IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

FALCONE BROTHERS & ASSOCIATES, INC.,
AN ARIZONA CORPORATION,
Plaintiff/Counterdefendant/Appellee,

v.

CITY OF TUCSON, A MUNICIPALITY,
Defendant/Counterclaimant/Appellant.

No. 2 CA-CV 2019-0114
Filed October 29, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20152217
The Honorable Richard Gordon, Judge

VACATED IN PART AND REMANDED

COUNSEL

Kelly McCoy PLC, Phoenix
By Matthew J. Kelly and Walid A. Zarifi
Counsel for Plaintiff/Counterdefendant/Appellee

Mesch Clark Rothschild, Tucson
By Melvin C. Cohen, Gary J. Cohen, David J. Hindman, and
Bernardo M. Velasco

and

Tucson City Attorney's Office
Michael G. Rankin, Tucson City Attorney
By David L. Deibel, Chief Deputy Attorney, and Jennifer Stash, Tucson
Counsel for Defendant/Counterclaimant/Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 The City of Tucson appeals from the trial court's judgment and denial of its motion for new trial and renewal of motion for judgment as a matter of law entered after a jury verdict in favor of Falcone Brothers & Associates Inc. in Falcone's breach-of-contract action against the City. The City raises several issues on appeal, including that the court erred by denying summary judgment because "Falcone [had] waive[d] its claims for delay and for extra work by failing to satisfy the Contract's notice-and-document requirements."[1] For the following reasons, we vacate in part and remand for further proceedings.

Factual and Procedural Background

¶2 The following facts are undisputed. In 2012, Falcone and the City entered into a contract to improve the Grant and Oracle intersection ("the Project"). The contract incorporated the 2003 City of Tucson and Pima County Specifications for Public Improvements ("PAG Specifications"), which required Falcone to give the City notice and documentation of any

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[1]Because our decision on this issue is dispositive, we do not address the following issues also raised by the City: (1) the trial court erroneously permitted Falcone to "seek delay damages without proving that City-caused delays affected the Project's critical path"; (2) the court erred by permitting Falcone "to present a 'total cost' claim without evidence that 'exceptional circumstances' prevented it from proving actual costs"; and (3) the court erred in awarding pre- and post-judgment interest under A.R.S. § 34-221 as "Falcone neither plead[ed] a statutory cause of action under [that statute] nor produced sufficient evidence that it complied with the statutory prerequisites for such an award."

claim for a time extension or additional compensation based on additional work or a compensable delay. In particular, they required immediate notice of any potential "revision of the contract," written notice within three days if the issue had not been resolved, a more detailed written notice within seven days of the initial written notice, and submission of documentation supporting "costs resulting from the claim" within sixty days of costs being incurred.

¶3 The contract required documentation to include what labor or materials would be affected, any delay and disruption in "sequence of performance," and "the nature and the specific cost ascribed to each element of the claim." Additionally, after providing claim notification under the contract, Falcone was required to "keep and maintain complete and specific records to the extent possible, including, but not limited to, cost records concerning the details of the claim." Under the terms of the contract, failure to comply with these procedures would "constitute a waiver of entitlement to additional compensation or a time extension."

¶4 In July 2012, the City notified Falcone it could begin construction on the Project. During construction, representatives for both Falcone and the City attended regular meetings to discuss the Project's progress. Falcone soon discovered differing site conditions than those described in the plans, such as mismarked waterlines and unmarked subterranean structures. Some of these issues resulted in agreements between the parties, resulting in either extra payment from the City or a time extension. For some issues, the City requested additional documentation from Falcone. Throughout the construction, the City withheld a portion of each estimate as a retention or "a guarantee for complete performance of the contract," pursuant to A.R.S. §§ 34-221(C). The City certified the Project as complete on January 15, 2014.

¶5 In February 2014, pursuant to A.R.S. § 12-821.01, Falcone filed a statutory notice of claim with the City, requesting $579,289 for extra work; compensation for 165 days of delay, including $540,662.10 for overhead and $638,809.05 for loss of productivity; and $300,366 previously withheld as a retention. Falcone attached summary charts of its purported damages and some other documents. In response, the City rejected most of Falcone's claims and offered a twenty-five-day extension notwithstanding its allegation that Falcone had failed to comply with the contract's notice-and-documentation requirements. Falcone rejected the City's offer. The City later prepared and offered a pay estimate and change orders, which acknowledged that it owed Falcone approximately $475,000, including the $300,366 retention, but also reduced the overall contract price

and Falcone's obligations to the City. Falcone also rejected these proposals, as it "did not agree" with them.

