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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BEGL CONSTRUCTION COMPANY, INC., et al., Plaintiffs, Cross-defendants, and Appellants, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant, Cross-complainant and Appellant; STAR INSURANCE COMPANY, Cross-defendant and Respondent.	B181933 (Los Angeles County Super. Ct. No. BC293970)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

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* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of parts II. III, IV, V, VI, VII, VIII, IX, X, XI and XII of the Discussion.

Bergman & Dacey, Inc., Gregory M. Bergman, John P. Dacey, and John V. Tamborelli for Defendant, Cross-complainant, and Appellant.

Mark E. Baker; Bistline & Cohoon and Ted H. Luymes for Plaintiffs, Cross-defendants, and Appellants.

Mark E. Baker for Cross-defendant and Respondent.

This case arises from a public works construction contract entered into by appellant Los Angeles Unified School District (the District) and cross-appellant BEGL Construction Company, Inc. (BEGL).

The District argues the trial court abused its discretion in admitting evidence of BEGL's lost profits due to impaired bonding capacity. In the published portion of this opinion, we reject that argument. In the unpublished portion of this opinion, we consider the District's further contentions that: the court erred in admitting certain expert testimony regarding lost profits, evidence of extra work that was not the subject of written change orders, and testimony regarding damages that were the subject of stop notices; BEGL's claim for earned project costs is not supported by evidence, and is an attempt to recover money already encompassed in BEGL's request for delay damages; the court erred in denying its new trial motion on the False Claims Act cause of action; the court erred in denying its motion to vacate the judgment; the court improperly granted Star Insurance Company's (Star) motion for nonsuit; and it should have been awarded attorney fees under Public Contract Code section 7107. We also consider BEGL's arguments on cross-appeal that: the contractual liquidated damages provision limiting delay damages to $250 per day is unconscionable; the court erred in failing to award sanctions and prejudgment interest; and BEGL should have been awarded attorney fees, costs and penalty interest under Public Contract Code section 7107.

We shall affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

In August 2000, the District awarded BEGL a public works construction contract for a seismic retrofit of the Science Building at its Los Angeles Center for Enriched Studies (LACES), and for the demolition and reconstruction of the LACES West Arcade. Because the project was a public work, BEGL was required to post a performance and payment bond. After BEGL started the project, the West Arcade work was removed from the scope of the contract.

The District terminated BEGL in January 2002. It then filed a bond claim with BEGL's surety, Fidelity & Deposit Company of Maryland (Fidelity), for completion of the LACES project. The District and Fidelity entered into a takeover agreement, and Fidelity hired another contractor to finish the project. Fidelity then sued BEGL. That case was later settled.

In April 2003, BEGL filed an action against the District for breach of contract and breach of warranty of plans and specifications. BEGL alleged the District breached the contract between them by: "a. Failing to issue a notice to proceed in a timely manner; [¶] b. Supplying inadequate and faulty plans and specifications; [¶] c. Failing to supply necessary design information in a reasonable and timely manner; [¶] d. Failing to provide sufficient qualified representatives to provide for timely resolution of design and other technical issues; [¶] e. Failing to cooperate with plaintiff to allow for the efficient and timely completion of the project; [¶] f. Frustrating, obstructing, hindering and interfering with plaintiff's performance of the project; [¶] g. Demanding that plaintiff perform work which was not an agreed part of plaintiff's scope of work; [¶] h. Failing to disclose pertinent information in defendants' possession and control, when such information was relevant and necessary for the proper and timely completion of the project; [¶] i. Failing to process requests for information and clarification in an efficient and timely manner; [¶] j. Failing to process change order requests in a timely manner[;] [¶] k. Failing to grant plaintiff extra time to complete the project due to delays . . . ; [¶] l. Failing to pay plaintiff sums due under the contract, extra work and changes; [¶] m. Failing to pay plaintiff sums due for delays, disruptions, and impacts in the work; [¶]

n. Failing to pay plaintiff interest and penalties under Public Contract Code section § 7107, and like statutes, for the LAUSD's failure to make payments promptly; and [¶] o. Unlawfully terminating the contract."

In an amended cross-complaint, the District claimed that BEGL had breached the contract: "Within the last four (4) years, [BEGL] breached the Contract with the District by, without limitation, failing to perform work on the Project pursuant to the terms and conditions of the Contract, failing to timely complete its work on the Project, failing to correct defective and/or nonconforming work, failing to perform work per plans and specifications, failing to provide adequate labor and/or supervision, failing to complete the project on time, and failing to develop and maintain an appropriate schedule." The District also alleged that BEGL and its president, Mehr Z. Beglari, violated the False Claims Act. (Gov. Code, §§ 12650-12656.) Finally, the District sought damages from Star, the surety that issued a contractor's license bond to BEGL, for BEGL's alleged violation of the Business and Professions Code.

At the close of evidence, the trial court granted nonsuit on the District's claim against Star. A jury found that both BEGL and the District had breached the contract, and awarded BEGL $954,197 in damages and the District $1 in damages. The jury found that the District did not breach the warranty of plans and specifications. It also found that BEGL and Beglari did not violate the False Claims Act. After several post-trial motions by both parties, the District filed a timely notice of appeal. BEGL filed a timely cross-appeal.

DISCUSSION

I

At trial, BEGL argued that as a result of the District's breach of contract, its bonding capacity was diminished, causing BEGL to lose $506,000 in profits. After beginning the LACES project, which was bonded by Fidelity, BEGL began doing business with a new surety, CNA. BEGL then moved from CNA to INSCO/DICO. In 2002, BEGL's bonding capacity was $3 million to $4 million per job, and $6 million to

$7 million aggregate for all work in progress. INSCO/DICO decided to stop bonding BEGL in November 2002 after it learned of the dispute between Fidelity and BEGL regarding the LACES project. BEGL's bonding agent tried to place BEGL with another surety, but he was unsuccessful. Sureties would not bond BEGL because of the current dispute between Fidelity and BEGL. Eventually, BEGL was bonded for $500,000 per job, and $500,000 aggregate.

Consistent with its position before and during trial, the District argues the trial court abused its discretion in admitting evidence of BEGL's lost profits. The District's primary contention is that because it was not foreseeable at the time of contracting that BEGL would lose profits as a result of the District's breach, the damages are improper as a matter of law, and thus the evidence should not have been admitted.

The basic law on secondary or derivative damages from breach of contract was established over 150 years ago in the celebrated English precedent, *Hadley v. Baxendale* (1854) 156 Eng.Rep. 145. That decision has been followed and applied in California through Civil Code section 3300 and a series of cases, beginning with *Hunt Bros. Co. v. San Lorenzo etc. Co*. (1906) 150 Cal. 51, 56.

Our Supreme Court's most recent and definitive application of this law in the context of a construction contract is in *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 973, 975 (*Lewis Jorge*).[1] In that case, the court held that loss of potential profits on unearned future construction projects due to impaired bonding capacity was not recoverable as general damages because "[t]he District's termination of the school contract did not directly or necessarily cause Lewis Jorge's loss of potential profits on future contracts. Such loss resulted from the decision of CNA, Lewis Jorge's surety at the time of the breach, to cease bonding Lewis Jorge."

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[1] *Lewis Jorge* was decided about a month after the jury verdict in this case. BEGL argues that to the extent *Lewis Jorge* establishes new standards regarding lost profits due to diminished bonding capacity, it would be "fundamentally unfair" to apply the case retroactively. Because *Lewis Jorge* only applies existing law, we find no reason not to apply the case here.

(*Id*. at p. 973.) But the court did not foreclose the availability of lost profits as secondary or special damages. "Special damages are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of contracting (an objective test)." (*Id*. at pp. 968-969.)

