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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2181CV1464

G&R CONSTRUCTION

vs.

CITY OF MEDFORD

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

This action arises from a dispute between G&R Construction ("G&R"), a general contractor, and the City of Medford (the "City") concerning payments for delays to construction of a new public library caused by COVID-19 and its ensuing statewide shutdowns. G&R's complaint alleges, in essence, that COVID-19 shutdown orders were issued by the City for its convenience, thus entitling G&R to additional payment for the delays to its contract work. The City responds that the referenced COVID-19 shutdown orders were issued by the state, not the City, and that because they were not issued for convenience, G&R is not entitled to additional payment. G&R has brought claims of breach of contract (Count 1) and breach of the covenant of good faith and fair dealing (Count 2). The matter is presently before the court on the City's motion for summary judgment (Dkt. No. 9) and G&R's cross motion for partial summary judgment (Dkt. No. 10). For the reasons explained below, and following a hearing on December 6, 2022, the City's motion is ALLOWED, and G&R's cross motion is DENIED.

BACKGROUND

The summary judgment record sets forth the following facts.

The Project.

In or about August 2019, the City solicited bids for construction of a new public library (the "Project"). The Project was to be funded, at least in part, by the Massachusetts Board of Library Commissioners ("MBLC"). G&R submitted a bid in response to the City's solicitation and was awarded

the Project. The parties subsequently entered into a contract for construction of the Project (the "Contract") in October 2019. The Contract included, among other documents, (i) "Contract 19-0362" signed by the parties, and (ii) "General Conditions of the Contract for Construction" ("General Conditions"). Article 8.3.1 of the General Conditions provides as follows:

> If the Contractor is delayed at any time in the commencement or progress of the work by an act or neglect of the Owner or Architect . . . or by changes ordered in the Work; or by . . . unusual delay in deliveries, unavoidable casualties or other causes (except weather) beyond the Contractor's control; or by delay authorized by the Owner; or by other causes that the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine, and this shall be the Contractor's sole remedy for such delay. Under no circumstances will the Contractor be entitled to an increase in the Contract Sum, or to any other damages, on account of or in connection with any delay, regardless of the cause of such delay, and Contractor agrees not to make any claim for such damages, including, but not limited [sic], claims for damages on account of having to perform out-of-sequence work, claims for damages on account of loss production, and claims for damages on account of hindrances or interference with the work.

G&R commenced the Project work after execution of the Contract, in late 2019.

COVID-19 Order No. 13.

On March 10, 2020, with the Project well underway, the Massachusetts Governor declared a state of emergency due to COVID-19. On March 23, 2020, the Governor issued COVID-19 Order No. 13, titled, "Order Assuring Continued Operation of Essential Services in the Commonwealth, Closing Certain Workplaces, and Prohibiting Gatherings of More than 10 People" ("Order No. 13"). That order provided, in relevant part, as follows: "All businesses and other organizations that do not provide COVID-19 Essential Services shall close their physical workplaces and facilities ('brick-and-mortar premises') to workers, customers, and the public as of 12:00 noon on March 24, 2020 and shall not re-open to workers, customers, or the public before 12:00 noon on April 7, 2020." See Joint Exhibit 1.

Such "COVID-19 Essential Services" were defined in a separate "Exhibit A" of the same date, listing certain industries and kinds of workers as essential and exempt from closure. Order No. 13 identified one such category of essential workers as "Workers – including contracted vendors – involved in the construction of critical or strategic infrastructure including public works construction, airport operations, water, sewer, gas, electrical, nuclear, oil refining and other critical energy services, roads and

highways, public transportation, solid waste collection and removal, and internet, and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services)". See Joint Exhibit 1.

COVID-19 Order No. 21.

On March 31, 2020, the Governor issued COVID-19 Order No. 21, titled, "Extending the Closing of Certain Workplaces and the Prohibition of Gatherings of more than Ten People" ("Order No. 21"). That order provided, in relevant part, as follows:

> The provisions of the March 23, 2020 Order Assuring Continued Operation of Essential Services in the Commonwealth, Closing Certain Workplaces, and Prohibiting Gatherings of More than 10 People ("COVID-19 Order No. 13") are hereby extended until May 4, 2020. Accordingly, all businesses and other organizations that do not provide COVID-19 Essential Services shall not re-open their bricks-and-mortar premises to workers, customers, or the public before May 4, 2020.
>
> Gatherings of more than 10 people also remain prohibited until May 4, 2020.
>
> Effective at 12:00 noon on April 1, 2020, Exhibit A of the previously issued COVID-19 Order No. 13 is hereby replaced with the attached, updated Exhibit A of even date with this Order to reflect the revised guidance of the Federal Cybersecurity and Infrastructure Security Agency and the additional services and functions that I, as Governor, have identified as essential to promote the public health and welfare of the Commonwealth.

