David A. Grace, and Thomas W. Pennington appeared on behalf of Respondent.

Procedural History

1. Claimant filed this claim against Respondent on April 30, 2019, seeking "not less than $292,868.30" in damages related to Respondent's alleged wrongful termination of two contracts with Claimant: (1) the Williamson Building remodel (the "Remodel Contract"), for which Claimant alleged damages in the amount of $255,716.30; and (2) the installation of insulation in the Williamson Building (the "Insulation Install"), for which Claimant alleged damages in the amount of $22,152.00. Claimant also requested in excess of $15,000.00 in attorney's fees and costs.

2. Respondent denied liability and filed a motion to dismiss.[1]

3. On June 18, 2019, Claimant filed an amended claim, providing fully executed copies of the Remodel Contract and the change order (which gave an additional 30 days on the Remodel Contract) and providing additional details regarding the Insulation Contract claim.

[1] The Claims Commission notes that this motion to dismiss was mooted by the filing of Claimant's amended complaint.

4. Respondent filed an amended answer denying liability.

5. Prior to the hearing, the parties submitted the following joint exhibits for the commissioners to review: Exhibit Nos. 1–6 (including 6a and 6b), 7–11 (including 11a), 12–19 (including 19a), and 20–94.

6. Prior to the hearing, the parties submitted the following deposition transcripts for the commissioners to review:

i. Kathy Arnold, Claimant's controller;

ii. Travis Bartlett, architect for the Remodel Contract, principal and director at MAHG Architecture Inc.;

iii. David Beggs, Claimant's co-owner;

iv. Bernadette Hinkle, Respondent's vice president of administration and finance;

v. Jessica Holloway, Respondent's director of business services;

vi. Alan Kays, estimator and project manager for Claimant;

vii. Sandra Mabry, Respondent's construction director;

viii. Suzanne McCall, Respondent's controller;

ix. Galen Rousaville, Respondent's former construction manager; and

x. David Hardwick, Claimant's project superintendent.

7. Prior to the hearing, each party also submitted proposed findings of fact and conclusions of law.

8. Prior to the hearing, Respondent submitted a prehearing brief, with exhibits A–V attached.

9. Claimant filed a motion *in limine* asking the Claims Commission not to consider Joint Exhibit Nos. 79-83 and 89. Respondent filed a response opposing the motion. At the

beginning of the hearing, the Claims Commission denied the motion *in limine* but noted Claimant's objection.

10. At the hearing, each party presented closing arguments.

11. Claimant's counsel argued that Respondent should not have terminated the contracts and that Respondent did not follow the required procedure to terminate the contracts. Claimant was not a party to fraud because Claimant could not foresee the actions of its employee, Alan Kays. No one disputes that this issue was precipitated by Respondent's employee, Galen Rousaville, asking that Claimant overbill to spend down the grant amounts. Upon learning of the issue, Claimant immediately repudiated Kays' actions and repaid the money. Kays did not engage in fraud because Respondent did not rely on any material misrepresentation by Kays, and Kays did not intend to defraud or deceive anyone. Regarding the elevator issue raised in Respondent's prehearing brief, the only thing that Kays could have known was that an invoice for the full cost of the elevator had been requested of the elevator company by Rousaville. It does not prove that Kays knew what Rounsaville was doing. The party-to-fraud issues were waived because Respondent allowed Claimant to continue working until October.

12. Respondent's counsel argued that Claimant's damage calculations are not accurate because, as to the Insulation Contract, Claimant worked six days and wants to charge $22,152. This is hyperinflation of costs. Also, as to the Insulation Install, Respondent never signed a contract, and the Statute of Frauds requires Respondent's signature in order to seek enforcement of the contract. Regarding the Remodel Contract, any of the fourteen options to terminate the Remodel Contract in Paragraph 9 would work given that this job failed to progress (only 61% of the work completed by the end of October when only a month remained) and that Claimant's work was negligent (the elevator pit was not up to specifications, per Joint Exhibit No. 65; Bernadette Hinkle testified that the job was done in a sloppy manner). In Paragraph 23 of the Remodel

Contract, Claimant agreed to hold Respondent harmless for any losses arising from negligent acts by Claimant or its employees.