Under the facts in *Lewis Jorge*, the court held that loss of potential profits on future unearned construction projects was not recoverable as special damages because the "[e]vidence at trial established that the owner's terminating a contract might or might not cause the contractor's surety to reduce its bonding capacity. As the District pointed out at oral argument, when it signed the contract it did not know what Lewis Jorge's balance sheet showed or what criteria Lewis Jorge's surety ordinarily used to evaluate a contractor's bonding limits. Absent such knowledge, the profits Lewis Jorge claimed it would have made on future, unawarded contracts were not actually foreseen nor reasonably foreseeable." (*Lewis Jorge*, *supra*, 34 Cal.4th at p. 977.)

Unlike the showing in *Lewis Jorge*, in this case there is sufficient evidence of foreseeability. BEGL's bonding agent, Matthew Welty, stated that "[w]henever there's a dispute between a surety company, whether there's a lawsuit between—where a contractor is suing a bonding company or vice versa, no other surety company wants to do business with that contractor until that is resolved."

District witness Jordan S. Rosenfeld, a certified public accountant and member of the National Bond Claims Association, stated that "when the surety has a dispute with the contractor, they typically don't get bonded." In explaining several factors contributing to BEGL's inability to obtain bonding, Rosenfeld went on to say that "F & D had to step in as the surety for [BEGL] on this project and finish the job. They had incurred costs and [were] now looking to [BEGL] and the personal indemnitors to repay them. Once a company has an outstanding issue like that, sureties no longer will provide bonds until satisfaction is accomplished."

Another District witness, Gregg Okura, the vice-president of underwriting at INSCO/DICO, testified that it was "the general policy" in "the bonding industry that as

soon as a bond company learns of a dispute between a contractor and a bond company, they don't write further bonds for that contractor."

During a meeting regarding the LACES project, the District's construction manager "stated that if BEGL decides to abandon the job, [the District] would contact their bonding company to inform them of the situation. [He] stated that the District is not in the *business of breaking contractors* but if BEGL decides not [to] comply with the plans and specifications, the District has the right under FORM 82.39, to finish the job by whatever means necessary." (Italics added.)

Although the District may not have known what BEGL's balance sheet showed, or what criteria BEGL's surety used to determine bonding capacity, the evidence established an industry custom that where there is a dispute between a surety and a contractor, the contractor will not be bonded so long as the dispute remains unresolved. Unlike the equivocal showing in *Lewis Jorge*, where the "owner's terminating a contract *might or might not* cause the contractor's surety to reduce its bonding capacity," in this case, the evidence of industry custom was unequivocal. (Cf. *Lewis Jorge*, *supra*, 34 Cal.4th at p. 977, italics added.) The statement of the District's construction manager about "breaking" contractors demonstrates that the District was aware of the industry custom, and knew that terminating BEGL and filing a claim with Fidelity could do just that.

Because the evidence was sufficient for a trier of fact to reasonably find that BEGL's lost profits due to impaired bonding capacity resulting from the District's breach, were foreseeable to the District at the time of contracting, the court did not abuse its discretion in admitting evidence of lost profits. The jury was properly instructed that in order to award such damages, it had to first find forseeability: "[BEGL] also claims damages for loss of future profits and damage to its bonding capacity. To recover for harm, BEGL must prove that when the parties made the contract [the District] knew or reasonably should have known of the special circumstances leading to such harm." (Italics omitted.)

The District argues that because there was no evidence in the record "as to any project that BEGL would likely have won as the low bidder or any sum flowing from any

project," the lost profits damages are speculative and uncertain. "Lost anticipated profits cannot be recovered if it is uncertain whether any profit would have been derived at all from the proposed undertaking. But lost prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent. [Citation.]" (*S. C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 536 (*S. C. Anderson*).) "'[M]athematical precision'" is not required. (*Lewis Jorge*, *supra*, 34 Cal.4th at p. 975.) Although lost profits damages due to diminished bonding capacity are not inherently speculative, "such damages are frequently denied as too speculative." (*Lewis Jorge*, *supra*, 34 Cal.4th at p. 975; see also *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 489 (*Arntz*) ["lost profit from impaired bonding capacity . . . is not inherently speculative"].) "These cases bar recovery of profits lost on future contracts not because the amount of the lost profits is speculative or remote, but because their occurrence is uncertain." (*Lewis Jorge*, *supra*, 34 Cal.4th at p. 976.)

Although the *Lewis Jorge* court noted that the contractor's purported lost profits were uncertain and speculative, the court's basis for reversing the lost profits damage award was lack of forseeability. (*Lewis Jorge*, *supra*, 34 Cal.4th at p. 977.) "No court has adopted [the] position that damages for lost bonding capacity can be established only with proof of 'specific, identified construction projects that the contractor had prepared bids on, but was precluded from submitting because of an inability to obtain bid bonds.'" (*Arntz*, *supra*, 47 Cal.App.4th at p. 489.)

While BEGL did not present evidence regarding specific projects or sums lost as a result of its impaired bonding capacity, it provided other evidence of lost profits. BEGL was started in 1987, and it began performing public works projects in 1995. Beglari testified that BEGL was bidding jobs until INSCO/DICO was notified about the dispute between Fidelity and BEGL in November 2002. Once that occurred, BEGL could no longer obtain bonding for public works projects.

BEGL's expert, Ashton Golbar, a certified public accountant, testified that from 1997 through 2001, BEGL had an average annual income of $433,000. BEGL bid on

approximately 15 jobs while bonded by INSCO/DICO, and was awarded four or five of them. After reviewing all of BEGL's financial information from 1997 to the time of trial, Golbar testified that BEGL lost $506,000 in profits from November 2002 until the time of trial, November 2004, as a result of the loss of bonding capacity.

"Requiring [a contractor] to prepare detailed bids it could never submit would compel a senseless waste of time and provide no surer safeguard against speculative damages." (*Arntz, supra,* 47 Cal.App.4th at p. 489.) Because the District has not provided any other reason why the lost profits damages in this case are speculative or uncertain, we affirm the award.

II

The District argues the trial court abused its discretion in permitting Golbar to testify to matters not disclosed during his deposition. In particular, the District claims that Golbar's testimony regarding 2003 and 2004 should have been excluded because Golbar "had not done any evaluation or developed any opinion of lost net profits for the years of 2003 or 2004 at all and/or at best until after his deposition was taken and no notice provided to the District." The District also contends that because Golbar did not testify to net profits, the "judgment must be reduced accordingly."

In its opening brief, the District states: "[Golbar's] initial testimony that BEGL had lost $506,000 based on the income being received by Mr. Beglari was stricken from the record. . . . [¶] Thereafter, Mr. Golbar never provided any testimony concerning any loss of profits due to loss of bonding capacity for any year for BEGL. . . . [¶] . . . [¶] A further review of the record shows that there was absolutely no evidence of any loss of profits due to diminished bonding capacity." That is not what the record shows. The record reveals the following testimony by Golbar:

"[BEGL's counsel]: What was the scope of your services?

"[Golbar]: I was asked to look at and review the documents with respect to the period prior to that to determine what the loss of income was due to having the bonding capacity taken away from him.

"[BEGL's counsel]: And what documents did you review?

"[Golbar]: I looked at the financial statements from 1997 to date. I looked at personal financial statements. I looked at tax returns, both for business and for personal. I looked at some correspondence. Those are mainly what I looked at.

"[BEGL's counsel]: And did you reach any opinions or conclusions concerning BEGL's profitability from the years 1997 through 2002?

"[Golbar]: Yes.

" . . .

"[BEGL's counsel]: What are those opinions and conclusions?

"[Golbar]: The opinion [is] as follows: Based on review of the documents that I had requested, I'm of the opinion that BEGL Construction lost an amount [of] $506,000 from November 2002 up to today.

"[BEGL's counsel]: Now, what is the figure of $506,000 based on?