Joint Exhibit 2.

The updated Exhibit A, accompanying Order No. 21, included a separate category for essential construction activities exempt from closure, altering the previous Exhibit A to Order No. 13. Relevant here is the following clause from Exhibits A to Order No. 21:

> Workers – including contracted vendors – who support the operation, inspection, maintenance and repair of essential public works facilities and operations, including roads and bridges, water and sewer, laboratories, fleet maintenance personnel, construction of critical or strategic infrastructure, traffic signal maintenance, emergency location services for buried utilities, and maintenance of digital systems infrastructure supporting public works operations. Critical or strategic infrastructure includes public works construction including construction of public schools, colleges and universities and construction of state facilities, including leased space, managed by the Division of Capital Asset Management; airport operations; water and sewer; gas, electrical, nuclear, oil refining and other critical energy services; roads and highways; public transportation; steam; solid waste and recycling collection and removal; and internet and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services)

Joint Exhibit 2 at 16-17.

Closure of the Project.

By email sent April 6, 2020, Lauren Stara of the MBLC forwarded to Barbara Kerr, Medford Public Library Director, among others, an email from "Ryan Coleman, Chief Secretary and Director of Personnel and Administration in Gov. Baker's office." Joint Exhibit 3. That email from the Governor's Office stated that "In our intention of the order [Order No. 21] and reading of the order, Library construction, if not part of a State College Campus or being performed under the care and oversight of The State Division of Capital Asset Management, is deemed non-essential work at this time." *Id.* By email sent April 7, 2020, Jeff Fargo, a City inspector, forwarded a copy of Ms. Stara's April 6, 2020 email to Tim Mullen of G&R. *Id.* In an April 7, 2020, chain of emails among the City, G&R, and the City's project manager, The Vertex Companies, Inc. ("Vertex"), G&R was informed that the Project had to be paused based on "guidance from the Board of Library Commissioner and Governor's office." Joint Exhibit 4. In an April 13, 2020 email to Vertex, Erik Swenson of G&R responded to the April 7 "email chain from the Town of Medford directing the project to halt due to the COVID19 pandemic." *Id.* On or about April 7, 2020, G&R paused all work at the Project site.

On May 18, 2020, the Governor issued COVID-19 Order No. 33, entitled "Order Implementing a Phased Reopening of Workplaces and Imposing Workplace Safety Measures to Address COVID-19." That order allowed a phased reopening of businesses that had been closed by the Governor's previous COVID-19 orders. Included within Phase I of such phased reopening was construction work. Joint Exhibit 5. G&R accordingly resumed the Project work on May 25, 2020.

Change Requests.

Subsequent to resuming construction on the Project, G&R submitted a number of change requests to the City, seeking additional payment in connection with the temporary closure of the Project. In Change Request 041, dated July 21, 2020, G&R claimed that the pause in the Project, from about April 7, 2020 to May 25, 2020, delayed completion of the Project by thirty-nine days and requested a corresponding thirty-nine day extension of time to complete the Project. G&R also requested payment for

certain associated expenses. Change Request 041 was G&R's first request for payment of expenses due to the COVID Pause and resulting delay.

By letter dated August 30, 2020, in response to Change Request 041, the City's Project architect, Schwartz Silver ("Architect"), recommended acceptance of G&R's request for time extension but rejection of its request for payment of expenses. The City agreed to and granted G&R's request (in Change Request 041) for a thirty-nine-day time extension, but it did not agree to G&R's request for payment of expenses.

G&R submitted a revised version of its earlier Change Request 041 on or about October 5, 2020, titled Change Request 041R. Joint Exhibit 16. In Change Request 041R, G&R requested payment of the same expenses set forth in Change Request 41. *Id.* Change Request 041R was rejected by the City. By letter from G&R's legal counsel dated November 17, 2020, and titled, "Notice of Claim," G&R again requested payment of the same expenses set forth in Change Request 041. By letter dated December 3, 2020, the Architect responded to G&R's November 17, 2020 Notice of Claim by forwarding to G&R another copy of the Architect's August 31, 2020 response to Change Request 041. By letter dated December 7, 2020, the City, through its legal counsel, rejected G&R's request for payment of expenses included in its November 17, 2020 Notice of Claim.

