NO.08-0272

IN THE

SUPREME COURT

OF TEXAS

DEALERS ELECTRICAL SUPPLY CO., Petitioner

VS.

SCOGGINS CONSTRUCTION COMPANY, INC. AND
BILL R. SCOGGINS, Respondents

RESPONDENTS' RESPONSE TO PETITIONER'S BRIEF ON THE MERITS

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INC. AND BILL R. SCOGGINS

DEFINITIONS

"SCC" shall mean Scoggins Construction Company, Inc.

"Dealers" or "Petitioner" shall mean Dealers Electrical Supply Co.

"Diamond" shall mean Arturo Bujanos d/b/a Diamond Industries, of San Benito, Cameron County, Texas, the electrical subcontractor who incurred the debt for electrical supplies with Dealers. Diamond walked off the job in May, 2002.

"Respondents" shall mean SCC and Bill R. Scoggins.

"Project" shall mean the Ruben Hinojosa Elementary School located in Mercedes, Hidalgo County, Texas. The project was owned by the Mercedes Independent School District of Mercedes, Hidalgo County, Texas.

"MISD" shall mean the Mercedes Independent School District of Mercedes, Texas.

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RESPONDENTS' RESPONSE ISSUES

RESPONSE ISSUE NO. 1

THE COURT OF APPEALS CORRECTLY RULED THAT THE McGREGOR ACT WAS AN "EXCLUSIVE" REMEDY PREEMPTING USE OF THE TEXAS CONSTRUCTION TRUST FUND ACT IN PUBLIC PROJECT CASES AFTER THE GENERAL CONTRACTOR POSTS ITS PERFORMANCE AND PAYMENT BONDS.

RESPONSE ISSUE NO. 2

THE COURT OF APPEALS CORRECTLY RULED THAT THE 1987 LEGISLATIVE AMENDMENTS ***WITHIN TCTFA*** DID NOT ALTER THE WELL-ESTABLISHED APPLICATION OF THE McGREGOR ACT AS THE MANDATORY AND EXCLUSIVE REMEDY OF A MATERIALMAN AGAINST THE GENERAL CONTRACTOR ON PUBLIC PROJECTS. PETITIONER FAILED TO CITE A SINGLE AUTHORITY SHOWING THAT THE 1987 LEGISLATIVE AMENDMENTS ***TO TCTFA*** HAD ANY MATERIAL EFFECT UPON THE APPLICATION OF THE McGREGOR ACT .

RESPONSE ISSUE NO. 3

THE COURT OF APPEALS DID NOT UPSET PUBLIC POLICY BY MAINTAINING THE EXCLUSIVE NATURE OF THE McGREGOR ACT. AS A MATTER OF PUBLIC POLICY, IT IS IN THE BEST INTEREST OF ALL PARTIES CONCERNED THAT THE McGREGOR ACT REMAINS THE MANDATORY AND EXCLUSIVE REMEDY TO MATERIALMEN. THE REASONS ARE:

A. THE McGREGOR ACT AFFORDS TO LABORERS AND MATERIALMEN A SPEEDY, AND HIGHLY REMEDIAL PROCEDURE IF THEY ARE VIGILANT IN FILING THEIR BOND CLAIMS.

B. THE McGREGOR ACT ALSO AFFORDS GOVERNMENTAL ENTITIES ASSURANCE OF PROMPT COMPLETION OF PUBLIC PROJECTS WITH REDUCED RISK OF LITIGATION DELAYS OR EXPENSES.

C. THE McGREGOR ACT ALSO PROTECTS GENERAL CONTRACTORS FROM EXPOSURE TO MULTIPLE CLAIMS AGAINST THE SAME CONSTRUCTION FUNDS, WITH THE POSSIBILITY OF DOUBLE LIABILITY, AS MIGHT HAPPEN IN THIS CASE IF DEALERS IS PERMITTED TO PROCEED UNDER TCFTA. THE 90 DAY STATUTE OF LIMITATIONS UNDER THE McGREGOR ACT REQUIRES MATERIALMEN TO BRING CLAIMS PROMPTLY,

BEFORE CONSTRUCTION FUNDS ARE FOREVER DISBURSED TO SUBCONTRACTORS OR OTHER MATERIALMEN.

<u>RESPONSE ISSUE NO. 4</u>

THE COURT OF APPEALS RULING DID NOT VIOLATE THE PETITIONER'S CONSTITUTIONAL RIGHTS BY DENYING PETITIONER'S CLAIMS UNDER THE *JOINT CHECK AGREEMENT* BECAUSE: (1) THE PETITIONER HAD A LEGAL REMEDY UNDER THE McGREGOR ACT; AND (2) THE PETITIONER FAILED TO PRESENT ANY EVIDENCE SUPPORTING ITS CLAIM THAT RESPONDENTS VIOLATED THE *JOINT CHECK AGREEMENT*.

<u>RESPONSE ISSUE NO. 5</u>

RESPONDENTS DENY THAT IT WAIVED ANY POINT OF ERROR. IN ITS FIRST ISSUE PRESENTED TO THE COURT OF APPEALS, RESPONDENTS DID ARGUE THAT PETITIONER'S "MANDATORY" AND "EXCLUSIVE" REMEDY WAS THE McGREGOR ACT.

<u>RESPONDENTS' CROSS POINTS OF ERROR</u>

<u>RESPONDENT'S CROSS POINT NO. 1</u>

IN THE EVENT THAT THE SUPREME COURT RULES THAT McGREGOR ACT WAS NOT DEALER'S EXCLUSIVE REMEDY IN THIS CASE, THE COURT OF APPEALS NEVER ADDRESSED ***ISSUE NO. 2*** RAISED IN RESPONDENTS' ***APPELLANT'S BRIEF*** BEFORE THE COURT OF APPEALS, THAT READ:

> ***"THERE WAS NO EVIDENCE, OR ALTERNATIVELY, INSUFFICIENT EVIDENCE, TO SUPPORT A JUDGMENT THAT APPELLANTS VIOLATED THE "JOINT CHECK" AGREEMENT. THE UNDISPUTED EVIDENCE SHOWS THAT SCC FULLY COMPLIED WITH THE TERMS OF THE AGREEMENT."***

UNDER T.R.A.P. 53.4, RESPONDENTS WOULD REQUEST A REMAND TO THE COURT OF APPEALS OF THIS ISSUE OR, ALTERNATIVELY, THAT THE SUPREME COURT REVIEW THIS ISSUE.

