JAMS ARBITRATION

AMMANN & WHITNEY CONSULTING ENGINEERS, PC	**)**	
(*Claimant*)	**)**	
v.	**)**	**JAMS Ref. No. 1425006890**
TROCOM CONSTRUCTION CORP.	**)**	
(*Respondent*)	**)**	

FINAL AWARD

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PLACE OF ARBITRATION:

JAMS Resolution Center, 620 Eighth Avenue, 34th Floor, New York, NY 10018

DATES OF ARBITRATION HEARING: September 14, 15, and November 17, 2010

***DATE OF ARBITRATION AWARD*:** November 25, 2010

I. INTRODUCTION AND PROCEDURAL STATEMENT

(1) This arbitration proceeding arises out of a subrogated claim, originally commenced by way of action in the United States District Court for the Eastern District of New York. The Plaintiff in that action, Fireman's Fund Insurance Company ("**Fireman's Fund**"), as subrogee, sued Ammann & Whitney Consulting Engineers, PC ("**Ammann & Whitney**") and Trocom Construction Corp. ("**Trocom**") for the recovery of monies which it paid to its insured, Joseph Serrano[1], the owner of 71 Carroll Street, Brooklyn, New York, for damages incurred in connection with an incident or incidents of sewer backup allegedly arising out of nearby construction activities involving the replacement and connection of new sewer pipes and mains.

(2) In the District Court action, both Ammann & Whitney and Trocom moved before Senior United States District Judge Frederic Block for summary judgment for the dismissal of Fireman's Fund's negligence claims against them. At the same time, Fireman's Fund brought a cross-motion for summary judgment against Trocom; and Ammann & Whitney also brought a motion for default judgment on its cross-claim against Trocom for indemnity. However, by Order dated March 12, 2010, Judge Block denied all motions.

(3) Counsel for the parties have advised that, subsequent to the disposition of the motions by Judge Block, Fireman's Fund entered into a settlement agreement with Ammann & Whitney and Trocom pursuant to which (i) Ammann & Whitney and Trocom collectively agreed to pay Fireman's Fund the sum of $125,000.00 in full and final settlement of its claim, and (ii) Ammann & Whitney and Trocom agreed to submit the issue of apportionment, as between them, to final and binding arbitration.

(4) By written Stipulation for Arbitration dated July 14, 2010 (executed in counterparts by their respective counsel), Ammann & Whitney and Trocom jointly agreed as follows:

> "*It is stipulated and agreed by the Parties to submit all disputes, claims or controversies to neutral, binding arbitration at JAMS, pursuant to the JAMS Arbitration Administrative Policies and, unless otherwise agreed in writing by the parties, to the applicable JAMS*

[1] Identity of the owner comes from an e-mail exchange (Exhibit 19), as well as the report of insurance adjuster, Richard Chalmers (Exhibit 23)

Arbitration Rules and Procedures. The Parties hereby agree to give up any rights they might possess to have this matter litigated in a court or jury trial".

(5) The Arbitrator convened a preliminary telephone conference call with counsel for the parties on Monday, July 12, 2010. Further pre-hearing conference calls with counsel were held on Wednesday, July 21, 2010 and Wednesday, September 8, 2010.

(6) In this proceeding, the Arbitrator's jurisdiction and authority derives from the said Stipulation for Arbitration, as supplemented by a Procedural and Scheduling Order dated July 21, 2010 which sets out the agreed-upon timeline and arbitration terms of reference.

(7) Paragraphs 3(a) and 18 of the said Procedural and Scheduling Order provide, *inter alia*, as follows:

3(a). "*Except where otherwise modified by this Procedural and Scheduling Order, this Arbitration proceeding is governed by the JAMS Engineering and Construction Arbitration Rules and Procedures, as amended and effective July 15, 2009*"; and

18. "*Any objections to this Procedural and Scheduling Order are deemed to have been waived unless submitted in writing no later than Tuesday, July 27, 2010*".

(8) The Arbitrator notes that no objections to the provisions of the Procedural and Scheduling Order were submitted by the July 27, 2010 deadline date.

(9) The Arbitrator also notes that, in the pre-hearing written Position Statements of the parties, neither party raised any objection or issue regarding the jurisdiction or authority of the Arbitrator. At the arbitration hearing and in the post-hearing written submissions, however, counsel for Trocom raised an issue with respect to Ammann & Whitney's claim, as well as the Arbitrator's jurisdiction, regarding any award of attorneys fees and costs, and this will be addressed below in this Final Award.

(10) The evidentiary hearing was held at the JAMS' Resolution Center in New York City on September 14 and 15, and November 17, 2010. At the hearing, each party relied upon documentary evidence, consisting of the contents of a consolidated electronic Book of Joint

Exhibits stored in a USB flashdrive (being a memory data storage device) containing images of all such Exhibits.

(11) Each side called witnesses and cross-examined opposing witnesses. In all, four fact witnesses testified, including Charles Leute, Louis Jusma, Joseph Travato, and Goolcharan Sookdeo. Ammann & Whitney's counsel also called one expert witness, namely James A. Parr. Trocom did not call an expert witness.

(12) At the conclusion of the arbitration hearing, the parties advised that they had no further oral evidence to submit, other than referencing the transcribed evidence relating to certain prior depositions. In this regard, counsel submitted selected transcript references of the prior depositions of Fred Redline (Exhibit 4), Justin Marvul (Exhibit 34), Joseph Trovato (Exhibit 61), Goolcharan Sookdeo (Exhibit 37), and James Parr (Exhibit 62) for consideration by the Arbitrator. Such submissions of portions of the transcribed testimony of those witnesses were not the subject of any objection by either counsel.

(13) Written closing arguments, with respect to both costs and the substantive matters in dispute, were exchanged between counsel and submitted to the Arbitrator on Monday, November 22, 2010 and Tuesday, November 23, 2010, respectively, and the matter was thereafter submitted for decision.

(14) Having examined the submissions and allegations of the parties; having received and considered the oral testimony of fact and expert witnesses, as well as the deposition testimony submitted by counsel; and having considered the written arguments and submissions of counsel, I hereby render this Award.

II. FACTS

(15) The following is a statement of those facts found by the Arbitrator to be true and necessary to the Award. To the extent that this recitation differs from either party's position, such is the result of determinations as to credibility, relevance, burden of proof considerations, and the weighing of the evidence, both oral and written.