13. Upon a question from a commissioner regarding Paragraph 26 of Respondent's prehearing brief as to why Respondent did not terminate the contracts in June 2018, Respondent's counsel pointed to Hinkle's deposition, where she states the following:

> Q. So why didn't ATU terminate Flynco in May of 2018?
> A. In hindsight, we should have.
> Q. But you didn't. And you knew you could have, but you did not, right?
> A. Yes, that is correct.
> Q. And why did you not?
> A. Because there was an investigation that was going to go forward with Legislative Audit and the State Police.
> Q. But it's true that legislative audit did not turn up any new facts that you didn't know in May and June of 2018; isn't that true?
> A. That's correct.
> …
> A. However, I did not know in May or June if there were any more false documents or we didn't know the extent of these actions.
> Q. So you didn't think that the actions to that point were enough to terminate Flynco?
> A. We had no information from an external source that would quantify what had actually happened, to the extent that we knew of.
> Q. But when you got all the rest of the information, it didn't change the facts you already knew; you knew that Flynco had turned in a pay application that was incorrect and had been paid, and had turned themselves in, and had refunded the money. So what else did you need to know?
> A. The lack of progress that Flynco took, and the way in which that job had been managed, with all of the information that was gathered, indicated that Flynco should have been terminated in May, but wasn't. And that was my opinion. And with the latest information in October and November of 2018, I recommended and believed that it was in the university's best interest to terminate the contract with Flynco.

See Hinkle's 3/9/2020 deposition at p. 61.

14. Upon a question from a commissioner, Respondent's counsel stated that the grant money was going to expire on June 30, 2018, and Rounsaville was trying to spend down the grant money. None of the money went into anyone's pocket, but Claimant did receive $138,000 for work that it had not completed.

15. Upon a question from a commissioner, Respondent's counsel stated that the project was supposed to be finished by Thanksgiving, but only 60% had been finished by October, so there was a change order that extended Claimant's time to perform until Christmas.

16. Upon a question from a commissioner as to the number of employees working on the jobsite, Claimant's counsel stated that Claimant was a general contractor, such that most of the work is done by subcontractors, not self-performed by Claimant's employees. Claimant had a supervisor on site every day to coordinate the job. Claimant has not been paid for amounts in Pay Application 6.

17. Upon a question from a commissioner, Claimant's counsel stated that the change order extending the completion date to December 2018 was due to sequencing issues with the insulation. *See* Joint Exhibit No. 5. Sandra Mabry testified that Claimant should be paid for the value of the work it had done, which was at least $53,000 of Pay Application 6:

> Q. Okay. So that's around $53,000 that was correctly billed, true?
> A. True.
> Q. And how much of that did Flynco get paid?
> A. I'm not aware of a check.
> …
> Q. Why wasn't Flynco paid $53,000 for the work—
> A. Because someone above me decided they didn't need it, and they weren't going to get paid.
> …
> Q. And why shouldn't they be paid for the work they did?
> A. I think they did us dirty.

See S. Mabry Deposition at pp. 225–27. There were issues with Mabry's other testimony because she said that no masonry work was performed in October, but there are pictures showing that there was.

18. Upon a question from a commissioner, Claimant's counsel stated that the details of the subcontractors' work was not included in the documents presented to the Claims Commission. This claim is based on the contracts and the amounts owed to Claimant under the contracts. The

claim is for the value of the work completed by Claimant for which Claimant did not receive payment.

19. Claimant's counsel stated that the pre-invoicing should not have been done and that Kays did it only because Rounsaville asked. Claimant had nothing to gain by it.

20. Claimant's counsel referenced its proposed findings of fact and conclusions of law regarding the discussion of the law and the value of the work performed plus profit. *See* Claimant's Proposed Findings of Fact and Conclusions of Law at p. 30, ¶ 7.

21. Claimant's counsel argued that the indemnity argument raised by Respondent is inapplicable.

Findings of Fact and Conclusions of Law

22. The Claims Commission appreciates the tremendous work done by both parties in preparing this claim for hearing.

23. The Claims Commission finds that the parties entered into the Remodel Contract on April 30, 2018. *See* Joint Exhibit No. 1. The Claims Commission finds that the value of the Remodel Contract was $739,700.00.