<u>RESPONDENT'S CROSS POINT NO. 2</u>

IN THE EVENT THAT THE SUPREME COURT RULES THAT McGREGOR ACT WAS NOT DEALER'S EXCLUSIVE REMEDY IN THIS CASE, THE COURT OF

APPEALS NEVER ADDRESSED ***ISSUE NO. 3*** RAISED IN RESPONDENTS' ***APPELLANT'S BRIEF*** BEFORE THE COURT OF APPEALS, THAT READ:

> ***"THERE WAS NO EVIDENCE, OR ALTERNATIVELY, INSUFFICIENT EVIDENCE TO SUPPORT A JUDGMENT AGAINST APPELLANT, BILL R. SCOGGINS, IN HIS INDIVIDUAL CAPACITY. MR. SCOGGINS DID NOT VIOLATE THE TEXAS CONSTRUCTION TRUST FUND ACT, HE WAS NOT A PARTY TO THE JOINT CHECK AGREEMENT, AND THERE WAS INSUFFICIENT EVIDENCE TO PIERCE THE CORPORATE VEIL."***

UNDER T.R.A.P. 53.4, RESPONDENTS WOULD REQUEST A REMAND TO THE COURT OF APPEALS OF THIS ISSUE OR, ALTERNATIVELY, THAT THE SUPREME COURT REVIEW THIS ISSUE.

RESPONDENT'S CROSS POINT NO. 3

IN THE EVENT THAT THE SUPREME COURT RULES THAT McGREGOR ACT WAS NOT DEALER'S EXCLUSIVE REMEDY IN THIS CASE, THE COURT OF APPEALS NEVER ADDRESSED ***ISSUE NO. 4*** RAISED IN RESPONDENTS' ***APPELLANT'S BRIEF*** BEFORE THE COURT OF APPEALS, THAT READ:

> "***THERE WAS NO EVIDENCE, OR ALTERNATIVELY, INSUFFICIENT EVIDENCE, TO SUPPORT THE JUDGMENT AGAINST APPELLANTS UNDER THE TEXAS CONSTRUCTION TRUST FUND ACT, (Tex. Prop. Code § 162.001, et. seq.). APPELLEE ALSO FAILED TO REFUTE APPELLANTS' PRIMA FACIE PROOF OF AFFIRMATIVE DEFENSES."***

UNDER T.R.A.P. 53.4, RESPONDENTS WOULD REQUEST A REMAND TO THE COURT OF APPEALS OF THIS ISSUE OR, ALTERNATIVELY, THAT THE SUPREME COURT REVIEW THIS ISSUE.

STATEMENT OF FACTS

SCC was the general contractor under a construction contract with the Mercedes Independent School District, ("MISD"), to build the Hinojosa Elementary School located in Mercedes, Hidalgo County, Texas. CR 205-6; RR Def's Ex. 1-4g. SCC hired as an electrical subcontractor for this project, Arturo Bujanos d/b/a Diamond Industries, ("Diamond"), of San Benito, Cameron County, Texas. CR 205-6; RR Def's Ex. 6.

During performance of the electrical subcontract, Diamond opened a credit account with Dealers, an electrical parts supplier. CR 205. Respondents were not parties to this credit account. RR Pff's Ex. 2; RR 28, line 9 through 30, line 9; RR 43, lines 7 through 11; and RR 149, line 22 through 150, line 2. During the course of construction, Diamond failed to finish its electrical subcontract and walked off the project in early May, 2002.[1] RR 132, lines 2-9; and RR 142, lines 1-19. On May 10, 2002, SCC notified Dealers by written letter that Diamond's subcontract had been terminated. RR Def. Ex. 16. SCC sued Diamond in a separate lawsuit in the 404th District Court of Cameron County, Texas, seeking to recover missing electrical materials that were paid for in prior electrical construction draw payments by SCC.

[1] Actually, Diamond had already quit working on the project for months before May, 2002, but by May, 2002, SCC knew for certain that Diamond had no intention of completing its subcontract.

None of these materials were recovered.[2] When Diamond walked off the job, the electrical work on Diamond's subcontract was incomplete and a portion of the work was defective and rejected by MISD. Furthermore, a portion of the electrical fixtures that were paid for by SCC, were missing from the job site. RR 132, line 2 through 134, line 19 and RR 137 lines 1-15. It was undisputed in the appellate record that SCC was required to pay significant sums to outside electrical contractors to complete work that Diamond failed to complete, and to repair Diamond's defective work that was not accepted by MISD. RR 132, line 2 through 134, line 19; RR Def's Ex. 7, 8A, 8B, 9A, 9B, 10A, 10B, 10C, 10D, and 13. More importantly, it was undisputed in the appellate record that SCC "overpaid" Diamond for the actual work completed by Diamond, and taking into consideration that a portion of the work performed by Diamond that was rejected by MISD. The bookkeeper for SCC, Stacey Scoggins, testified at trial that SCC had paid Diamond $665,789.00 (on a $662,000.00 subcontract), at the time that Diamond walked off the job. RR Def. Ex. 8a. RR 128, line 23 through 129, line 5. Ms. Scoggins also testified that SCC owed no monies to Diamond at the time Diamond walked off the job considering the percentages of work completed by Diamond and the work rejected by MISD. RR 132, line 2 through 134, line 19. Dealers did not notify SCC of any amounts being

[2] The suit was styled ***Scoggins Construction Company, Inc v. Arturo Bujanos d/b/a Diamond Industries***, in the 404th District Court of Cameron County, Texas, Case Number 2002-06-2391-G. In this suit, SCC obtained a writ of sequestration to search Diamond's warehouse, to recover electrical materials not located upon the job site. At the time of this suit, Diamond was out of business. RR Pff's Ex. 49; RR 137, lines 4-15; CR 261, RR Def's Ex. 13, 14, and 15.

due from Diamond until April 15, 2002. RR 141, lines 5-13. On April 15, 2002, SCC owed no monies to Diamond and Diamond had been fully paid (actually over-paid) for all of its work. RR 131, line 12 through 132, line 9; 141, line 5 through 142, line 19.

During the course of construction, Diamond, Dealers, and SCC entered into a *Joint Check Agreement*. RR Def's Ex. 17 and RR 123, line 13 through 125, line 11. The terms of the *Joint Check Agreement* merely required SCC was to write "joint checks" to Diamond and Dealers when Diamond was owed monies by SCC on electrical work completed and accepted. The undisputed evidence in the appellate record shows that, after the date of the *Joint Check Agreement*, SCC always paid Diamond (and Dealers) by joint check. RR 131, line 12 through 132, line 9. Dealers does not dispute this fact but argued to the trial court that the *Joint Check Agreement* was actually a debt "guaranty" agreement whereby SCC was guaranteeing payment of the Diamond account whether or not Diamond was owed monies by SCC for work completed and accepted. RR 23, lines 3-14. SCC has contested Dealers' interpretation of the *Joint Check Agreement*. RR 123, line 25 through 125, line 11. It appears that Dealers has now abandoned that argument. Respondent, Bill R. Scoggins, (individually) was not a party to the *Joint Check Agreement*. RR Def's Ex. 17. At trial, Dealers offered no evidence that SCC breached the *Joint Check Agreement* by writing checks that were not joint checks. Dealers merely argued that the *Joint Check Agreement* was, in fact, a "guaranty

agreement" on all debt that Diamond owed to Dealers and that the instrument "spoke for itself." RR 123, line 21.