G&R submitted a subsequent change request, titled "Change Request 114," on or about May 10, 2021. Joint Exhibit 7. By Change Request 114, G&R requested a forty-eight-day extension of time to complete the Project due to the addition of extra work to the Project. G&R also sought the payment of extended general conditions expenses covering the period of the requested time extension. *Id.* By letter dated June 7, 2021, in response to Change Request 114, the Architect recommended approval of an extension of time to complete the Project, but it did not recommend approval of the request for payment of the extended general conditions expenses. The City agreed to and granted G&R's request (in Change Request 114) for a forty-eight-day time extension, but it did not agree to G&R's request for payment of general conditions expenses.

As with Change Request 048R, G&R subsequently submitted a revised Change Request 114, titled "Change Request 114R." In Change Request 114R, dated June 28, 2021, G&R requested payment for the same extended general conditions expenses set forth in Change Request 114. By letter dated July 14, 2021, the Architect responded to Change Request 114R by referring G&R to the Architect's June 7, 2021 response to Change Request 114. In "Change Request 114R-Notice of Claim," dated July 26, 2021, G&R requested payment for the same extended general conditions expenses set forth in Change Request 114. By letter dated August 3, 2021, the Architect responded to "Change Request 114R-Notice of Claim" by referring G&R to the Architect's June 7, 20221 and July 14, 2021 responses to Change Request 114 and Change Request 114R, respectively. The City denied G&R's requests for payment of expenses in Change Requests 041/041R and 114/114R on grounds that G&R is not entitled to such payment under Section 8.3.1 of the General Conditions.

DISCUSSION

Summary judgment is appropriate where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56; *Cassesso* v. *Commissioner of Corr.*, 390 Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner* v. *Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991). A nonmoving party's failure to establish an essential element of his claim renders all other facts immaterial and mandates summary judgment in favor of the moving party. *Tedeschi-Freij* v. *Percy Law Group, P.C.*, 99 Mass. App. Ct. 772, 775 (2021), citing *Roman* v. *Trustees of Tufts College*, 461 Mass. 707, 711 (2012).

1. The Contract Precludes Delay Damages

The no-damages-for-delay clause in the Contract precludes G&R's recovery under the Contract as written. As noted above, Article 8.3.1 of the Contract's General Conditions prohibits G&R's claims for delay damages, stating, in relevant part: "Under no circumstances will the Contractor be entitled to an increase in the Contract Sum, or to any other damages, on account of or in connection with any delay, regardless of the cause of such delay . . . ." See Joint Exhibit 13 at 26-27. Such so-called no-damages-for-delay clauses are valid and enforceable under Massachusetts law. See *B. J. Harland Elec. Co.* v. *Granger Bros., Inc.*, 24 Mass. App. Ct. 506, 509 (1987) ("It is well established in Massachusetts that a contract provision such as art. XXIII [no-damages-for-delays provision] is enforceable and precludes an award of damages on account of delay.") and cases cited; *Worcester* v. *Granger Bros., Inc.*, 19 Mass. App. Ct. 379, 388 (1985) ("A no-damages-for-delay-provision in a public construction contract is valid and may be enforced."). Thus, G&R cannot recover for delay damages under the contract language.

Here, the damages sought by G&R in its Change Requests Nos. 041 and 041R are delay damages. In its Change Request No. 041, dated July 21, 2020, G&R sought additional payment for steel delivery and storage costs; steel crane remobilization costs; extended general conditions; idle equipment; and storage costs for materials that could not be stored onsite. G&R's general description of such work was "COVID-19 Damages & Delays". G&R's Change Request No. 041R, dated October 5, 2020, sought additional payment for the same items of work. However, G&R changed its general description of such work in its Change Request No. 041R to "COVID-19 Emergency / Shut Down / Damages". The payments sought by G&R in Change Requests Nos. 041 and 041R were plainly delay damages precluded by the language of the Contract.