Ammann & Whitney's Engineering Inspection Services Contract with the City of New York

(16) On or about June 7, 2005, Ammann & Whitney entered into a written contract with the City of New York (Exhibit 33, hereinafter called the "**Ammann & Whitney Inspection Services Contract**") for resident engineering inspection services generally relating to the reconstruction of Columbia Street in Brooklyn (the "**Project**"). The scope of such inspection services included, among other things, mains and sewers[2] in the area of "*Carroll Street from Hicks Street to Columbia Street*"[3].

(17) Article 6.1 of the Ammann & Whitney Inspection Services Contract obliged Ammann & Whitney to provide "*all services necessary and required for the inspection, management, coordination and administration of the Project, so that the required construction work is properly executed, completed in a timely fashion and conforms to the requirements of the construction contract and to good construction practice*".

Trocom's Construction Contract with the City of New York

(18) Exhibit 1 of the parties' consolidated electronic Book of Joint Exhibits is an unsigned and undated copy of the City of New York's "Standard Construction Contract" dated April 2006. Other than in the two Addenda, dated August 30, 2004 and February 2, 2005 respectively (the second of which consists of "Sewer Specifications" for the Project, which incorporate, by reference, the City of New York Department of Design and Construction's Standard Sewer Specifications dated December 1996), neither the Project nor the contractor, Trocom, were specifically identified. In any event, counsel for Ammann & Whitney has neither objected to this document, nor requested production of an executed copy of the final version (assuming that one exists). Furthermore, both parties apparently agreed to include this document in their consolidated electronic Book of Joint Exhibits, and have expressly stipulated that I may rely upon this version in preparing my Award. Accordingly, I am assuming that Exhibit 1, although unsigned and undated, represents the actual construction contact between Trocom and the City of

[2] See "*Scope of Work*" in Exhibit E to the Ammann & Whitney Inspection Services Contract

[3] See "*Project Limit*" in Exhibit E to the Ammann & Whitney Inspection Services Contract

New York, and, for ease of reference, I will hereinafter call it the "**Trocom Construction Contract**".

(19) Article 4.1 of the Trocom Construction Contract generally provided that Trocom was responsible for the means and methods of the sewer and main reconstruction work (" . . . *such as the Contractor may choose*"), subject to the right of the engineer to reject any such means and methods which could constitute or create a hazard; or which would not be in compliance with the terms of the contract; or which would be detrimental to the overall progress of the Project. However, Article 4.2 generally provided that the failure of the engineer to reject Trocom's means and methods would not relieve Trocom of its obligation to compete the work in accordance with the contract. To the same effect, Article 6.3 generally provided that the "*inspection and approval*" by the engineer "*shall not relieve* [Trocom] *of its obligation to perform the Work in strict accordance with the Contract*".

(20) Furthermore, Article 7.1 of the Trocom Construction Contract provided that "(t)*he obligation to deliver finished Work in strict accordance with the Contract prior to final acceptance shall be absolute and shall not be affected by the Resident Engineer's approval of, or failure to prohibit, the Means and Methods of Construction used by the Contractor*".

Background Events Leading Up to the Claim

(21) Exhibit 14 is an "as built" schematic drawing which, for demonstrative purposes, shows a sewer main running in an east-west direction along and under Carroll Street, between Columbia Street and Hicks Street. New clay piping was to branch out from the sewer main for the purpose of connecting to the houses or buildings along the street. Part of Trocom's work included, among other things, the installation of such new clay house connections.

(22) Along the branch of piping extending from the sewer main toward the building at 71 Carroll St., Trocom had to install a bell joint in order to connect the pre-existing clay house connection with the new clay pipe.

(23) It is Trocom's position that, when the area of the proposed house connection was excavated and exposed, Trocom's construction superintendent, Goolcharan Sookdeo, expressed the view that the brittleness of the exposed pre-existing clay pipe might compromise the integrity

of the connection, and allegedly asked Louis Jusma (Ammann & Whitney's Assistant Resident Engineer) for permission to substitute cast iron pipe for clay pipe for the house connection. As will be seen below, there is a dispute as to whether this conversation ever took place.

(24) Aside from this factual dispute, counsel for Ammann & Whitney, in his opening submissions, stated that, had the request for permission in fact been made (which is denied by Ammann & Whitney), it would likely have been rejected or not acted upon, in that (i) cast iron pipe was more costly than clay pipe, (ii) the proposed change would have created insurance issues, (iii) the proposed change would have generated more expense and complexity to the extent that there was already a newly laid sidewalk, and a catch basin might have had to be moved, and (iv) to the knowledge of Trocom, Ammann & Whitney did not have authority to order any changes in the work[4].

(25) It is Ammann & Whitney's position that there are apparently no documents, reports, contemplated change notices, correspondence, or other corroborating evidence or proof which would serve to confirm the fact or substance of the alleged conversation between Mr. Sookdeo and Mr. Jusma. Counsel for Ammann & Whitney submitted that the first time his client found out about the alleged statements made at the time by Mr. Sookdeo was when he was deposed in the District Court action, although counsel for Trocom replied that, in the District Court action, Ammann & Whitney never denied that that alleged conversation took place.

(26) Trocom's trenching work for the house connection apparently commenced on June 23, 2006, and the initial connection of the new clay pipe was made on June 26, 2006.

(27) According to his deposition transcript (Exhibit 34), in the summer of 2006, Justin Marvul was a construction supervisor with Basile Builders Group and was actively involved in new construction activities at 71 Carroll Street. Exhibit 17 (Project Complaint form) indicates that, on June 28, 2006, Mr. Marvul made a complaint to Ammann & Whitney's Community

[4] Article 25.1 of the Trocom Construction Contract provides that "(c)*hanges may be made to this Contract only as duly authorized in writing by the Commissioner* [of the City of New York's Department of Design and Construction]"; and Article 31.1 provides that "(t)*he Resident Engineer shall not . . . have the power to issue an Extra Work order, except as specifically designated in writing by the Commissioner*". Furthermore, Article 32.2 provides that "(t)*he Engineer or Architect or Project Manager shall not . . . have the power to issue an Extra Work order, except as specifically designated in writing by the Commissioner*"

Construction Liaison, Kijana Wright, regarding a sewer backup in the building. In his deposition, Mr. Marvul indicated that there was approximately an inch to an inch-and-a-half of standing water by every floor drain in the parking garage (which was empty at the time). This backup episode apparently caused only minimal damage. In any event, according to Exhibit 17, Mr. Wright contacted Joseph Trovato (Trocom's construction supervisor) and Fred Redline (Ammann & Whitney's Resident Engineer at the time), who in turn "*instructed the contractor to investigate the problem*"[5].

