

CAUSE NO. 17-001469-CV-361

ACKLAM CONSTRUCTION COMPANY LTD.,	§	IN THE DISTRICT COURT OF
	§	
<i>Plaintiff,</i>	§	
	§	
vs.	§	BRAZOS COUNTY, TEXAS
	§	
THE BOARD OF REGENTS OF THE TEXAS A&M UNIVERSITY SYSTEM,	§	
	§	
<i>Defendant.</i>	§	____ JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION**

NOW COMES Acklam Construction Company, Ltd. ("Acklam" or "Contractor"), Plaintiff in the above-styled case, who files this Original Petition against Defendant, The Board of Regents of the Texas A&M University System ("TAMUS" or "Owner"), and hereby represent as follows:

**I.**

**STATEMENT OF THE CASE**

1. This is a breach of contract case. Under the terms and conditions of a "Construction Manager-At-Risk ("CMAR") agreement, entered into by and between Acklam and TAMUS, Acklam successfully renovated a large portion of the Commons Building on the Texas A&M campus in College Station, Texas. Acklam's scope of work was completed 150 days early and under budget. Yet, TAMUS has wrongfully refused to pay Acklam the balance of the money owed to it under the CMAR agreement, totaling \$476,234.36. Under the direction of Mr. Russ Wallace (Executive Director of the TAMUS's Office of Facilities Planning & Construction), TAMUS has improperly engaged in a scorched earth campaign to (i) withhold valid payments owed to Acklam, and (ii) effectively ban Acklam from

performing any further construction work for TAMUS. TAMUS has also improperly attempted to subject Acklam to an onerous third-party audit, which is not contractually warranted. TAMUS's actions are an attempt to retaliate against Acklam for its justified refusal to perform another contractor's work on the Commons Building Renovation project and distribute certain construction materials to a TAMUS employee under the table. TAMUS must now be held accountable for its breaches and ordered to pay the remainder of the funds owed to Acklam, in addition to Acklam's attorneys' fees, costs and interest owed under Texas law.

## **II.**

### **DISCOVERY CONTROL PLAN**

2. Plaintiff intends to conduct discovery under Level 2 of the Texas Rules of Civil Procedure 190.3.

## **III.**

### **CLAIM FOR RELIEF**

3. Plaintiff, Acklam, seeks monetary relief in the amount of \$476,234.36, in addition to attorneys' fees, pre- and post-judgment interest, costs and expenses.
4. Acklam also seeks declaratory relief, pursuant to Chapter 37 of the Texas Civil Practices and Remedies Code, the Uniform Declaratory Judgments Act. Specifically, Acklam hereby requests and is entitled to a declaratory judgment from this Honorable Court specifying that (i) the Contract does not contemplate or allow a third-party audit of Acklam; and (ii) Acklam is not required to comply with any TAMUS requests for a third-party audit.

**IV.**

**PARTIES**

5. Plaintiff, Acklam, is a Texas corporation with its principal place of business in Brazos County, Texas.
6. Defendant, TAMUS, is a “state agency,” as defined by the Texas Civil Practices and Remedies Code, §114.001(3), principally located in Brazos County, Texas.

**V.**

**JURISDICTION**

7. This Honorable Court has jurisdiction over the above styled proceeding under Chapter 114 of the Texas Civil Practice and Remedies Code and because the amount in controversy exceeds the Court’s minimum jurisdictional requirements.

**VI.**

**FACTUAL BACKGROUND**

**The Past Relationship between Acklam and TAMUS**

1. For the last thirty-three (33) years, TAMUS and Acklam have successfully worked together. Recently, TAMUS contracted with Acklam to perform certain “construction manager-at-risk” (CMAR) services on five previous projects (not including the project involved in this matter).
2. These projects include:

	PROJECT
1.	Rudder Life Safety Upgrades
2.	Military Walk Redevelopment
3.	Penberthy Field Renovations
4.	Player Development Center
5.	Kyle Field District Plan Phase II

