

Pursuant to this HSM Contract, UFI agreed to provide labor, materials, equipment, and services to construct the reinforced concrete building foundation and the equipment foundation for the HSM Project. UFI's scope of work included formwork erection; furnishing and placement of reinforcing steel (or rebar); furnishing, placing and finishing concrete; and installing various "embeds" used to attach or support the work of other trades and the equipment that would be placed in the HSM. TKS is the owner of the HSM Project and UFI served as one of its general contractors. UFI was properly licensed in the State of Alabama, and the HSM Contract between TKS and UFI is "legal."

The original HSM Contract Sum was \$37,000,000.00. TKS and UFI agreed to a total of 53 Change Orders that increased the HSM Contract Sum to \$109,695,132.00. Between 2008 and May 2010, TKS has paid UFI the sum of \$97,949,132.00 for work on the HSM Contract. UFI seeks to recover from TKS the sum of \$11,746,430.25 as the Contract Balance on the HSM Project. TKS did not pay the alleged remaining Contract Balance because of damages in that amount that it attributes to UFI's defective work.

UFI entered into a written subcontract with Liberty Reinforcing Steel, Inc. ("Liberty") to provide labor and services to install the rebar on a portion of the HSM Project. The total amount of the UFI/Liberty Subcontract was \$3,426,178.63. UFI paid Liberty \$3,101,271.12 and the unpaid subcontract balance is \$324,907.51. TKS was not a party to the UFI/Liberty Subcontract. The total value of Liberty's work on the HSM Project of \$3,426,178.63 is approximately 3.12 percent of the total HSM Contract Sum. During the time it provided labor and services for construction of the HSM Project, Liberty was not licensed with the Alabama Licensing Board for General Contractors.

Liberty should have been licensed to perform the rebar installation for the HSM Project. The Subcontract between Liberty and UFI was “illegal” pursuant to the Alabama General Contractor’s Practice Act (the “AGCPA”), ALA. CODE § 34-8-1, *et seq.*, as construed by the Alabama courts.

Many of the Contractors and Subcontractors on the HSM Project, including UFI and Liberty, were enrolled in an insurance plan, referred to as an “OCIP” (Owner-Controlled Insurance Program), through which TKS purchased insurance coverage for the Contractors and Subcontractors, including Liberty and UFI, and then deducted the pro-rata costs of this insurance program from the contract price of the various Contractors, including UFI. These Contractors, including UFI, would then typically allocate their respective subcontractors’ shares of the OCIP premium to the subcontractors, including Liberty. As TKS required of UFI, UFI required Liberty to complete a “ThyssenKrupp OCIP Enrollment Form” that identified the work Liberty would be performing and estimated the insurance premiums to cover Liberty, and this form was then forwarded to TKS, as was UFI’s own OCIP enrollment form.

UFI substantially completed its work on the HSM Project on or about February 28, 2010. TKS filed its Complaint against UFI in the United States District Court for the Southern District of Alabama on May 1, 2012 seeking a declaration of its duties and liabilities of the parties. UFI filed a Counterclaim against TKS on May 25, 2012 based, in part, upon the unpaid HSM Contract Balance of \$11,746,430.25. Of that balance claimed in UFI’s Counterclaim, UFI sought to recover \$11,421,522.74 for on its own account and \$324,907.51 for money due to Liberty.

On August 15, 2012, TKS filed a motion for summary judgment based, in part, on the unlicensed status of Liberty. UFI opposed the motion. The District Court granted in part TKS's motion for summary judgment by Order dated January 29, 2013. The questions certified by the District Court arise from that Order.

III. Questions of law to be answered:

1. Under the Alabama General Contractor's Practice Act (the "AGCPA"), ALA. CODE § 34-8-1, *et seq.*, where an owner and a general contractor enter into an agreement, does a general contractor's reliance in any part on work performed pursuant to a separate agreement with a subcontractor not licensed under the AGCPA (an "illegal subcontract") prevent the general contractor from recovering the entire contract balance on the agreement between it and the owner?
2. If the answer to question (1) is in the negative, should the contract balance owed to the general contractor be adjusted on account of the illegal subcontract? And, if so, what is the proper adjustment, *i.e.*, should the full illegal subcontract amount be deducted from the contract balance owed by the owner to the general contractor, or only so much of the full illegal subcontract amount, if any, as the general contractor owes to the subcontractor and has included in its claim against the owner?

This certificate was prepared by the United States District Court for the Southern District of Alabama.

OFFICIAL SEAL:



**CHARLES R. DIARD, JR.,
CLERK
United States District Court
113 St. Joseph Street
Mobile, Alabama 36602**