(28) According to the evidence, on or about Saturday, July 1, 2006, there was a second more serious sewer backup at 71 Carroll Street which caused significant damage (although the damage was apparently not discovered until Monday, July 3, 2006). In a letter from an insurance adjuster, Richard Chalmers, to Fireman's Fund dated July 17, 2006 (Exhibit 23), Mr. Chalmers reported that "(w)*ater backup through floor drains in the ground floor commercial space and in the underground parking garage caused water damage on or about July 1, 2006*".

(29) Mr. Marvul lodged a second complaint with Mr. Wright on July 11, 2006, regarding the significant damage arising from the second incident of sewer backup. In his Project Complaint form (Exhibit 21), Mr. Wright recorded that the entire first floor had flooded, and that the damage was "*extremely bad*". And at his deposition, Mr. Marvul described "*major flooding*" to the first floor commercial space and the basement/parking garage. He also stated that sewer water, laced with feces, seeped down from the first floor to the parking garage, that parts of the garage's drywall ceiling were coming down, and that there were two to three inches of contaminated standing water on the floor of the garage and in the basement utility room**.**

(30) On July 11, 2006, a dye test was undertaken by Ammann & Whitney[6] in order to attempt to ascertain the source and cause of the sewer backup problem. The test demonstrated a

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[5] It is not entirely clear whether "*contractor*" refers to Trocom or to the contractor working on 71 Carroll Street, Mr. Marvul. Mr. Trovato testified, though, that it referred to the latter

[6] In his July 11, 2006 Resident Engineer's Daily Project Diary, Mr Redline wrote that "(w)*e ran a dye test . .*". This was confirmed in his January 17, 2008 deposition transcript (see pages 21-22 of Exhibit 4). And, paragraphs 24-25 on page 9 of Trocom's Pre-Hearing Memorandum also references other testimony to corroborate this. Furthermore, in his direct testimony at the arbitration hearing, Mr. Trovato confirmed that the dye testing was not undertaken by Trocom; although, to confuse the issue, Mr. Trovato, when he was deposed on August 31, 2010, testified that "(t)*he initial dye test was Trocom's dye test*" (see page 83 of deposition transcript of Joseph Trovato (Exhibit 61)). Similarly, Mr. Marvul, in his October 21, 2008 deposition (see page 65 of Exhibit 34), stated that he believed that Trocom and the City had conducted the dye test

continuity of flow of dye-colored water from the house connection into the manhole, but it was not a definitive test as to whether the integrity of the sewer connection was the root cause of the problem. In fact, an e-mail from Ammann & Whitney to the City dated July 12, 2006 (part of Exhibit 19) indicated that the "(f)*looding problem must be from another source*".

(31) On July 24, 2006, a plumbing company engaged by Mr. Serrano, the owner of 71 Carroll Street, arranged for video testing of the piping and concluded that there was evidence of blockage approximately 39 feet from the building. An Inspector's Report (see Exhibit 25) prepared by Mr. Jusma that day observed that "*the property owner hired a contractor to videotape the sewer house line from the trap to the sewer line in the street. At 29'* [feet] *out, the pipe (6") was full of water; at 39' the camera, then the snake, can't go any further*". According to a July 25, 2007 letter (Exhibit 31) from Paul Plunkett (Ammann & Whitney's Resident Engineer who succeeded Mr. Redline in that position) to Tony Santoro of Trocom, "(t)*his approximate measurement of 39 feet from the house trap coincided with the point of connection* [of the pre-existing clay house connection with the new clay pipe] *that was made on June 26, 2006*".

(32) On July 25, 2006, Ammann & Whitney instructed Trocom to excavate the house connection which had already been backfilled, whereupon Trocom determined that there was a separation of the bell connection near the connection of the pre-existing clay pipe and the new clay pipe. This was described by Mr. Plunkett in his July 25, 2007 letter (Exhibit 31) referenced in the preceding paragraph: "(T)*he House Connection was exposed and it was observed that the bell end of the existing 45*° [degree] *bend (to which the new connection was made) was damaged and detached from the rest of the House Connection. The 45*° [degree] *bend was removed and replaced with a straight section of 6" clay pipe (17 inches long)*".

(33) A July 25, 2006 report (Exhibit 28) prepared by one of Ammann & Whitney's field inspectors, Ashraf Toson, describes what was observed upon the excavation of a hole 11 feet long by 8 feet wide by 7 feet deep, as well as the remedial work undertaken with respect to the repair of the sewer house connection. Additionally, Exhibit 53 is a photo which shows the broken connection.

The Testimony of Witnesses

Charles Leute

(34) Ammann & Whitney's first witness at the arbitration hearing was Charles Leute, who has been an employee of the company for 15 years, initially as Director of Construction Services dealing with all of the company's construction inspection work, and subsequently as Senior Vice-President and Head of the Construction Services Division. As a graduate civil engineer, he has been licensed to practice in the State of New York since the late 1980s.

(35) Mr. Leute testified that the Project was designed by the City of New York, without any involvement on the part of his company. He described his role and title as "Project Executive", whose responsibility it was to liaise with the City: "*We are the owner's rep, his eyes and ears, and we report directly to the City our findings*".

(36) Ammann & Whitney typically had a staff of about 5 employees dedicated full time to the Project, including Fred Redline (Resident Engineer at the beginning of the work, from 2005 to early 2007) and Louis Jusma (Assistant Resident Engineer). Other employees on the Project included an office engineer, and 3 to 4 field inspectors (including Ashraf Toson and Yakov Kleyman), whose roles, according to Mr. Leute, were limited to "*making sure the work was being done safely*", and "*measuring quantities*", particularly with respect to unit price items in the Trocom Construction Contract, which were documented in the Inspectors' Daily Reports. Mr. Leute generally stated that his company's scope of work was to perform inspection services for the construction work to be performed by Trocom and its subcontractors: "*We monitor the work the contractor does* [and] *we record the quantity of work*".

(37) Mr. Leute also testified that, in his view, Ammann & Whitney's responsibilities and authority were narrow and limited. He stated that "(m)*y inspectors don't have authority to do very much*". They could not order a stop to the work; and, if construction were being carried out in a manner which was contrary to good practice, Ammann & Whitney's recourse would have been to report any impropriety to the City.

(38) He stated that Ammann & Whitney also employed a Community Construction Liaison, Kijana Wright, whose role it was to attend public meetings and generally to deal with community relations and complaints arising out of the construction activities.