3. Each of these projects was governed by precisely the same CMAR agreement, which contained identical terms and conditions.
4. All of these projects were satisfactorily completed on time and under budget.
5. However, after substantial completion was obtained on each project and no further costs were anticipated, Acklam was asked to submit to an “audit” that was reasonable in scope and substance.
6. In each of these five cases, the same audit procedure was followed. Shawn Acklam, as Acklam’s representative, and Randy Wipke, the Owner’s Designated Representative (“ODR”), would meet to review the most recent Acklam payment application and identify all unspent funds related to allowances, contingencies and general conditions, as well as any bond premium dividend that may be payable to the Owner. After calculating the amount of these unspent funds and bond premium dividend owed to the Owner, Mr. Wipke reconciled and prepared a Final Deductive Change Order to the contract. At that point in time, all line items on the payment application were considered to be final and Acklam submitted its Final Payment Application.
7. This is precisely the process and responsibility of the ODR that is dictated by Article 4.3 of the CMAR agreements.
8. Specifically, Article 4.3 states in pertinent part:

Owner will identify a person as its Owner’s Designated Representative (“ODR”) who is authorized to act on Owner’s behalf with respect to the Project, including final determination of fees and costs earned by Contractor and equitable back charges against Contractor. The ODR shall examine the documents submitted by Contractor and shall render decisions on behalf of Owner. The ODR shall have all the responsibilities and authorities to him/her in the UGSC [Uniform General and Supplementary Conditions].

9. Following the fulfillment of the ODR's responsibilities under Article 4.3, Acklam received payment in full on all of these CMAR projects.

**The Contract between Acklam and TAMUS for the Commons Building Renovation Project**

10. On December 13, 2013, TAMUS accepted CMAR proposals for the Commons Building Renovation construction project, TAMUS Project No. 02-3156 (hereinafter the "Project").  
  
The Commons Building is located on the Texas A&M University campus in College Station, Texas.
11. Acklam was one of the contractors to submit a CMAR proposal for the Project.
12. The Project was divided into two primary scopes of work.
13. Acklam was awarded the contract to renovate the Commons Building, with the exception of the "white box area" (hereinafter the "Work"). The "white box area" consists of an area in the Commons Building specifically designed and constructed for food preparation, serving, dining and storage. The Compass Group USA, Inc., by and through its Chartwells Division (hereinafter "Chartwells") was responsible for constructing and finishing out the "white box area" (hereinafter "Chartwells' Work").
14. On February 28, 2014, Acklam and TAMUS entered into the Agreement Between "The Board of Regents of the Texas A&M University System and Acklam Construction Company, Ltd., Construction Manager-At-Risk" (hereinafter, the "Contract") for Acklam's Work. See Exhibit "A."
15. The original guaranteed maximum price ("GMP") for Acklam's Work was \$35,181,729.
16. Chartwells' Work was performed under a Dining Services Agreement, dated August 3, 2012, entered into by and between "Texas A&M University, a member of the Texas A&M

University System” and Chartwells. See Exhibit “B”, Chartwells’ Contract, Sections 5.2, 8.3, 14.2, and p. 37 (Exhibit A – Dining Service Facilities).

17. The terms and conditions of the Contract are identical to the CMAR agreements executed in connection with the five past Acklam/TAMUS projects and, notably, contains the same Article 4.3 (quoted above in para. 8).

18. As the work was progressed by Acklam, it was to receive periodic progress payments. See Exhibit “A,” Contract, Exhibit B – Uniform General and Supplementary Conditions (“UGSC”), Article 10.2.

19. With regard to Acklam’s right to periodic progress payments, the Contract states:

The Contractor will receive periodic progress payments for Work performed, materials in place, suitably stored on site, or as otherwise agreed to by the Owner and the Contractor. Payment is not due until receipt by the ODR or his designee of a correct and complete Pay Application in electronic and/or hard copy format as set forth in Special Conditions or Division 1 Specifications, and certified by the A/E [Architect/Engineer].<sup>1</sup>

*Id.*

20. Furthermore, the Contract specifically provides that the Owner has a duty to pay the Contractor upon the receipt of (1) a complete invoice certified by the A/E, (2) the Contractor’s updated Work Progress Schedule and (3) confirmation that the Contractor’s as-built documentation at the site is kept current. See Contract, Exhibit “A,” Exhibit B – UGSC, Article 10.3.

