Affirmed and Opinion filed June 29, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00551-CV

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VIV ELECTRIC CO., INC., Appellant

V.

STR CONSTRUCTORS, INC., Appellee

On Appeal from the County Court at Law
Waller County, Texas
Trial Court Cause No. C-96-71

O P I N I O N

Appellant, VIV Electric Company, Inc., appeals from a judgment in which the trial court awarded VIV actual damages against appellees, STR Constructors, Inc., and Insurance Company of the West, and granted STR a partial offset against VIV. In seven points of error, VIV contends the trial court erred in failing to award attorney's fees and in granting the partial offset because there is no evidence or insufficient evidence to support findings of fact and conclusions of law regarding STR's damages, terms of the contract, and VIV's breach of the contract. We affirm.

I. Background & Procedural Posture

STR was the general contractor and VIV, the electrical subcontractor, on a construction project to renovate a building at Prairie View A & M University. This case involves a dispute between STR and VIV about whether VIV (1) delayed the completion of the construction project, and (2) then refused to complete, causing STR to hire another electrical subcontractor to complete the job. The contract between STR and VIV controls the answers to some of the questions in the case, and the trial court's resolution of the factual disputes controls the answers to the other questions in the case. The following facts pertain to the construction project and the trial.

The contract between STR and VIV provided that the project be completed by October 21, 1995. A critical component of the project was an electrical transformer, which required approval of the project's engineer before it could be ordered. By mid-July, 1995, VIV was responsible for preparing detailed electrical submittals about the transformer and other equipment for the engineer's approval. Although timely, the submittals were unacceptable to the project engineer because they did not provide the data that he requested. The submittals were not approved until the third attempt, on October 6, 1995. Because the transformer would take weeks to manufacture, this late approval meant that the transformer would not arrive for the October deadline. In fact, it did not arrive until mid-December, 1995, and VIV did not install it until December 27, 1995.

Prairie View A & M extended STR's deadline for completion of the project to January 8th, but did not accept the job as complete until March 8, 1996. Because STR did not complete the project by the January 8th deadline, Prairie View A & M invoked the liquidated damages clause in its contract with STR and charged STR $7,840 for fifty-six days of delay. STR blamed the delay on VIV because of its deficient performance in acquiring the transformer and its failure to properly man the job. Moreover, STR did not pay VIV all that VIV was owed under the contract.

In May, 1996, VIV demanded that STR pay the full amount of the subcontract. STR offered to pay part of what it owed VIV under the contract and to negotiate with VIV about liquidated damages. VIV rejected the offer. STR then filed suit against VIV alleging breach of contract and seeking declaratory relief for damages it incurred from VIV's alleged deficient performance. VIV counterclaimed, alleging that STR breached the subcontract, and sought damages for the breach and declaratory relief under the Uniform Declaratory Judgment Act for the full amount due under the subcontract, for attorney's fees pursuant to section 38.001 of the Civil Practice and Remedies Code, interest, and costs.

At the conclusion of a bench trial, the trial court entered judgment for VIV in the amount of $24,683.38 after allowing a offset of $20,179.02 to STR. The trial court refused to allow attorney's fees for either party. VIV filed a motion for new trial, which was denied by operation of law. At VIV's request, the trial court entered findings of fact and conclusions of law, which VIV challenges on appeal.

VIV attacks the trial court's judgment in three general areas. First, in issue one, it complains about the court's refusal to grant it attorney's fees. Next, it challenges the court's refusal to award it the full contractual amount. Thus, in issue four it complains of the court's findings that it (a) failed to complete the work required by the contract, (b) failed to perform in a workmanlike manner, (c) abandoned the project, and (d) failed to prove substantial performance. Finally, in the remaining issues, VIV attacks its award of damages and the offset to STR.

II. Standard of Review

Findings of fact in a bench trial have the same force and dignity as a jury verdict; they are reviewable for legal and factual sufficiency by the same standards asked for reviewing a jury's findings. *See Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991); *Dickerson v. DeBarbieris*, 964 S.W.2d 680, 683 (Tex. App.—Houston [14th Dist.] 1998, no pet.). In reviewing fact findings for legal sufficiency, we consider only the evidence and inferences supporting the finding. *Minnesota Mining and Mfg. Co. v. Nishika Ltd.*, 953

S.W.2d 733, 738 (Tex. 1997). In cases where the appellee bears the burden of proof at trial, an appellant's no-evidence challenge will fail if more than a scintilla of probative evidence supports the finding. *Id.* More than a scintilla of evidence exists where evidence supporting the finding, as a whole, rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied*, 523 U.S. 1119 (1998). In cases where the appellant bears the burden of proof at trial, a no-evidence challenge will fail unless the evidence conclusively establishes the issue as a matter of law. *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982).

In reviewing for factual sufficiency, we examine all of the evidence in the record and overturn the finding only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Vickery v. Vickery*, 999 S.W.2d 342, 375 (Tex. 1999); *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996).

Conclusions of law are reviewable when attacked as a matter of law, but not on grounds of factual sufficiency. *Tigner v. City of Angleton*, 949 S.W.2d 887, 888 (Tex. App.—Houston [14th Dist] 1997, no writ). The standard of review is whether the legal conclusions drawn from the facts are correct. *Dickerson*, 964 S.W.2d at 683. We will uphold conclusions of law if the judgment can be sustained on any legal theory supported by the evidence. *Id.*

III. Attorney's Fees

We address first the issue of attorneys fees. In its first point of error, VIV claims the trial court abused its discretion when it failed to award attorney's fees to VIV on its breach of contract claim that it brought under section 38.001 of the Texas Civil Practice and Remedies Code. VIV challenges one of the court's findings and one conclusion of law: the eighteenth finding of fact, in which the trial court found that VIV did not meet the requirements for recovery of attorney's fees under section 38.001, and the tenth conclusion of law, in which the trial court denied attorney's fees. We look first to whether VIV had a basis for recovering fees; this question is governed by section 38.001 and the caselaw interpreting it.

Section 38.001 provides for the recovery of attorney's fees associated with a successful claim on an oral or written contract. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1997). To obtain an award of attorney's fees under section 38.001, a party must meet two requirements: (1) it must prevail on a cause of action for which attorney's fees are recoverable, and (2) it must recover damages. *See Green Intern. Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997); *Kenneth Leventhal & Co. v. Reeves*, 978 S.W.2d 253, 257 (Tex. App.—Houston [14th Dist.] 1998, no pet.). When a claim under section 38.001 is successful, a trial court has the discretion to determine the proper amount of attorney's fees. Additionally, when a claim is successful, and reasonable fees are proven, a trial court has no discretion to deny the fees. *See World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 683 (Tex. App.—Fort Worth 1998, pet. denied); *Cortland Line Co., Inc. v. Israel*, 874 S.W.2d 178, 184 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

VIV maintains the record indicates that it met the requirements of sections 38.001 and 38.002 of the civil practice and remedies code, and, therefore, the court had to award it attorneys fees. However, although the record reflects some evidence that VIV met the procedural requirements to recover attorneys fees under section 38.002, other fact findings support a conclusion that VIV cannot recover because it did not prevail on its breach of contract claim.