Change Requests Nos. 114 and 114R present a closer question than Change Requests Nos. 041 and 041R. Change Requests No. 114 requested additional payment from the City for extended general

conditions[1] incurred in completing additional work requested by the City.[2] The City approved G&R's request for additional time but denied G&R's request for payment for extended general conditions, citing the no-damages-for-delay clause in the Contract. G&R then submitted Change Request No. 114R, again requesting additional payment from the City for extended general conditions, which was again denied. This court is persuaded that such extended general conditions represent delay damages precluded by the no-damages-for-delay clause in the Contract. See *S. Seeding Serv., Inc.* v. *W.C. English, Inc.*, 217 N.C. App. 300, 305 (2011) ("This Court has defined 'delay damages' to include a contractor's 'extended general conditions' expenses, that is, the cost of keeping tools and equipment on the site for the extended period."), citing *Bolton Corp.* v. *T.A. Loving Co.*, 94 N. C. App. 392, 404 (1989); see also B. B. Bramble & M. T. Callahan, Construction Delay Claims § 2.16 (7th ed. 2022-23 Supplement) ("Delay damages of contractors are typically time-related costs such as extended general conditions, escalation of labor and material, extended equipment costs, and home office overhead."); § 7:16. Delays, 57 Mass. Prac., Mass. Construction Law § 7:16 (extended general conditions a form of delay damages). As such, the damages sought by G&R for extended general conditions represent delay damages precluded by the Contract.

2. Damages for Delay Statute

Though G&R's recovery of delay damages is precluded by the language of the Contract's no-damages-for-delay clause, it is still possible that G&R could recover delay damages under G. L. c. 30, § 39O, which provides for delay damages in some situations. The statute provides as follows:

> Every contract subject to the provisions of section thirty–nine M of this chapter or subject to section forty–four A of chapter one hundred forty–nine[3] shall contain the following provisions (a) and (b) in their entirety . . . .
>
> > (a) The awarding authority may order the general contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the awarding authority; provided however, that if there is a suspension, delay or interruption for fifteen days or more or due to a failure of the

[1] Such extended general conditions represented additional costs for things like an onsite superintendent, temporary signage, dumpsters, and concrete barriers, among other things.
[2] Change Request No 114 did not seek payment for the additional work, which was addressed through various other change requests preceding Change Request 114.
[3] The parties do not dispute that the Contract is a contract subject to the requirements of G. L. c. 30, § 39O, but the parties dispute whether the factual circumstances of this case allow recovery under G. L. c. 30, § 39O.

> awarding authority to act within the time specified in this contract, the awarding authority shall make an adjustment in the contract price for any increase in the cost of performance of this contract but shall not include any profit to the general contractor on such increase; and provided further, that the awarding authority shall not make any adjustment in the contract price under this provision for any suspension, delay, interruption or failure to act to the extent that such is due to any cause for which this contract provides for an equitable adjustment of the contract price under any other contract provisions.
>
> (b) The general contractor must submit the amount of a claim under provision (a) to the awarding authority in writing as soon as practicable after the end of the suspension, delay, interruption or failure to act and, in any event, not later than the date of final payment under this contract and, except for costs due to a suspension order, the awarding authority shall not approve any costs in the claim incurred more than twenty days before the general contractor notified the awarding authority in writing of the act or failure to act involved in the claim.

G. L. c. 30, § 39O. The Supreme Judicial Court, noting that subsection (a) of the statute is "far from the model of clarity," has explained that it entitles a general contractor to "a price adjustment only when the awarding authority . . . exercises its statutory right to order the contractor in writing to delay its performance, *and* there is either (1) a delay of fifteen or more days resulting from that order, or (2) following such a written order, the authority fails to take action within a specified time as required by the contract which results in a delay of any length." *Reynolds Bros., Inc.* v. *Commonwealth*, 412 Mass. 1, 6 (1992) (emphasis in original). Further, per the plain language of the statute, any such order by the awarding authority must be for convenience. See G. L. c. 30, § 39O(a). Though the statutory language is apparently not reflected in the Contract, its substance is implied in the Contract through operation of law, defeating any clause with which it conflicts. *Reynolds Bros., Inc.* v. *Commonwealth*, 412 Mass. 1, 5 (1992). Thus, if G&R is entitled to recovery under G. L. c. 30, § 39O, the no-damages-for-delay clause will not bar such recovery. See *id.*