21. However, TAMUS was entitled to withhold as retainage five percent (5%) of the total amount earned by Acklam. See Contract, Exhibit “A,” Exhibit B –UGSC, Article 10.3.2.

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<sup>1</sup> Barnes Gromatzky Kosarek Achitects (“BGKA”) was firm employed by TAMUS as the architect/engineer of record for the Project. Mr. Ray Vela was the BGKA architect assigned to this Project.

22. Once sixty-five percent (65%) of the Project was complete, TAMUS could begin releasing the retainage amount withheld. See Contract, Exhibit “A,” Exhibit B – UGSC, Article 10.3.2.2.
23. The term “audit” is not defined by the Contract in Article 2 (titled, Definitions) or otherwise.
24. Rather, Article 4.3 of the Contract makes it clear that the ODR (and no one else) is empowered to review Acklam’s documents and make decisions regarding fees and costs earned by the Contractor. See Exhibit “A.”
25. Furthermore, the Contract does not give TAMUS the right to withhold or refuse a periodic progress payments on the grounds that an audit has been requested or is pending.

#### **Acklam’s Performance of the Commons Building Renovation Project**

26. On March 13, 2015, representatives from TAMUS, Acklam, Chartwells and the A/E held and participated in the Pre-Construction Conference.
27. The Pre-Construction Conference was to cover a number of important issues related to the Project. The scope of the conference was set forth in the Contract:

Prior to, or concurrent with, the issuance of the Notice to Proceed with Construction, a conference will be convened for attendance by the Owner, Contractor, A/E and appropriate Subcontractors. The purpose of the conference is to establish a working understanding among the parties as to the Work, the operational conditions at the Project Site, and general administration of the Project. Topics include communications, schedules, procedures for handling Shop Drawings and other submittals, processing Applications for Payment, **maintaining required records**, and all other matters of importance to the administration of the Project and effective communications between the project team members.

See Exhibit “A,” Contract, Article 3.1.1 (emphasis added).

28. At no point during the Pre-Construction Conference did TAMUS state that it would deviate from the audit procedures utilized on the past five CMAR projects or specify any new or

different records that should be maintained by Acklam. See Exhibit “C,” Meeting Minutes from the Pre-Construction Conference.

29. In fact, a third-party audit is not contemplated or allowed under the terms and conditions of the Contract.

30. If TAMUS intended to conduct a more extensive audit of Acklam than what had previously occurred on past projects, it was contractually bound to inform Acklam at the Pre-Construction Conference.

31. However, it was not until February 1, 2017, nearly two years later, that TAMUS informed Acklam of its purported position that “this particular project meets a minimum dollar level established to conform with the A&M System internal audit procedures that automatically triggers a third party audit at the conclusion of the project.” See Exhibit “D,” Letter from Philip Ray (TAMUS Vice Chancellor for Business Affairs) to Jon Acklam, p. 2.

32. TAMUS’s failure to notify Acklam of this purported policy (to the extent it even existed at the time) essentially set the stage for this dispute at the very outset of this Project.

33. TAMUS should have also provided Acklam with a list of all the documents and information that it needed to maintain related to its Work at the Pre-Construction Conference. This would have allowed Acklam to put the proper book keeping procedures in place at the outset and to timely notify its subcontractors of these requirements so they could also comply.

34. On February 27, 2015, TAMUS notified Acklam that it could begin its Work on March 16, 2015. See Exhibit “E,” TAMUS Notice to Proceed.