"A prevailing party is one of the parties to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of its original contention." *F.D.I.C. v. Graham*, 882 S.W.2d 890, 900 (Tex. App.—Houston [14th Dist.] 1994, no writ) (quoting *Criton Corp. v. the Highlands Ins. Co.*, 809 S.W.2d 355, 357 (Tex. App.—Houston [14th Dist.] 1991, writ denied)). Determination of whether a party is the prevailing or successful party must be based upon success on the merits, and not on whether or not damages were awarded. *City of Amarillo v. Glick*, 991 S.W.2d 14, 17 (Tex. App.—Amarillo 1997, pet. denied); *Perez v. Baker Packers*, 694 S.W.2d 138, 143 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). In other words, a prevailing party is one

who is vindicated by the trial court's judgment. *Dear v. City of Irving*, 902 S.W.2d 731, 739 (Tex. App.—Austin 1995, writ denied).

The trial court made several fact findings that VIV was not the prevailing party at trial on its breach of contract claim. In its third finding of fact, the trial court found that VIV "failed to timely complete its work in accordance with the Subcontract." In its fourth finding, the court said that VIV "failed to complete the scope of work required by the Subcontract." In its fifth, the trial court found that VIV "failed to perform the Subcontract and electrical services in a workmanlike manner." In its seventh finding, the trial court found that VIV "abandoned the Subcontract and its work." Finally, in its twenty-third finding, the trial court found that VIV "did not establish substantial performance." We have found such findings to be supported by sufficient evidence.

Because VIV was not the prevailing party on its breach of contract claim, the trial court did not abuse its discretion in denying attorney's fees under section 38.001 of the civil practices and remedies code. Accordingly, we overrule VIV's first point of error.

IV. Factual Findings Regarding VIV's Performance

In its fourth issue, VIV challenges the legal and factual sufficiency of the evidence to support findings of fact that it failed to substantially complete the contract and to perform in a workmanlike manner, and that it abandoned the contract. In this sufficiency challenge, VIV attacks the following findings:

> 4. Defendant, VIV, failed to complete the scope of work required by the Subcontract.
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> 5. VIV failed to perform the Subcontract and electrical services in a workmanlike manner.
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> 6. Plaintiff, STR, was required to incur expenses in the amount of $20,179.02 to complete the Subcontract in a workmanlike manner.
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> 7. Defendant, VIV, abandoned the Subcontract and its work.
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> 23. Defendant, VIV, did not establish substantial performance.

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26. STR notified VIV that VIV was required to complete scope of electrical work.

A. Scope of Work Contemplated by VIV's Subcontract

We look first to the evidence presented on the scope of work contemplated by the contract between VIV and STR. It was a form construction contract. Section one provided that VIV furnish and pay for all labor, services, and materials, and perform all work necessary or incidental for the completion of the electrical work as provided by the contract documents. In a typewritten section beneath this form provision, the parties inserted the following:

> The intent of this Subcontract is that the Subcontractor [VIV] shall provide all items, articles, materials, operations, methods listed, implied, mentioned, or scheduled on the contract documents and herein listed, including all labor, materials, equipment, supervision and incidentals necessary and required, all of which are collectively required, for the construction of ELECTRICAL work in strict accordance with the Contract Plans and Specifications with particular compliance to Section(s) SPEC. SECTION 16000 of the contract specifications and addenda thereof.

VIV also agreed that the contract specifically included fixtures, contactors, conduit, wire and cable, devices, panelboards, disconnects, grounding, transformers, outlets, electrical demolition, fire alarm and detection systems, and temporary electrical. VIV noted its awareness that the contractual completion date for the project was October 21, 1995 and agreed to "schedule, coordinate, and diligently perform his work in order that the project will complete by that date." VIV also agreed to comply with pages marked Attachment A and B of the subcontract.

Attachment A was not a form addendum, but a typed agreement relating specifically to the renovation of Farrell Hall - Job 9503. Attachment A addressed specific requirements about submitting drawings, samples, schedules, and so forth, as well as, insurance, temporary work, discrimination against employees, time completion of the project, and compliance with local, state, and federal regulations and standards.

Section 16000 addressed the general requirements for all electrical work under the contract between STR and Prairie View A & M. Subsection I.B. entitled "Scope of Work" indicated that the "work covered by the Electrical Sections of the Specifications include the furnishing of all materials, labor, transportation, tools, permits, fees, utilities, and incidentals necessary for the complete installation of all electrical work required in the Contract Drawings." Section 16000 also stated that the intent of the contract documents was to provide an installation complete in every respect; thus, if additional or special construction was required, the contractor would bear the responsibility to provide all material and equipment to complete the electrical installation, "whether mentioned or not."

Even though it agreed to these terms, the record reflects that VIV failed to complete several items on the punch list necessary to the completion of the job, including the installation of an exit light, fixture whips and some spring isolators for some hanging transformers. VIV also failed to provide a written warranty guaranteeing the project for one year and refused to provide operation and maintenance manuals for the electrical work. STR notified VIV of the specific deficiencies under the contract and requested that VIV correct the deficiencies within forty-eight hours as provided in section nine of the subcontract. VIV responded that it had no problem in complying with the request, but indicated that it would assess an additional charge per item. Three days later, STR informed VIV that its refusal to provide the organization and maintenance manuals, which were a contract requirement, left it no choice but to complete the job and charge VIV for the cost incurred in completing its work.

Richard Pickel, VIV's president, testified that VIV refused to correct the deficiencies noted by STR unless STR paid it additional money because the deficiencies were the result of changes made outside the contract.[1] Pickel further testified that VIV did not prepare the

[1] Pickel testified that VIV charged extra for the exit light because the owner changed the location of the light after VIV had installed the box and materials for an exit light in another location. Pickel attested that in 1995, he talked with Kennedy about hanging a transformer with the spring isolator because VIV did not think it safe to hang a heavy transformer in the air. Once he received assurance that the spring would hold the transformer and installed the spring isolator, the engineer determined that the transformers needed (continued...)

organization and maintenance manuals and did not give the warranty because STR had not paid the amount owed VIV for work performed.

The subcontract, however, provided the means by which VIV would be compensated for changes made outside the contract and the means by which disputes could be resolved.[2] VIV produced no change orders indicating the punch list items were outside the contract and no evidence, other than lack of compensation, to justify its failure to produce the warranty and organization and maintenance manuals.

Because the parties agreed to a complete installation and sufficient evidence exists that VIV did not complete the work, the trial court did not err in finding that VIV did not complete the scope of the work. Additionally, even though VIV presented some evidence through its president for why some items were not done, the courts finding is not against the great weight and preponderance of the evidence.

B. Workmanlike Manner

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[1] (...continued)
bigger springs. Pickel disagreed and refused to change the springs. As to the exit light, Pickel testified that the problem was not with the lights, but with the electrical conduit that goes to the light itself. Pickel testified that the conduit was a six-foot piece of flexible metal, called a fixture whip. The whip was UL approved. Pickel said if he cut the fixture whip to four feet as the engineer requested, the whip would no longer be UL approved.

[2] In Section 4 of the subcontract, VIV agreed to perform its work under the direction of a named architect and that "his decisions as to the true construction and meaning of the drawing and specifications shall be final." VIV agreed that it would "conform to and abide by any additional specifications, drawings, contract documents or explanations furnished by the Architect to detail and illustrate the work to be done." In section 5, VIV further agreed to make "all alterations, furnish materials for and perform all extra work or omit any work Contractor may require without nullifying this agreement, at a reasonable addition to/or deduction from the contract price....HOWEVER, NO ALTERATIONS OR CHANGES SHALL BE MADE EXCEPT UPON CONTRACTOR'S WRITTEN ORDER."

