

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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SUPERIOR GUNITE,

Plaintiff,

Index No. 54272/2013

-against-

**RULE 19-A STATEMENT OF
UNDISPUTED FACTS
IN SUPPORT OF PLAINTIFF'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

YONKERS CONTRACTING COMPANY, INC. and
ZURICH AMERICA INSURANCE COMPANY,

Defendant.

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Pursuant to Rule 19-a of the Rules of the Justices of the Commercial Division, Supreme Court, Westchester County, Plaintiff Superior Gunite ("Gunite" or "Plaintiff") submits this Statement of Undisputed Facts Pursuant to Rule 19-a under Section 202.70 Rules of the Commercial Division of the Supreme Court as to which there is no material issue of fact to be tried.

1. The project included construction of a vertical shaft, a connector corridor, inclined tunnels (all made from reinforced concrete), and a ventilation building and station entrance located at 34th Street between 10th and 11th Avenues in the Borough of Manhattan (the "Project").

2. Yonkers entered into a general contract with the Metropolitan Transportation Administration Capital Construction ("MTA") for the sum of \$116,195,997, pursuant to which Yonkers agreed to provide all labor, materials and equipment necessary for the construction of the structures referenced above (the "Prime Contract").

3. On or about March 3, 2011, Yonkers entered into a subcontract with Gunite, pursuant to which Gunite agreed to construct various concrete structures including certain walls, portions of the vertical shaft, inclined tunnels, and arches on behalf of Yonkers (the "Subcontract").

4. The Subcontract required Yonkers to pay Gunite the sum of \$7,500,000, including such other additions or deletions to the work as the parties might agree upon.

5. During the period of June 2011 through April 2012, due to the over excavation of the site by Yonkers, Gunite was asked to perform additional shotcrete work. Gunite submitted thirteen (13) change orders requesting additional compensation, and an adjustment of the Subcontract price.

6. Yonkers did not execute any of the thirteen (13) change order requests when submitted by Gunite.

7. Yonkers waited until April 2012, and then negotiated all of the Gunite change requests at once. The result was the issuance of two change orders to the Subcontract, Amendment #1 for \$674,813, and Amendment #2 for \$476,000 (collectively, the "Amendments").

8. Upon execution of the Amendments in April 2012, Gunite's Subcontract value was increased from \$7,500,000 to \$8,650,813.

9. The Subcontract required Gunite to submit applications for payment, and for Yonkers to make progress payments.

10. During the period June 2011 through completion of Gunite's Work in September 2012, Gunite submitted thirteen periodic payment requisitions to Yonkers (the "Requisitions").

11. The Requisitions were approved by Yonkers and incorporated in Yonkers' payment requests to the MTA.
12. Article 4.2 of the Subcontract required Yonkers to make payments to Gunite within fifteen (15) days after Yonkers received payment from the MTA for Gunite's work.
13. Yonkers received payment from the MTA for the work that Gunite billed to Yonkers on its Requisitions.
14. Payment records from the MTA indicate that, other than retainage, the amount unpaid to Yonkers is only \$49,502.19.
15. Yonkers routinely failed to make payment to Gunite within fifteen (15) days after Yonkers received payment from the MTA.
16. Yonkers also failed to pay certain of Gunite's payment requisitions entirely.
17. By April 2012, Yonkers owed \$1,618,802 to Gunite on requisitions submitted between February 2012 and April 2012.
18. In June 2012, Yonkers required a payment plan to address the past due amounts.
19. By October 2012, Yonkers owed Gunite the sum of \$1,835,899 against the base contract and approved amendments (exclusive of retainage and unapproved change orders).
20. Yonkers did not make any payments to Gunite after November 30, 2012.
21. As of the last payment requisition for the period ending September 30, 2012, Gunite billed the entire Subcontract amount of \$8,650,813, less the contractually required ten (10%) percent retainage, or \$7,785,732.

22. Yonkers has paid Gunite only \$5,949,834 or roughly 66% percent of the adjusted Subcontract price. Yonkers failed to pay \$1,835,898 of the approved payments it received from the MTA.

23. All retainage except for five (5%) percent has been released by the MTA.

24. Yonkers continues to hold the full ten (10%) percent retainage of \$865,081 on Gunite's Subcontract.

25. Gunite submitted forty-one (41) extra work claims to Yonkers totaling \$477,797 for work performed on behalf of Yonkers between March 2012 and September 2012 (the "Change Orders").

26. A substantial number of Gunite's Change Order requests involved the cost of premium time for work outside the regular work day, or on Saturdays.

27. Yonkers sought and received \$3.5 million dollars from the MTA for, among other things, the cost of accelerating the work.

28. An accelerated schedule was necessary to recover for construction delays not caused by Gunite.

29. Yonkers sought more than \$379,000 from the MTA, specifically to pay for Superior Gunite to work overtime and on weekends.

30. Gunite submitted other Change Order requests for the cost of extra work performed on behalf of Yonkers COR 12 – COR 16.01.

31. Yonkers admits that Gunite is entitled to additional compensation for at least nineteen (19) of the extra work Change Orders numbered COR 12 - COR 16.01.

32. Yonkers has not compensated Gunite for any of the extra work it performed from March 2012 through completion of Gunite's work in September 2012.

33. On February 28, 2013, Gunite issued a Final Notice of Demand for Payment in Full (the "Final Demand"), in which it sought all amounts due under the Subcontract.

34. Gunite's Final Demand included: (1) amounts billed on the Requisitions (\$1,835,899); (2) retainage (\$865,081); and (3) change order requests submitted between March 2012 and September 2012 (\$477,796).

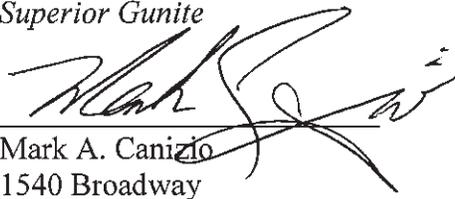
35. Zurich, as surety for Yonkers, as principal, signed and executed a payment bond dated September 3, 2010, Bond No. PRF09011946, guaranteeing payment of all monies due to persons furnishing labor, supplies, materials or equipment used in the prosecution of the Project, including the Work performed pursuant to the Subcontract between Gunite and Yonkers (the "Bond").

36. On or about January 9, 2013, Gunite made a claim against the Bond for payment of the money due and owing under the Subcontract.

Dated: New York, New York
March 7, 2014

Respectfully submitted,

DUANE MORRIS
Attorney for Plaintiff
Superior Gunite

By: 

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