24. The Claims Commission finds that Rounsaville directed Kays to submit Pay Application 1 (in the amount of $138,621.34) and Pay Application 2 (in the amount of $124,933.15) and encouraged Bartlett to approve both pay applications in an attempt to spend down grant money before the June 30, 2018, deadline:

> Q. … The $280,000 is that the amount that you told Alan Kays he had to bill for work on this project before, I guess, May 18?
> A. Yes.
> Q. Okay. And I see Mr. Bartlett got this, too. What had you told – what had you discussed with Mr. Bartlett about this, about the bill that he was going to have to certify for payment?
> A. Basically that this is what we're going to have to do in order to save this grant money.

Q. Okay. So you instructed Mr. Bartlett to certify this pay application for payment, period?
A. Not in those words. But, yes.
Q. Yeah. Whether the work was done or not?
A. Yes.
Q. Okay. And what did Mr. Bartlett say?
A. Okay. That's what we have to do.

Deposition of G. Rounsaville at p. 43–44; *see also* Joint Exhibit Nos. 9, 11a. Rounsaville's testimony matches that of Kays:

Q. … on May 14, 2018, had $138,621.34 worth of work and materials been provided to Arkansas Tech University?
A. No.
Q. Why did you sign the document [Pay Application 1] then?
A. Because I was asked to and directed by Arkansas Tech's construction manager to provide an invoice in this amount, roughly?
Q. You're referring to Galen Rounsaville?
A. That is correct.
Q. Why did you say yes?
A. Because I was doing what my client had asked me to do.

Deposition of A. Kays at pp. 49–50. Rounsaville's testimony also matches Bartlett's testimony on this issue:

Q. And earlier you said that there was pressure from the University. Can you explain that for me?
A. I didn't feel like there was the ability for us to discuss or ask questions about these two pay apps. I felt like there were potential conversations behind the scenes that pushed these numbers through, and especially with Pay App Number 2. I did not have it very long before I even received, I think a phone call and a text along with an email, telling me that I needed to approve these quickly.
Q. Who'd you get that from?
A. Galen Rounsaville.
Q. And is he the individual that you felt the pressure from to make sure that Pay App Number 1 and Pay App Number 2 were signed?
A. Yes.

Deposition of T. Bartlett at pp. 49.

25. The Claims Commission finds that, after questions arose as to Pay Application 2, Hinkle sent a letter to Claimant on May 31, 2018, stating the following in pertinent part:

> I am writing in regard to the payment of application no. 1. Pursuant to our conversation, there was a discrepancy in amount on application #1 and due to same we are requesting the full amount of $138,621.34 be returned to Arkansas Tech University. Also, please void application #2 as it was determined that the labor had not [been] incurred and the materials were not property of Arkansas Tech University. We appreciate your help in this matter. . . .

Joint Exhibit No. 12.

26. The Claims Commission finds that Claimant refunded the entire $138,621.34 to Respondent that same day. Joint Exhibit No. 13.

27. The Claims Commission finds that Respondent allowed Claimant to continue with the Remodel Contract after May 31, 2018, as shown through Hinkle's testimony:

> Q. … So I take it from that email that you were in agreement with the actions that had been taken by Flynco and others, after May 31, to spend down this grant; is that fair?
> A. Yes, that's fair.

2/12/2020 Deposition of B. Hinkle at p. 99. Kays also testified that Claimant continued with the Remodel Contract after May 31, 2018:

> Q. Can you tell me about your interactions with Sandra Mabry? . . .
> A. Brian Lasey sent me an email in early October. . . . Brian responded back to me and said, please copy Sandra Mabry on any future communications related to Williamson Hall. I think Travis Bartlett or somebody had made me aware that Arkansas Tech had hired Galen's replacement, that being Sandra Mabry. I think she took about a week to get feet on the ground and the she and I and Travis Bartlett met, probably the second week of October, in the dining room at Williamson Hall to kind of talk about the progress of the project.

Deposition of A. Kays at pp. 73–74 (emphasis added).

28. The Claims Commission finds that Claimant submitted a new Pay Application 1 on June 14, 2018, in the amount of $56,461.52, which was reviewed, approved, and paid by Respondent. Joint Exhibit No. 24. This pay application indicated that a retainage was withheld by Respondent in the amount of $6,273.50. *See id*.

29. The Claims Commission finds that Claimant submitted a new Pay Application 2 on June 25, 2018, in the amount of $22,298.66, which was reviewed, approved, and paid by Respondent. Joint Exhibit No. 33. This pay application indicated that the retainage amount increased to $8,750.03. *See id*.