To determine whether G. L. c. 30, § 39O allows G&R's recovery in this case, the court must first determine whether the City issued an "order" to "suspend, delay, or interrupt" the Project work. The case of *Bonacorso Const. Corp.* v. *Commonwealth*, 41 Mass. App. Ct. 8 (1996) ("*Bonacorso*") is instructive on this point. There, the relevant contract's completion date was greatly extended by redesign, cessation in asphalt production during the winter months, and the need for additional safety barriers. *Id.* at 10. The contractor ultimately initiated suit against the Commonwealth, seeking costs attributable to a 516-day

delay caused by the aforementioned issues. *Id.* After a jury waived trial, the judge issued a decision holding that the contractor could not recover under G. L. c. 30, § 39O because the awarding authority had never issued an "order" to "suspend, delay, or interrupt" within the meaning of the statute.[4] See *id.* at 10. On appeal, the Appeals Court carefully reviewed the communications from the awarding authority to contractor to determine whether any constituted an "order" within the meaning of G. L. c. 30, § 39O. Among other communications, the Appeals Court looked to a communication from the awarding authority to the contractor which ordered a halt to bituminous concrete work. See *id.* at 11. The Appeals Court held that because the order to halt bituminous concrete work was "no more than repetition of what the contract had provided for" concerning work during the winter months, it was not an order within the meaning of G. L. c. 30, § 39O. *Id.*

Here, the City argues that its instruction to G&R to pause work on the Project was not an order within the meaning of G. L. c. 30, § 39O because it, in essence, merely recited the Governor's COVID-19 Order No. 21 which was the true cause of the work suspension.[5] That is, the City argues, in essence, that because the source of the suspension was not the City, the reasoning of *Bonacorso* applies. In *Bonacorso*, the order to stop the bituminous concrete work originated with the contract's prohibition of work in the winter months, not with the awarding authority. See 41 Mass. App. Ct. at 11. Here, the City argues, the order to suspend work on the Project originated with the Governor's Office prohibiting nonessential services, not with the City. Thus, the argument goes, the City's communications to G&R suspending work on the Project did not constitute orders to suspend work within the meaning of G. L. c. 30, § 39O.

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[4] Also significant to the Appeals Court's decision was that fact that no such order was made for the convenience of the awarding authority. See *Bonacorso*, 41 Mass. App. Ct. at 13. ("[T]here is no showing in the exchange of correspondence culminating in the DPW's letter of February 3, 1988, that the delay order was for the convenience of the DPW.").

[5] The City sent communications to G&R in early April 2020 suspending work on the Project. On or about April 6, 2020, the City forwarded an email from the Governor's Office to G&R which stated that the Project was not essential construction exempt from the statewide shutdown under Order No. 21, following with the comment that "From the looks of this, it appears that the library should be paused." See Joint Exhibit 3. Another email from the City confirmed that it would "have to pause construction on the project." See Joint Exhibit 4. G&R thereafter confirmed, via email, the City's order that it pause work on the project. See *id.*

To determine whether, in fact, the City or the Governor's Office ordered that G&R's work on the Project be suspended, the court looks to Order No. 21. As explained above, the Governor's Order No. 21, dated March 31, 2020, replaced Order No. 13's list of essential services with a revised list of essential services, exempt from shutdown. Services and workers not exempted under Order No. 21 were to remain closed. See Joint Exhibit 2. One such category of essential services and workers was:

> "Workers . . . who support the operation, inspection, maintenance and repair of essential public works facilities and operations, including . . . construction of critical or strategic infrastructure . . . . Critical or strategic infrastructure includes public works construction including construction of public schools, colleges and universities and construction of state facilities, including leased space, managed by the Division of Capital Asset Management; airport operations; water and sewer; gas, electrical, nuclear, oil refining and other critical energy services; roads and highways; public transportation; steam; solid waste and recycling collection and removal; and internet and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services).