¶6 In 2015, Falcone participated in a contractually mandated administrative process, which in an earlier appeal, this court determined "was inconsistent with Arizona's procurement code" and "unenforceable as a matter of contract law." *Falcone Bros. & Assocs., Inc. v. City of Tucson*, 240 Ariz. 482, ¶¶ 19, 22 (App. 2016). At an administrative hearing, Falcone submitted documentation including a handwritten summary and bills for internet and phone, satellite television service, cell phone service, and other utilities. The City denied the claim. Falcone then sued, alleging breach of contract for failure to compensate Falcone for delays and extra work performed.[2] Falcone requested compensation consistent with the statutory notice of claim it had submitted to the City. The City counterclaimed, alleging breach of contract due to uncorrected or disputed "deficiencies" and failure to complete the Project within the contract time.

¶7 The City moved for summary judgment, which the trial court denied. After a seven-day trial, the jury returned a verdict of $1,049,000 for Falcone and $164,000 for the City on its counterclaim.[3] Additionally, the court granted Falcone attorney fees and costs and pre- and post-judgment interest under A.R.S. §§ 34-221(J) and 44-1201(B). The City moved for a new trial and a renewed motion for a judgment as a matter of law, which the court denied.

¶8 This appeal followed. We have jurisdiction over the appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (5)(a).

Summary Judgment

¶9 The City argues Falcone "waived its claims for delay and extra work" because it "did not satisfy the Contract's notice-and-document requirements," and the trial court erred in denying its motion for summary judgment on this issue.[4] As Falcone correctly points out, denials of

[2]Pursuant to a stipulation, the trial court dismissed Falcone's claim for unjust enrichment during trial.

[3] Falcone did not appeal the judgment regarding the City's counterclaim. Accordingly, it is not before us to review.

[4]In an appeal from a final judgment, this court shall "review any intermediate orders involving the merits of the action and necessarily

summary judgment generally cannot be appealed. *See Desert Palm Surgical Grp. v. Petta*, 236 Ariz. 568, ¶ 21 (App. 2015). "But if the denial was grounded on a purely legal issue that affected the final judgment, we can review it like any other interim order." *Ryan v. Napier*, 245 Ariz. 54, ¶ 14 (2018); *see also* A.R.S. § 12-2102(A) (authorizing review of "any intermediate orders involving the merits of the action and necessarily affecting the judgment").

¶10 Here, the trial court relied on the parties' assertions at the hearing on the City's motion to conclude that "[b]oth parties have witnesses" to testify regarding strict compliance with the notice-and-documentation requirements and that "neither party has submitted all of the actual relevant documents."[5] The court specifically asked Falcone multiple times whether there was "evidence out . . . there that [it] will be able to show [the court], to show the jury . . . Falcone produced the sort of records that [PAG §§] 104 and 105 contemplate." At first, Falcone conceded that "outside of what is in [the] notice and claim that was prepared, [it] ha[d] not disclosed any additional records," but that it would provide "testimonial evidence." Falcone later stated it would be able to present "the documents that [it] submitted to the City that support[]" its claim.

¶11 The trial court's ruling turned on its assessment of which party bore the burden of proof regarding compliance with the contractual requirements—a purely legal issue. The interpretation of a contract is a question of law we review de novo. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9 (App. 2009). We also review a denial of a motion for summary

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affecting the judgment, and all orders and rulings assigned as error." A.R.S. § 12-2102(A); *see also Rourk v. State*, 170 Ariz. 6, 12 (App. 1991).

[5]Falcone stated at oral argument that the City had asserted "the real issue [at] summary judgment" was lack of notice, not lack of documentation. In its motion for summary judgment, the City referred to §§ 105-18 and 108-8 of the PAG, relating to the specific documentation requirements, and asserted that Falcone had been "unable to produce documentation to support Falcone's claims." The City specifically argued that "Falcone waived any claim for additional compensation by failing to properly provide notice and *failing to properly document* its claims." (Emphasis added.) The lack of documentation was therefore directly at issue, in addition to the lack of strict compliance with the notice requirements.

judgment de novo. *See Ryan*, 245 Ariz. 54, ¶¶ 14-15. In considering "the merits of an order denying summary judgment [we will] direct entry of summary judgment if there are no issues of material fact and the movant is entitled to judgment as a matter of law." *Kaufmann v. M & S Unlimited, L.L.C.*, 211 Ariz. 314, ¶ 5 (App. 2005).