"[Golbar]: What I did is I took the financial information from 1997 up through 2001, and I looked at the average income that BEGL Construction was providing Mr. Beglari, and in assessing the amount of income that Mr. Beglari was earning, it was determined by me that the amount was $433,000 on the average annually.

"[BEGL's counsel]: When you say Mr. Beglari, are you speaking of Mr. Beglari personally or his construction company?

"[Golbar]: I'm talking about Mr. Beglari from BEGL Construction.

"[BEGL's counsel]: All right. And so you determined that from 1997 to 2001 there was an average income per year of $433,000?

"[Golbar]: That is correct.

"[The District's counsel]: Your Honor, I move to strike this testimony. The income of Mr. Beglari is not at issue in this case.

"The Court: Sustained. Stricken.

"[BEGL's counsel]: Did you perform a financial analysis of the income of BEGL Construction Company?

"[Golbar]: Yes, I did.

"[BEGL's counsel]: And is the $433,000 figure the income of BEGL Construction Company?

"[Golbar]: Yes, it is."

Golbar testified that BEGL lost $506,000 in lost profits due to diminished bonding capacity. That evidence was not stricken from the record. Instead, the court struck Golbar's testimony regarding Beglari's $433,000 average annual income, which Golbar later clarified was BEGL's income.

The District questions Golbar's conclusion, claiming that it lacked foundation because he did not say he was testifying about *net* profits. As a result, the District argues that Golbar's testimony should have been stricken from the record. When Golbar testified regarding income and profits, he did not state whether he was referring to a gross amount or net amount, and the District did not clarify the point on cross-examination. Golbar testified that he analyzed BEGL's losses in 2003 and 2004. Thus, the District's position is speculative. More importantly, the District did not make these arguments to the trial court, and did not request that the court strike Golbar's testimony on the basis of improper foundation. The claim is therefore forfeited. (See *Howard S. Wright Construction Co. v. BBIC Investors, LLC* (2006) 136 Cal.App.4th 228, 242, fn. 13 ["As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal, out of fairness to both the trial court and the opposing parties"].)

The District argues that Golbar testified to matters outside the scope of his deposition, but it has not made Golbar's deposition part of the record on appeal. Based on a colloquy between the court and the parties' counsel outside of the jury's presence, it appears that in his deposition, Golbar stated that although he was given BEGL's financial documents for 2003, he had not yet performed a formal analysis for that year. Golbar stated that if he became aware of income earned by BEGL in 2003, he would reduce that amount from his lost profits conclusion, and that he intended to render an opinion regarding 2003 at a later date.

Golbar's testimony at trial regarding 2003 is as follows: "In order to determine what the losses were for 2003 and 2004, I looked at 2003 financial information to

determine what sort of income was being earned in BEGL Construction." The trial court denied the District's request to strike this testimony.

On appeal, the District cites *Jones v. Moore* (2000) 80 Cal.App.4th 557 (*Jones*), in which this court upheld a trial court decision to preclude expert testimony: "While plaintiff's expert witness declaration . . . arguably was broad enough to encompass his testifying regarding ways in which defendant breached the standard of care after the further judgment was entered, in his deposition he testified as to certain specific opinions, said those were his only opinions, and if he had others he would notify defense counsel. Under these circumstances, exclusion of testimony going beyond the opinions he expressed during his deposition was justified." (*Id.* at pp. 564-565.)

Unlike the evidence in *Jones*, Golbar's testimony at trial regarding 2003 was consistent with his deposition testimony, which stated that he planned to look at BEGL's 2003 financial information to determine lost profits. Golbar did not offer "'new and unexpected'" testimony. (*Jones*, *supra*, 80 Cal.App.4th at p. 566.) And, unlike *Jones*, where the expert stated that he did not have any other opinions and would notify defense counsel if anything had changed, the District was given notice that Golbar planned to analyze 2003 at a later date. There was nothing "grossly unfair" or "prejudicial" to the District. (*Id.* at p. 565.)

As for 2004, the District has not demonstrated that Golbar's testimony was outside the scope of his deposition as it is unclear what Golbar's deposition revealed or did not reveal regarding 2004. Golbar testified at trial that he was using 2003 information to determine BEGL's income for 2003 and 2004. He stated that although he had been given some information regarding BEGL's 2004 expenses after the deposition, he did *not* analyze 2004 to determine what BEGL's income was that year. We find no abuse of discretion.

III

The District argues the trial court abused its discretion in admitting testimony regarding extra work performed by BEGL that was not approved by the District in a

written change order. We agree that it was error to admit this evidence, but there is no showing that the error affected the verdict.

Public Contract Code section 7105, subdivision (d)(2) provides in part: "Contracts of public agencies, excluding the state, required to be let or awarded on the basis of competitive bids pursuant to any statute may be terminated, amended, or modified only if the termination, amendment, or modification is so provided in the contract or is authorized under provision of law other than this subdivision. The compensation payable, if any, for amendments and modifications shall be determined as provided in the contract." Thus, in a public works construction contract such as this one, changes, amendments and modifications to the contract can be made only if authorized by the contract or another statute. Further, payment for any changes, amendments or modifications is determined by the terms of the contract.

The parties' contract regarding changes in work states that the "District may, at any time prior to Acceptance of Completion, *by written Change Order*, make changes in the work by alteration, addition, deviation, or omission, without making the contract void. The Contractor when notified by the District shall proceed without delay with the changes. The details, workmanship and materials involved in the Change Order shall conform to the original Drawings and Specifications unless specifically provided otherwise by the Change Order. [¶] *The Contractor shall not perform any extra work or make any change except by a written Change Order from the District. No claim for an addition to the contract amount shall be valid unless the work or change is so ordered*." (Italics added.)

"Compliance with contractual provisions for written orders is indispensible in order to recover for alleged extra work. [Citations.] Subordinate field personnel . . . cannot waive the mandatory contract requirement that ordered changes or additions or extras be approved in writing by the [state agency]. [Citations.]" (*Acoustics, Inc. v. Trepte Constr. Co.* (1971) 14 Cal.App.3d 887, 912.) While it is true that a contractual written change order requirement can be waived in special circumstances, we

find no waiver in this case. (See *Weeshoff Constr. Co. v. Los Angeles County Flood Control Dist.* (1979) 88 Cal.App.3d 579.)

BEGL argues the District waived the written change order requirement because, on at least two occasions, its facilities project manager ordered BEGL to perform extra work to expedite the project prior to obtaining a written change order. But BEGL points to no evidence that it performed the work under protest, that change orders were being processed or that it later attempted to obtain written change orders. The contract language clearly states that BEGL "shall not perform any extra work or make any change except by a written Change Order from the District. No claim for an addition to the contract amount shall be valid unless the work or change is so ordered." Thus, it was improper for the court to admit testimony regarding extra work that was not the subject of a written change order from the District.

In requesting damages from the jury, BEGL argued that it was owed $199,304 for work it performed for which it was not paid by the District. BEGL's damages expert, Clarence S. Kurisu, testified that he reviewed the contract, the plans and specifications, correspondence between BEGL and the District, daily inspector's reports, a payment request file, shop drawings, and change order data, including change order proposals and change orders. He then stated that in determining whether there was a "cost impact" on BEGL, he evaluated "various change order proposals by examining the scope of work for the contract and the scope of work for the change, and if there was a difference, I evaluated the entitlement or was BEGL Construction due additional work and compensation for that additional work in either cost or time."

The District argues that the $199,304 in damages claimed by BEGL should be stricken from the judgment because BEGL's expert considered change order proposals, not written change orders, in his evaluation. Kurisu stated that the $199,304 figure included contract work and change order work. He later explained that $43,976 of his estimation of damages was based on change order proposal work, as opposed to written change order and contract work. Thus, if we were to reduce the verdict, it would be by $43,976, not $199,304. But as we shall explain, the verdict need not be reduced at all.