We now turn to VIV's claim that the evidence is legally and factually insufficient to support the court's finding that VIV did not perform in a workmanlike manner. "Workmanlike" is the quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice or a trade or occupation and who performs in a manner generally considered proficient by those capable of judging such work. *See Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987). STR presented no evidence that VIV lacked the knowledge, training, or experience necessary to successfully perform the subcontract or the work of an electrician. There is, however, more than a scintilla of evidence that the quality of electric work performed by VIV and the manner in which VIV performed the work fell below the standard of proficiency as judged by those capable of judging such work.

Rick Kennedy, STR's president, attested that "the engineer stated that light fixtures and some chases were not installed in a workmanlike manner and were not acceptable." Kennedy also attested that there was a discrepancy on the location of an exit light. He attested that VIV refused to correct these deficiencies without additional money so STR hired another electrician to do the work. He further testified that the engineer would not accept the installation of spring-loaded isolators for some hanging transformers and that VIV refused to make the changes unless they were paid additional money. Again, STR hired another electrician to perform the work. STR, however, did not condemn any of VIV's work on the project.

Other evidence indicates that the manner in which VIV performed its work was deficient. In the subcontract, VIV acknowledged that it was aware of the October, 1995 contractual completion date for the project and promised to schedule, coordinate and diligently perform its work in order that the project will complete by that date. In Attachment "A," VIV agreed that it would be aware of the time of completion of the project and would schedule its work to avoid any delay to the overall completion of the project. VIV also promised that "[a]ny delays in the progress of the work shall be remedied by Subcontractor with all reasonable dispatch and at no additional cost to the Contractor or

Owner." In spite of this agreement, there is some evidence that VIV breached these terms by delaying the installation of the transformer and failing to properly man the job.

VIV signed the subcontract in mid-June, 1995. In mid-July, STR informed VIV that the transformer and switch gear needed to be installed during a scheduled power outage in late September. Five days later, VIV informed STR that the transformer and switch gear required a twelve to fourteen week delivery and that to meet this deadline, the architect would have had to approve and return the submittals by the end of June. Pickel, VIV's president, claims VIV was unaware of the delivery problem until Reilly Electric, its supplier, prepared the first submittals for the engineer's approval. STR informed Prairie View A & M of the delivery problem and it agreed to reschedule the outage to the week of October 23rd.

The transformer, however, did not arrive in time for the October 23rd outage because VIV's transformer submittals were rejected by Paul Swoboda, the electrical engineer in charge of the project. Pickel attributed the deficiences in the submittals to Reilly Electric, who prepared them without VIV's assistance. Pickel admitted that VIV did not attempt to correct the deficiencies in the rejected submittals, but returned the submittals to Reilly to correct the deficiencies. Reilly's third submittal was not rejected, but it was not fully accepted. By a letter dated October 6th, Swoboda sought clarification of four items on the third submittal. On October 13th, Reilly Electric informed STR that the transformer was scheduled for shipment on December 29 and for an additional $500, the transformer could be shipped on December 15. VIV paid the additional $500.

On October 23rd, STR informed VIV that the transformer would arrive on site the week ending December 22 and that prior to that time, all work should be accomplished to make the change from the existing transformer to the new transformer. STR also indicated that the job would be completed, inspected, and turned over to Prairie View A & M no later than January 8, 1995. The job was not completed on January 8.

The record also reflects evidence that VIV delayed the work of other contractors. Swoboda testified that he observed the electrical work and from the very beginning the electricians seemed to be behind. He testified VIV delayed the work of other subcontractors because they were slow to put up temporary lighting, thus, workers could not see what was going on. Larry Myers, the superintendent with STR, testified that VIV often did not man the job; consequently, other trades could not perform their job. He further attested that VIV could have completed everything inside the building except for hooking up the transformer, but VIV postponed much of its work until after installation of the transformer.

Pickel, VIV's president, offered controverting testimony. Pickel testified that the placement of the transformer did not delay other crafts from performing their work because there was power to the building at all times from an existing transformer. Pickel attested that from the beginning there were problems with other crafts and that the "work wasn't really very scheduled at all." Pickel claimed that VIV was delayed because the ceiling and wall grids were not installed until the end of November or first of December. Pickel also acknowledged that VIV did not follow STR's schedule because it "wasn't no good to start with." He claimed VIV manned the job properly because "[e]verytime we needed somebody out there we sent somebody."

Pickel claimed that VIV completed its work on the project around February 12. According to Pickel, VIV billed for the job on January 24th because the job was substantially complete at that time, except for items on the punch list. VIV completed all the items on the February 8th punch list, but did not complete all the items on the March 4th punch list.

Notwithstanding Pickel's testimony, evidence of VIV's defective installation of some fixtures, its defective submittals, and its failure to properly man the job is legally and factually sufficient to support the trial court's finding that VIV did not complete the subcontract or the electrical work in a workmanlike manner.

C. Substantial Performance

VIV's next claim is that the trial court's finding, that VIV did not substantially perform, is not supported by the evidence. Generally, a party to a contract who is itself in default cannot maintain a suit for its breach. *See Dobbins v. Redden*, 785 S.W.2d 377, 378 (Tex. 1990). The doctrine of substantial performance has ameliorated this rule by allowing a contract action by a builder who has breached, but nevertheless substantially completed, a building contract. *Id.* The doctrine is an equitable action that allows a contractor who has substantially performed a construction contract to sue on the contract rather than being relegated to his cause of action for quantum meruit. *See Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 482 (Tex. 1984). The doctrine does not permit the contractor to recover the full consideration provided in the contract because, by definition, the doctrine recognizes that the contractor is in breach of the contract. *Id.* Although the contractor is allowed to sue on the contract, his recovery is decreased by the cost of remedying those defects for which he is responsible. *Id.*

A contractor seeking recovery on a substantial performance theory has the burden to plead substantial performance, to prove that he did substantially perform, and to prove the consideration due him under the contract, and the cost of remedying the defects due to his errors or omissions. *Id.* at 483.; *Carr v. Norstok Bldg. Systems, Inc.*, 767 S.W.2d 936, 940 (Tex. App.—Beaumont 1989, no writ). A finding that a contract has been substantially completed is the legal equivalent of full compliance, less any offsets for remediable defects. *Uhlir v. Golden Triangle Development Corp.*, 763 S.W.2d 512, 515 (Tex. App.—Fort Worth 1988, writ denied).

VIV contends that it established substantial performance because several witnesses testified that the electrical work was substantially complete on different days and because Kennedy "swore under oath in a notarized pay application that the electrical work was 100% complete as of February 19, 1996. The owner's representative, Robert Duffie, testified that, based on Kennedy's attestation, Prairie View A & M believed the electrical work was

100% complete on February 16, 1996, that being synonymous with substantial completion. Pickel testified that VIV's job was substantially complete on January 24th except for items on the punch list.

The record, however, indicates that in addition to items on the punch list, VIV did not prepare the organization and maintenance manuals or the warranty, both of which were required by the subcontract. Furthermore, VIV did not proffer evidence to properly measure the deductions and expenses necessary to remedy the defects. Moreover, VIV did not plead substantial performance. Instead, it alleged that it had "fully performed all conditions precedent for recovery on said obligation," and sought recovery from STR "for the wares [sic] materials, and/or services which it has provided under the principle of quantum meruit in the amount of at least $62,045.87."