30. The Claims Commission finds that Claimant submitted Pay Application 3 on July 25, 2018, in the amount of $34,160.36, which was reviewed, approved, and paid by Respondent. Joint Exhibit No. 36. This pay application indicated that the retainage amount increased to $12,545.62. *See id*.

31. The Claims Commission finds that Claimant submitted Pay Application 4 on August 25, 2018, in the amount of $73,667.60, which was review, approved, and paid by Respondent. Joint Exhibit Nos. 37. This pay application indicated that the retainage amount increased to $20,730.92. *See id*.

32. The Claims Commission finds that Claimant submitted Pay Application 5 on September 25, 2018, in the amount of $141,598.33, which was review, approved, and paid by Respondent. Joint Exhibit Nos. 38. This pay application indicated that the retainage amount increased to $36,464.07. *See id*.

33. The Claims Commission finds that, on October 24, 2018, Respondent sent Claimant a "Notice of Intent to Award" a contract to Claimant for the Insulation Install, pending Claimant's submission of certain documents. Joint Exhibit No. 41. It is undisputed that Claimant submitted the required documents on October 30, 2018. Joint Exhibit No. 44.

34. The Claims Commission finds that Respondent encouraged Claimant to begin working on the Insulation Install, per an October 31, 2018, email from Mabry to Kays:

> I guess I am in shock that all I have heard since Oct. 4th is we cannot make this Nov. finish date [ ] because ATU was behind on the insulation package. And, we have

> the package and now it's not going to be done for weeks. The hole drilling should have been done by Friday and insulation on Monday. Where am I wrong?

Joint Exhibit No. 47 (emphasis added). In response, Kays advised Mabry, in pertinent part:

> … Upon award of the insulation project, we began opening the walls up last Friday. The project has a duration of 30 days. I anticipate 2 weeks to get walls open and Capitol Insulation anticipates 2 day installation. That would put us finishing the insulation project at least a week early.

See id. (emphasis added).

35. The Claims Commission finds that Claimant submitted Pay Application 6 on October 25, 2018, in the amount of $117,014.10. Joint Exhibit No. 42. This pay application indicated that the retainage amount increased to $49,465.66. *See id*. It is undisputed that Respondent has not paid Claimant for this pay application.

36. The Claims Commission finds that on November 2, 2018, Hinkle sent a letter to Claimant providing "written notice of its neglect and/or default" related to the Remodel Contract and terminating the Remodel Contract effective November 9, 2018. Joint Exhibit No. 50.

37. The Claims Commission finds that, also on November 2, 2018, Respondent notified Claimant that Claimant would not receive a contract for the Insulation Install. Joint Exhibit 52.

38. The Claims Commission finds that the Remodel Contract provided the following with regard to Respondent's ability to terminate the contract:

> The Owner may terminate this agreement to the extent Owner's funds are no longer available for expenditures under this agreement. The Owner may terminate this agreement after providing the Contractor written notice of delay, neglect or default, if the Contractor:
>
> (a) fails to begin the work after the notice to proceed has been issued;
> (b) fails to perform the work with sufficient workers, equipment or materials to assure prompt completion of the work;
> (c) performs the work negligently or unsuitably or neglects or refuses to remove materials or to perform anew such work as may be rejected as unacceptable or unsuitable;
> (d) discontinues the prosecution of the work;
> (e) fails to resume work that has been discontinued within 10 calendar days after notice to do so;

(f) becomes insolvent or is declared bankrupt, or commits any act of bankruptcy or insolvency;
(g) or fails to provide a replacement bond that must be on a State of Arkansas Statutory and Performance Bond form within 10 calendar days, if the Surety should be declared in default and/or liquidation;
(h) fails to settle all valid claims for materials, labor or supplies in an expedient manner;
(i) allows any final judgment to stand unsatisfied for a period of 10 calendar days;
(j) makes an assignment for the benefit of creditors;
(k) fails to refund any moneys due the Owner in determining pay quantities for estimates within 30 calendar days;
(l) fails to comply with the contract documents;
(m) is a party to fraud;
(n) or, for any other cause whatsoever, fails to carry on the work in a manner acceptable to the Owner.

Joint Exhibit No. 1 at ¶ 9.