Owens v. Pyeatt (1967) 248 Cal.App.2d 840 is instructive. That case observes: "Where several issues responsive to different theories of law are presented to the jury and the evidence is sufficient to support facts sustaining the verdict under one of those theories, it will be upheld even though the evidence is insufficient to support facts sustaining it under any other theory. [Citations.] On the other hand, if the evidence does not support facts authorizing recovery on any theory, the verdict must be rejected. Where a verdict awarding a lump sum is dependent upon a factual determination in favor of the prevailing party on more than one issue and the evidence is not sufficient to support such a determination as to one of the issues, it must be rejected *in toto* unless the amounts included within the lump sum are clearly separable." (*Id*. at p. 844.)

BEGL requested a total of $1,203,721 in damages: $506,000 in lost profits, $300,000 for the costs of settling its dispute with Fidelity, $199,304 for work performed but unpaid, $73,000 in delay damages, $69,417 for earned project costs, and $56,000 for money owed to its subcontractor, Arrow Concrete Cutting (Arrow). The jury awarded BEGL $954,197 in damages, $249,524 less than requested.

On this record, it is not shown that the jury awarded BEGL damages for extra work performed without written change orders. No special verdict having been requested, the jury returned a general verdict on damages. It had been instructed: "If you find that a public employee or other representative of the District attempted to change, modify, amend or terminate the contract in this case in a manner not expressly provided for in the contract itself, you may not hold the school district liable for unauthorized conduct of such an employee or representative. . . . The compensation payable if any for amendments and modifications shall be determined as provided for in the contract." The jury is presumed to have followed this instruction in reaching its verdict. (See *Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 523 ["Jurors are presumed to have understood instructions and to have correctly applied them to the facts as they find them"].) Further, the District's attorney extensively argued during closing argument that the jury should not award damages for extra work that was not the subject of written change orders.

In light of this, and because the change order proposal work only constitutes $43,976 of BEGL's request for damages, the evidence is sufficient to support the $954,197 verdict under the other theories of damage. There is no basis to reduce the verdict. Nor is it reasonably probable that absent the trial court's error in admitting evidence regarding change order proposal work, the verdict would have been for a lesser amount. (Cf. *O'Hearn v. Hillcrest Gym & Fitness Center, Inc.* (2004) 115 Cal.App.4th 491, 502.)

The District also claims that $56,000 should be stricken from the judgment because there was no written change order regarding Arrow's claim for money owed. BEGL points out that the District did not make this argument at trial. More importantly, however, the District has made no showing that the work done by Arrow was "extra" work not included in the contract. A written change order is not required for contract work.

IV

At trial, the District objected to testimony by BEGL's damages expert, Kurisu, regarding $69,417 in damages claimed by BEGL for earned project costs. The court ruled that Kurisu could testify to the damages, provided that he based his testimony on "some evidence in this case." The District claims that because there is no evidence to support these damages, the "sum must be stricken and/or a new trial ordered."

Kurisu testified that the earned project costs included "field costs of labor, equipment, and materials outside of the [$199,304 for work performed but unpaid], such as the cost of the trailer, the port-a-potties, fax machines, telephones, vehicles, superintendent, et cetera." Earlier in the trial, a segregation of contract costs document was admitted into evidence. It was prepared by the District and includes an itemized list of approved contract costs. Those costs include job site administration, temporary sanitation facilities, storage of furniture and equipment, field offices, construction elevators and a construction hoist. Because the segregation of contract costs document shows that the earned project costs about which Kurisu testified were approved contract costs, there is sufficient evidence to support the damages.

The District argues that these damages would constitute double recovery because they are essentially delay damages. It claims that the earned project costs "are unequivocally time-sensitive costs that would be impacted by delay. In other words, these are costs that were intended to be encompassed by the liquidated damages recovered." BEGL states that "these damages were incurred whether BEGL was delayed or not. They have no correlation to delay; they are damages because BEGL was compelled to pay them, and never received payment for them from the District."

Because neither party cites evidence to support its respective claims, it is unclear whether the $69,417 included project costs for delay days, or whether Kurisu deducted delay days from his analysis. The District's expert, Craig Alan Sorensen, testified that, based on his understanding of Kurisu's testimony, BEGL was requesting double damages. Thus, we presume the jury resolved this factual dispute in coming to its verdict. Further, the jury verdict was $249,524 less than BEGL requested, a sum that may have reflected a rejection of the $69,417 in earned project costs. Because the evidence is sufficient to support the $954,197 verdict under the other theories of damages, and it is not reasonably probable that BEGL would have obtained a lesser verdict absent the alleged error, we affirm the judgment.[2]

V

The District argues the trial court abused its discretion in allowing testimony regarding damages that were the subject of stop notices. The District was served with a stop notice by Estep and Sons Plumbing (E & S) for $11,128.30, and by Arrow for $81,790. E & S was paid in full by Fidelity. Fidelity did not pay Arrow because it believed Arrow's claim had expired by operation of law. The District contends that because it was entitled to withhold $92,918 based on these stop notices, and another $23,229.50 for interest and costs of litigation, "BEGL should have not been allowed to

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[2] Our decision in section III of this opinion does not change the result. Even if the $43,976 for change order proposal work is combined with the $69,417 for earned project costs, the sum of $113,393 still falls below the $249,524 in damages rejected by the jury.

argue this [amount] as an item of damage to the jury." Accordingly, the District asks this court to strike $116,147.50 from the judgment.

At trial, BEGL argued the District owed BEGL $199,304 for work performed but unpaid (it is unclear whether this sum includes money owed to E & S). BEGL also requested $56,000 in damages for money it still owed to Arrow. BEGL argues that the District's stop notice defense for withholding contract funds was no longer valid because Fidelity paid E & S for its stop notice claim, and because Arrow's stop notice claim had expired by operation of law. Civil Code section 3210 provides: "An action against the original contractor and the public entity to enforce payment of the claim stated in the stop notice may be commenced at any time after 10 days from the date of the service of the stop notice upon the public entity and shall be commenced not later than 90 days following the expiration of the period within which stop notices must be filed as provided in [Civil Code s]ection 3184.[3] No such action shall be brought to trial or judgment entered until the expiration of said 90-day period. *No money or bond shall be withheld by reason of any such notice longer than the expiration of such 90-day period unless proceedings be commenced in a proper court within that time by the claimant to enforce his claim, and if such proceedings have not been commenced such notice shall cease to be effective and the moneys or bonds withheld shall be paid or delivered to the contractor or other person to whom they are due*." (Italics added.)

The District argues that because the stop notices were still valid when it entered into the takeover agreement with Fidelity, it no longer had a legal obligation to pay BEGL $116,147.50. The District cites no legal authority for the proposition that once a public entity enters into a takeover agreement with the contractor's surety and tenders the contract balance to the surety, it is released from future legal liability to the contractor.

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[3] Civil Code section 3184 states: "To be effective, any stop notice pursuant to this chapter must be served before the expiration of: [¶] (a) Thirty days after the recording of a notice of completion (sometimes referred to in public works as a notice of acceptance) or notice of cessation, if such notice is recorded. [¶] (b) If no notice of completion or notice of cessation is recorded, 90 days after completion or cessation."

The District had the opportunity to, and did, argue its stop notice defense to the jury. Whether the defense was factually meritorious was a question properly submitted to the jury. The jury was instructed that "[i]t shall be the duty of the public entity upon the receipt of a stop notice to withhold from the original contractor money due or to become due to the contractor in an amount sufficient to answer the claim stated in the stop notice and to provide for the entity's reasonable costs of any litigation thereunder." The court did not abuse its discretion in allowing testimony regarding damages subject to the stop notices.