(39) Mr. Leute also testified that Ammann & Whitney did not have authority to approve changes or extras to the work performed by Trocom, or additional payments in respect thereof. Rather, only the City had such authority under the Trocom Construction Contract pursuant to that contract's Change Order process. According to Mr. Leute, if Trocom incurred any additional expense arising out of (for example) an unforeseen site condition, Trocom would prepare a cost estimate, which would then be reviewed by the Ammann & Whitney Resident Engineer. Assuming that the City concurred that there had been a scope change and a cost increase, a formal Change Order would then be issued by the City, on its letterhead, signed by various City representatives.

Louis Jusma

(40) Ammann & Whitney's second witness at the arbitration hearing was Louis Jusma. He testified that he had received a masters degree in Civil Engineering from City College of New York in 1988, and that he had been an employee of the company for 7 years. At the time of the incident giving rise to this claim, his job title was Chief Inspector. In that role, he worked with the other inspectors daily, reviewed Inspectors' Reports, and conducted field inspections himself.

(41) Mr. Jusma observed that the "*means and methods*" of the sewer and main reconstruction work were Trocom's responsibility, and that Ammann & Whitney watched and generally made sure that Trocom followed the plans, specifications and safety procedures.

(42) The pre-existing house connection at 71 Carroll Street was made of clay, and he emphasized that, in making a connection with the new clay pipe, it was important to connect "*clay to clay*" because that is what was in the Project specifications, and it was "*good engineering practice*". He also testified that clay sewer pipes had more longevity than piping made of other materials -- "*concrete disintegrates over time, and iron rots*".

(43) Mr. Jusma expressly denied that he was ever asked by Mr. Sookdeo, or anyone else at Trocom, that a specification change be permitted in order to substitute cast iron pipe for clay

pipe for the house connection. Mr. Jusma reiterated that, in his view, that would not have been "*good engineering practice*". He also testified that Ammann & Whitney had received no change order request from Mr. Sookdoeo, and that, in any event, Ammann & Whitney would have had no authority to change any of the specifications for the Project or indeed to approve a payment for any such change.

(44) At the hearing, Mr. Jusma was not able to provide a rationale as to why, in his opinion, the separation of the house connection occurred. In his previous deposition, though, he reviewed three possibilities (i.e., the separation (i) occurred while excavating, or (ii) occurred while backfilling, or (iii) "*it was there before*"); but those 3 views were not informed and did not rise above the level of speculation.

(45) When asked about Trocom's response to the first sewer backup incident, Mr. Jusma stated that "*Trocom did nothing*".

James A. Parr – Ammann & Whitney's Expert Witness

(46) Ammann & Whitney's third witness was its expert, James A. Parr. Mr. Parr graduated from the New Jersey Institute of Technology with a B.S.–Civil Engineering in 1975, and an M.S.–Civil Engineering in 1983. He generally testified about his 32 years of resident engineering experience in sewer rehabilitation projects and wastewater treatment plants, his continuing education courses, and his professional memberships. His curriculum vitae is included in Exhibit 7.

(47) Mr. Parr testified that, although clay pipe may indeed become brittle over time, it had very good chemical resistant properties. He also supported the earlier testimony of Mr. Jusma to the effect that both "*common engineering practice*" and the Project's specifications called for a clay-to-clay house connection. As he stated, "*you don't want a hodge-podge of various types of pipe connected*".

(48) Mr. Parr's expert's report (Exhibit 7) was dated January 30, 2009 (almost two years ago). In his report, he opined, somewhat categorically, and "*to a reasonable degree of engineering*

certainty"[7], that "*the proximate cause of the 71 Carroll Street house connection failure was the downward and lateral movement of Trocom's reconnection pipe,* ***which occurred as a result of Trocom's backfilling operations***" [emphasis added][8]. He continued: "*The subject reconnection resulted in a vertical elevation difference of 8 to 10 inches over a horizontal distance of a few feet,* ***which made the reconnected pipe susceptible to lateral movement during backfill***" [emphasis added][9]. And, inasmuch as "*Trocom was responsible for its work, the means and methods of constructing its work, the success or failure of its work and damages incurred as a result of its work*"[10], he concluded that the failure of the house connection was solely its responsibility[11].

(49) Mr. Parr concluded his report by stating that he reserved the right "*to supplement or amend this report and the opinions issued, should additional material become available for review and evaluation*"[12]. As will be discussed below, Mr. Parr did indeed revise his opinion subsequently, without issuing an amended expert's report.

(50) Mr. Parr testified that his original conclusion regarding the proximate cause of the house connection separation, back in January of 2009 when he prepared his expert's report, was premised upon his review and analysis of black-and-white photocopies of certain photographs of the house connection separation[13]. However, 19 months later, at his August 10, 2010 deposition, he expressed an admittedly revised opinion, based upon an examination of the original *color* photographs. As he stated at his deposition, "*my review of the photographs leads me in a different direction* [from his original opinion]"[14]. He continued:

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[7] See page 10 of expert's report (Exhibit 7)

[8] Paragraph number 1 on page 8 of expert's report (Exhibit 7)

[9] *ibid*

[10] Paragraph number 2 on page 8 of expert's report (Exhibit 7)

[11] Paragraph number 2, continued on page 9 of expert's report (Exhibit 7)

[12] See page 10 of expert's report (Exhibit 7)

[13] See third and sixth bullets on page 1 of expert's report (Exhibit 7)

[14] Page 33 of deposition transcript of James Parr (Exhibit 62)

> *"As I reviewed the file in the last several days and examined it again, I realized that there are* ***two other possibilities for the cause of the separation*** *. . .*
>
> ***The piping may have been disturbed if and when the sheeting was withdrawn by the contractor****, . . . and I think that the more likely scenario is that* ***when he*** [Trocom] ***removed the existing pipe from the manhole, he had pulled it apart***" [emphasis added][15]

Further, his deposition transcript discloses the following:

> "*I have not seen anything in the file that indicated that* [the sheeting] *remained or was removed. I'm saying that, if it was removed, that would be a potential for disturbance of the house connection pipe. . . .* (T)*he sheeting is vertical. The piping penetrates through the sheeting. If it's lifted by a machine, as is normally done, you run the risk of striking it.* ***You run the risk of creating a void where the sheeting had been and losing the support for the pipe****.*
>
> *So* [the sheeting] *was there at one time. Simple matter of questioning the proper witnesses to find out if it's been removed or not.*
>
> [Secondly] *when Trocom removed the existing piping that was connected from the 71 Carroll house connection to the manhole, that in that effort,* [Trocom] ***may have pulled the 45-degree bend off of the next straight piece of piping, which, I think, is the more likely****.*" [emphasis added][16]

(51) An old brick manhole had been situated where the house connection met the sewer main. Part of the sewer and main reconstruction work required Trocom to relocate and construct a new concrete manhole a few feet to the west, since environmental protection legislation deemed the position of the old manhole "illegal".