After reviewing the entire record, we conclude that legally and factually sufficient evidence supports the trial court's finding that VIV did not establish substantial performance.

D. Abandonment of Job

VIV's final complaint about the court's failure to award it the full contract price pertains to the court's finding that VIV abandoned the subcontract. The abandonment of a contract "is a matter of intent [citations omitted], and implies not only nonperformance, but an intent not to perform which may be inferred from acts which necessarily point to actual abandonment." BLACK'S LAW DICTIONARY, 2-3 (6th ed. 1990). Here, the record indicates that VIV did not perform any work on the Prairie View A & M job after March 1, 1996 and it expressed an intent not to perform some items on the punch list without additional compensation. Other evidence indicates that VIV did not intend to provide the organization and maintenance manuals or the warranty as required by the contract without payment from STR. After notification, STR employed other electricians to complete the job and sued VIV for damages. This evidence is sufficient to support the trial court's finding that VIV abandoned the job.

V. Expenses to Complete the Subcontract

In the remaining points of error, VIV attacks the trial court's award of damages based on the expenses STR incurred to complete the contract in a workmanlike manner. In point of error two, VIV challenges the sufficiency of the evidence to support the assessment of extended overhead or liquidated damages against VIV. In point of error three, VIV attacks the reasonableness of the amount STR claimed it cost to provide the warranty. In point of error five, VIV claims the trial court erred by refusing to find that STR breached the contract term on payment, thus excusing its nonperformance. In points of error six and seven, VIV claims the trial court misinterpreted the contract completion date and language capping damages for delay at liquidated damages. In the interest of judicial economy, we consider VIV's sixth, seventh, and fifth points of error, respectively, before addressing the sufficiency of the evidence to support the trial court's determination of STR's damages in points of error two and three.

A. Subcontract Completion Date

In point of error six, VIV claims the trial court failed, as a matter of law, to properly interpret the subcontract's provisions regarding the completion date of the electrical job. VIV contends the subcontract is subject to the prime contract between STR and Prairie View A & M; therefore, the prime contract, and not the subcontract, controls the date by which VIV's electrical work on the project was to have been completed. VIV contends the trial court interpreted the completion date to be October 21, 1995, as stated in the subcontract, instead of November 18, 1995, as calculated by VIV according to the terms of the prime contract.[3] VIV further claims that, because the subcontract makes the

[3] Under the prime contract, the project was to be completed 135 consecutive calendar days, beginning ten days after the Notice to Proceed, plus any extended days approved by the contract. VIV maintains the true completion date according to the prime contract is November 18, 1995. VIV calculates this date from the date ordering commencement of the project in the Notice to Proceed, which Prairie View A & M issued on June 26, 1995. In the Notice to Proceed, Prairie View A & M ordered the project to commence on July 6, 1995. Based on the formula in the prime contract and the July 6th commencement date,

(continued...)

subcontractor's rights subject to provisions for change in the prime contract, extensions granted to STR under the prime contract also served to extend the date by which VIV was to have completed its work. VIV further contends that two change orders approved by Prairie View A & M extended STR's completion date to January 8, 1996, and thus, extended its completion date to January 8, 1996.

The trial court made no specific finding about the date VIV was to have completed the job under either or both contracts. VIV, nevertheless, contends the trial court's refusal of its additional findings of fact support two of its requests for the contention that the trial court misinterpreted the subcontract. The trial court refused to find the following:

> 2. The subcontract completion date was not extended by the owners [sic] extensions of time under its contract with STR.
>
> 3. The subcontract between STR and VIV was not extended 56 days, plus a 5-day abatement, by virtue of the extension of the Prairie View A & M contract with STR.

These two requests concern extensions of the completion date and not the date VIV was to have completed the electrical project. Although VIV claimed in its motion for new trial that both parties agreed that the subcontract had been extended to January 8th by agreement, it made no allegation that the trial court misinterpreted the subcontract in construing the initial completion date.

"The law is unequivocal: it is incumbent upon appellants to request additional findings on a contested issue if they desire such findings." *O'Farrill Avila v. Gonzalez*, 974 S.W.2d 237, 248 (Tex. App.—San Antonio 1998, pet. denied). A request for additional findings is in the nature of an objection; therefore, the request must be for specified additional or amended findings and conclusions. *See Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 256 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); TEX.

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[3] (...continued)
VIV calculates the completion date for the project to be November 18, 1995. VIV further contends that the October 21st completion date would be the true completion date only if Prairie View A & M had actually issued the Notice to Proceed on June 9th, the date of the prime contract.

R. CIV. P. 298. Because VIV did not request an additional finding on the completion date of the electrical subcontract, it failed to preserve error on its claim. *See* TEX. R. APP. P. 31.1(a).

Even if VIV preserved error, its contention that the trial court misinterpreted the completion date of the subcontract fails because the subcontract does not expressly make all terms of the subcontract subject to any and all provisions of the prime contract. The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument. *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex.1995). If an instrument is worded so that it can be given an exact or certain legal interpretation, it is not ambiguous and a court can construe the contract as a matter of law. *Chapman v. Hootman*, 999 S.W.2d 118, 122-123 (Tex. App.—Houston [14th Dist.) 1999, no pet.); *Louisiana Natural Gas Pipeline, Inc. v. Bludworth Bond Shipyard, Inc.*, 875 S.W.2d 458, 461 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

Subsection 5(d) of the subcontract makes the subcontract and VIV's rights under the subcontract subject to all provisions for renegotiation, change, revision, cancellation or termination in the prime contract. This provision does not operate to change the completion date specified in the subcontract because the parties agreed to a specific date[4] with knowledge that the prime contract did not specify a completion date. Contracting parties are obligated to protect themselves by reading what they sign and are presumed, as a matter of law, to know the contract terms. *See Castroville Airport, Inc. v. City of Castroville*, 974 S.W.2d 207, 211 (Tex. App.—San Antonio 1998, no pet.). VIV acknowledged in section 3 of the subcontract that it had thoroughly read and was familiar

[4] In a typewritten portion of section one, VIV acknowledged that "the contractural [sic] completion date for the project is October 21, 1995." In section twenty of attachment A of the subcontract, VIV once again acknowledged its awareness of the October 21, 1995 completion date and "agreed to abide by the project schedule established by the general contractor." In section thirteen of the same attachment, VIV acknowledged its awareness of the completion date of the project and its willingness to schedule work to avoid delay to the overall completion of the project.

with the prime contract and its documents "insofar as they relate in any part or in any way to the work undertaken."

Also without merit is VIV's contention that two change orders approved by Prairie View A & M extended its completion date to January 8, 1996. Neither change order related in any way to electrical work on the project even though they extended STR's deadline to January 8th for completion of the entire project. VIV, nevertheless, contends because the project deadline was extended to January 8th, its deadline for completing the electrical subcontract was extended to January 8th.