VI

The District argues the trial court abused its discretion in denying the new trial motion on the False Claims Act cause of action.[4] The False Claims Act provides that any person who "[k]nowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim for payment or approval" shall be liable to the state or political subdivision for treble damages and costs, and may be subject to civil penalties. (Gov. Code, § 12651, subd. (a)(1).) The statute punishes "a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision [who] subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim" in the same manner. (*Id.* at subd. (a)(8).)

The jury found that BEGL and Beglari did not violate the statute. The District argued that because the jury's verdict was contrary to law, the court should grant a new trial in accordance with Code of Civil Procedure section 657, subdivision 6. The court denied the motion, observing that "we don't know what the jury decided . . . . I understand what you believe the evidence to have been, but more so [than] in many jury

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[4] The District filed a separate notice of appeal from the denial of its new trial motion. An order denying a new trial motion is not independently appealable, but may be reviewed on appeal from the underlying judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19.)

trials I've seen, this one was very fact intensive, and the jury did have to do an awful lot of sifting through competing theories, competing testimony, and really, in a very classic sense, had to weigh and decide credibility in this case."

On appeal, the District makes essentially the same arguments it did on the new trial motion. First, it claims that as of April 2002, when BEGL submitted payment request No. 10, Beglari knew that "with respect to change order T-506 (carpet and tile replacement) that was listed as 100% complete, that his company was paid the work . . . and that as of that time the work was never done." Thus, the District argues that BEGL and Beglari knowingly submitted a false claim. The District also contends that BEGL and Beglari knowingly submitted a false claim when BEGL billed the District for work on air conditioning, epoxy dowels, and fire sprinklers, even though it knew, no later than September 2003, that the work had not been performed.

Beglari testified that prior to submitting a payment request for change order No. T-506, he reviewed the request with Alexander Weston, the District's construction inspector. Change order No. T-506 included eight different work orders, including orders for carpet and tile replacement work. Weston wrote "100% Complete" next to change order No. T-506. Although the other work orders in change order No. T-506 were completed, the tile and carpet replacement work was not. Beglari explained that billing the District for the tile and carpet replacement work was an "honest mistake" that everyone overlooked, and that although he knew the work had not been performed, he did not "relate [the tile and carpet replacement work] to that T-506, No." Because there was substantial evidence for a reasonable jury to conclude that BEGL and Beglari did not *knowingly*[5] submit a false claim for the tile and carpet replacement, we will not disturb the jury's verdict on this basis.

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[5] "'Knowing' and 'knowingly' mean that a person, with respect to information, does any of the following: [¶] (A) Has actual knowledge of the information. [¶] (B) Acts in deliberate ignorance of the truth or falsity of the information. [¶] (C) Acts in reckless disregard of the truth or falsity of the information." (Gov. Code, § 12650, subd. (b)(2).)

As for the work itself, the District argues only that after litigation began, one of BEGL's experts became aware that the work on these items was never performed. The District points to no evidence that BEGL or Beglari knowingly submitted a false claim for these items. In fact, Beglari testified to the contrary. He stated that neither he nor BEGL intended to overbill the District, and that he did not become aware of billing errors until after litigation had begun.

Finally, the District contends that BEGL and Beglari are liable under the False Claims Act because they became aware of the erroneous claim for carpet and tile replacement, but did not notify the District of the error. Although the District states that "[i]t is uncontroverted BEGL/Mr. Beglari chose to not disclose the false claim after discovery of a claimed inadvertent submission," it provides no citation for this proposition. Nor does it cite evidence in the record that indicates BEGL or Beglari failed to disclose the billing error to the District once they became aware of it, or evidence that if they did disclose the error, their doing so was not within a "reasonable time after discovery." (Gov. Code, § 12651, subd. (a)(8).) The District has failed to carry its affirmative burden to demonstrate error.

VII

The District argues the trial court improperly granted Star's motion for nonsuit. "We independently review the ruling on a motion for nonsuit, guided by the same rules that govern the trial court. [Citations.] 'We will not sustain the judgment '"'unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.'"'" [Citation.] However, '[a] mere "scintilla of evidence," does not create a conflict for the jury's resolution; "there must be substantial evidence to create the necessary conflict." [Citation.]' [Citation.]" (*Pinero v. Specialty Restaurants Corp.* (2005) 130 Cal.App.4th 635, 639.)

In relevant part, Business and Professions Code section 7071.6 requires that the Contractor's State License Board "require as a condition precedent to the issuance, reinstatement, reactivation, renewal, or continued maintenance of a license, that the

applicant or licensee file or have on file a contractor's bond . . . ." Section 7071.5 of that code provides: "The contractor's bond required by this article shall be executed by an admitted surety in favor of the State of California, in a form acceptable to the registrar and filed with the registrar by the licensee or applicant. The contractor's bond shall be for the benefit of the following: [¶] . . . [¶] (b) Any person damaged as a result of a willful and deliberate violation of this chapter by the licensee . . . ."

The District argues that because BEGL violated Business and Professions Code section 7107 by abandoning the project, it was entitled to recover on the contractor's bond issued by Star for the resulting damages. The statute states: "Abandonment without legal excuse of any construction project or operation engaged in or undertaken by the licensee as a contractor constitutes a cause for disciplinary action." (Bus. & Prof. Code, § 7107.) The District cites two pieces of evidence in support of its claim that BEGL abandoned the project. First, the District cites its meeting minutes, which "stated that as of December 4, 2001, BEGL abandoned the project." Second, the District cites the testimony of Teodorico Sierra, its construction manager, who "confirm[s]" the minutes.

The relevant meeting minutes state: "BEGL stated that at this time there is nothing to do at the job site. The project super (Ross F.) from BEGL stated that the project had been abandoned, due to the slow response to issues. CM [the District's construction manager] stated that if BEGL decides to abandon the job, CM would contact their bonding company to inform them of the situation. . . . [¶] BEGL responded that at this time, they have nothing to do since the response to the fixing of the walls (critical path item) has not been submitted to them, they can not proceed with any other item but the erection of steel. BEGL will proceed with this activity even when this activity [i]s not on the critical path." Sierra did not testify that BEGL abandoned the job on December 4, 2001. Instead, when asked whether BEGL abandoned the job, he stated that "[a]ccording to the meeting minutes, that's the statement that they made due to the slow response to issues."

Even interpreting the evidence most favorably to the District, it does not show that BEGL willfully and deliberately abandoned the LACES project without legal excuse, as is required by Business and Professions Code section 7071.5. The minutes show that BEGL believed there was no work to be done because the District had not given a response regarding the remedy for the walls. But BEGL also stated that it would proceed with the erection of steel. The record shows that BEGL continued to work on the LACES project for at least another month, and it was the District that sent BEGL a letter on January 16, 2002 terminating their "right to proceed with the work . . . ." The District claims that "the law supports the conclusion that such abandonment can constitute a willful and deliberate violation," but it cites no legal authority for this proposition. Because the District has not presented substantial evidence that BEGL willfully and deliberately abandoned the LACES project without legal excuse, we affirm the court's ruling granting Star's motion for nonsuit.

VIII

On cross-appeal, BEGL argues the trial court erred in limiting its delay damages to a liquidated amount of $250 per day. BEGL claims that its actual delay damages were $600 per day. The first page of the parties' contract sets out the identity of the parties, the project name, and the project location. Directly beneath that are six short sentences. The second sentence states that "$250.00 shall be the amount of Liquidated Damages per day, as set forth in Section 3 herein." The third sentence states that "$250.00 shall be the amount of Liquidated Damages per day, as set forth in Section 15c herein." Below the sixth sentence are the parties' signatures.

Section 3 of the contract provides: "It is agreed by the contractor and the District that, because it would be impracticable and extremely difficult to fix the actual damage to the District should the entire work not be completed within the time period specified above plus the authorized extensions of time, there shall be assessed as liquidated damages, but not as a penalty, the amount hereinabove stated for each day thereafter until the date of physical completion of the work as accepted by the District."