See Joint Exhibit 2. The court interprets such executive order consistent with principles of statutory construction. See *City & Cty. of S.F.* v. *Trump*, 897 F.3d 1225, 1238-39 (9th Cir. 2018) ("As is true of interpretation of statutes, the interpretation of an Executive Order begins with its text, 'which must be construed consistently with the Order's object and policy.'"), quoting *Bassidji* v. *Goe*, 413 F.3d 928, 934 (9th Cir. 2005) (internal quotations omitted); *United States* v. *Marzook*, 412 F. Supp. 2d 913, 922 (N.D. Ill. 2006) ("The Court interprets Executive Orders in the same manner that it interprets statutes.").[6]

Firstly, and most simply, public libraries were not identified as essential services exempt from shutdown in either Order No. 21 or its revised Exhibit A, indicating that construction work on libraries—such as the Project—was not intended to be exempt from shutdown during the COVID-19 pandemic. See *Schulman* v. *AG*, 447 Mass. 189, 191 (2006) ("In interpreting any statutory or constitutional provision, including this exclusion, the starting point of our analysis is its plain language, 'the principal source of insight into legislative purpose.'"), citing *Simon* v. *State Examiners of Electricians*, 395 Mass. 238, 242 (1985). Still, as the order's list of public works construction was not exhaustive, this fact is not dispositive.

[6] As courts interpret executive orders consistent with principles of statutory interpretation, the court's citations to caselaw concerning statutory interpretation apply with equal force to the executive order at issue.

Secondly, the Project was not essential to maintain public health and welfare during the COVID-19 pandemic. As the City persuasively argues, Order No. 21 narrowly targets "services and functions . . . essential to maintain in order to promote the public health and welfare" as COVID-19 essential services. See Joint Exhibit 2. While public libraries undoubtedly contribute to public welfare, they were not, as a matter of common sense, "essential to maintain in order to promote the public health and welfare" during the COVID-19 pandemic. Interpreted consonant with common sense, Exhibit A to Order No. 21 did not exempt the Project from closure. See *Meyer* v. *Veolia Energy North America*, 482 Mass. 208, 212 (2019) ("Our principal objective is to ascertain and effectuate the intent of the Legislature in a way that is consonant with 'common sense and sound reason'."), citing *Commonwealth* v. *Curran*, 478 Mass. 630, 633-634 (2018).

Thirdly, the Project—a public library—was dissimilar to the other kinds of critical or strategic infrastructure listed. The library undoubtedly shares some characteristics with "public schools, colleges and universities," identified as critical or strategic infrastructure exempt from closure. However, the Project was dissimilar from such institutions in that the Project was not a school—an institution whose primary purpose was "systematic instruction in any or all of the useful branches of learning [] given by methods common to schools and institutions of learning". See *Chicopee* v. *Jakubowski*, 348 Mass. 230, 232 (1964) (discussing definition of "school" in context of G. L. c. 40A, § 2). This fact weighs against inclusion of the Project in the list of essential services exempt from closure under Order No. 21.

Fourthly, and finally, the Governor's Office itself provided clarification to the City that the Project was not intended to be included within the Governor's list of essential services exempt from closure. On April 6, 2020, the Chief Secretary and Director of Personnel and Administration in the Governor's Office emailed the MBLC concerning Order No. 21, stating, "In our intention of the order and the reading of the order, Library construction, if not part of a State College Campus or being performed under the care and oversight of The State Division of Capital Asset Management, is deemed non-essential work at this time." See Joint Exhibit 3. That the Governor's Office stated that it did not intend to exempt public library construction in Order No. 21 strongly favors the City's position. Cf. *United States* v. *Yellin*,

272 F.3d 39, 45-46 (1st Cir. 2001) (statements of a statute's sponsors probative of intent); *Kuehner* v. *Heckler*, 778 F.2d 152, 160 (3d Cir. 1985) (bill's Senate manager's statement as to statute's purpose given "great weight"); *Mills* v. *United States*, 713 F.2d 1249, 1253 (7th Cir. 1983) (representative's remarks "are entitled to substantial weight since he acted as floor manager of the bill"); *College of Dental Surgeons of P.R.* v. *Triple S Mgmt.*, 2011 U.S. Dist. LEXIS 12796 at *16-17 (2011) ("statements of bill managers, sponsors, or members of the committee that reported the bill have been treated as probative of intent.").

The court briefly addresses G&R's counterargument. In essence, G&R argues that Exhibit A to Order No. 21 defines essential services broadly to include *all* public works construction, including the Project. G&R's argument fails as it does not consider the broader substance of Order No. 21. Exhibit A to Order No. 21 identifies essential workers as "Workers . . . who support the operation, inspection, maintenance and repair of essential public works facilities and operations, including . . . construction of critical or strategic infrastructure . . . ." See Joint Exhibit 3. It goes on to state that "Critical or strategic infrastructure includes public works construction including construction of public schools, colleges and universities . . . ." *Id.* The language surrounding "public works construction," taken together with the stated purpose of the Order, make clear that the Order did not intend to exempt workers on *every* public works facility and operation from its shutdown order. See *Commonwealth* v. *Connor C.*, 432 Mass. 635, 640 (2000) ("[A] statute must be interpreted 'according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.'"), quoting *Champagne* v. *Champagne*, 429 Mass. 324, 326 (1999). To hold otherwise would ignore the order's stated purpose and its language.