¶12 In its motion for summary judgment, the City argued that "Falcone [had] waived any claim for additional compensation by failing to properly provide notice and failing to properly document its claims" and that it had been prejudiced because without proper documentation, the City could not verify Falcone's claims. The City submitted an affidavit from its contract administrator, who stated, "Falcone frequently failed to . . . provide the supporting documentation and information required by the Contract." The City also submitted portions of the PAG, expressly incorporated as part of the contract, that require contractors to "keep and maintain complete and specific records" and provide, "in writing, a projection of the contractor's additional costs," "the nature and the specific cost ascribed to each element of the claim or for each period of time involved, the basis used in ascribing each such element of cost or for each such period of time, and all other pertinent factual data," and for delay claims, "the contract's revised schedule and all other pertinent data." Additionally, the administrative hearing transcript, attached as an exhibit to the City's statement of facts in support of its motion, included testimony explaining the City had requested that Falcone provide additional documents because the City could not substantiate the claims because of insufficient documentation.

¶13 Falcone responded that it had "provided the City with verbal and written notice of all issues and problems" and that the City was only alleging that it failed to comply with the requirement to give written notice within three days. Further, Falcone argued the City was "simply ignor[ing] the realities of what [had] actually t[a]k[en] place while this Project was being undertaken." It submitted an affidavit from Gaetano "Tom" Falcone, an owner of Falcone,[6] with exhibits including some letters regarding construction disputes, some minutes from meetings during the Project, in which the parties discussed construction issues and in some cases the City requested additional information. Falcone did not attach any invoices, receipts, or bills. After oral argument, the trial court denied the City's motion, reasoning that "both parties have witnesses who state their belief

[6]We use "Falcone" to refer to the party and company and "Tom Falcone" to refer to the person.

as to whether [Falcone] complied with the PAGs, but neither party has submitted all of the actual relevant documents that were given to the City of Tucson by [Falcone] and explained why they were or were not compliant."

¶14 A trial court shall grant summary judgment when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). A party opposing a properly supported summary judgment motion cannot rest on "mere allegations or denials" in its response. Ariz. R. Civ. P. 56(e); *see Schwab v. Ames Constr.*, 207 Ariz. 56, ¶ 15 (App. 2004). At summary judgment, the moving party "must cite the specific part of the record where support for each fact may be found," Ariz. R. Civ. P. 56(c)(3)(A), and parties may only rely on affidavits that "set out facts that would be admissible in evidence," Ariz. R. Civ. P. 56(c)(5). The moving party "must come forward with evidence it believes demonstrates the absence of a genuine issue of material fact and must explain why summary judgment should be entered in its favor." *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 14 (App. 2008).

¶15 When the ultimate burden of proof for a claim or defense rests on the non-moving party at trial, the moving party can meet its burden of production without presenting evidence disproving the non-moving party's claim or defense. *See id.* ¶ 22. It may instead "merely point out by specific reference to the relevant discovery that no evidence existed to support an essential element of the claim." *Orme Sch. v. Reeves*, 166 Ariz. 301, 310 (1990). "Conclusory statements will not suffice, but the movant need not affirmatively establish the negative of the element." *Id.* If the moving party meets this initial burden of production, the burden shifts to the non-moving party, who "must call the court's attention to evidence overlooked or ignored by the moving party or must explain why the motion should otherwise be denied." *Thruston*, 218 Ariz. 112, ¶ 26; *see also Orme Sch.*, 166 Ariz. at 310 ("If the party with the burden of proof on the claim or defense cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted.").

Burden for Notice and Documentation

¶16 The City contends the trial court erred by permitting Falcone's claim to proceed to trial when Falcone had failed to comply with the contract's notice-and-documentation requirements. It argues that the court "accepted mere avowals that Tom Falcone would testify to these matters" without requiring Falcone to demonstrate that there was a

genuine dispute of material fact by producing the underlying documentation to support its claim at summary judgment. Falcone argues that the City had the ultimate burden of proof of showing failure to comply with the notice-and-documentation requirements in the contract given that the City was asserting Falcone had waived its claims.