At all times material herein, the Hinojosa Elementary School contract between SCC and MISD was a "public works contract" as defined under §2253.001(4), Tex. Gov. Code, and for the first part of this litigation, Dealers pursued a McGregor Act bond claim. CR 139, 198-9. Under the contract with MISD and under the McGregor Act, SCC was required to post both a performance bond to protect the MISD, and a payment bond to protected subcontractors and materialmen. It was undisputed in the appellate record that SCC posted both bonds for the full amount of the construction contract with MISD. RR 142, line 20 through 143, line 13; RR Def's Ex 22 and 23.

After Diamond abandoned the project, Dealers failed to give SCC timely notice under the McGregor Act to collect its alleged debt under the payment bond posted by SCC. Stacey Scoggins testified that SCC did not have knowledge of any debts owed by Diamond to Dealers for the period of time between January 15, 2002 to April 15, 2002. Dealers first notified SCC of Diamond's unpaid debt at issue on April 15, 2002. RR 140, line 1 through 142, line 19 and RR def's Ex 19. Dealers has admitted in its *Statement of Facts* that it failed to give SCC timely notice of its bond claim. Dealers originally filed suit against SCC, Diamond, and SCC's two bonding companies, seeking recovery under the McGregor Act. CR 10. Dealers later non-suited the two bonding companies and withdrew its McGregor Act claims. CR 218,

220.

At trial, Dealers asserted two separate claims: (1) a claim under the Texas Construction Trust Fund Act, Tex. Prop. Code, §162.001, et seq.,("TCTFA"); and (2) a claim that Respondents violated the *Joint Check Agreement*. RR 4, lines 10-21 and CR 204. Respondents offered uncontested testimony, through Stacey Scoggins, that SCC paid to Diamond all monies that were due and owing to Diamond and that SCC used all construction funds received from MISD to pay the subcontractors, materialmen, general overhead, and litigation costs,[3] regarding the school project. RR 125, line 12 through 149, line 21. Ms. Scoggins also testified, without rebuttal by Dealers, that no construction funds were siphoned from the MISD project by the Respondents for other projects or for purposes not relevant to the construction of the school project. RR 150, lines 3-10. Ms. Scoggins also testified that SCC did not achieve its projected 5% profit margin on the project largely because of the fact that Diamond was overpaid and performed defective work that required costly repairs by outside contractors. RR 146, line 23 through 148, line 12; RR Def's Ex 9A, 9B, 10A, 10B, 10C, and 10D. Ms. Scoggins also testified that her father, Respondent, Bill Scoggins, did not personally divert any construction funds, and that at all times, Mr. Scoggins acted in his corporate capacity as president of SCC in handling the MISD construction funds paid to SCC. RR 150 lines 3-10.

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[3] Including attorneys fees and costs in suing Diamond in the 404th District Court of Cameron County, Texas.

None of this factual testimony was rebutted.

On May 25, 2005, Dealers took an *Interlocutory Agreed Judgment* against Diamond in the amount of $78,123.59, the full amount of Dealers' claims. CR 202. On September 14, 2005, Dealers non-suited the bonding companies. CR. 218, 220. After dismissing the bonding companies, Dealers amended its pleadings dropping all claims under the McGregor Act and presented its case at trial on November 16, 2005, against Respondents alleging violations of the TCTFA and breach of the "joint check" agreement. CR 204; RR 14, lines 9-25.

The case was tried before the court, without a jury on November 16, 2005. CR 7. At the conclusion of the trial, the court entered a *Final Judgment* against Respondents on April 4, 2006. CR 257. The trial court entered *Findings of Fact and Conclusions of Law*, prepared by Dealers lawyers, on April 3, 2006. CR 246. The 13th Court of Appeals reversed the judgment of the trial court and ruled that Dealers "take nothing" of and from Respondents' on December 20, 2007.

SUMMARY OF ARGUMENT

There are sound public policy reasons as to why the McGregor Act should be maintained as a mandatory and exclusive remedy for materialmen in public project cases. As correctly stated by the 13th Court of Appeals, the McGregor Act provides a "simple and direct method for claimants who supply labor and materials" in public construction projects and that many Texas courts have observed that the McGregor Act is a "highly remedial" statute that "should receive the most comprehensive and

liberal construction possible to achieve its purposes." *Scoggins Construction Company, Inc. v. Dealers Electrical Supply Co.*, 2007 WL 4442544 (Tex. App.-Corpus Christi, 2007), p. 3. Because the McGregor Act provides speedy and remedial claims procedures, it promotes prompt completion of public schools and other public projects in Texas and prevents delays caused by litigation or threats of litigation by unpaid laborers and material providers. The McGregor Act also protects general contractors from materialmen claims brought long after construction funds have been disbursed by general contractors on public projects. To allow TCTFA to be utilized by material suppliers (with its four year statute of limitations), would circumvent the McGregor Act 's 90 day limitations period, (Tex. Gov. Code § 2253.041), unleashing upon the Texas court system a barrage of claims brought by material suppliers possibly years after construction funds have been disbursed and possibly long after the public projects has been completed. The injustice to general contractors would be immense. Since a general contractor is required to purchase a payment bond for the protection of laborers and material suppliers under the McGregor Act, it makes little sense to allow TCTFA as an alternative remedy. As the 13th Court of Appeals correctly states, "the payment bond provisions of the McGregor Act would be eviscerated" if Dealers were allowed to proceed under TCTFA, and such would be "contrary to the intent of the legislature" in enacting the McGregor Act. Id. at 8.

Alternatively, if the Supreme Court ultimately rules that the McGregor Act was not an exclusive remedy to Dealers, then Respondents would alternatively request that their Cross Points set forth herein below, be remanded to the Court of Appeals for consideration and ruling. Alternatively, Respondents request that the Supreme Court considers and rules upon Respondent's Cross Points.

RESPONSE ARGUMENT AND AUTHORITIES

RESPONSE ISSUE NO. 1

THE COURT OF APPEALS CORRECTLY RULED THAT THE McGREGOR ACT WAS AN "EXCLUSIVE" REMEDY PREEMPTING USE OF THE TEXAS CONSTRUCTION TRUST FUND ACT IN PUBLIC PROJECT CASES AFTER THE GENERAL CONTRACTOR POSTS ITS PERFORMANCE AND PAYMENT BONDS.

RESPONSE ISSUE NO. 2

THE COURT OF APPEALS CORRECTLY RULED THAT THE 1987 LEGISLATIVE AMENDMENTS ***WITHIN TCTFA*** DID NOT ALTER THE WELL-ESTABLISHED APPLICATION OF THE McGREGOR ACT AS THE MANDATORY AND EXCLUSIVE REMEDY OF A MATERIALMAN AGAINST THE GENERAL CONTRACTOR ON PUBLIC PROJECTS. PETITIONER FAILED TO CITE A SINGLE AUTHORITY SHOWING THAT THE 1987 LEGISLATIVE AMENDMENTS ***TO TCTFA*** HAD ANY MATERIAL EFFECT UPON THE APPLICATION OF THE McGREGOR ACT .