Section 15c of the contract provides: "In anticipation of, and in compliance with, the provisions of Public Contract Code Section 7102, and because it is agreed by the Contractor and the District that actual damages are impracticable and extremely difficult to ascertain, if the Contractor is delayed in completing the work due solely to the fault of the District, and where such delay is unreasonable under the circumstances and not contemplated by the parties, the Contractor shall be entitled to the appropriate time extension and to payment of liquidated damages in the amount per day hereinabove specified for such delay. The Contractor expressly agrees to be limited solely to these liquidated damages for all such delays as defined specifically in this subsection (15.c.)."

Prior to trial, BEGL argued that the $250 limitation on delay damages was unconscionable. After a hearing, which included witness testimony, the trial court rejected BEGL's claim, finding that BEGL did not establish procedural or substantive unconscionability. The court ruled that both parties are limited at trial to delay damages of $250 per day. BEGL argues that the court's ruling was error.

"Unconscionability is ultimately a question of law for the court," and the trial court's ruling will be reviewed de novo. (*Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851 (*Flores*).) "'It is true that numerous factual inquiries bear upon that question, e.g., the business conditions under which the contract was formed, and to the extent there are conflicts in the evidence or in the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the judgment.'" (*Ibid.*)

"Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. [Citation.] 'The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113 (*Armendariz*).)

BEGL argues that the liquidated damages provision is one of adhesion because it was drafted unilaterally by the District and was not amenable to negotiation. BEGL cites

the testimony of Yvette Merriman-Garrett, a senior contracts and administration manager for the District, stating that competitively bid public works contracts are nonnegotiable. The trial court did not believe that this was a contract of adhesion because both parties were sophisticated entities and had the ability to walk away from the contract. But even if the contract could be characterized as adhesive it still "is fully enforceable according to its terms [citations] unless certain other factors are present which, under established legal rules—legislative or judicial—operate to render it otherwise." (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 819-820, fns. omitted (*Graham*).)

"Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. [Citations.] The second—a principle of equity applicable to all contracts generally—is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.'" (*Graham*, *supra*, 28 Cal.3d at p. 820, fn. omitted.)

BEGL argues the liquidated damages provision was not within its reasonable expectations, and it is unreasonable under Civil Code section 1671. Subdivision (b) of that section states that "a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made."

The District stated that the $250 limit on delay damages was standard in all of its contracts regardless of the amount of the contract or the number of days to complete the project. Beglari testified that he had never encountered a liquidated damages provision limiting the contractor's damages and claimed that he did not read the bid form which clearly stated that both the contractor and the District would be limited. The court did not find Beglari to be credible "based upon his demeanor and his other testimony." And although the $250 limit on delay damages is lower than BEGL's alleged $600 actual

damages, that does not necessarily establish that the provision is unreasonable. Beglari testified that he knew there was a liquidated damages provision limiting the District's damages to $250 per day before he signed the contract. That BEGL's delay damages would also be subject to that same limitation is not unreasonable. Absent some other evidence showing that limiting delay damages for both parties to $250 per day is unreasonable, we hold that BEGL failed to establish that the liquidated damages provision is unreasonable or outside its reasonable expectations.

We also hold that the liquidated damages provision is not unconscionable. Both procedural and substantive unconscionability must be present before a contract or term will be deemed unconscionable. (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317.) "But they need not be present in the same degree . . . the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz, supra*, 24 Cal.4th at p. 114.) Procedural unconscionability focuses on oppression, surprise and the manner in which the agreement was negotiated. (*Ibid.*; *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 113.)

BEGL failed to prove that the liquidated damages provision was procedurally unconscionable. "Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." (*Flores, supra*, 93 Cal.App.4th at p. 853.) Oppression also refers to the absence of reasonable market alternatives. (*Morris v. Redwood Empire Bancorp, supra*, 128 Cal.App.4th at p. 1320.) Although BEGL may not have been able to negotiate the terms of the liquidated damages provision, it has not shown the absence of meaningful choice or reasonable market alternatives. BEGL could have bid on other public works projects without a liquidated damages provision such as the one in place here. As the trial court correctly observed, "[a]s a corporate contractor BEGL was not in the same position as the 80 year old plaintiff who obtained a 'reverse mortgage' in *Flores*. BEGL had the choice of bidding on LAUSD projects or not . . . ."

The contractual provision limiting delay damages to $250 per day certainly was no surprise to BEGL. "Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them." (*Flores*, *supra*, 93 Cal.App.4th at p. 853.) Beglari testified that when he read about the LACES project in trade papers, he noticed a $250 per day liquidated damages provision. Although Beglari stated that he believed the provision only limited the District's damages, he filled out a two-page bid form, "which clearly stated that both BEGL *and* LAUSD would agree to liquidated damages of $250 per day because 'it would be impracticable and extremely difficult to fix actual damage' should there be delays in the project." Beglari's signature on the bid form "is approximately one inch below the liquidated damages paragraphs." Finally, the two liquidated damages provisions, one applicable to the contractor and the other applicable to the District, were clearly set out on the first page of the contract. Beglari signed the first page of the contract just below both provisions.

BEGL also failed to demonstrate that the liquidated damages provision is substantively unconscionable. Substantive unconscionability focuses on "the actual terms of the agreement and evaluates whether they create '"overly harsh"' or '"one-sided"' results as to '"shock the conscience."'" (*Aron v. U-Haul Co. of California* (2006) 143 Cal.App.4th 796, 808.) Although BEGL argues that "the only justification for the clause is to arbitrarily set BEGL's damages at an amount that would provide a financial windfall for the District in the event that it delayed the project," the liquidated damages provision applies equally to both parties. The District's delay damages also are limited to $250 per day regardless of the actual damages it incurs.

IX

The District argues that because the jury found that it had not breached the warranty of plans and specifications, the only breach of contract the jury could have found was wrongful termination. On that basis, it contends the trial court erred in denying its motion to vacate the judgment because substantial evidence did not support a finding of wrongful termination.

Although the District claims its termination of BEGL was proper (because, it claims, BEGL breached the contract, the District issued three-day notices to cure in accordance with the contract, and BEGL did not cure), there was substantial evidence that the District's termination procedure was wrongful. The District's three-day notices to cure alleged that BEGL was not interpreting the contract work properly, failed to properly staff the project, and failed to deliver a remedy for the correction of the shear walls. However, BEGL provided evidence that it was following the plans and specifications, that there were problems with the District's designs, that its valid suggestions for correcting defective results were rejected by the District, that the District delayed a remedy for the shear walls, that BEGL was properly staffed at all times, and that BEGL could not proceed on the project until the District responded to BEGL.

BEGL presented evidence that the District representative who observed that BEGL had an insufficient workforce was "not familiar with the work detail, outstanding items to be resolved by the district, pending change orders and scope of work in each trade in this project." Beglari testified that BEGL could not fix the problems with the shear walls because the concrete remedy had not yet been approved by the District, and because the District had instructed BEGL to wait until the District finished its investigations. He further stated: "We've done whatever we could in October and November to just keep busy, finish all the structural steel beam[s] on the school. We had put up the forms on the second floor, put up the rebars. Whatever we could do, we did. And we did some electrical work, plumbing work. And it got to a point where we couldn't do much . . . ."

After receiving the first three-day notice from the District, BEGL responded by letter: "We are ready, willing, and able to perform the work. It is our understanding that the project site is not ready for further work based upon the reasons set forth in the previous correspondences and conversations. [¶] On November 29, 2001, we received a 3-Day Notice to Proceed. Proceed with what? If you believe that there is work that can be performed today and the work falls within a natural and critical sequence of work, we

will immediately add more men to the site." (Emphasis omitted.) BEGL received no response.