The subcontract makes no explicit provision for a subcontractor to request an extension of time unless the contractor delays the subcontractor's work. VIV, nevertheless, contends that subsection 5(d) of the subcontract expressly makes it subject to all provisions for change under the prime contract. Although subsection 5(d) provides that the terms of the prime contract govern changes, revision, renegotiation, and so forth of the subcontract and the subcontractor's rights under the subcontract, subsection 5(d) does not provide that extensions granted to one subcontractor apply to all subcontractors. The prime contract is silent as to whether an extension granted to one subcontractor extends the deadline for completion of another subcontractor. The prime contract makes no provision whether an order that extends the completion time of the entire project also extends the completion deadlines for all subcontractors. Instead, the prime contract provides for delays and extensions of time as follows:

> The contractor may be granted an extension of time because of changes ordered in the Contract or because of strikes, lockouts, fire, unusual delay in transportation, unavoidable casualties, unusual inclement weather, or any cause beyond the Contractor's control, which constitutes a justifiable delay. **The expediting of equipment and materials delivery is considered within the Contractor's control. Time extension for non-delivery of equipment and materials will be considered only after submission of evidence that the Contractor has exerted every reasonable expediting effort.** (emphasis added)

The prime contract affords no relief to VIV because delivery of the transformer constituted the major reason for its delay in completing the electrical work on the project. Moreover, VIV never sought an extension of the October 21st deadline because of the transformer delay. In late July, 1995, VIV informed STR that the transformer and switch gear required a twelve to fourteen week delivery. STR informed Prairie View A & M of the delivery problem and Prairie View rescheduled a power outage scheduled for August to install the transformer to the week of October 23rd. The transformer did not arrive in time for the October 23rd outage because VIV's submittals were defective and not approved until early October.

We conclude that the trial court did not err in finding that "VIV did not file a claim for extension of time pursuant to the Subcontract" and refusing VIV's two requested fact findings regarding the extensions. We overrule point of error six.

B. Liquidated Damages for Delay

In its seventh point of error, VIV claims the trial court failed to properly interpret the subcontract, which capped damages for delay at liquidated damages. VIV contends the following findings of fact indicate that the trial court misinterpreted provisions in the subcontract and prime contract in assessing damages to STR:

> 6. Plaintiff, STR, was required to incur expenses in the amount of $20,179.02 to complete the Subcontract in a workmanlike manner.
>
> 15. Plaintiff, STR Constructors, Inc., did not wrongfully withhold funds to VIV under the Subcontract.

VIV further contends as a result of the misinterpretation, the trial court erred in its first conclusion of law, that "Plaintiff, STR, after offsets are allowed to STR in the sum of $20, 179.02 is indebted to Defendant, VIV, in the sum of $24,685.38."

Section 2(b) of the subcontract provides that the "Subcontractor shall be bound to the General Contractor by the same liquidated damages provisions which bind the General

Contractor to the Owner." Article 2 of the prime contract provides for liquidated damages for work not completed after the expiration of the completion date for the entire project, as follows:

> For each calendar day that any Work is not completed after the expiration of the time, as calculated ten (10) days from the date of the Notice to Proceed plus consecutive calendar days stated above plus approved extended days, the sum of One Hundred Forty and no/100 dollars ($140), per calendar day, will be deducted from the money due or to become due the Contractor, not as a penalty, but as liquidated damages and added expense for administration.

Paragraph 8.4 of the prime contract also provided for liquidated damages as follows:

> The Contract Time is an essential element of the contract and the Contractor's failure to complete the Work within such time may cause damage to the Owner. The value of such damages, if any, are stated in the contract documents as liquidated damages. For each Day after the expiration of the Contract Time that any Work, including the correction of deficiencies found during the final inspection, is not completed and accepted, the amount per Day as stipulated in the Contract will be deducted from the money due or to become due the Contractor, not as a penalty but as liquidated damages and added expense for supervision and delay in obtaining use of the Work.

VIV recognized that the subcontract's liquidated damage clause applied to damages incurred after the completion date of the entire project. At trial, VIV objected to the admission of Plaintiff's Exhibit No. 7, which was a summary of STR's accounting information and damages. VIV objected to the content of the exhibit on two grounds. First, VIV argued the exhibit contained information about STR's extended home office overhead, which required the application of the *Eichleay* formula,[5] and STR had not laid a foundation to qualify its expert to testify to the application of the formula. Second, VIV objected that

[5] The *Eichleay* formula is the means by which the unabsorbed home office overhead expenses are calculated as a legitimate component of the damages caused by delay in performing a construction contract. *See Chilton Ins. Co. v. Pate & Pate Enterprises, Inc.*, 930 S.W.2d 877, 892 (Tex. App.—San Antonio 1996, writ denied).

the exhibit violated the Parole Evidence Rule because, as VIV's trial counsel argued, "there's nothing in the contract that allows them to recover any damages for delay. What they're allowed to do is pass through their liquidated damages. That's what the contract says."

The trial court agreed that the subcontract allowed STR to pass through to VIV the liquidated damages STR owed to Prairie View A & M. In its eighth conclusion of law, the trial court held that STR was entitled to indemnity from VIV, for its liquidated damages incurred with Prairie View A & M. VIV does not challenge this conclusion of law.

Likewise, VIV does not challenge STR's right to recover damages under subsection 9(a) of the subcontract. Subsection 9(a) allows for recovery of expenses when the contractor, with proper notice to the subcontractor, provides labor and materials to complete the job because the subcontractor abandoned the work, failed to prosecute the work with promptness and diligence, or failed to perform an agreement in the subcontract. VIV contends, "If there is no termination under Paragraph 9, then the subcontractor is bound to the general contractor by the same liquidated damages provisions which bind the general contractor to the owner."

VIV, however, contends because these are the only two damage provisions in the subcontract, they are exclusive remedies for a breach of contract. The subcontract, however, does not provide that these remedies are exclusive. "Remedies provided in a contract may be permissive or exclusive, and the mere fact that an agreement provides a party with a particular remedy does not necessarily mean that such remedy is exclusive of all others." *Enterprise Products Co. v. Tenneco Inc.*, 929 S.W.2d 444, 454-55 (Tex. App.—Houston [1st Dist. 1995), *rev'd on other grounds*, 925 S.W.2d 640 (Tex. 1996). "A construction that renders the specified remedy exclusive should not be made unless the intent of the parties that it be exclusive is clearly indicated or declared." *Id.* Nothing in the subcontract clearly indicates that the two specific remedies are exclusive. Accordingly, we overrule VIV's seventh point of error.

C. STR's Prior Breach

In its fifth point of error, VIV maintains the trial court erred by ignoring that STR committed a prior breach of the subcontract; thereby relinquishing STR's right to recover liquidated damages or additional costs after the date of the breach.[6] VIV claims STR breached the subcontract by failing to pay it in a timely manner; thus excusing its non-performance. VIV challenges twelve findings of fact, including findings already addressed in previous points of error regarding its own breach and STR's damages. VIV also challenges the following findings, some of which indicate that STR did not breach the subcontract:

> 1. On or about June 15, 1995, Plaintiff, STR Constructors, Inc. ("STR") and Defendant, VIV Electric Co., Inc. ("VIV"), entered into [sic] written subcontract ("Subcontract") for providing of electrical services by VIV on a project known as Farrell Hall, Prairie View A & M University covering rights and duties of Subcontractor.
>
> * * * * *
>
> 9. The original Subcontract called for payment in the amount of $79,570.00. VIV was paid $34,705.60 by STR. After expenses are allowed to STR in the amount of $20,179.02 the balance owed to VIV is $24,685.38.
>
> * * * * *
>
> 13. STR did not promise to pay VIV for goods, wares and merchandise described in Exhibit "A" attached to Cross-Plaintiff VIV's First Amended Original Counterclaim and First Amended Original Third Party Action.
>
> * * * * *
>
> 15. Plaintiff, STR Constructors, Inc., did not wrongfully withhold funds owed to VIV under the Subcontract.
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> * * * * *
>
> 25. STR notified VIV that VIV was required to timely perform its work.
>
> 26. STR notified VIV that VIV was required to complete the scope of electrical work.