RESPONSE ISSUE NO. 3

THE COURT OF APPEALS DID NOT UPSET PUBLIC POLICY BY MAINTAINING THE EXCLUSIVE NATURE OF THE McGREGOR ACT. AS A MATTER OF PUBLIC POLICY, IT IS IN THE BEST INTEREST OF ALL PARTIES CONCERNED THAT THE McGREGOR ACT REMAINS THE MANDATORY AND EXCLUSIVE REMEDY TO MATERIALMEN. THE REASONS ARE:

A. THE McGREGOR ACT AFFORDS TO LABORERS AND MATERIALMEN A SPEEDY, AND HIGHLY REMEDIAL PROCEDURE IF THEY ARE VIGILANT IN FILING THEIR BOND CLAIMS.

B. THE McGREGOR ACT ALSO AFFORDS GOVERNMENTAL ENTITIES ASSURANCE OF PROMPT COMPLETION OF PUBLIC PROJECTS WITH REDUCED RISK OF LITIGATION DELAYS OR EXPENSES.

C. THE McGREGOR ACT ALSO PROTECTS GENERAL CONTRACTORS FROM EXPOSURE TO MULTIPLE CLAIMS AGAINST THE SAME CONSTRUCTION FUNDS, WITH THE POSSIBILITY OF DOUBLE LIABILITY, AS MIGHT HAPPEN IN THIS CASE IF DEALERS IS PERMITTED TO PROCEED UNDER TCFTA. THE 90 DAY STATUTE OF LIMITATIONS UNDER THE McGREGOR ACT REQUIRES MATERIALMEN TO BRING CLAIMS PROMPTLY, BEFORE CONSTRUCTION FUNDS ARE FOREVER DISBURSED TO SUBCONTRACTORS OR OTHER MATERIALMEN.

(Response Issues No. 1, 2, and 3 are argued together)

Respondents will not repeat the previous arguments or authorities made by Respondents to this Court in ***Respondents' Response to Petition for Review*** or in ***Respondents' Response to Petitioner's Motion for Rehearing***, but will refer the Supreme Court to those briefs by reference. Respondent's believe that the arguments and authorities cited by Respondents in their prior briefs would support a ruling by the Supreme Court that the McGregor Act was Dealers' mandatory and exclusive remedy in this case. The Respondents would also refer the Supreme Court to the 13th Court of Appeals' unpublished decision in this case which is well reasoned and provides substantive and authoritative reasoning for maintaining the McGregor Act as a mandatory and exclusive remedy. See, 2007 WL 4442544.

What Respondents would like to add to their previously submitted arguments and authorities are the practical and public policy reasons why the McGregor Act must be ruled to be Dealers' exclusive remedy in this case.

A. Public Policy Considerations

The limitations periods between the McGregor Act and TCTFA cannot be reconciled. The McGregor Act has a 90 day limitations period (§ 2253.041, Tex. Gov. Code), and TCTFA has a four-year statute of limitations.[4] As matter of public policy, allowing materialmen to proceed under TCTFA against a fully bonded general contractor would be grossly unfair to the general contractor and would create additional burdens for the governmental entity.

Prior to commencing work on public projects, general contractors are required under the McGregor Act to purchase, usually for significant sums, both a performance bond to protect the government entity and a payment bond to protect laborers and material suppliers. Tex. Gov. Code, § 2253.021(a) and (b). The prime contract between the general contractor and government entity also usually requires purchase of the performance and payment bonds. For many years, general contractors in Texas have followed and relied upon the specific procedures set forth in the McGregor Act to pay construction draw requests to subcontractors and their materialmen on public projects. As the 13th Court of Appeals noted, Texas courts have applied the McGregor Act to public work contracts for nearly seventy-five years, citing *Employers' Liab. Assur. Corp. v. Young County Lumber Co.*, 122 Tex. 647, 64 S.W.2d 339, 344-5 (1933). Id. at 9, Fn. 10. As a matter of regular practice, if a

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[4] There is no specific limitations provision under TCTFA. Accordingly, the general four year limitations period of Tex. Civ. Pract. & Rem. Code, § 16.004 (Vernon 2005), applies. See *Williams v. Khalaf*, 802 S.W.2d 651 (Tex. 1990).

materialman makes a claim on a public project for unpaid materials to the general contractor and bonding company within the 90 day limitations period, the general contractor usually withholds the claimed funds from their subcontractor, and promptly pays the material supplier. The sums paid to the supplier are then deducted from the amounts paid thereafter to the subcontractor. Once a general contractor knows that the 90 day limitations period under the McGregor Act has passed, general contractors have traditionally felt safe to pay their subcontractors the full amount of their claims believing there are no outstanding material claims.

In this case, Dealers has admitted that it failed to timely assert its McGregor Act Claims and dismissed its McGregor Act claims prior to trial. To now allow Dealers to assert claims under TCTFA would subject SCC to the possibility of double liability on the claims already billed and paid to Diamond, the electrical subcontractor. As testified to by Stacey Scoggins, SCC has already paid Diamond for all sums due under the Diamond subcontract, including claims for materials now asserted by Dealers. RR 140, line 1 through RR 141, line 13. As a matter of public policy, allowing materialmen to assert claims for up to four years after delivery of materials to a public project, would create a great injustice for general contractors. In some instances, general contractors would be exposed to material supplier claims long after all construction funds were disbursed, (and possibly after the project was completed), exposing the general contractor to double liability. General contractors would possibly be required to pay for the same materials twice. Furthermore,

general contractors would be tempted, out of fear of double liability, to withhold construction funds for longer periods of time thus creating a likelihood of litigation being filed by subcontractors and material suppliers who are unhappy about the delays in payment. Such a result would gut the meaning and procedures of the McGregor Act. The posting of the payment bond by the general contractor would become meaningless, and make the McGregor Act would become an "eviscerated" piece of legislation as suggested by the 13th Court of Appeals.

Furthermore, if Dealers gets its way and is allowed to proceed against SCC under TCTFA, school districts and public entities would also experience delays in completion of the public projects due to likely litigation, or threats of litigation, made by material suppliers against general contractors. It is likely that many of these claims would arise long after public construction funds were disbursed by the general contractor to their subcontractors or other material suppliers. Since general contractors would have valid concerns about disbursing funds soon after work was completed by subcontractors, it would be likely that general contractors would withhold construction funds for much longer periods of time. This would likely result in litigation being filed by subcontractors and materialmen which, in turn, would require public entities to hire attorneys to participate in the litigation. This litigation would cause delays in the completion of the public projects due to work stoppages or slowdowns by unpaid subcontractors. Public entities would be faced with an increase the costs of construction due to delays and litigation expenses. In sum, a

holding allowing materialmen to proceed under TCTFA, circumventing the 90 day limitations period of the McGregor Act, would turn the world of public construction upside-down. For these reasons, Respondents believe that the McGregor Act must be ruled to be Dealers' exclusive remedy against SCC.