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[15] Page 18 of deposition transcript of James Parr (Exhibit 62)

[16] Pages 19-22 of deposition transcript of James Parr (Exhibit 62)

(52) One of Mr. Parr's revised views was that the lateral ***removal*** of the old pipe connection for the manhole[17], without sufficient or any restraint (i.e., "*bars, levers* [or] *blocking*"[18]), as well as the lack of granular and soil bedding support for the subgrade void beneath the piping[19], resulting from improper backfilling by Trocom, likely was the "*probable cause*" (his words) of the separation of the 45-degree bend and the straight pipe section of the house connection.

(53) Mr. Parr admitted that his opinion had changed from the opinion set out in his expert's report dated January 30, 2009, and that he was essentially modifying paragraph 1 on page 8 of his expert's report.

(54) At the arbitration hearing, Mr. Parr also made the following unequivocal comments:

- "*In all of my 32 years of experience, the contractor is always responsible for any damage. It's all part of his risk in signing the contract*";
- "*The contractor is still responsible, even if he did nothing wrong*";
- "*Even if Trocom conformed with good construction practice, Trocom is still responsible*";
- "*If it happened, Trocom must have been responsible*"; and
- "*It's always the contractor's responsibility*".

(55) Mr. Parr is probably wondering why there have been any court or arbitration proceedings at all, given his uncompromising and straightforward view as to liability. By making these statements, he has simplistically pre-judged the issue on which he has been asked to opine (and on which I have been asked to rule). Furthermore, although he clearly has his opinions as to the liability of contractors in general, and Trocom in particular, he has suggested three distinct and different theories of as to the cause of the separation of the house connection -- stating only that

[17] At page 28 of his deposition transcript (Exhibit 62), Mr. Parr emphasized that "*it was when removal of the old pipe was occurring, not connection of the new pipe*"

[18] Page 23 of deposition transcript of James Parr (Exhibit 62)

[19] According to Mr. Parr, the subgrade void was created by the removal of the base, the bench, and the sidewalls of the old manhole, and possibly by the withdrawal of the sheeting

he prefers one over the other two – but he was unable to provide an unqualified opinion on the very matter which he was called upon to testify as an expert witness.

(56) Although Mr. Parr testified that it was his view that Trocom's backfilling work was not performed properly, he conceded that Ammann & Whitney's field inspectors did not note any deficiency in Trocom's work. It may also be relevant in this regard to note that Mr. Jusma, in his earlier testimony, also expressed the view that the backfilling was performed properly by Trocom, although it is not clear whether he was in a position to draw this conclusion.

(57) And what was Mr. Parr's opinion as to the role and responsibility, if any, of Ammann & Whitney ? In his deposition testimony, he stated that "*the engineer on top of the trench is not going to have the same observation capabilities as the contractor down in the trench actually performing the work at the junction of the piping*". And, according to his expert's report, "(i)*t is not standard custom and practice for inspectors on sewer construction projects to conduct inspections from within trenches. It is standard custom and practice that sewer construction inspection be conducted from the top of the trench with only occasional trench entry at times when observed conditions warrant closer inspection*"[20].

(58) In this same regard, he also testified that "*Ammann & Whitney would observe whether Trocom was* ***apparently*** *doing its work properly, which*", he continued, "*would be in accordance with good practice in the construction industry*". "*Inspection is undertaken*", he testified, "*on a routine basis, not a constant basis*".

(59) Mr. Parr expressed these views regarding "*standard custom and practice*" without referencing any corroborating authority regarding industry standards, customs, or practice. In any event, the concluding opinion in his report was that "*the 71 Carroll Street house connection failure, and resultant damages, were not due to an impropriety on the part of Ammann & Whitney*"[21].

(60) At his earlier deposition on August 10, 2010, Mr. Parr was asked whether Ammann & Whitney, as the resident engineer, should have closely inspected, and perhaps even tested, the

[20] Paragraph number 7 on page 9 of expert's report (Exhibit 7)

[21] See page 10 of expert's report (Exhibit 7)

condition of the soil bedding support beneath the piping before backfilling commenced, particularly given (i) that, when the area of the proposed house connection was excavated and exposed, the pre-existing clay pipe appeared old and brittle, and (ii) that Mr. Sookdeo allegedly brought this to the attention of Mr. Jusma at the time. Mr. Parr, though, did not necessarily concede this point: "*Not unless he saw that something was at variance to the typical method that the contractor was using for backfill and preparation of the trench bottom*"[22].

(61) Although Mr. Parr's opinion had changed between January 2009 and August 2010, his essential conclusion, that Trocom was solely responsible for the separation of the house connection, remains the same.

Joseph Trovato

(62) Trocom's first witness at the arbitration hearing was Joseph Trovato, who has been an employee of the company for more than 15 years, and who was currently Supervisor / Vice-President. Mr. Trovato had received a liberal arts degree from a community college in Florida, was not an engineer, and had not taken any engineering or materials courses. In June of 2006, he was one of two Supervisors on the Project (the other being Goolcharan Sookdeo), and, in that capacity, he was on the site every day, keeping track of manpower, making sure the construction schedule was being observed, and ensuring that construction materials were being delivered on time.

(63) Mr. Trovato testified that Ammann & Whitney's role generally included making sure that Trocom followed the Project's plans and specifications in a timely manner. When asked whether Ammann & Whitney offered any direction to Trocom, he answered: "*Every day. Ammann & Whitney was involved in everything we did*". He stated that Messrs. Jusma, Toson and Redline "*were on the job the entire time*". As Chief Inspector, Mr. Jusma was on the site "*from the beginning of the day to the end of the day*"; and, as Resident Engineer, Mr. Redline was "*at the site a few times per week*".

(64) Mr. Trovato also testified that Mr. Jusma was "*very vocal in our means and methods and our following the specifications*", and he, Mr. Trovato, referred to examples involving safety

[22] Page 65 of deposition transcript of James Parr (Exhibit 62)

measures, layout (i.e., "*in accordance with a schematic drawing or plan*"), trench limits ("*width, length and depth*"), proper sheeting, and backfilling. "*Sometimes*", he said, "*Ammann & Whitney would make decisions in the field or ask us to wait and move to another location*".

(65) He also stated that Ammann & Whitney would issue "Field Orders", when it was felt that a specification was not being followed.

(66) According to Mr. Trovato's recollection, the Project specifications originally called for cast iron pipe for the house connections. When this was ascertained by Trocom, the City agreed to issue a global Change Order for the entire Project, specifying clay pipe for the house connections, since cast iron did not marry up with the pre-existing clay pipe.