39. The Claims Commission finds that the Remodel Contract incorporated the General Conditions of the Contract for Construction (the "General Conditions"), which specified how Respondent could terminate the contract:

> The Owner may terminate the Contract if the Contractor:
> 1. Repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
> 2. Fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
> 3. Repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
> 4. Otherwise is guilty of substantial breach of a provision of the Contract Documents.

Joint Exhibit No. 1. at ¶ 1; Joint Exhibit No. 3 at § 14.2.1. However, for Respondent to terminate the Remodel Contract for one of these reasons set out in the General Conditions, Respondent had to have the basis for termination "certified" by the "Initial Decision Maker":

> When any of the above reasons exists, the Owner, upon certification by the Initial Decision Maker that sufficient cause exists to justify such action, may . . . after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor. . . .

Joint Exhibit No. 3 at § 14.2.2 (emphasis added). With regard to the Remodel Contract, the agreed Initial Decision Maker was the architect, Travis Bartlett. *See id*. at § 15.2.1 ("The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement").

40. The Claims Commission finds that Respondent did not follow the process outlined in the Remodel Contract or in the General Conditions. Instead, Respondent notified Claimant on November 2, 2018, of Claimant's "neglect and/or default" and terminated the Remodel Contract all in one letter. Joint Exhibit No. 50. Furthermore, Respondent did not spell out a specific basis for termination, provide Claimant with an opportunity to cure, or have Bartlett certify the basis for termination. Claimant's surety, Westfield Insurance Company ("Westfield"), succinctly summarized the issues with the termination in response to a claim made by Respondent on Claimant's bond, as set out in pertinent part below:

> … On November 2, 2018, ATU provided notice to Flynco of what ATU described simply as Flynco's "neglect and/or default"—without further elaboration—and stated that Flynco's contract would be terminated on November 9, 2018. Although the notice-of-termination letter referred generally to Section 9 of the JOC Agreement [the Remodel Contract], ATU did not specify any act or omission that constituted such "neglect and/or default," nor did it articulate the provision under Section 9 upon which the termination was based. Furthermore, ATU failed to comply with Article 14 of the General Conditions. . . . Article 14.2 requires as a condition precedent to termination that ATU obtain certification by the Initial Decision Maker that sufficient cause exists to justify termination and provide seven days' written notice to the Surety, which ATU did not do. We further understand that ATU provided no opportunity for Flynco to cure any alleged deficiencies or violations and that on November 9, 2018, ATU terminated Flynco. ATU did not notify the Surety of any deficiencies in construction or other issues with the Project until ATU responded to the Surety's Contract Status Inquiry on or about December 5, 2018, and state that ATU had terminated Flynco. . . . Based upon the above history, it is clear that ATU wrongfully terminated Flynco. . . .

Joint Exhibit No. 71.

41. The Claims Commission appreciates that Respondent found itself in a difficult position, as its Initial Decision Maker (the architect – Bartlett), was involved in the issues with Pay Application 1 and Pay Application 2. However, the Claims Commission finds that Respondent

could have proposed a modification of the Remodel Contract to specify a different Initial Decision Maker, as the General Conditions provides that the parties could agree to a different Initial Decision Maker. *See* Joint Exhibit No. 3 at § 15.2.1 ("The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement").

42. The Claims Commission finds that the General Conditions permitted Respondent to terminate the Remodel Contract "for convenience" and without cause:

> The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.
> …
> In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

Joint Exhibit No. 3 at §§ 14.4.1, 14.4.3. However, of course, Claimant would be entitled to receive payment for the Work executed. *See id*. at § 14.4.3.

43. The Claims Commission finds that Respondent essentially terminated the Remodel Contract for convenience. Given the questions raised about the performance of the work referenced in Pay Application 6, however, the Claims Commission finds that Claimant is only entitled to the undisputed work performed with regard to Pay Application 6, in the amount of $53,000.00. *See* S. Mabry Deposition at pp. 225–27. Additionally, Claimant is entitled to recover its retainage, which would be approximately $43,000.00 given the dispute over the total amount listed on Pay Application 6. Claimant is also entitled to "reasonable overhead and profit on the Work not executed." Kays stated in an October 17, 2018, email to Mabry that overhead and profit is calculated at nine percent. Joint Exhibit No. 65. As such, Claimant's overhead and profit calculation can be approximated as follows:

Total work remaining per Respondent:	$358,523.53	(amount listed on Pay App. 6 plus $64,014.10 in disputed work on Pay App. 6)
9 percent of total work:	$32,267.12	

Thus, with regard to the Remodel Contract, the Claims Commission awards Claimant $53,000 in unpaid work, $43,000 in unpaid retainage, and $32,267.12 in reasonable overhead and profit, for a total of $128,267.12.