B. 1987 amendments to TCTFA did not alter or change the exclusive nature of the McGregor Act.

Dealers has brazenly argued to this Court that TCTFA has always been permitted in public construction projects, claiming that the Court of Appeals has made a serious departure from existing Texas law on this subject. As noted several times by the 13th Court of Appeals in this case, Dealers has failed to cite a single relevant authority showing that its arguments are true. Id. at 2 and 4. On the other hand, SCC has cited two prior Court of Appeals cases that have specifically ruled that the McGregor Act was a material supplier's mandatory and exclusive remedy against a general contractor once the general contractor has posted its payment bond on a public project, preempting TCTFA. See e.g. *Economy Forms Corp v. Williams Brothers Construction Co.*, 754 S.W.2d 451, 457 (Tex. App.-Houston [14th Dist.] 1988, no writ) and *Trucker's, Inc v. South Texas Const. Co.*, 561 S.W.2d 855, 859 (Tex. Civ. App.-Corpus Christi 1977, no writ).

It is true that both *Economy Forms*, supra, and *Trucker's, Inc.*, supra, were decided based upon the TCTFA as it existed prior to the 1987 legislative changes.[5]

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[5] *Economy Forms*, supra, was actually decided after the 1987 changes to TCTFA but applied TCTFA as it existed prior to the 1987 legislative amendments. 754 S.W.2d at 457.

The 13th Court of Appeals in this case followed and relied upon the rulings in *Economy Forms,* supra, and *Trucker's, Inc.,* supra, finding that the 1987 legislative changes to TCTFA were not significant or material to the application of the McGregor Act in public construction cases.[6] 2007 WL 4442544 at 5-7. The Court of Appeals also correctly found that the legislature intended that the McGregor Act provided a comprehensive remedy for laborers and materialmen in bonded public projects whereas TCTFA provided a remedy for laborers and materialmen in private construction projects that were not bonded. Id. at 7-8.

In the more than 20 years since the 1987 amendments to TCTFA, and until the 13th Court of Appeals' decision in this case, there has not been a single court that has addressed the issue of whether the McGregor Act preempts TCTFA. The legislature in 1987, provided no legislative history to explain what was intended by the 1987 amendments to TCTFA. The 13th Court of Appeals in this case was the first Texas appellate court to consider whether the McGregor Act preempted TCTFA since the 1987 legislative changes to TCTFA. The 13th Court of Appeals considered Dealers' arguments and concluded that the McGregor Act continued to be a comprehensive legislative scheme providing materialmen with a potent remedy against general contractors in public project cases for their material claims and that

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[6] Prior to August 31, 1987, the Trust Fund Act read, *"This chapter does not apply to... (3) receipts under a construction contract if the full amount is covered by a corporate surety payment bond."* After August 31, 1987, the Trust Fund Statute read: *"This chapter does not apply to... (3) a corporate surety who issues a payment bond covering the contract for the construction or repair of the improvement."*

the McGregor Act still stood as an mandatory and exclusive remedy preempting TCTFA in public project cases. Id. Furthermore, in the more than 20 years since that amendments to TCTFA, no Texas Court has criticized or overruled the rulings in *Economy Forms,* supra, and *Trucker's, Inc.,* supra. It is odd that such a monumental change in construction law, as argued by Dealers, took place over 20 years ago without a single Texas court or legal treatise making commentary upon the same. Respondents would argue that this is because the legislature did not intend a change to the applications of the McGregor Act as an exclusive remedy in public projects.

Texas legal encyclopedias and horn books on construction law have remained unchanged since 1987 concerning the McGregor Act and its application. See, 61 Tex. Jur. 3d, Public Works and Contracts, §52, p. 421-422, (1999), wherein it is stated:

> "In construing the statute requiring a contractor's payment bond for the protection of materialmen and laborers under a public work's contract, and in giving a cause of action thereon to those for whose benefit the bond is executed, the intent of the legislature is that the remedies therein accorded to materialmen and laborers are exclusive. This is so even though it is claimed that the bond sued on is a valid common-law, rather than statutory, obligation. If no recovery can be had in similar circumstances on a statutory bond, a contention that the claimants are suing on a common-law obligation will be unavailing.
>
> "The statutes are mandatory as well as exclusive; they must be complied with in all respects or the action is not maintainable; although a party to such a suit may waive certain failures to comply with the statute, or be estopped to assert such failures." (Citations omitted and emphasis added).

Also see, 3 Bruner & O'Connor, Construction Law, §8:41, Trust Fund Statutes, (2005), wherein it is stated: "The statute (TCTFA) does not apply in the event that a payment bond is issued in connection with the project."

For these reasons, it appears that the 13th Court of Appeals in this case acted reasonably in following the decisions of *Economy Forms*, supra, and *Trucker's, Inc.*, supra, holding that the McGregor Act still stands as a mandatory and exclusive remedy of materialmen in public projects, preempting TCTFA.

RESPONSE TO ISSUE NO. 4

THE COURT OF APPEALS RULING DID NOT VIOLATE THE PETITIONER'S CONSTITUTIONAL RIGHTS BY DENYING PETITIONER'S CLAIMS UNDER THE *JOINT CHECK AGREEMENT* BECAUSE: (1) THE PETITIONER HAD A LEGAL REMEDY UNDER THE McGREGOR ACT; AND (2) THE PETITIONER FAILED TO PRESENT ANY EVIDENCE SUPPORTING ITS CLAIM THAT RESPONDENTS VIOLATED THE *JOINT CHECK AGREEMENT*.

Respondents would incorporate herein by reference for all purposes, Respondents' arguments and authorities under **Issue No. 4** in ***Respondents' Response to Petition for Review*** previously filed with the Supreme Court. Alternatively, Respondents would show the Supreme Court that its insufficient evidence issue presented to the Court of Appeals regarding the joint check agreement was never reviewed and ruled upon by the Court of Appeals. See **Issue No. 2** to Respondents' ***Appellants' Brief*** filed in the Court of Appeals. Respondents would accordingly request that if the Supreme Court rules that the McGregor Act did not preempt or effect Dealers' claims under the joint check agreement, that

Respondents' insufficient evidence issue be remanded to the Court of Appeals for consideration, or alternatively, that the Supreme Court consider this Cross Point and make a ruling upon the same. See ***Respondents' Cross Point No. 1***, below.