¶17 Under a strict compliance requirement, once the City pointed to specific discovery indicating a lack of strict compliance, Falcone would bear the burden of establishing it had strictly complied with the contract's notice-and-documentation requirements, as it would be the party in the best position to do so. *Cf. Thomas v. Montelucia Villas, LLC*, 232 Ariz. 92, ¶ 17 (2013) (deciding that party with burden is "party in the best position to marshal the evidence"). Conversely, claims for compensation will not be barred by strict application of notice requirements "where the government is aware of the changed conditions and of the claim for compensation and where no prejudice is shown by the lack of formal notice." *New Pueblo Constructors, Inc. v. State*, 144 Ariz. 95, 101 (1985) ("The decision will go the other way when prejudice is shown."); *see also R.P. Wallace, Inc. v. United States*, 63 Fed. Cl. 402, 417 (2004) (citing cases holding that notice provisions should "not be applied too technically and illiberally where the Government is quite aware of the operative facts");[7] *cf. Pinal County v. Fuller*, 245 Ariz. 337, ¶¶ 15-16 (App. 2018) (distinguishing strict compliance from statutory notice of claim and from substantial compliance standard in *New Pueblo Constructors*). The contractor bears the burden of establishing actual notice, while the agency bears the burden of showing prejudice. *See George Sollitt Constr. Co. v. United States*, 64 Fed. Cl. 229, 291-92 (2005). Because the purpose of the documentation requirement is consistent with the purpose of the notice requirement—allowing the agencies to consider alternatives and permitting early thorough investigation of claims—the same principles apply in both contexts. *Cf. New Pueblo Constructors*, 144 Ariz. at 100-01 (stating purpose of notice requirement).

¶18 As to which party should bear the burden, Falcone contends the trial court was correct to deny the City's motion for summary judgment as ordinarily, waiver is an affirmative defense, and the City would bear the burden of proof as the party alleging Falcone contractually waived its claims. *See Russo v. Barger*, 239 Ariz. 100, ¶ 12 (App. 2016). While that is the

[7]We look to the Federal Court of Claims for guidance in public contract law. *See Richard E. Lambert, Ltd. v. City of Tucson Dep't of Procurement*, 223 Ariz. 184, ¶ 11 (App. 2009) (citing *New Pueblo Constructors*, 144 Ariz. at 101).

general rule, when considering a contractual waiver based on the notice-and-documentation requirements in a governmental construction contract, the ultimate burden is as outlined above. Accordingly, once the City satisfied its burden of showing Falcone had failed to provide necessary documentation, the court should have tasked Falcone with establishing that it had complied with the contract by producing the documentation to support its claim or that the City had received actual notice of both the changed conditions and Falcone's claims, and tasked the City with showing it had been prejudiced by the lack of strict compliance. *See George Sollitt Constr.*, 64 Fed. Cl. at 291-92; *Orme Sch.*, 166 Ariz. at 310; *cf. Thomas*, 232 Ariz. 92, ¶ 17.

¶19 The City submitted a declaration and testimony from the administrative hearing, which explained that Falcone had failed to provide proper documentation to support its claims, including Falcone's statutory notice of claim. The City therefore "point[ed] out by specific reference to the relevant discovery that no evidence existed to support" compliance with the notice-and-documentation requirements of the contract. *See Thruston*, 218 Ariz. 112, ¶¶ 21, 26 (quoting *Orme Sch.*, 166 Ariz. at 310). It was then Falcone's burden to "call the court's attention to evidence overlooked or ignored by the moving party or . . . explain why the motion should otherwise be denied." *See Thruston*, 218 Ariz. 112, ¶ 26; *George Sollitt Constr.*, 64 Fed. Cl. at 291-92; *Orme Sch.*, 166 Ariz. at 310; *cf. Thomas*, 232 Ariz. 92, ¶ 17. It filed an affidavit from Tom Falcone and exhibits explaining that it had informed the City both verbally and in writing of issues relating to the project and reasserted them "constantly and consistently" at "weekly meetings" with the City and on a "daily basis" with the City's engineers. But Falcone did not assert that it had strictly complied with the contract's notice-and-documentation requirements; particularly lacking was any indication that it provided documentation showing its costs within sixty days of incurring the claimed costs.[8]

¶20 At oral argument on summary judgment, the trial court acknowledged that it "didn't see any" evidence "in the record" to verify Falcone's compliance with the notice-and-documentation requirements. Falcone stated that it did not "have any additional records outside the

[8] Falcone does not argue on appeal that it had satisfied the notice-and-documentation requirements. Failure to address a debatable issue raised in an opening brief may result in confession of error. *See* Ariz. R. Civ. App. P. 13(a)(7)(A), (b)(1); *Hecla Mining Co. v. Indus. Comm'n*, 119 Ariz. 313, 314 (App. 1978).

letters and the meeting minutes that everybody was present at and [its] notice of claim." However, Falcone assured the court it would be able to show the jury that "Falcone is asking for this much . . . money for this particular project and here are the documents that [it] submitted to the City that supports that [request]."