44. As to the Insulation Install, the Claims Commission finds that Mabry's October 31, 2018, email to Kays illustrates Mabry's frustration that the Insulation Install was not further along (despite the fact Respondent had not signed a contract for the Insulation Install as of that date). Joint Exhibit No. 47. Kays advised Mabry that "[u]pon award of the insulation project, we began opening walls up last Friday." *See id*. Perhaps Mabry did not know on October 31, 2018, that Respondent had not signed a contract. But through Mabry, Respondent was on notice that Claimant was working on the Insulation Install. To deny Claimant any recovery on the work performed from October 26, 2018, through termination on November 2, 2018, would constitute unjust enrichment. *See Hartness v. Nuckles*, 2015 Ark. 44, 475 S.W.3d 558 ("Under the principle of unjust enrichment, a 'person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution . . . for . . . benefits received . . .'"). The Claims Commission finds that based upon the work records from October 26–November 2, Claimant is entitled to reimbursement of the demolition line item on Pay Application 6, for a total of $7,326.00. Joint Exhibit Nos. 74, 88. The Claims Commission finds that Claimant is also entitled to nine percent of the demolition line item to account for reasonable profit and overhead, which amounts to $659.34. The Claims Commission declines to make an award of the "general conditions" line item, as the Claims Commission is not persuaded that all of these costs had been incurred before November 2, 2018, and the Claims Commission does not have enough information to determine which costs were incurred:

> Q. …And we see number 1, the general conditions. Explain that again, what that is? And you have billed that at 100 percent.
> A. Superintendent, project manager, superintendent's trucks, fuel, porta-potties, temporary buildings, dumpster, office trailer.

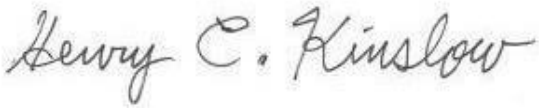
See Deposition of A. Kays at p. 202. Thus, with regard to the Insulation Install, the Claims Commission awards Claimant $7,326.00 in reimbursement for the demolition and $659.34 in profit/overhead, for a total of $7,985.34.

45. Ark. Code Ann. § 16-22-308 provides that the prevailing party in a breach of contract action may recover a "reasonable" attorney's fee. In light of the voluminous discovery conducted by the parties, including numerous depositions, the Claims Commission finds that Claimant should be awarded an additional $7,500.00 in attorney's fees.

46. As such, the Claims Commission AWARDS Claimant $128,267.12 in damages related to the Remodel Contract, $7,985.34 in damages related to the Insulation Install, and $7,500.00 in attorney's fees, for a total award of $143,752.46.

IT IS SO ORDERED.

ARKANSAS STATE CLAIMS COMMISSION
Dexter Booth



ARKANSAS STATE CLAIMS COMMISSION
Henry Kinslow, Chair

ARKANSAS STATE CLAIMS COMMISSION
Sylvester Smith

DATE: October 29, 2021

Notice(s) which may apply to your claim

(1) A party has forty (40) days from the date of this Order to file a Motion for Reconsideration or a Notice of Appeal with the Claims Commission. Ark. Code Ann. § 19-10-211(a)(1). If a Motion for Reconsideration is denied, that party then has twenty (20) days from the date of the denial of the Motion for Reconsideration to file a Notice of Appeal with the Claims Commission. Ark. Code Ann. § 19-10-211(a)(1)(B)(ii). A decision of the Claims Commission may only be appealed to the General Assembly. Ark. Code Ann. § 19-10-211(a)(3).

(2) If a Claimant is awarded less than $15,000.00 by the Claims Commission at hearing, that claim is held forty (40) days from the date of disposition before payment will be processed. *See* Ark. Code Ann. § 19-10-211(a). Note: This does not apply to agency admissions of liability and negotiated settlement agreements.

(3) Awards or negotiated settlement agreements of $15,000.00 or more are referred to the General Assembly for approval and authorization to pay. Ark. Code Ann. § 19-10-215(b).