35. Acklam’s Work began promptly on March 16, 2015.

36. Once again, Mr. Randy Wipke was the appointed ODR for this Project.



37. The Project was to be substantially completed by April 2017. Acklam successfully obtained substantial completion on November 17, 2016, 150 days ahead of schedule and under budget.
38. As a result of Acklam's early completion and high quality of construction, praise was showered upon Acklam from a number of TAMUS employees within the Dept. of Residence Life.
39. Additionally, three months after Acklam obtained substantial completion, Philip Ray (Vice Chancellor for Business Affairs) also left Jon Acklam a highly complementary voicemail stating, in pertinent part: "you all [Acklam] do a fantastic job."
40. Examples of the complimentary messages received by Acklam include:
- a. On September 6, 2016, Chareny Rydl (Director, Dept. of Residence Life) stated: "I would like to take you out to lunch and thank you for all the hard work you have done on the Commons project. I know we are finishing early because of the hard work you have done." See Exhibit "F."
  - b. October 5, 2016, Ms. Rydl further stated: "I heard your firm was not submitting a bid for the Commons dining project. Although I understand why not I just wanted you to know I would have enjoyed working with your team again if you had submitted and been awarded the project. You have done a great job." See Exhibit "G."
  - c. On February 10, 2017, Steve Laube (Facilities & Construction Manager, Dept. of Residence Life) stated: "You and your team have a lot to be proud of. The Commons renovation from what it was to what it is now is absolutely amazing. Thank you for all your hard work and dedication." See Exhibit "H."

- d. On February 13, 2017, Dan Mizer (Senior Associate Director, Dept. of Residence Life) stated: “We received many, many compliments from students and former students last Friday and Saturday on how very nice the Commons turned out. It was fun for me to tour Former Students (and their sons/daughters) who lived on campus back in the late 80s and 90s, to get their reactions of before and after. Very impressive.” See Exhibit “I.”
41. However, despite the foregoing compliments by many TAMUS employees, TAMUS is now engaging in a campaign to improperly discriminate against Acklam on future projects and withhold payments related to Acklam’s Work that are undisputedly owed. As explained below, TAMUS’s actions are an attempt to retaliate against Acklam for its refusal to: (i) perform Chartwells’ Work on the Project and (ii) hand out construction materials “under the table” to certain TAMUS employees in violation of Article 22 of the Contract (titled, “Business Ethics Expectations”).

**Acklam’s Justified Refusal to Perform Chartwells’ Work**

42. In April 2015, TAMUS and Chartwells approached Acklam about performing Chartwells’ Work in the “white box area” on the Lower Level of this Project. Mr. Russ Wallace, Executive Director of the TAMUS’s Office of Facilities Planning & Construction, primarily represented TAMUS in these discussions.
43. For a variety of reasons outlined in correspondence from Acklam to Mr. Wallace, dated April 20, 2015, Acklam declined TAMUS and Chartwells’ request to assume and perform Chartwells’ Work. See Exhibit “J.”
44. At this point in time, there was a noticeably negative change in TAMUS’s demeanor towards Acklam.

## **TAMUS's Improper Refusal to Award Acklam New Projects – Despite Acklam Offering the Lowest Fee**

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45. TAMUS's resentment of Acklam first manifested itself after Acklam declined to perform Chartwells' Work.
46. This quickly became apparent in construction bidding and CMAR selection process, which is significantly controlled by Mr. Wallace and slanted against Acklam.
47. The CMAR selection process entails the following steps. First, CMAR proposals, including fees for both Pre-Construction and Construction Service, are submitted by all the contractors on a given date and time. Mr. Wallace then selects the "short-list" of contractors who will advance to the interview phase of the selection process. The interview phase is conducted by a committee of TAMUS personnel. After the interview phase, Mr. Wallace submits his rankings to the Chancellor for the Chancellor's approval and signature. Russ Wallace then publishes a final ranking of the contractors (hereinafter the "Final Ranking(s)") and begins negotiating a contract with the highest ranking contractor. If TAMUS and the highest ranking contractor are unable to come to an agreement on the contractual terms and conditions, TAMUS will terminate negotiations with that contractor and proceed to negotiate with the next highest ranking contractor.
48. Since Acklam declined to perform Chartwells' Work, it has submitted CMAR proposals for three TAMUS construction projects, including: (i) the Center for Infrastructure Renewal; (ii) Music Activities Center; and (iii) Student Services Building.
49. Despite submitting the lowest fee proposal on all three projects, Acklam has not been awarded any work by TAMUS. In fact, Acklam has either been the last contractor listed in the Final Rankings, or not listed at all. For example:

50. On December 2, 2015, TAMUS released the various fee proposals submitted by contractors for the Center for Infrastructure Renewal project. See Exhibit “K.” Acklam submitted the lowest proposal by a margin of \$662,829 (or 19%). *Id.* Acklam’s fee proposal for this project was \$2,785,600. *Id.* The next highest fee proposal, submitted by Bartlett Cocke General Contractors, was \$3,448,429. *Id.* The contract for this project was awarded to Bartlett Cocke General Contractors. Acklam was listed last (fourth) in the Final Ranking. See Exhibit “L.”
51. Acklam also submitted the lowest fee proposal for the Music Activities Center project by a margin of \$245,000 (or 26%). See Exhibit “M.” However, Acklam was not included in the Final Ranking for this project at all. See Exhibit “N.” The project was ultimately awarded to SpawGlass, who submitted a fee proposal for \$1,268,103—nearly \$563,100 more than Acklam. See Exhibits “M” and “N.”
52. Finally, Acklam similarly submitted the lowest fee proposal for the Student Services Building project by a margin of \$274,727 (or 28%). See Exhibit “O.” However, Acklam was again omitted from the Final Ranking for this project. See Exhibit “P.” The project was ultimately awarded to Vaughn Construction, who submitted a fee proposal for \$1,268,103—nearly \$559,800 more than Acklam. See Exhibits “O” and “P.”
53. On these three projects alone, TAMUS selected contractors who cumulatively submitted fee proposals worth \$1,785,729 more than Acklam.
54. Mr. Wallace continually preaches about fiduciary responsibility with the taxpayers’ money. But, to the contrary, his actions resonate with discrimination and favoritism.

### **Mr. Wallace's Relationship With SpawGlass Merits Further Investigation**

55. As explained above, despite Acklam submitting the lowest fee proposal for the Music Activities Center project by a margin of \$245,000, Mr. Wallace awarded that project to SpawGlass, whose fee proposal exceeded Acklam's by nearly \$563,100.
56. However, Mr. Wallace has previously accepted benefits from SpawGlass and should recuse himself from the CMAR proposal process when SpawGlass is a participant.
57. For example, on January 31, 2015, Mr. Wallace and his wife attended the 2015 OPAS Gala held at the Brazos Expo Center. The Wallaces were guests of SpawGlass and sat at the company's table. Those also seated at the same table include:
- a. Roger Berry (President, Senior Living and Campus Housing, SpawGlass Construction Corporation);
  - b. Brandon Meyers (President, Houston Division, SpawGlass Construction Corporation);
  - c. Melodye Tomsu (Business Development Manager, SpawGlass Construction Corporation); and
  - d. Matt Elliott (Project Executive, SpawGlass Construction Corporation).
58. At another event in April 2017, Mr. Wallace is found pictured on the Internet with his son-in-law participating as guests at the SpawGlass Skeet Shoot. See Exhibit "Q." Mr. Wallace was the guest of Ms. Tomsu. *Id.*
59. Acklam's proposal presented the best value for the Music Activities Center project. Acklam was unfairly treated by not being short-listed and interviewed for this project. Conversely, SpawGlass submitted one of the highest fee proposals for the project; however, regardless of its high fee, SpawGlass was awarded the contract by Mr. Wallace. See Exhibits "M" and "N."

60. Accordingly, an investigation should be conducted to ensure that no abuses of authority have occurred in connection with the CMAR selection process.

**Acklam Also Rightly Refused Unethical TAMUS Requests**

61. On or about October 19, 2016, Audrey Rohloff-Ecklund, who is an Architectural Project Manager within TAMUS's Office of Facilities Planning & Construction, began asking Shawn Acklam, Vice President of Operations for Acklam, to give her a set of temporary metal stairs, worth an estimated \$12,000, utilized in Acklam's Work. *See* Exhibit "R," *in globo*, E-mail from Ms. Rohloff-Ecklund to Mr. Acklam, dated October 19, 2016, as well as text messages dated January 5, 2017 and February 23, 2017.