(67) When the area of the house connection for 71 Carroll Street was first excavated, Mr. Trovato observed (from the top of the 6-foot-deep trench) approximately two inches of exposed pre-existing pipe, which appeared to him to be "*old, brittle, dried out, and of a different color*". He testified that Mr. Sookdeo had recommended to Mr. Jusma to replace the entire pre-existing pipe, from the sewer main to the curb at 71 Carroll Street, since it was in poor condition; but, when pressed, Mr. Trovato admitted that he had not heard that conversation, but was only told about it by Mr. Sookdeo after the fact. Mr. Sookdeo also apparently told him that the recommendation was rejected by Ammann & Whitney, on the basis that such a change would be too expensive, and that Trocom "*was attempting to gouge Con-Ed*", by seeking extra contractual payment for "special care" and for crossing over the electrical utility.

(68) When asked whether Trocom had undertaken any testing between the first and second sewer backup complaints, he confirmed that no testing was done. He also confirmed that Trocom had not carried out the dye testing, referred to above. He apparently did not know much about it, and was not present when it was carried out.

(69) After the subsequent video test was completed, Ammann & Whitney directed Trocom to re-excavate the area of the house connection. Mr. Trovato was present at the time, and was able to observe that "*Trocom's work was intact*", but that "*there was a break or separation upstream from the connection*".

(70) Although Mr. Redline's July 25, 2006 Resident Engineer's Daily Project Diary records the comment that "*contractor wanted to get paid for extra* [excavation and reconnection] *work*", Mr. Trovato confirmed that Trocom did not ever render any account for it.

Goolcharan Sookdeo

(71) Trocom's second witness at the arbitration hearing was Goolcharan Sookdeo. He had started his career in 1995 as a laborer, and then as an inspector, with other construction companies, and joined Trocom in June of 2006 as Field Supervisor. In that role, he was on the Project site on a daily basis, and Mr. Trovato would assign duties to him.

(72) He testified that Ammann & Whitney oversaw and gave direction to Trocom (orally and by way of Field Orders) with respect to all of its work, including, among other things, the excavation, sheeting, backfilling, trenching, and "*pipe items*". In this regard, he commented that Ammann & Whitney's Messrs. Jusma, Redline, Kleyman and Toson were on the site on a daily basis.

(73) As indicated above, the City had determined that the original brick manhole, which had been situated where the house connection met the sewer main, had to be replaced (with a concrete manhole). Furthermore, due to environmental protection regulations, the old manhole was "illegal" and also had to be relocated.

(74) Mr. Sookdeo testified that he had recommended to Mr. Jusma (i) that the position of the new manhole be moved to the *east*, (ii) that ductile iron pipe be used for the spur assembly, joining the sewer main to the house connection, and (iii) that the spur be connected to new cast iron pipe (instead of clay) all the way to the curb or to the joint where the cast iron pipe extending downstream from 71 Carroll Street ended. He also stated that "*Mr. Jusma agreed with me*". However, it appeared that the new manhole could not be "moved" to the east because it would have interfered with a utility crossing, thereby giving rise to extra expense; and, as a result, Mr. Sookdeo's recommendation was not approved. Consequently, this resulted in a decision by Ammann & Whitney to move the position of the new manhole to the west instead.

(75) As a result, according to Mr. Sookdeo, Mr. Jusma directed him to construct the new manhole to the west of its original position, to install a clay (instead of a ductile iron pipe) spur, and to use clay piping for the house connection which was to service 71 Carroll Street.

(76) Mr. Sookdeo stated that Mr. Toson was observing the Trocom laborer making the new clay-to-clay house connection. He also testified that the nature and scope of Ammann & Whitney's supervisory inspection role was detailed and extensive, including taking measurements and photographs, and observing the nature of the cement mix used for the concrete encasement of the pipe, the characteristics and quality of the sand used for backfilling, and the installation and removal of the sheeting.

(77) Consistent with a comment made earlier by Ammann & Whitney's expert witness, Mr. Parr, Mr. Sookdeo testified that, based on his experience, it was not customary for Ammann & Whitney's field inspectors to descend into the trench while Trocom was working on the house connection, except for "*unusual circumstances*".

(78) Finally, Mr. Sookdeo observed that the separation of the house connection did not occur in the area which was part of Trocom's work, but rather occurred 6" – 12" upstream from the point of the new connection. This meant (to him) that the Trocom laborer performing the work would not have been able to anticipate the risk of causing a separation of the 45-degree bend and the straight pipe section of the house connection: "*That area was beyond our sheeting, and we were never instructed to investigate beyond the sheeting*". He continued: "*We never knew there was a bell (elbow). It is not common for there to be a bend in the pipe*".

III. ANALYSIS AND CONCLUSION

(79) Both parties have essentially argued that, although they have jointly negotiated a settlement of the subrogated claim of Fireman's Fund, capping their potential exposure to the claimant at $125,000.00, neither of them has any legal obligation to contribute to the payment of that amount. However, despite that their respective contracts were with the City of New York, both Trocom, which undertook the sewer and main reconstruction work, and Ammann & Whitney, which supervised and inspected that work, had a duty to the owner of 71 Carroll Street

to ensure that their services were performed in reasonably competent and a good and workmanlike manner, and without negligence, particularly since it was foreseeable that any negligence on their parts could possibly result in the owner incurring a loss or damages.

(80) It appears to be common ground, and I have also concluded from the evidence, that the separation of the house connection pipe was the effective cause of the sewer backup problems at 71 Carroll Street, which gave rise to Fireman's Fund's subrogated claim for damages.

(81) In evaluating the apportionment issue, it is important to remember that neither Trocom nor Ammann & Whitney had privity of contract with the owner of 71 Carroll Street, and that Fireman's Fund's subrogated claim was founded in negligence, and not breach of contract.

(82) Furthermore, while the Trocom Construction Contract generally outlines the nature, extent and scope of Trocom's work, only the Ammann & Whitney Inspection Services Contract is intended separately to define the scope of Ammann & Whitney's services and responsibilities.

(83) As indicated above, Article 4.1 of the Trocom Construction Contract generally provides that Trocom was responsible for the means and methods of construction (*" . . . such as the Contractor may choose"*); Article 4.2 provides that the failure of the engineer to reject Trocom's means and methods would not relieve Trocom of its obligation to compete the work in accordance with the contract; Article 6.3 provides that the "*inspection and approval*" by the engineer "*shall not relieve* [Trocom] *of its obligation to perform the Work in strict accordance with the Contract*"; and Article 7.1 of the Trocom Construction Contract provides that "(t)*he obligation to deliver finished Work in strict accordance with the Contract prior to final acceptance shall be absolute and shall not be affected by the Resident Engineer's approval of, or failure to prohibit, the Means and Methods of Construction used by the Contractor*".