Finally, even assuming the communications from the City to G&R constituted "orders" to "suspend, delay, or interrupt all or any part of the work" within the meaning of G. L. c. 30, § 39O, G&R's claim would still fail because such suspension order would not have been for the City's convenience, as

required by G. L. c. 30, § 39O. For the purpose of this analysis, the court accepts G&R's definition of "for convenience" as the "quality of being suitable to one's comfort, purposes, or needs." See *Morton Street LLC* v. *Sheriff of Suffolk County*, 453 Mass. 485, 494 (2009) (defining convenience). Assuming the City's communications to G&R constituted orders to suspend work, that order flowed directly from the Governor's statewide order and indirectly from the deadly COVID-19 pandemic. Undoubtedly, the City desired prompt completion of the Project as much as G&R, and suspension of the Project, though necessary, ran counter to both the City's and G&R's "comfort, purposes, or needs". As such, even were the City's communications orders to suspend, those orders were not for the City's convenience, and G&R's claim under G. L. c. 30, § 39O would still fail.

For the foregoing reasons, the court is persuaded that the City's communications to G&R suspending work on the Project did not constitute orders within the meaning of G. L. c. 30, § 39O because the source of the suspension was Order No. 21, not the City itself. In so finding, the court is guided by the reasoning of *Bonacorso*, 41 Mass. App. Ct. at 11, outlined above. As the City's instructions to G&R to suspend work on the Project were not orders within the meaning of G. L. c. 30, § 39O, the no-damages-for-delay clause of the Contract remained effective, precluding G&R's recovery for delay damages in this case.

As the City has prevailed on its arguments concerning application of the no-damages-for-delay clause and application of G. L. c. 30, § 39O, the court need not address the City's remaining arguments. Any of G&R's arguments concerning the no-damages-for-delay clause or G. L. c. 30, § 39O not addressed above are rejected.

3. G&R's Remaining Count

The City has also moved for summary judgment on G&R's Count 2 for breach of the covenant of good faith and fair dealing. The covenant of good faith and fair dealing is implied in every contract. *Anthony's Pier Four* v. *HBC Associates*, 411 Mass. 451, 471 (1991). It requires that "neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id.* at 471-72. "[T]he purpose of the implied covenant is to ensure that neither party

interferes with the ability of the other to enjoy the fruits of the contract, . . . and that, when performing the obligations of the contract, the parties remain faithful to the intended and agreed expectations of the contract." *Eigerman* v. *Putnam Investments, Inc.*, 450 Mass. 281, 287 (2007) (internal citation and quotations omitted). "A breach occurs when one party violates the reasonable expectations of the other." *Id.* at 287-288. For instance, "a party breaches the covenant . . . when the party exceeds its contractual discretion or uses its discretionary power in a pretextual manner." *S.M.* v. *M.P.*, 91 Mass. App. Ct. 775, 784 (2017). "In determining whether a party violated the implied covenant of good faith and fair dealing, we look to the party's manner of performance." *T.W. Nickerson, Inc.* v. *Fleet Nat. Bank*, 456 Mass. 562, 570 (2010).

G&R's good faith and fair dealing claim can only source to the City's alleged breach of contract. See *Eigerman*, 450 Mass. at 289 ("[T]he implied covenant of good faith and fair dealing cannot create rights and duties that are not already present in the contractual relationship"); *Ayash* v. *Dana-Farber Cancer Inst.*, 443 Mass. 367, 385 (2005) ("The scope of the covenant is only as broad as the contract that governs the particular relationship"). In the present case, the City committed no such breach as it did not order suspension of the Project for convenience, thus the Contract's no-damages-for-delay clause precludes G&R's recovery. Accordingly, G&R's claim for breach of the covenant of good faith and fair dealing necessarily fails.

ORDER

In accordance with the foregoing, the City's motion for summary judgment is ALLOWED, and G&R's cross motion for summary judgment is DENIED.

Honorable Shannon Frison
Justice of the Superior Court

January 10, 2023