62. Shawn Acklam tried his best to ignore these requests, which continued through February 2017, and ultimately refused to hand over the stairs. *Id.*

63. At a minimum, these inquiries constitute a violation of Article 22.02 of the Contract (titled, "Business Ethics Expectations").

64. Article 22.02 provides, in pertinent part:

Contractor's employees, agents, subconsultants (and their representatives) shall not make or offer, or cause to be made or offered, any cash payments, commissions, employment, gifts valued at \$50 dollars or more, entertainment, free travel, loans, free work, substantially discounted work, or any other considerations to Owner's representatives, employees or their relatives.

*See* Exhibit "A."

65. Ms. Rohloff-Ecklund's unethical requests were a violation of this contractual provision and surely also TAMUS's own code of ethics.

66. However, TAMUS's bad faith tactics did not end there.

### **TAMUS's Request for a Third-Party Audit & Refusal to Pay Acklam**

67. On January 3, 2017, nearly 22 months after the Pre-Construction Conference and one and one-half months after Acklam obtained substantial completion, Acklam was first contacted by Michael Campbell (Project Manager III, TAMUS Office of Facilities Planning & Construction) about meeting with an external, third-party auditor (Mr. Rich Townsend) working for TAMUS. See Exhibit "S."
68. On January 12, 2017, Dawn Acklam, Acklam's Secretary and accountant, Mr. Townsend and others met to discuss the scope of the requested audit and the documents that Mr. Townsend wanted to review.
69. And, it was at this moment that Acklam first realized TAMUS intended to use this contractually unauthorized audit as a weapon in an effort to deny it any further payments and claw-back amounts previously paid.
70. Mr. Townsend's document request was overly burdensome and sought documents that Acklam had never been asked to maintain and preserve on past CMAR projects, at the Pre-Construction Conference for this Project or at any other point during this Project. See Exhibit "T," *in globo*, E-mails from Mr. Townsend to Acklam.
71. Furthermore, as explained above, the Contract does not contemplate or allow a third-party audit of this type. Accordingly, Acklam has refused to participate in the audit requested by Mr. Townsend.
72. Up to this point, all of Acklam's previous payment applications have been validated and approved, along with Acklam's work.
73. Nevertheless, Acklam is still owed \$476,234.36 for current work and partial retainage withheld by TAMUS.

74. On March 28, 2017, Acklam uploaded its latest application for periodic progress payment, Application for Payment. No. 27 (hereinafter “Payment Application”), in the amount of \$339,262.36, to the e-Builder software utilized by TAMUS. See Exhibit “U.”
75. On March 31, 2017, Mr. Ray Vela, the project architect/engineer approved Acklam’s Payment Application.
76. At that point in time, under the terms and conditions of the Contract and applicable Texas law, payment should have been released to Acklam.
77. However, to date, TAMUS has not released payment to Acklam.
78. On May 1, 2017, undersigned counsel sent a letter to TAMUS demanding payment to Acklam. See Exhibit “V.” TAMUS did not respond to this letter.
79. On May 16, 2017, without any prior notification, TAMUS voided Acklam’s Payment Application and stated as follows:

Acklam Construction Company’s Application for Payment No. 28 [sic] for the TAMU Commons Building Renovation is hereby rejected for reasons as follows: Acklam Construction has refused to comply with TAMUS’ requests for information needed to complete an audit of the overall construction costs of this project. Until the requested information is produced, and the construction audit completed, TAMUS is unable to validate the amounts due to Acklam Construction Company. As such, this and all future payment applications will be denied until satisfactory completion of the TAMUS construction audit of this project.

See Exhibit “W.”

80. TAMUS’s purported justification for voiding Acklam’s payment application is bogus and improper for three primary reasons.
81. First, the Contract does not allow TAMUS to withhold a periodic progress payment from Acklam on the grounds that an audit has been requested or is pending. If the terms and



conditions of Articles 10.2 and 10.3 have been met, then TAMUS has a contractual duty to pay Acklam. See Exhibit “A,” Contract, Exhibit B – UGSC.

82. Second, Acklam has, in fact, agreed to participate in an audit similar to the one carried out by Mr. Wipke on each of the five previous CMAR projects that Acklam has performed for TAMUS.