(84) Furthermore, if Mr. Parr's opinion as to the cause of the separation of the house connection is accurate, then it may also be important to observe that paragraph 9 of the "Notice to Bidders" section of the Project's Sewer Specifications provides that "(a)*ll existing house connections shall be* ***maintained and supported*** *during construction*"[23] [emphasis added].

[23] See page A2-2 of the Addendum 2 of the Trocom Construction Contract (page 340 of 363 of Exhibit 1)

(85) Given the extensive nature of Trocom's obligations and responsibilities, I am unable to conclude that Trocom has no liability. The only issue is whether, as Mr. Parr has contended, "(t)*he failure of the 71 Carroll Street house connection was solely Trocom's responsibility*"[24], or whether liability is shared by Ammann & Whitney to any extent.

(86) As indicated above, Article 6.1 of the Ammann & Whitney Inspection Services Contract obliged Ammann & Whitney to provide "*all services necessary and required for the inspection, management, coordination and administration of the Project, so that the required construction work is properly executed, competed in a timely fashion and conforms to the requirements of the construction contract and to good construction practice*".

(87) Furthermore, Article 6.4.3 provides that Ammann & Whitney's services include (without limitation) the following responsibilities with respect to the inspection of the work:

> *"(a) Provide technical inspection, management and administration of the work on the project until final completion and acceptance of the work by the Commissioner, verifying that the materials furnished and work performed are in accordance with the requirements of the construction contract(s) . . .* ";
>
> *"(c) Take appropriate action to prevent the installation of work, or the furnishing of material or equipment, which has not been properly approved or otherwise fails to conform to the requirements of the construction contract(s) . .";*
>
> *"(d) Supervise the performance of all detailed inspection and field-testing of materials and items of work, quality control tests, and any other tests required by the construction contract(s) . . .".*

(88) Article 6.4.5 of Ammann & Whitney Inspection Services Contract also provides that Ammann & Whitney is to "(r)*eview and evaluate the means and methods of construction proposed by the contractor(s) and advise the Commissioner in the event the Engineer reasonably believes that such proposed means and methods of construction will constitute or create a*

[24] Paragraph number 2, continued on page 9 of expert's report (Exhibit 7)

hazard to the work, or persons or property, or will not produce finished work in accordance with the construction contract(s)".

(89) It is to be noted that Article 6.4 of the Ammann & Whitney Inspection Services Contract contains more than 8 pages of detailed and extensive engineering services which were to be performed during the construction phase, and which were "*necessary and required for the inspection, management, coordination and administration of the Project*"[25]. Those services purported to address, among other things, responsibilities with respect to (i) general inspection of the work[26]; (ii) checking the layout of conduits, pipes, and mains[27]; (iii) checking the performance of excavation, compliance with safety standards for sheeting, and preparing trench and backfill certifications[28]; (iv) field investigation relating to taps, connections and data on existing mains which are to be replaced[29]; (v) recommending field changes in pipe connections to new mains[30]; (vi) recommending resolution of utility and other interference problems[31]; (vii) checking the relocation, replacement, support and protection of utility facilities[32]; (viii) reviewing and evaluating the contractors' means and methods[33]; (ix) reviewing contractors' payment applications (which would include reviewing field measurements and work performed)[34]; (x) providing progress photographs on a regular basis[35]; (xi) reviewing requests for change orders[36]; (xii) preparing written progress reports[37]; and so on.

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[25] Article 6.1

[26] Article 6.4.3

[27] Article 6.4.29

[28] Article 6.4.31

[29] Article 6.4.37

[30] *ibid*

[31] *ibid*

[32] Article 6.4.39(b)

[33] Article 6.4.5

[34] Article 6.4.10

[35] Article 6.4.21

[36] Article 6.4.13

(90) It is also to be noted that the "maximum fee" for Ammann & Whitney's services, based on the original scope of services which had been undertaken, was not an insignificant amount, ($2,126,367.00[38]).

(91) The extensive scope of professional services described above, and the fee for such services, is inconsistent with Mr. Parr's somewhat categorical view that "(i)*t is standard custom and practice that sewer construction inspection be conducted from the top of the trench*"; that "*Ammann & Whitney would* [only] *observe whether Trocom was* ***apparently*** *doing its work properly*"; and that "(i)*nspection is undertaken* [only] *on a routine basis*".

(92) It is also inconsistent with Mr. Leutes' testimony, where he stated that Ammann & Whitney's field inspectors "*don't have authority to do very much*", and that their work was limited to "*making sure the work was being done safely*" and "*measuring quantities*". Perhaps that may be his personal observation as to what actually happened in the field, but that it not what was apparently contemplated, given the scope of services mandated by the contract.

(93) Simply observing, euphemistically, "*from the top of the trench*" (i.e., with a minimal level of responsibility) is not sufficient, given the extent of the obligations assumed by Ammann & Whitney for inspection, management, coordination and administration. I am not convinced, and therefore do not agree, that inspection should be as casual, and without a higher degree of care, responsibility and accountability, as Mr. Parr has essentially opined and as Mr. Leutes has described.

(94) I am therefore also unable to conclude that A & W has no liability.

(95) In his expert's report (Exhibit 7), Mr. Parr expressed his opinion as to (i) the probable cause of the separation of the house connection, as well as (ii) the roles, responsibilities and respective liabilities of Trocom and Ammann & Whitney in respect thereof. Given that his main theory of causation for the separation (as set out in paragraph 52 above) is reasonable, and in the absence of any other expert opinion or theory which might challenge, contradict or otherwise

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[37] Articles 6.4.3, 6.4.15

[38] October 7, 2005 "Professional Services Contract - Advice of Award" letter to Ammann & Whitney from New York City Department of Design and Construction (part of Exhibit 33)

address Mr. Parr's opinion, I am prepared to accept his opinion as to the effective cause of the separation of the house connection (and the resulting sewer backup). However, based upon the analysis set out above, I am unable to accept his opinion regarding the apportionment of fault.

(96) I have therefore determined that there should be an apportionment of liability as follows:

Trocom -- 75%

Ammann & Whitney -- 25%

(97) This means that, with respect to the settled claim of Fireman's Fund, Trocom is responsible for payment of $93,750.00 (i.e., 75%), and Ammann & Whitney is responsible for payment of $31,250.00 (i.e., 25%), for a total of $125,000.00.