¶21 The trial court accepted Falcone's bare assertions that it would "have witnesses who state their belief as to whether Falcone . . . [had] complied with" the notice-and-documentation requirements, the statutory notice of claim, and Falcone's affidavit, which does not assert strict compliance with the contract, as sufficient to find a genuine dispute over material facts. It quoted Falcone's affidavit, which stated that Tom Falcone had "personally informed" the City of issues and problems relating to the construction and had followed up "with detailed written correspondence outlining the specific problem or issue encountered." Additionally, it relied on Falcone's assertions at oral argument, stating that "the [statutory] Notice of Claim and its attachments, including two spread sheets which not only ostensibly detail Falcone['s] . . . claims, but also refer to numerous other supporting documents." Neither the evidence provided nor Falcone's assertions at oral argument about what it would produce at trial met its burden at the summary judgment stage: to demonstrate strict compliance with the requirement to provide documents under the contract—timely or otherwise—such as a projection of additional costs, "the nature and the specific cost ascribed to each element of the claim or for each period of time involved, the basis used in ascribing each such element of cost or for each such period of time, and all other pertinent factual data." Falcone thus failed to establish a factual dispute as to strict compliance. *See* Ariz. R. Civ. P. 56(c)(3)(A), (B); *Florez v. Sargeant*, 185 Ariz. 521, 526 (1996) (self-serving assertions not supported by factual record insufficient to defeat summary judgment); *Orme Sch.*, 166 Ariz. at 310; *Schwab*, 207 Ariz. 56, ¶ 15. The court apparently incorrectly accepted Falcone's assertion that it would produce the documentation to support its claim at trial and ended its inquiry there. Our inquiry turns to whether the City established that it was prejudiced by Falcone's failure to strictly comply.

Actual Notice and Prejudice

¶22 Although Falcone provided some evidence that the City had received actual notice of its general claim for additional compensation based on the differing conditions encountered during construction, the City was still entitled to summary judgment if it showed there was no genuine dispute that it had been prejudiced by lack of compliance with the express documentation requirements of the contract. *See George Sollitt Constr.*, 64

Fed. Cl. at 291-92 (placing ultimate burden of proof regarding actual notice on contractor and on government regarding prejudice). Notice-and-documentation requirements "permit[] early investigation of the validity of a claim when the evidence is still available and the memories of witnesses have not faded." *New Pueblo Constructors*, 144 Ariz. at 100-01. They also "allow[] the agency to compile records of the contractor's costs." *Id.* Additionally, they enable agencies to evaluate alternative methods that may cut costs. *Id.*

¶23 In this case, the City presented evidence that, after conducting its own investigation, it had been unable to compile records to support Falcone's claims and had paid or offered to pay Falcone for the costs it could substantiate. Falcone merely directed the trial court to its statutory notice of claim, which used summary charts instead of original documents to substantiate the costs, and meeting minutes and letters to satisfy the notice requirements. It did not and could not claim that it had provided the City with its "costs resulting from the claim," which clearly documented labor or materials affected or "the nature and the specific cost ascribed to each element of the claim" as the summary chart indicated the most recent correspondence had been approximately ninety days prior. Indeed, the court noted that it "didn't see any" of this documentation "in the record" to prove damages, such as "the billing records, the man-hours, [and] the equipment." Falcone did not assert that it had provided this information to the City in either its statement of facts or Tom Falcone's affidavit. At most, Falcone denied the City's statement of fact that it had not provided this information and asserted at oral argument on the motion that it would provide "documents that [it] submitted to the City that support[] that [request]."