There also is evidence that the District's position in its three-day notices was unreasonable. For example, the District stated that BEGL's workforce had shown an inability to erect steel beams. BEGL's position was that it could not erect the beams because the District's architect had not responded to its several requests for a clarification of the plans and specifications. Apparently, the jury credited BEGL's evidence.

The District also argues that the breach of contract verdict against it is inconsistent with the breach of contract verdict against BEGL. The District states: "The evidence was undisputed that under paragraph 16 of the contract, the District was entitled to terminate BEGL's right to proceed with work (and complete the work by whatever method the District deemed expedient) if BEGL failed to perform any provision of the contract. . . . Consequently, as a matter of law, since the jury found that BEGL breached the contract, the District's termination of BEGL's right to proceed was necessarily and logically legal and valid under the express terms of the contract. In other words, since BEGL breached the contract, the District could not, as a matter of law, have breached the contract by wrongfully terminating BEGL."

The argument is unavailing. The parties' contract provides that the District can remedy deficiencies and complete the contract "by whatever method the District may deem expedient" if "in the opinion of the District, the Contractor at any time during the progress of the work . . . fails to perform any provision of this contract . . . ." The contract requires the District to give BEGL a written three-day notice to cure before taking any action. We interpret this to mean that BEGL's breach of contract can preclude a finding of wrongful termination only if the termination was based on a failure to cure that breach. If BEGL corrected a breach, and the District wrongfully terminated BEGL for different conduct, the District cannot later justify its termination on the basis of the previous and unrelated breach. There is sufficient evidence that BEGL breached the contract in a manner that is unrelated to the District's reasons for terminating BEGL.

At trial, the District argued that BEGL breached the contract by severing an electrical conduit during demolition and excavation of the West Arcade in March 2001. While digging with a tractor, BEGL exposed the conduit. The District's construction manager observed that the conduit was running towards the LACES Science Building and instructed BEGL to use care. The conduit was later severed and damaged by the "bucket" of a tractor operated by BEGL. That cut off electrical power to the Science Building. BEGL was asked to replace the conduit. During closing argument, the District argued that BEGL breached the contract by failing to use "extreme caution as to not . . . disturb the existing utilities." The District suggested that BEGL should have excavated by hand, not by tractor.

This evidence of BEGL's breach was unrelated to the reasons the District offered for terminating BEGL, and occurred over six months before the District sent its first three-day notice to cure. Because the jury's findings are not inconsistent, we affirm.

X

BEGL alleged the District failed to make prompt payment in accordance with Public Contract Code section 7107 (Section 7107). The contract permitted the District to retain 10 percent of each progress payment. The last payment document shows that the District withheld $40,189.60 in retention funds. Section 7107 requires a public entity to release retention funds "[w]ithin 60 days after the date of completion of the work of improvement . . . . In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount." (§ 7107, subd. (c).)

Subdivision (f) of Section 7107 provides: "In the event that retention payments are not made within the time periods required by this section, the public entity or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney's fees and costs." The jury was not instructed regarding

the wrongful withholding of retention funds, neither party requested that the jury make a special finding on the issue, and, of course, no such finding was made.

After trial, both BEGL and the District moved for attorney fees and costs pursuant to Section 7107. BEGL also requested a two percent interest penalty.

The District argued that its withholding of retention funds was not wrongful because BEGL did not complete the LACES project, as required by Section 7107,[6] BEGL was not owed money under the contract, and two valid stop notices were in place totaling $92,918. The District also argued that because it was BEGL's burden to request a jury finding on the issue and it did not, the District was the "de facto the prevailing party on that issue."

In denying the District's motion for attorney fees and costs, the court stated: "It seems that neither side bothered to submit a jury instruction on Section 7107 . . . so there were no findings of fact by the jury. There was not a simultaneous court trial, so the court was not called upon to make any determinations, and I feel that a motion for attorney's fees at this date is an attempt to argue for a judgment that was not requested from the jury or the court and would be inappropriate. . . . I don't know how I can rule for either side, [counsel], because neither side submitted the issue for determination. I would have to go back and try and analyze all of your evidence and compare it to his and have a mini-trial in my own mind to determine who the prevailing party was. I just think

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[6] "For purposes of this subdivision, 'completion' means any of the following: [¶] (1) The occupation, beneficial use, and enjoyment of a work of improvement, excluding any operation only for testing, startup, or commissioning, by the public agency, or its agent, accompanied by cessation of labor on the work of improvement. [¶] (2) The acceptance by the public agency, or its agent, of the work of improvement. [¶] (3) After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 100 days or more, due to factors beyond the control of the contractor. [¶] (4) After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 30 days or more, if the public agency files for record a notice of cessation or a notice of completion." (§ 7107, subd. (c).)

the state of the record here is that there were no findings on that provision of the Public Contract Code . . . ."

A month later, the court denied BEGL's motion for attorney fees and costs. We infer that the court also denied BEGL's request for a two percent interest penalty. BEGL argued that the jury implicitly found that the District had wrongfully withheld retention funds as part of its breach of contract verdict against the District. BEGL also contended that the issue of wrongful withholding of retention funds was for the court to decide, not the jury. BEGL claimed that the District wrongfully withheld $143,854.51 in contract funds, and that its stop notice defense was without merit because Fidelity paid one stop notice claim and because the other stop notice had expired by operation of law. The court ruled that "attorney's fees are not recoverable under [Section 7107] because the jury never made a finding under this Code section that the Los Angeles Unified School District wrongfully withheld retention proceeds. Nor did [BEGL] introduce sufficient evidence on this point."

Both parties now argue that the court erred in denying their respective requests for attorney fees, costs and penalty interest. The trial court exercised its discretion in declining to find that there was a prevailing party for the purposes of Section 7107. "Discretionary decisions are subject to an abuse of discretion standard of review, and will not be reversed on appeal unless it appears that the court abused its discretion and a miscarriage of justice has resulted. [Citation.]" (*Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 449.) To the extent that we must decide the correct application of Section 7107, we consider that issue de novo. (*Id.* at pp. 448-449.)

On appeal, the District argues that because BEGL did not request a special jury finding on the wrongful withholding of retention funds issue, the District was entitled to fees by default. BEGL argues that because the jury rendered an implied finding that the District wrongfully withheld retention funds in its breach of contract verdict against the District, BEGL is entitled to fees, costs and penalty interest. BEGL also argues that because it obtained a net monetary recovery in the overall lawsuit, it should be awarded fees, costs and interest under Section 7107.

We reject all three arguments. At trial, BEGL argued it had not been paid for $199,304 in earned contract work, and evidence was admitted showing that the District withheld $40,189.60 in retention funds. BEGL requested a total of $1,203,721 in damages for its breach of contract claim based on several different theories of recovery. The jury found that both parties breached the contract and awarded BEGL $954,197 in damages, $249,524 less than requested. However, as we have seen, there was no special finding regarding whether the jury believed that the District wrongfully withheld retention funds, and the jury did not allocate damages to specific theories of recovery. As a result, it is unclear whether the jury believed that the District wrongfully withheld money earned on the contract, let alone retention funds.

Because neither party obtained a finding from the trier of fact regarding whether the District wrongfully withheld retention funds, and because a finding on this issue cannot be inferred from the verdict, there was no predicate factual determination from which the court could determine which party had prevailed for purposes of Section 7107 attorney fees, costs and interest. BEGL did not show that the jury found the District wrongfully withheld retention funds, and the District did not show the jury rejected that allegation. Accordingly, the court did not abuse its discretion in finding that neither party had demonstrated that it was the prevailing party under Section 7107.