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[6] The trial court refused VIV's request for an additional finding of fact that "VIV is not excused from performance of the Subcontract by STR's failure to timely pay VIV."

Except for finding of fact 15, VIV presents no argument on appeal regarding these specific fact findings. Instead, VIV presents argument on the following conclusions of law:

> 3. Defendant VIV is not excused from performance of the Subcontract by STR's conduct.
>
> 4. Plaintiff STR's claims are not barred by conduct of STR.
>
> 5. Plaintiff STR's claims are not estopped or waived by Plaintiff STR's conduct.

Because VIV presents argument on these conclusions law, we consider whether they are correct, based on the facts from which they are drawn. *See Dickerson*, 964 S.W.2d at 683.

When a party to a contract fails to perform its obligation, it may not thereafter enforce the remaining terms of the contract. *See Graco Robotics, Inc.*, 914 S.W.2d 633, 641 (Tex. App.—Texarkana 1995, writ dism'd); *see also Shintech Inc. v. Group Constructors, Inc*, 688 S.W.2d 144, 151 (Tex. App.—Houston [14th Dist.] 1985, no writ) (holding owner breaching construction contract relinquishes it contractual procedural rights concerning change orders and claims for additional costs). Furthermore, when a party commits a material breach of a contract, the non-breaching party is discharged or excused from any obligation to perform and may sue the breaching party for the benefit of the bargain. *See Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994); *Graco Robotics, Inc.*, 914 S.W.2d at 641; *see also Sage Street Assoc. v. Northdale Const.*, 809 S.W.2d 775 (Tex. App.—Houston [14th Dist.] 1991), *aff'd in part and rev'd and remanded in part on other grounds*, 863 S.W2d 438 (Tex. 1993).

Whether a party has breached a contract is a question of law for the court. *Meek v. Bishop Peterson & Sharp, P.C.*, 919 S.W.2d 805, 808 (Tex. App.—Houston [14th Dist.] 1996, writ denied). The court determines what conduct is required by the parties, and, insofar as a dispute exists concerning the failure of a party to perform the contract, the court submits the disputed fact questions to the fact finder. *See id.*

As we discuss below, here, the issue regarding payment revolves around the fact that VIV never received payment when it was required to under the contract. This fact is the result of one of two problems: (1) STR did not pay in a timely manner or (2) VIV did not retrieve its payments when they were first available. The contract sets up the parameters of the dispute. It was then incumbent upon the trial court to resolve the factual dispute. We look first to the contract.

Neither party disputes that the subcontract provided that STR would pay VIV as follows, in pertinent part:

> On the first day of each month Subcontractor shall present to Contractor a statement of the work done during the preceding month, which statement, when checked and approved by Contractor, will be paid within five (5) days after receipt of payment from Owner, providing progress of the work and payments for labor used and material purchased by Subcontractor have been satisfactory. . .

Moreover, neither party disputes that VIV did not receive payment within five days after STR received payment from Prairie View A & M.[7]

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[7] The record further reflects no connection between the actual work VIV performed and STR's certification and billing practice with Prairie View A & M. In September and early October, 1995, STR sought payments of $2,265 and $4,500, respectively, from Prairie View A & M for a percentage of the electrical work that it certified as complete even though VIV had not completed the work or billed STR for the work. The project architect approved the September request and denied the October request. On October 23, after Prairie View A & M paid STR $2,265 for the work certified in September, VIV sought $5,975.51 as payment for the electrical work it had performed to date. Thereafter, on November 1 and December 12, STR certified more electrical work as complete and sought payments of $6,639 and $750, respectively, from Prairie View A & M. Prairie View A & M paid STR for its November billing on December 20, the same day that VIV submitted another pay request for $32,939.35 to STR. On January 2, 1996, STR paid VIV $5,975.51, the amount it sought in its first request on October 23. On January 9, STR certified eighty-five percent of the electrical work complete and sought payment of $59,251 from Prairie View A & M. On January 24, VIV submitted two more pay requests to STR, one for $26,486.94 and the other for $8,377.20. On February 8, Prairie View A & M paid STR the $59,251 for work it certified on January 9. On February 16, STR certified the electrical work 100% complete and sought payment of $12,116 from Prairie View A & M. On February 17, STR paid VIV the $32,935 that it requested on December 20. In early March, Prairie View A & M paid STR $12,116 for work it certified on February 19.

(continued...)

Rick Kennedy, STR's president, offered an explanation for VIV's failure to receive payment from STR within the five day period provided for in the subcontract. Kennedy testified that when STR received a payment from Prairie View A & M, STR would contact subcontractors who were entitled to payment. He attested that STR's secretary often did not cut a subcontractor's check or note payment in STR's accounting ledger until the subcontractor signed a release and picked up the check. Kennedy testified that if VIV received its payments at a later date, it was because a VIV representative did not pick up the check in a timely manner after receiving notice from STR.

Richard Pickel, VIV's president, testified that "every time we'd send an invoice let's say 45 days I would start calling him [Kennedy] asking him when we would get our money." Pickel attested that Kennedy would reassure him that VIV would get paid. Pickel also confirmed that STR "would either call or fax something over saying that there was – there would be money to be picked up, yes, and then we would go pick it up." Nevertheless, Pickel claimed that he did not recall waiting more than two days to pick up one of the two payments STR made to VIV. Pickel further attested that he first became concerned about payment in January because Prairie View A & M informed him that STR had been paid for the electrical work and VIV had not received payment.

Regarding VIV's delay in receiving payment for the work completed, the trial court apparently believed Kennedy, and not Pickel because it found that STR did not wrongfully withhold funds owed to VIV under the subcontract. *See Schwartz v. Pinnacle Communications*, 944 S.W.2d 427, 431 (Tex. App.—Houston [14th Dist.] 1997, no writ) (noting that in bench trial, "the trial judge, acting as fact finder, is presumed to have ruled not only on the legal sufficiency of the evidence, but also on the weight of the evidence and the credibility of the witnesses"). According to Kennedy's testimony, STR was not responsible for the delay in payment; VIV was responsible because it did not send a

[7] (...continued)

representative to STR's office to pick up the check after notification. Based on these facts, the trial court could find as a matter of law that STR's claims are not barred, estopped or waived by STR's conduct and VIV is not excused from performing the subcontract. VIV's fifth point of error is overruled.

D. Warranty

In its third point of error, VIV challenges the sufficiency of the evidence to support a finding that the amount claimed by STR for the one year electrical warranty was reasonable and necessary. VIV contends this point of error challenges the following findings of fact:

> 4. Defendant, VIV, failed to complete the scope of work required by the Subcontract.
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> * * * * *
>
> 6. Plaintiff, STR, was required to incur expenses in the amount of $20,179.02 to complete the Subcontract in a workmanlike manner.
>
> * * * * *
>
> 9. The original Subcontract called for payment in the amount of $79,570.00. VIV was paid $35,705.60 by STR. After expenses are allowed to STR in the amount of $20,179.02 the balance owed to VIV is $24,685.38.