RESPONSE TO ISSUE NO. 5

RESPONDENTS DENY THAT IT WAIVED ANY POINT OF ERROR. IN ITS FIRST ISSUE PRESENTED TO THE COURT OF APPEALS, RESPONDENTS DID ARGUE THAT PETITIONER'S "MANDATORY" AND "EXCLUSIVE" REMEDY WAS THE McGREGOR ACT.

Respondents would show that Respondents' first issue presented to the Court of Appeals in ***Appellant's Brief*** read:

> *THE McGREGOR ACT, (Tex. Gov. Code § 2253.001, et. seq.), WAS PETITIONER'S MANDATORY AND EXCLUSIVE REMEDY AGAINST THE RESPONDENTS. SINCE PETITIONER FAILED TO SUE THE RESPONDENTS UNDER THE McGREGOR ACT, THE JUDGMENT SHOULD BE REVERSED AND RENDERED "TAKE NOTHING."*

This Issue specifically stated that Petitioner's sole and exclusive remedy against the Respondents was the McGregor Act. Respondents did raise the appropriate issues covering the entire scope of Dealers' claims and the issues discussed and ruled upon by the Court of Appeals. Respondents clearly argued that the entire judgment of the trial court was to be reversed due to the exclusive nature of the McGregor Act.

RESPONDENT'S CROSS POINT NO. 1

IN THE EVENT THAT THE SUPREME COURT RULES THAT McGREGOR ACT WAS NOT DEALERS' EXCLUSIVE REMEDY IN THIS CASE, THE COURT OF APPEALS NEVER ADDRESSED ***ISSUE NO. 2*** RAISED IN RESPONDENTS' ***APPELLANT'S BRIEF*** BEFORE THE COURT OF APPEALS, THAT READ:

> ***"THERE WAS NO EVIDENCE, OR ALTERNATIVELY, INSUFFICIENT EVIDENCE, TO SUPPORT A JUDGMENT THAT APPELLANTS VIOLATED THE "JOINT CHECK" AGREEMENT. THE UNDISPUTED EVIDENCE SHOWS THAT SCC FULLY COMPLIED WITH THE TERMS OF THE AGREEMENT."***

UNDER T.R.A.P. 53.4, RESPONDENTS WOULD REQUEST A REMAND TO THE COURT OF APPEALS OF THIS ISSUE OR, ALTERNATIVELY, THAT THE SUPREME COURT REVIEW THIS ISSUE.

A "joint check" agreement is a standard agreement in the construction industry that requires a general contractor to pay his subcontractor by "joint check" with the material supplier, but only when monies are actually owed by the general contractor to the subcontractor. See 3 Bruner & O'Connor, Construction Law, § 8:52 (2006), discussing joint check agreements. In this case, there was a joint check agreement entered among SCC (as general contractor), Diamond (as subcontractor), and Dealers (as material supplier). RR Def's Ex. 17. The joint check agreement at issue reads, in relevant part: *"Scoggins Construction ...agrees to make all payments for all materials and/or services furnished by Vendor ("Dealers") to the project by check made jointly payable to Subcontractor ("Diamond") and Vendor."* Emphasis added. The joint check agreement goes on to state: *"Any direct payment from the General Contractor to the Vendor shall be charged against Subcontractor's account."* RR

Def's Ex. 17.

At trial, Dealers offered no evidence on the meaning or intent of the "joint check" agreement other than the agreement itself. RR, Pff's Ex. 11. Dealers attorney argued that the agreement "spoke for itself" and needed no further interpretation or evidence. RR 123, lines 13-21. Dealers took the position that the "joint check" agreement was unambiguous and stood alone without necessity of proof. At trial, Dealers offered no evidence, or alternatively, insufficient evidence, that Respondents "breached" the joint check agreement. Dealers offered no evidence to rebut the testimony of Stacey Scoggins, SCC's secretary and bookkeeper, that SCC always paid Diamond by joint check with Dealers after the joint check agreement was entered by SCC, Diamond and Dealers. RR. 113, line 9 through 115, line 15. Dealers also offered no rebuttal evidence to Stacey Scoggins' testimony that at the time Diamond walked off the job, SCC owned no monies to Diamond. RR. 131, line 7 through 132, line 8; RR. 140, line 1 through 141, line 13. Dealers also did not refute Ms. Scoggins' testimony that the joint check agreement only required SCC to pay by joint check if SCC owed monies to Diamond and that it was not a debt guaranty agreement, as argued by Dealers. RR 125, line 2-11 and RR 149, line 22 through 150, line 2. It was Dealers' burden of proof to prove otherwise. In summary, Dealers failed to carry its burden of proof showing that Respondents breached the joint check agreement.

Respondents respectfully requests that this issue be remanded to the Court of Appeals for review, or alternatively, that the Supreme Court rule upon this issue.

RESPONDENT'S CROSS POINT NO. 2

IN THE EVENT THAT THE SUPREME COURT RULES THAT McGREGOR ACT WAS NOT DEALERS' EXCLUSIVE REMEDY IN THIS CASE, THE COURT OF APPEALS NEVER ADDRESSED ***ISSUE NO. 3*** RAISED IN RESPONDENTS' ***APPELLANT'S BRIEF*** BEFORE THE COURT OF APPEALS, THAT READ:

> ***"THERE WAS NO EVIDENCE, OR ALTERNATIVELY, INSUFFICIENT EVIDENCE TO SUPPORT A JUDGMENT AGAINST APPELLANT, BILL R. SCOGGINS, IN HIS INDIVIDUAL CAPACITY. MR. SCOGGINS DID NOT VIOLATE THE TEXAS CONSTRUCTION TRUST FUND ACT, HE WAS NOT A PARTY TO THE JOINT CHECK AGREEMENT, AND THERE WAS INSUFFICIENT EVIDENCE TO PIERCE THE CORPORATE VEIL."***

UNDER T.R.A.P. 53.4, RESPONDENTS WOULD REQUEST A REMAND TO THE COURT OF APPEALS OF THIS ISSUE OR, ALTERNATIVELY, THAT THE SUPREME COURT REVIEW THIS ISSUE.

A. Mr. Scoggins was not a party to the Joint Check Agreement.

There was insufficient evidence presented at trial in this case that Respondent, Bill R. Scoggins, was personally liable under either the "joint check" agreement or under the Texas Construction Trust Fund Act.

It is undisputed in the record that Mr. Scoggins was not a party to the joint check agreement. RR Def's Ex. 17. Without executing the agreement, Mr. Scoggins cannot be personally liable under its terms. See the *Statute of Frauds*, Tex. Bus. & Com. Code, § 26.001. Accordingly, there is insufficient evidence to hold Respondent, Bill Scoggins, liable under the joint check agreement.

B. Insufficient evidence to hold Mr. Scoggins not liable under TCTFA.

Dealers failed to present sufficient evidence at trial to hold Bill Scoggins liable under TCTFA. At trial, Dealers' witness, Mr. Ernesto Garcia, Jr., conceded that he was not aware of Mr. Scoggins misappropriating construction funds from the MISD school project. Mr. Garcia also did not have any direct knowledge as to how Mr. Scoggins handled construction funds. RR 43, line 7 through RR 44, line 4. This was the only evidence presented by Dealers against Respondent, Bill Scoggins.