¶24 At oral argument before this court, Falcone argued that, in *New Pueblo Constructors*, "under similar circumstances," our supreme court found no prejudice had been shown. We disagree that the cases are similar. In *New Pueblo Constructors*, the documentation was "impractical" to collect and provide after the project area experienced a "hundred year[]" storm followed by "the biggest flood and runoff . . . for 43 years" where "heavy construction equipment sank in mudholes fed by groundwater." *See* 144 Ariz. at 99, 101. The court noted that the government had even sought a declaration that "the Santa Cruz River Basin, which included the project site, was a major disaster area." *Id.* Here, Falcone conceded that it had been able to document other claims for additional compensation during the Project and gave little to no explanation as to why it would have been "impractical" to provide documentation to support the disputed claims.

¶25 Falcone also argued at oral argument that the notice issue is separate from Falcone's ability to substantiate its damages claim at trial. On this point, we agree. The issue is not whether, at trial, Falcone would be able to present the documentation to substantiate its claims but is instead whether, at the summary judgment stage, the City had been prejudiced by Falcone's failure to comply with the documentation requirements of the contract. Had Falcone provided the necessary documentation when the City requested it, litigation, much less litigation culminating in a jury trial, could have been avoided entirely.

¶26 The City established that it had been prejudiced by the lack of proper documentation as expressly required by the contract. Falcone did not show a genuine issue of material fact sufficient to prevent summary judgment. *See* Ariz. R. Civ. P. 56(c)(3)(A), (B); *Florez*, 185 Ariz. at 526; *Schwab*, 207 Ariz. 56, ¶ 15.

Waiver

¶27 Falcone further argues that summary judgment was not warranted as the City had waived the notice-and-documentation requirements because: (1) it had issued time extensions absent formal requests and (2) it had not terminated the contract despite Falcone's failure to provide monthly project schedules, as required in the contract. We disagree.

¶28 The City did not waive the notice-and-documentation requirements under the contract through these actions. *Cf. Fuller*, 245 Ariz. 337, ¶¶ 12, 19-20 (considering compliance with statutory notice requirements, purpose of which is to allow government to investigate, assess, and possibly settle claims). Otherwise, the burden of ensuring compliance would be squarely on the City, thereby "improperly shifting the burden to evaluate and ensure compliance with [notice] requirements from the claimant to the government." *See id.* ¶ 19. Additionally, it was undisputed that the City did request that Falcone submit documents to support its claim for additional compensation. Therefore, the City's offers for time extensions or to settle the claim for other amounts did not waive the notice-and-documentation requirements. *See Kaufmann*, 211 Ariz. 314, ¶ 5.

¶29 Additionally, the contract states, "A waiver on the part of the [City] of any breach of any part of the contract shall not be held to be a waiver of any other or subsequent breach." Even if the City had waived strict compliance with some requirements or by not terminating the

contract, it does not follow that it had waived all notice-and-documentation requirements for compensable delay. *Cf. Am. Cont'l Life Ins. v. Rainer Constr. Co.*, 125 Ariz. 53, 55 (1980) ("The waiver of one right under a contract does not necessarily waive other rights under the contract."). Again, there are no disputed material facts and, as a matter of law, the City did not waive the notice-and-documentation requirements by potentially waiving other contractual obligations. *See Kaufmann*, 211 Ariz. 314, ¶ 5.

¶30 Accordingly, the trial court erred as a matter of law in denying the City's motion for summary judgment. *See Ryan*, 245 Ariz. 54, ¶¶ 14-15. Denial of summary judgment would have been appropriate if Falcone had shown that it had complied with the notice-and-documentation requirements under the contract by producing the documents it purportedly had given the City to support its claim or that it had given actual notice of its claim to the City and the City had not shown prejudice. The court erred by accepting Falcone's assertion that it would produce such documents at trial. Further, there was no genuine issue of material fact regarding prejudice to the City in not being able to timely assess Falcone's claim. Finally, undisputed evidence demonstrated that the City had not waived these requirements.

Attorney Fees and Costs

¶31 The City requests its attorney fees pursuant to A.R.S. § 12-341.01(A) and Rule 21(a), Ariz. R. Civ. App. P., and Falcone requests attorney fees and costs pursuant to A.R.S. §§ 12-331, 12-341.01, and Rule 21(a). In our discretion, we deny both requests for attorney fees. However, as the successful party on appeal, the City is entitled to its costs incurred on appeal contingent on its compliance with Rule 21(b). *See* § 12-341.

Disposition

¶32 For the reasons stated above, we vacate the trial court's judgment as to Falcone's claim and remand for further proceedings consistent with this decision.