VIV further contends the point challenges the trial court's first conclusion of law that "Plaintiff, STR, after offsets are allowed to STR in the sum of $20,179.02, is indebted to Defendant, VIV, in the sum of $24,685.38."

At trial, Kennedy testified that STR was required to give an electrical warranty because VIV refused to provide the written warranty. Kennedy attested that he did not know what a written warranty was worth, so he asked around and determined the warranty was worth $4100. VIV objected on the ground that STR had not established that Kennedy was an expert to testify about the electrical warranty. On voir dire, STR offered Kennedy as an expert over VIV's objection. The trial court overruled the objection and accepted Kennedy

as an expert. Kennedy later testified that STR had not been charged anything by Prairie View A & M for electrical work but had been called to reprogram the fire alarm, an item that would be covered by the warranty.

On appeal, VIV contends that Kennedy's testimony is insufficient to support any award of damages for a warranty. VIV contends that Kennedy's general testimony about the reasonableness and necessity "does not overcome or rehabilitate his direct testimony that he did not know what it cost, that he had to ask around."[8]

While VIV's objection at trial went to the Kennedy's qualifications as an expert to testify to the value of the electrical warranty, its argument on appeal is an attack on the reliability of Kennedy's testimony. *See Reliance Ins. Co. v. Denton Cent. Appraisal Dist.*, 999 S.W.2d 626, 630 (Tex. App.—Fort Worth 1999, no pet.). A determination of scientific reliability is appropriate in reviewing the legal sufficiency of evidence. *See Havner*, 953 S.W.2d at 713-14. An expert's opinion is unreliable if the foundational data underlying the opinion testimony is unreliable or if the expert draws conclusions from data based on flawed methodology. *Id.* at 714. In either case, "the expert's scientific testimony is unreliable and legally, no evidence." *Id.*

Because VIV's objection at trial is not the same as its objection on appeal, VIV waives review of its legal sufficiency challenge to the reliability of Kennedy's testimony regarding the electrical warranty. *See Knoll v. Neblett*, 966 S.W.2d 622, 639 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). "To preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial

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[8] In support of its argument about evidence of the reasonableness and necessity of an expense, VIV relies on *Royal Globe Ins. Co. v. Bar Consultants*, 577 S.W.2d 688, 694 (Tex. 1979). In *Royal Globe*, the supreme court found a misrepresentation made by a local insurance recording agent and his secretary concerning insurance policy coverage prior to a third party's act of vandalism constituted a deceptive trade act or practice. *Id.* at 694. The court determined that Bar Consultants' injury was that it believed the agent's misrepresentation when it purchased the policy and at each renewal. *Id.* Royal Globe's damage for this misrepresentation "was the reasonable and necessary cost of repairs made necessary" by the uninsured act. *Id.*

or when the evidence is offered." *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex.), *cert. denied*, 525 U.S. 1017 (1998). To allow appellate review of the expert's reliability without a proper objection at trial would deny STR's expert the opportunity to provide reliable evidence and usurp the trial court's discretion as gatekeeper under *Havner*. *See id.*

Nonetheless, VIV has alleged on appeal that insufficient evidence supports the trial court's conclusion that the one year warranty was worth $4100. First, we note that STR's damages for VIV's refusal to furnish a warranty is governed by section nine of the subcontract. Section nine provides that if VIV abandons the work, fails in any respect to prosecute the work with promptness and diligence, or fails to perform any of the agreements in the subcontract, STR can provide, after forty-eight hours notice to VIV, such labor and materials and deduct the cost from any money due or to become due to VIV under the subcontract. Section nine further provides that STR can terminate the subcontract and, for the purpose of completing the work covered by the subcontract, either complete the work itself or employ someone else to complete the contract.

On two occasions, STR gave VIV forty-eight hours notice of its intent to complete VIV's work. In one instance, STR elected to hire other electricians to complete the punch list abandoned by VIV and in the other instance, STR elected to provide the organization and maintenance manuals and the warranty instead of contracting with a third party for those services.[9] The damage STR incurred from VIV's refusal to warrant its electrical work was the cost of a one-year electrical warranty, as provided in section nine of the subcontract. STR's president, Rick Kennedy, testified that he inquired what a one-year electrical warrant would cost and determined it to be $4,100.00.

[9] STR provided VIV with the forty-eight hour notice of termination required by section nine because of VIV's refusal to submit the organization and maintenance manuals. VIV does not challenge on appeal whether this notice was sufficient to apprise VIV that STR would assess costs of the electrical warranty as well.

Kennedy's testimony, however, is factually insufficient to support an award of $4,100 for an electrical warranty because it is unreliable. Kennedy offered no evidence indicating how he arrived at his estimate of the value of a warranty except that he asked around and determined it to be $4,100. Kennedy offered nothing to insure that his opinion comported with applicable professional standards or that his opinion had a reliable basis in the knowledge and experience of electrical engineering. *See Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713,725-26 (Tex. 1998). In other words, he offered no foundational basis for his expert opinion.

Pickel testified that a one-year electrical warranty on the Farrell Hall renovation could not have been more than a "couple hundred bucks" because the size of the job was not that big. Pickel explained that all of the supply houses took care of the warranty items. He further attested that VIV refused to provide the warranty to STR on this project "until we got some money" and that he stated the same to Kennedy.

Even though the evidence is factually insufficient to support an award of $4,100 as STR sought, it is not insufficient to support the trial court's determination of damages. The trial court made no finding on the value of the warranty or how it calculated STR's damages. VIV did not request an additional finding on the warranty value or the calculation of the offset awarded STR. Because the trial court awarded STR substantially less than it sought and other evidence supports the trial court's findings of fact and conclusions of law, we overrule VIV's third point of error.

E. Extended Overhead and Liquidated Damages

In its second point of error, VIV challenges the sufficiency of the evidence to support the assessment of extended overhead and liquidated damages against VIV. STR sought all of its extended overhead costs, which include supervision and field and home office costs, and ninety percent of the liquidated damages that Prairie View A & M assessed against it on the project. VIV contends the trial court erred in awarding less than

all of STR's overhead expenses and less than ninety percent of the liquidated damages paid to Prairie View A & M because STR presented no evidence or insufficient evidence by which the trial court could assess anything less than the full amount of damages. VIV further contends that STR failed to prove the extent of unreasonable delay resulting from VIV's action, which is necessary to provide a basis for making a reasonably correct approximation of damages.

In the absence of a contractual provision to the contrary, a contractor is entitled to recover damages for losses due to delay and hindrance of its work if it proves (1) that its work was delayed or hindered, (2) that it suffered damages because of the delay or hindrance, and (3) that the contractor was responsible for the act or omission that caused the delay or hindrance. *See City of Houston v. R.F. Ball Constr. Co.*, 570 S.W.2d 75, 77 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.); *Jensen Const. Co. v. Dallas Cty.*, 920 S.W.2d 761, 770 (Tex. App.—Dallas 1996, writ denied); *Electro Assoc., Inc. v. Harrop Const. Co., Inc.* 908 S.W.2d 21, 23 (Tex. App.—Houston [1st Dist.] 1995, writ denied). As previously discussed in point of error four, there is sufficient evidence, both legally and factually, to support a finding that VIV was the contractor responsible for the acts or omissions that caused a delay in completion of the entire project and a delay in the completion of electrical subcontract. The evidence is also sufficient to support a finding that STR suffered damages because of the delay.