Respondents offered the testimony of Stacey Scoggins, the secretary and bookkeeper for SCC. Ms. Scoggins testified that she was not aware of any construction funds being siphoned off by her father, Bill R. Scoggins, and that Bill R. Scoggins only acted in his corporate capacity as president of SCC to pay draw claims that he felt were justly due and owing. RR 149, line 22 through 150, line 10. Dealers failed to offer any evidence to rebut this testimony.

Furthermore, as for Dealers' claims under the Texas Construction Trust Fund Act, Dealers offered no evidence that Mr. Scoggins handled any funds in his individual capacity or that he knowingly, intentionally, or fraudulently misapplied construction trust funds. See Tex. Prop. Code § 162.031 (Vernon 1987). Dealers also presented no evidence to support its claim that the corporate veil should be pierced. Accordingly, the judgment against Bill R. Scoggins, in his individual capacity, should be reversed and rendered "take nothing" being that there is no evidence, or alternatively, insufficient evidence to support the trial court judgment.

RESPONDENT'S CROSS POINT NO. 3

IN THE EVENT THAT THE SUPREME COURT RULES THAT McGREGOR ACT WAS NOT DEALERS' EXCLUSIVE REMEDY IN THIS CASE, THE COURT OF APPEALS NEVER ADDRESSED ***ISSUE NO. 4*** RAISED IN RESPONDENTS' ***APPELLANT'S BRIEF*** BEFORE THE COURT OF APPEALS, THAT READ:

> ***"THERE WAS NO EVIDENCE, OR ALTERNATIVELY, INSUFFICIENT EVIDENCE, TO SUPPORT THE JUDGMENT AGAINST APPELLANTS UNDER THE TEXAS CONSTRUCTION TRUST FUND ACT, (Tex. Prop. Code § 162.001, et. seq.). APPELLEE ALSO FAILED TO REFUTE APPELLANTS' PRIMA FACIE PROOF OF AFFIRMATIVE DEFENSES."***

UNDER T.R.A.P. 53.4, RESPONDENTS WOULD REQUEST A REMAND TO THE COURT OF APPEALS OF THIS ISSUE OR, ALTERNATIVELY, THAT THE SUPREME COURT REVIEW THIS ISSUE.

A. DEALERS FAILED TO PROVE THE ELEMENTS OF ITS CLAIM:

The Texas Construction Trust Fund Act, (Tex. Prop. Code § 162.001, et seq.), is not a strict liability statute. The fact that a materialman has not been paid by a general contractor does not make the contractor automatically liable. Dealers was required at trial to carry its burden of proof that the statute was violated.

TCTFA requires the Plaintiff to prove an intentional tort. TCTFA, in relevant part reads: *"A trustee who, **intentionally or knowingly or with intent to defraud**, directly or indirectly retains, uses, disburses, or otherwise diverts trust funds without first fully paying all current or past due obligations **incurred by the trustee** to the beneficiaries of the trust funds, has misapplied trust funds."* Tex. Prop. Code § 162.031(a) (Vernon 1987). Emphasis added. Also see, *Holliday v. CW & A, Inc.*, 60 S.W.3d 243, 245-6 (Tex. App.-Corpus Christi 2001, pet. denied). There is no evidence in the appellate record that Respondents committed any knowing or

intentional violation of TCTFA. It also appears that this statute does not apply because the debt at issue was the debt of Diamond and therefore, was not *"incurred by the trustee."* Id.

As stated earlier in this brief, Dealers' primary witness at trial, Mr. Ernesto Garcia, Jr., conceded that he was not aware of the Respondents misappropriating construction funds from the MISD school project. Mr. Garcia also did not have any direct knowledge as to how Mr. Scoggins handled construction funds. RR 43, line 7 through RR 44, line 4.

In its defense, Respondents offered the testimony of Stacey Scoggins, a person with first hand knowledge of how funds were handled by SCC. She testified that after the "joint check" agreement was entered, that SCC only paid Dealers by joint check (with Dealers) and that she was in constant contact with Cynthia Stanton of Dealers to verify and pay amounts owed to Dealers by Diamond through Diamond's construction draws. RR 131, line 7 through RR 132, line 9. Ms. Scoggins testified that after receiving a demand letter from Dealers dated January 15, 2002, that SCC paid Dealers' demand in full and that between that January 18, 2002 and April 15, 2002, there was no communication by Dealers to SCC as to any additional amounts on Diamond's account being past due. RR 140, line 1 through RR 141, line 13. Ms. Scoggins testified that there was one last joint check payment during this time period made on March 22, 2002. At that time, SCC again presumed that Dealers was fully paid. RR 141, lines 14-25. Only on April 15, 2002, did SCC learn

that Dealers was allegedly owned additional monies by Diamond but by that time, SCC owed no monies to Diamond because Diamond was behind in its work, there were quality issues with Diamond's past work raised by MISD, and Diamond had abandoned the job. RR 142, lines 1-19.

B. DEALERS FAILED TO PROVE THAT THE BULK OF THE MATERIAL SOLD TO DIAMOND WERE ACTUALLY INCORPORATED INTO THE SCHOOL PROJECT.

Dealers also failed to show through first hand testimony that a significant portion of the materials that it allegedly sold to Diamond were actually incorporated into the Hinojosa Elementary School project. Dealers failed to subpoena for trial the principals of Diamond or any other eyewitness that could testify, based upon first hand knowledge, that the electrical materials sold by Dealers to Diamond were actually incorporated into the public project, (versus being diverted to other projects by Diamond). During cross-examination, Dealers' witnesses conceded that they had no actual first hand knowledge as to which materials were actually incorporated into the project and which materials were diverted by Diamond to other projects. See the cross-examination of Dealers' employee, Mr. Ruben Garcia, Jr., RR 41, line 23 through 67, line 12; RR 71, line 20 through 77, line 15. Also see the cross-examination of Dealers' employee, Mr. Antonio Teller. RR 88, line 1 through 95, line 20. During this cross examination, it was shown that Dealers either delivered the bulk of materials to Diamond's place of business in San Benito, Cameron County,

Texas, or that Dealers allowed Diamond to pick up materials at Dealers' place of business, not knowing where these materials were ultimately taken. Approximately, $56,000.00 of materials (out of $78,639.00 claimed by Dealers) allegedly sold by Dealers to Diamond were not directly delivered to the job site. RR 67, lines 2-12. RR Pff's Ex 21. Dealers presented no eyewitness testimony as to whether the materials it sold to Dealers actually became incorporated into the project. Dealers' failure to subpoena the appropriate eyewitnesses for trial to offer such proof was a fatal error requiring reversal of the judgment.