83. Third, the Contract does not contemplate or allow an audit by a third-party. Under Article 4.3 of the Contract, Mr. Wipke, the ODR, is expressly responsible for reviewing Acklam’s documents and making decisions regarding fees and costs. See Exhibit “A,” Contract.

84. TAMUS’s improper refusal to release a contractually owed periodic progress payment to Acklam, in the amount of \$339,262.36, and demand for an onerous third-party audit are blatant attempts by TAMUS, and particularly Mr. Wallace, to harass and retaliate against Acklam for its refusal to (i) construct and perform Chartwells’ Work and (ii) unethically distribute surplus construction materials to TAMUS employees in violation of Article 22 of the Contract.

## **VII.**

### **CAUSES OF ACTION**

#### **Count 1: TAMUS Breached the Contract**

85. Plaintiff repeats and reasserts all preceding allegations as if set forth herein verbatim.

86. To prevail on a breach-of-contract claim, a party must establish the following elements: (1) a valid contract existed between the plaintiff and the defendant, (2) the plaintiff tendered performance or was excused from doing so, (3) the defendant breached the terms of the contract, and (4) the plaintiff sustained damages as a result of the defendant's breach.

87. Here, all of the foregoing elements are satisfied.

88. First, a valid contract exists between the parties. See Exhibit “A.”
89. Second, Acklam has tendered performance of its Work. Acklam’s work was completed and approved by TAMUS 150 days early.
90. Third, TAMUS has breached the Contract by not approving Acklam’s most recent application for a periodic progress payment (Application for Payment No. 27) and releasing \$339,262.36 to Acklam and preemptively denying all future payments to Acklam. See Exhibit “W.”
91. With regard to Acklam’s right to periodic progress payments, the Contract states:
- The Contractor will receive periodic progress payments for Work performed, materials in place, suitably stored on site, or as otherwise agreed to by the Owner and the Contractor. Payment is not due until receipt by the ODR or his designee of a correct and complete Pay Application in electronic and/or hard copy format as set forth in Special Conditions or Division 1 Specifications, and certified by the A/E.
- See Exhibit “A,” Contract, Exhibit B - UGSC, Article 10.2.
92. Additionally, the Contract specifically provides that the Owner has a duty to pay the Contractor upon the receipt of: 1) a complete invoice certified by the A/E, 2) the Contractor’s updated Work Progress Schedule, and 3) confirmation that the Contractor’s as-built documentation at the site is kept current. See Exhibit “A,” Contract, Exhibit B – UGSC, Article 10.3.
93. All of these requirements have been met. Acklam has submitted the following information to TAMUS: (1) a complete invoice certified and approved by the A/E; (2) its updated Work Progress Schedule (which is now complete), and 3) confirmation that the Contractor’s as-built documentation at the site is kept current.
94. Acklam’s Payment Application was approved by the A/E, Mr. Ray Vela, on March 31, 2017.

95. To be clear, Acklam's Payment Application is not a request for final payment—it is a request for a periodic progress payment.
96. Finally, Acklam has undisputedly sustained damages through TAMUS's failure to approve Acklam's Payment Application and pay Acklam \$339,262.36 and preemptive denial of all future payments to Acklam.
97. TAMUS further breached the Contract by failing to properly execute its contractual obligations related to the Pre-Construction Conference. See Exhibit "A," Contract, Exhibit B - UGSC, Article 3.1.1 (also quoted above in para. 27). Had TAMUS timely informed Acklam of any heightened record keeping and audit requirements at the Pre-Construction Conference, the Parties undoubtedly would not find themselves in this current situation, which has caused significant damage to Acklam.
98. Finally, TAMUS also breached the Contract by requesting a third party external audit, which is plainly outside the limits of the Contract and one of the main catalysts that sparked the sequence of events leading to this lawsuit.
99. Accordingly, TAMUS has breached the Contract in a number of respects, and Acklam's claim for breach of contract should be granted. Acklam should be awarded \$476,234.36, in addition to all attorneys' fees, costs and interest owed under Texas law.