STR asserted that VIV was responsible for delaying the project 126 days, calculated from the day the transformer was initially due on August 27, 1995, until the transformer was delivered on December 27, 1995. To prove damages from the August to December delay, STR introduced its extended overhead expenses, which included salaries of STR's superintendent and project manager, a truck allowance, and some field and home office expenses for a total of $24,289. STR also included expenses that it incurred to complete the project, which included the cost of the isolators, fixtures and exit light, the organization and maintenance manuals, and the one year electrical warranty for a total of $6,169.70.

Together, STR's overhead expenses for the 126 day delay and its cost to complete the project totaled $30,458.70.

The trial court, however, did not award STR all of these damages. In one finding of fact, the trial court found that STR was required to incur expenses in the amount of $20,179.02 to complete the subcontract in a workmanlike manner. In a second finding, the trial court allowed STR an offset of $20,179.02 from the amount owed to VIV under the original subcontract.

Prairie View A & M assessed liquidated damages against STR in the amount of $7,850 for the January 1996 through March 1996 delay in completing the job as provided in the general contract. STR asserted that VIV caused it to incur $6,590 of these liquidated damages. The trial court found that "STR became indebted to Prairie View A & M University in the amount of $7,840.00 as and for liquidated damages because of delays caused by VIV's failure to timely complete Subcontract." In a conclusion of law, the trial court held that STR was "entitled to indemnity from Defendant, VIV, for its liquidated damages incurred with the Owner, Prairie View A & M University." The trial court, however, did not state how much of the liquidated damages VIV owed to STR for causing the delay or whether these damages were part of the $20,179.02 awarded to STR to complete the contract in a workmanlike manner.

The trial court simply did not explain how it calculated STR's damages for either delay. Nevertheless, in its first conclusion of law and the final judgment, the trial court held that STR was entitled to an offset of $20,179.02 from the amount it owed VIV under the subcontract. The trial court did not state whether the $20,179.02 included extended overhead expenses, costs to complete the project, or liquidated damages. Moreover, VIV did not request an additional finding that segregated these damages.

VIV does not challenge the computation of overhead expenses or the costs of items to complete the project in this point of error.[10] VIV contends that the trial court erred in awarding any damages because "STR presented no evidence or insufficient evidence to allow the court to make a reasonable approximation of the damages."

VIV contends there is no evidence or insufficient evidence to support a finding that VIV delayed the project for 126 days because STR's experts did not follow the proper methodology for proving the duration of delay using the critical path model enunciated in federal cases where construction claims are brought against the United States in the court of claims. "[T]he critical path method is an efficient way of organizing and scheduling a complex project which consists of numerous interrelated separate projects. Each subproject is identified and classified as to the duration and precedence of work." *Haney v. U.S.*, 676 F.2d 584, 595 (1982). A computer analyzes the data to determine the most efficient schedule for the entire project. *See id.* Some subprojects may be performed at any time without any effect on the completion of the project. *Id.* Other subprojects must be performed on schedule; otherwise, the entire project will be delayed. *Id.* "These latter items of work are on the 'critical path.'" *Id.* During construction, the critical path can change and items not originally on the critical path can become critical. *Id.* "Thus, if the CPM [critical path model] is to be used to evaluate delay on the project, it must be kept current and must reflect delays as they occur." *Fortec Constructors v. U.S.*, 8 Cl.Ct. 490, 505 (1985), *aff'd*, 804 F.2d 141 (Fed. Cir. 1986).

Kennedy, STR's president, and a construction expert testified that the installation of the electrical transformer was a critical component of the project. STR also presented its initial critical path schedule and argued that VIV's failure to comply with the initial schedule caused other trades to lag behind and delayed completion of the project.

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[10] VIV does not challenge the competency of STR's experts to testify to the computation of field office overhead expenses and the application of these expenses to delays.

VIV complains that STR's initial critical path schedule and the testimony of its experts is insufficient because it does not reflect changes that occurred along the critical path as the Farrell Hall project progressed toward completion. VIV contends STR attempted to establish delay by use of an "as planned" critical path schedule and did not introduce any evidence of an "as-built" critical path schedule, which would reflect extensions and delays as they occurred during the construction process. Without a comparison of the "as-planned" schedule to the "as-built" schedule, VIV contends, there is no evidence that the initial schedule was reasonable or achievable.[11]

Like its objection to Kennedy's testimony regarding the value of the warranty, VIV's attack on the application of the critical path methodology is an attack on the reliability of the testimony of STR's expert witnesses. *See Reliance Ins. Co.*, 999 S.W.2d at 630. As before, VIV did not voice an objection at trial to the reliability of STR's experts to testify to critical path model. Therefore, VIV waives review of its legal sufficiency challenge to the reliability of the critical path testimony. *See Maritime Overseas Corp.*, 971 S.W.2d at 409.

We do not determine whether the critical path evidence is factually sufficient to support a 126 day delay because other evidence supports a finding of damages for less than 126 days of delay. STR's project superintendent testified from his daily construction reports that VIV caused several days of delay. The superintendent's testimony and the daily reports reflect that VIV caused less than 126 days of delay to other subcontractors and the entire project. The reports cover the delay attributable to VIV's failure to install the electrical transformer and to perform other electrical work from August to December, 1995, the same period that Kennedy claimed VIV caused the 126 day delay. VIV presented controverting evidence that other subcontractors delayed the installation of electrical

[11] VIV readily admits that "[n]o Texas case has used a Critical Path Model [CPM] to establish delay in a construction case." Moreover, the record reflects that STR submitted revised schedules to Prairie View A & M on a regular basis, yet none of those schedules were presented to the trial court.

equipment and the entire project. VIV's president also testified that VIV properly manned the job on a daily basis.

On appeal, STR and VIV offer various computations of the number of delay damages raised by the superintendent's testimony and the daily reports in light of the trial court's damage award. The trial court, however, did not make a finding on the number of days of delay and did not segregate damages.[12] Moreover, the trial court did not award STR all the damages it sought for the delay from August to December. Because the record reflects some evidence of specific days that VIV caused damages to STR from August through December, we cannot say the trial court's finding of $20,179.02 of damages is unsupported or manifestly unjust. *See Shintech Inc.*, 688 S.W.2d at 152.

VIV also contends there is no evidence or insufficient evidence to support a finding that it caused ninety percent of the liquidated damages that STR owed to Prairie View A & M because of its failure to complete the job after January 8th. The record reflects some evidence that VIV did not prepare the organization and maintenance manuals, provide an electrical warranty, or complete a few items on the punch list after January 8th. But the record reflects no evidence that VIV was the primary cause of any delay from January to March, 1996. Several other subcontractors were still on the job during this three month period.

Even if STR's evidence is insufficient to support a finding that VIV caused ninety per cent of its liquidated damages, the record reflects sufficient evidence to support the trial court's finding that VIV caused STR to incur some liquidated damages. Because the trial court awarded STR substantially less than it sought and because there is some evidence to support the trial court's findings of fact, there is sufficient evidence to support the offset awarded to STR. VIV's second point of error is overruled..

Accordingly, we affirm the judgment of the court below.

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[12] Moreover, VIV did not request a finding on the number of days of delay and did not request a finding that reflected a segregation of damages.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed June 29, 2000.

Panel consists of Chief Justice Murphy, and Justices Yates and Fowler. (Justice Yates not participating.)

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