C. DEALERS FAILED TO REBUT THE APPELLANTS' PRIMA FACIE PROOF OF AFFIRMATIVE DEFENSES:

Dealers also failed to offer sufficient evidence to rebut the prima facie evidence offered by Respondents establishing affirmative defenses to Dealers' claims under the Texas Construction Trust Fund statute. The following are recognized affirmative defenses for general contractors under Texas law:

1. Actual Expense Defense. It is an affirmative defense for a general contractor to use construction trust funds to pay "actual expenses" on a project plus the contractor's general overhead. If construction funds are used to pay expenses and costs on the project, or the general contractor's general overhead costs, then the general contractor cannot be held liable under TCTFA simply because construction funds were exhausted. In other words, there is the necessity that the claimant prove a misappropriation of funds to some use other than the contractor's

general overhead or the specific job costs. SCC presented evidence that all funds received from MISD were used to pay for labor and materials on the Hinojosa Elementary School project, for usual overhead expenses, and a reasonable builder's fee. RR 125, line 12 through 149, line 21. Dealers failed to refute this testimony. See, *Lively v. Carpet Services, Inc.*, 904 S.W.2d 868, 875 (Tex. App.-Houston [1st Dist.] 1995, writ denied). "Actual expenses" have also been ruled by the Texas courts to include payments to all other subcontractors and materialmen on the specific project, costs of insurance, incidental costs on the project, and the general contractor's overhead, (i.e., employee wages, light bills, telephone bills, and insurance). Id. These overhead expenses do not have to be traceable to the particular project so long as they are "actually incurred." *Holliday v. CW & A, Inc.*, 60 S.W.3d 243, 248 (Tex. App.-Corpus Christi 2001, review denied). The overhead expenses for SCC in this case also included significant legal expenses incurred in an attempt to recover missing electrical supplies in the 2002 lawsuit against Diamond in the 404th District Court of Cameron County, Texas, referred to earlier in this brief. RR 137 lines 4-15. No materials were ever recovered by SCC in the lawsuit and SCC was required to pay a outside contractors (Borchers Electric and Ace Fire and Sound) for these materials (and labor) at a significant loss to SCC. RR 137, lines 14-15; RR 147, lines 11-22.

2. "Profits" under the Contract are an affirmative defense. SCC was entitled to take a reasonable "profit" or "builder's fee" on the public job at issue. This "profit"

is considered an affirmative defense under TCTFA. See Tex. Prop. Code., §162.001(c) and also see, e.g., *Perry & Perry Builders, Inc v. Galvan*, 2003 WL 21705248, (Tex. App.-Austin 2003, no pet.-not designated for publication). Ms. Stacey Scoggins testified that SCC bid the project at issue with a projected 5 percent profit, but achieved profits less than 5 percent due in large part to Diamond's breach of the subcontract. RR 125, lines 12-22; RR 144, line 1 through 149. line 21. The uncontested evidence showed that at the conclusion of the project, after SCC paid all subcontractors and materialmen, and paid other expenses associated with this project, that only 4.87% of funds received from MISD were remaining for payment of SCC's general overhead expenses and builder's fee. The figures presented at trial were as follows:

$5,794,031.73 representing the total monies paid by MISD to SCC on the project
-5,489,260.28 representing total expenses on project incurred by SCC, excluding overhead
-12,553.38 representing SCC's costs after job closed to make warranty repairs
- 8,503.43 representing SCC's legal costs suing Diamond/Bujanos to recover materials
$283,714.64 NET GROSS MARGIN, not including deductions for profit or general overhead

As can be seen from these figures, SCC received a builder's fee from this project that was less than originally projected.

3. Offsets. SCC also presented evidence of significant "offsets" and "counterclaims" against Diamond for unfinished work, missing materials, and defective work. Under TCTFA, these are considered affirmative defenses to Dealers' claims. See Tex. Prop. Code, §162.031(b). Also see, e.g., *Holliday v. CW & A, Inc.*, 60 S.W.3d at 247-8.

Looking only at the electrical subcontract between SCC and Diamond, SCC proved at trial that it overpaid Diamond and incurred significant costs to outside subcontractors to complete the electrical work on the project that should have been completed by Diamond and to fix Diamond's defective work. RR 128, line 13 through 134, line 20; RR 137, lines 1-15; RR 144, lines 1-22; and RR 147, lines 11-21. It was undisputed that the contract with Diamond was for $665,789 and that SCC paid Diamond $498,591.35, (including numerous joint checks to Dealers). Thereafter, SCC had to pay $107,440.27 to Borchers Electric to complete the electrical work on the project and to repair the defective work. SCC also had to pay $34,640 to Ace Fire and Sound to complete the alarm system (part of Diamond's subcontract), and SCC paid $8,503.43 to SCC's lawyer to sue Diamond to recover missing electrical materials. Dealers never rebutted this evidence. SCC also presented evidence that it had a $50,000.00 per month general overhead expense at the time of the project at issue. RR 145, line 22 through 146, line 22. SCC was handling a total of five other school construction projects at the time of the Diamond subcontract. These facts were undisputed.

Taking into account the undisputed evidence offered by SCC at trial, SCC proved that it handled all MISD construction funds within a reasonable manner and did not misappropriate any construction trust funds. Dealers failed to present any evidence to rebut testimony by Stacey Scoggins that showed no violations of TCTFA and that proved the affirmative defenses pleaded by Respondents in the trial court.

Accordingly, the judgment against Appellants must be reversed for insufficient evidence.

WHEREFORE, PREMISES CONSIDERED, Respondents, Scoggins Construction Company, Inc. and Bill R. Scoggins, respectfully request that the honorable Texas Supreme Court deny the *Petition for Review* presented by Petitioner, Dealers Electrical Supply Co., for the reasons and authorities cited herein above. Alternatively, Respondents request that the Court of Appeals' decision be affirmed in all respects by the Supreme Court. Alternatively, should the Supreme Court rule that the McGregor Act was not Dealers' mandatory and exclusive remedy, then Respondent would request that Respondents' Cross Points be remanded to the Court of Appeals for consideration and decision, or alternatively, that the Supreme Court make rulings on the Respondents' Cross Points. Respondents also request such other and further relief as the Supreme Court deems appropriate.

Respectfully Submitted,

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BY: ___________________________________
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ATTORNEY FOR RESPONDENTS, SCOGGINS CONSTRUCTION COMPANY, INC. AND BILL R. SCOGGINS, INDIVIDUALLY

CERTIFICATE OF SERVICE

_____I hereby certify that a true and correct copy of the above and foregoing instrument was, on this 17th day of November, 2008, mailed by certified mail, return receipt requested, to Mr. Ben L. Aderholt, **LOOPER, REED & McGRAW**, 1300 Post Oak Blvd., Suite 2000, Houston, Texas 77056.

____
WILLIAM F. KIMBALL