**Count 2: TAMUS Violated the Texas Government Code**

100. Plaintiff repeats and reasserts all preceding allegations as if set forth herein verbatim.
101. Under Section 2251.042 of the Texas Government Code, TAMUS was required to notify Acklam of any errors in its invoice within 21 days of the invoice being received.
102. TAMUS undisputedly failed to comply with this law and has waived its right to challenge Acklam's Payment Application.

103. Acklam submitted its Payment Application, which included a valid Acklam invoice, to TAMUS on March 28, 2017.
104. Acklam's Payment Application was approved by Mr. Ray Vela, the A/E, on March 31, 2017.
105. However, TAMUS did not approve Acklam's Payment Application or notify Acklam of any errors within its invoice within the 21 day time limit.
106. Rather, TAMUS remained completely silent for 49 days, until May 16, 2017, when it unilaterally and improperly rejected Acklam's Payment Application.
107. Accordingly, TAMUS violated the aforementioned law and is responsible for all damages contemplated by the Texas Government Code, including, but not limited to, (1) the principal outstanding balance of \$476,234.36; (2) attorneys' fees and costs incurred by Acklam; and (3) pre-/post-judgment interest on the principal balance of \$476,234.36. See Sec. 2251.043 and Sec. 2251.026(a).

**Count 3: Acklam Is Entitled to Declaratory Relief**

108. Plaintiff repeats and reasserts all preceding allegations as if set forth herein verbatim.
109. Pursuant to Chapter 37 of the Texas Civil Practices and Remedies Code, the Uniform Declaratory Judgments Act, Acklam hereby requests and is entitled to a declaratory judgment from this Honorable Court specifying that (i) the Contract does not contemplate or allow a third-party audit of Acklam; and (ii) Acklam is not required to comply with any TAMUS requests for a third-party audit.

**Count 4: TAMUS Is Responsible for Acklam's Attorneys' Fees, Costs & Interest**

110. Plaintiff repeats and reasserts all preceding allegations as if set forth herein verbatim.

111. Considering the foregoing, Acklam is legally entitled to recover its reasonable attorneys' fees and costs incurred prosecuting this civil action under the Texas Civil Practices and Remedies Code and Texas Government Code. See Sec. 37.009, Sec. 114.004(3) and Sec. 2251.043, respectively.
112. Additionally, Acklam should also be awarded the pre- and post-judgment interest accumulating on the outstanding principal balance owed by TAMUS, totaling \$476,234.36. See Id. at Sec. 114.004(4) and Sec. 2251.026(a).

### **VIII.**

#### **CONDITIONS PRECEDENT**

113. All conditions precedent to Plaintiff's claims for relief have been performed or have occurred.

### **IX.**

#### **REQUESTS FOR DISCLOSURE**

114. Under Texas Rule of Civil Procedure 194, Plaintiff requests that Defendant disclose within 50 days of the service of this request, the information and materials described in Rule 194.2.

### **X.**

#### **PRAYER FOR RELIEF**

115. Wherefore, after due consideration is given, Acklam hereby prays that a final judgment be entered awarding it the following relief:
- a. The principal outstanding balance of \$476,234.36;
  - b. Pre-judgment interest;
  - c. Post-judgment interest;

- d. All attorneys' fees and costs incurred by Acklam;
- e. A declaration that (i) the Contract does not contemplate or allow a third-party audit of Acklam; and (ii) Acklam is not required to comply with any TAMUS requests for a third-party audit; and
- f. All other relief that Acklam may be entitled to as a matter of law or equity.

Respectfully submitted,

BLAND & PARTNERS P.L.L.C

/s/ Brian J. Comarda  
BRIAN J. COMARDA  
Trial Attorney  
Texas Bar No. 24055332  
JACK E. BYROM  
Texas Bar No. 24082763  
1717 St. James Place, Suite 360  
Houston, Texas 77056  
Telephone: (713) 627-7100  
Facsimile: (504) 627-7148  
[bcomarda@blandpartners.com](mailto:bcomarda@blandpartners.com)  
[jbyrom@blandpartners.com](mailto:jbyrom@blandpartners.com)

Attorneys for Acklam Construction Co., Ltd.