Alternatively, BEGL argues the court erred in denying its motion based on the lack of a jury finding because the issue of whether BEGL was entitled to Section 7107 attorney fees was for the court to decide, not the jury. Even if that is true, the court found that BEGL did not present sufficient evidence that the District wrongfully withheld retention funds.[7] BEGL does not challenge this finding. We decline to address whether the court's finding has any implication on the District's motion for Section 7107 attorney

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[7] At oral argument, BEGL claimed the trial court did not make a finding as to whether the District had wrongfully withheld retention funds. However, after BEGL argued this was a question for the court to decide, the court, in a minute order, stated that BEGL did not "introduce sufficient evidence on this point." We interpret this to be a court finding against BEGL on this point.

fees as the District has not raised the issue on appeal. (See *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [issue not raised on appeal is considered waived].)

XI

BEGL argues the trial court erred in denying its motion under Civil Code section 3287 (Section 3287), subdivision (a) for prejudgment interest. It also argues the court failed to exercise its discretion to award prejudgment interest under subdivision (b) of the same section.

Section 3287 provides: "(a) Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state. [¶] (b) Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed."

The court found that the damages sought by BEGL were not "certain or capable of being made certain without the Jury's Verdict," and denied the request for prejudgment interest. "Damages are deemed certain or capable of being made certain within section 3287, subdivision (a), where there is essentially no dispute between the parties concerning the basis of imposition of damages that are recoverable but where the dispute centers on the issue of liability giving rise to the damage." (*Stein v. Southern Cal. Edison Co.* (1992) 7 Cal.App.4th 565, 571.) "'[Section 3287] does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, "depends upon a judicial determination based upon conflicting evidence and is not ascertainable from truthful data supplied by the claimant to his debtor." [Citations.]'

[Citation.] Thus, where the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate." (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 960.)

As we have recounted, BEGL requested $506,000 in lost profits, $300,000 for the costs of settling its dispute with Fidelity, $199,304 for work performed but unpaid, $73,000 in delay damages, $69,417 for earned project costs, and $56,000 for money still owed to Arrow. The amount of damages owed for lost profits, work performed but unpaid, delay damages, earned project costs, and money owed to Arrow was substantially disputed, and did not become certain until the jury resolved conflicting evidence and rendered a verdict. The $300,000 BEGL owed to Fidelity, its surety, for settling their dispute, also was not liquidated or certain until the jury's verdict. The terms of the settlement require BEGL to pay Fidelity $175,000 without conditions. BEGL was obligated to pay another $125,000 if the jury verdict against the District was greater than $700,000. The court did not err in denying BEGL's motion for prejudgment interest under Section 3287, subdivision (a).

BEGL's argument that the court failed to exercise discretion regarding prejudgment interest under Section 3287, subdivision (b), also is without merit. BEGL asked the court to exercise its discretion pursuant to that provision, and absent an indication otherwise, we presume the court did so. (Evid. Code, § 664.) In its minute order, the court states that the "Motion for Pre-Judgment Interest is DENIED." We interpret this to include a denial of BEGL's request for discretionary interest. BEGL's argument that "given the record in this case, and District's wrongful withholding of funds, interest pursuant to this subsection is warranted," does not establish that the court abused its discretion in denying prejudgment interest under Section 3287, subdivision (b).

XII

BEGL argues the court abused its discretion in denying its motion for sanctions pursuant to former Code of Civil Procedure section 2033 (Section 2033), subdivision (o), which provided: "If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this section, and if the party requesting that

admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make this order unless it finds that (1) an objection to the request was sustained or a response to it was waived under subdivision (l),[[8]] (2) the admission sought was of no substantial importance, (3) the party failing to make the admission had reasonable ground to believe that that party would prevail on the matter, or (4) there was other good reason for the failure to admit."[9]

BEGL alleges: "During the course of this action, BEGL served certain Request for Admissions [(RFAs)] on District. District failed to admit several requests, which were of a substantial nature. Based on the proof at trial, and the verdict, it is clear that District's denial of these requests was unreasonable. District took a 'scorched earth' position in litigating this matter from the outset, and its failure to respond to RFAs in

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[8] Section 2033, subdivision (l) stated: "If the party requesting admissions, on receipt of a response to the requests, deems that (1) an answer to a particular request is evasive or incomplete, or (2) an objection to a particular request is without merit or too general, that party may move for an order compelling a further response. The motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. [¶] Unless notice of this motion is given within 45 days of the service of the response, or any supplemental response, or any specific later date to which the requesting party and the responding party have agreed in writing, the requesting party waives any right to compel further response to the requests for admission. [¶] The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. [¶] If a party then fails to obey an order compelling further response to requests for admission, the court may order that the matters involved in the requests be deemed admitted. In lieu of or in addition to this order, the court may impose a monetary sanction under Section 2023."

[9] The statute has since been renumbered and now appears as sections 2033.010-2033.440. Former section 2033, subdivision (o) is now section 2033.420. Former section 2033, subdivision (l) is now codified as section 2033.290.

good faith was, unfortunately, typical. In many instances, it responded with a boilerplate list of well-worn 'objections,' and never admitted or denied the matter."

The trial court's denial of BEGL's motion for sanctions was based on several considerations. "[BEGL has] failed to show that each of the requests for admissions that are the subject of this motion was proven at trial. [BEGL has] also failed to show that the Los Angeles Unified School District had no reasonable ground to believe that it would prevail on the matter, or that there was no other reason for failing to admit the requests for admission. Finally, [BEGL] never made a motion to compel further responses to the requests for admissions, which demonstrates that they have waived their right to now seek sanctions." We review the court's ruling for abuse of discretion. (*Wimberly v. Derby Cycle Corp*. (1997) 56 Cal.App.4th 618, 636-637 (*Wimberly*).)

BEGL argues the District should be sanctioned for objecting to RFA Nos. 2, 9, 10, 20, and 21, instead of admitting or denying these requests for admissions. Subdivision (o) of Section 2033 stated that a court shall order sanctions unless it finds that "an objection to the request was sustained or a response to it was waived under subdivision (l)." Subdivision (*l*) provided that "[i]f the party requesting admissions, on receipt of a response to the requests, deems that . . . an objection to a particular request is without merit or too general, that party may move for an order compelling a further response." BEGL did not move to compel a further response once the District objected to RFA Nos. 2, 9, 10, 20 and 21. Because the District's objections were unchallenged, the court was within its discretion to deny sanctions for the District's responses to those RFAs. (See *Wimberly*, *supra*, 56 Cal.App.4th at p. 636 [holding that because objections to requests for admissions were unchallenged by a motion to compel a further response, the denial of sanctions was proper].)

BEGL also points out that the District did not admit or deny RFA No. 11, which states: "'Subsequent to the execution of the contract, LAUSD requested certain additions and/or changes to the scope of work, and plaintiff agreed to perform same, resulting [in] additional work in the amount of approximately $188,349.22.'" We agree with the trial court that it is unclear whether the truth of this statement was proved at trial based on the

jury's verdict. BEGL's own expert on damages testified that the amount of extra work performed for change order proposals totaled $43,976. Further, the court did not abuse its discretion in finding that BEGL failed to show that the District did not have a reasonable belief it would prevail on this issue.

Finally, BEGL asserts that the District unreasonably failed to admit or deny RFA Nos. 23, 24, 25, 27, 29, 30, 32, 35, 36, 38, 39, 40, 41, 42, 45, 46, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 71, 72, and 73. Because BEGL's conclusory statement is not supported by citations to evidence or specific legal authority, and because BEGL has not provided a record citation to these RFAs, we regard the argument as abandoned. (See *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1486 ["It is not the duty of a reviewing court to search the record for evidence on a point raised by a party whose brief makes no reference to the specific pages where the evidence can be found. [Citation.] Further, other than cite the statute[], [appellant] provides no authority to support his argument. Thus, this argument for attorney fees is deemed to be without foundation and abandoned."].) The court's denial of BEGL's motion for sanctions under Section 2033, subdivision (o) is affirmed.

DISPOSITION

The judgment and orders are affirmed. Each party is to bear its own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.