IV. ATTORNEYS' FEES / ARBITRATION FEES

(98) In this proceeding, Ammann & Whitney has asserted a claim for reimbursement for its attorneys' fees and related costs. This allegedly did not come to the attention of Trocom's counsel, Ms. Villani, until a few days prior to the arbitration hearing, although Ammann & Whitney's counsel, Mr. Morin, has asserted that a plain reading of his Position Paper clearly indicates that there was a reservation of rights in this regard. In any event, Trocom, in response, has taken the position that that claim is outside of the scope of this arbitration, and that I have no jurisdiction or authority to deal with it. Should I decide otherwise, Ms. Villani has advised that she would move to vacate my Award to the extent that it relates to such fees. Despite the threat, Ms. Villani participated in a process which contemplated her reviewing Mr. Marin's legal accounts to his client, her negotiating the terms of a confidentiality agreement regarding the production of such legal accounts, and her decision to depose Mr. Marin with respect to those accounts (which was deferred by agreement). Both counsel have also now made written submissions regarding entitlement, and, if appropriate, quantum.

The Jurisdiction Issue

(99) The "*Nature of Dispute*" narrative, which was initially submitted to JAMS, concludes that "*Plaintiff* [i.e., Fireman's Fund Insurance Company] *has agreed to accept $125,000 in damages and the Defendants agreed to proceed to arbitration regarding liability as between the Defendants. Plaintiff is not participating in the arbitration. The arbitrator will decide the apportionment of liability as between the defendants*". While that narrative does not specifically mention attorneys fees and costs, it did not necessarily exclude them from the scope of the Arbitration.

(100) The "*Stipulation for Arbitration and Selection of Arbitrator*" document, which was executed by counsel for both parties in counterparts, provides that "*all disputes, claims or controversies*" are to be submitted "*to neutral binding arbitration at JAMS, pursuant to the JAMS Arbitration Administrative Policies, and, unless otherwise agreed in writing by the parties, to the applicable JAMS Arbitration Rules and Procedures. The Parties hereby agree to give up any rights they might possess to have this matter litigated in a court or jury trial*".

(101) In the first pre-hearing conference call with counsel on July 21, 2010, we canvassed issues relating to, among other things, the exchange of pleadings, documentary production, depositions, witness lists, experts' reports, etc., and, based upon that discussion, I issued a Procedural and Scheduling Order dated the same day. Paragraph 2 of the Order provided that both the Stipulation and the Order set out the terms of reference for the Arbitration proceeding. Paragraph 3 provided that the "*JAMS Engineering and Construction Arbitration Rules and Procedures*" (with a URL reference to those Rules and Procedures) were to apply. Paragraph 17 addressed the "*attorneys fees/costs*" issue (see next paragraph). And paragraph 18 provided that "(a)*ny objections to this Procedural and Scheduling Order are deemed to have been waived unless submitted in writing no later than Tuesday, July 27, 2010*". No objections were submitted by the deadline date.

(102) Paragraph 17 of the Procedural and Scheduling Order provided as follows:

"*17. Costs*

(a) Unless the Parties advise and confirm that they have agreed on a different allocation of fees and expenses, the Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses, in accordance with Rule 24(f) of the JAMS Rules; and

(b) Unless the Parties have agreed otherwise, and unless the Parties advise and confirm that it would be disallowed under applicable law, the Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate), in accordance with Rule 24(g) of the JAMS Rules".

(103) Subrules 24 (f) and (g) of the *JAMS Engineering and Construction Rules and Procedures* further provide:

"*f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses unless such an allocation is expressly prohibited by the Parties' agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c).)*

(g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' agreement or allowed by applicable law".

(104) Rule 11(c) of the *JAMS Engineering and Construction Arbitration Rules and Procedures* provides as follows:

"*Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter*".

(105) Based on the foregoing, I find that I have jurisdiction and authority to deal with the issues of attorneys fees, arbitration fees, and Arbitrator compensation and expenses.

Ammann & Whitney's Claim for Attorneys Fees and Costs

(106) Exhibit 63 is copy of a spread sheet, presumably prepared in the ordinary course of business by Ammann & Whitney's counsel, Marin/Goodman, LLP, which purports to show the total number of hours worked by attorneys and staff in that firm with respect to this claim (i.e., 429 hours), and the value of those hours (i.e., $108,253.24), from February 27, 2008 to September 9, 2010. Exhibit 63 does not disclose any claim for out-of-pocket disbursements. Since the written Stipulation for Arbitration in this matter was not filed with JAMS until July 14, 2010, I suspect that all or most of the time entries for the period from February 27, 2008 to approximately July 14, 2010 may possibly represent time spent dealing with the defence of Fireman's Fund's action in the United States District Court action.

(107) Also marked as a separate Exhibit 63 (perhaps the numbering was in error) is an e-mail from Ms. Villani to Mr. Josephs objecting to the inclusion of the spread sheet in the consolidated Book of Joint Exhibits, and expressing the position of Trocom to the effect that Ammann & Whitney is not entitled to "*any claim for reimbursement of legal fees and expenses*". The e-mail also alleges that Ammann & Whitney's "*attempt to enlarge the scope of this arbitration is contrary to the representation made to the Court*", and has been put forward in bad faith.

(108) Exhibit 64 is a collection of copies of the actual legal accounts which were rendered by Marin/Goodman, LLP to its client, Ammann & Whitney, for legal services rendered from February 27, 2008 to September 28, 2010. Those legal bills have not been totalled, but presumably they also add up to an amount close to the total dollar amount for fees set out in Exhibit 63, namely $108,253.24. These legal accounts, however, also include out-of-pocket disbursements, which also have not been totalled.

(109) Ammann & Whitney has advanced the argument that it is entitled to recover these fees/costs on one or both of the following two bases:

(i) as indemnity, pursuant to Article 7.4 of the Trocom Construction Contract; and/or

(ii) as attorneys' fees and expenses, and as arbitration fees, pursuant to subrules 24 (f) and (g) of the *JAMS Engineering and Construction Rules and Procedures*.

Article 7.4 of the Trocom Construction Contract

(110) Article 7.4 of the Torcom Construction Contract provides, in part, that "(t)*o the fullest extent permitted by law, the Contractor shall indemnify, defend and hold the City, its employees and agents (the 'Indemnitees') harmless against any and all claims . . . and costs and expenses of whatever kind (including but not limited to payment or reimbursement of attorneys' fees and disbursements) allegedly arising out of or in any way related to the operations of the Contractor and/or its Subcontractors in the performance of this Contract or from the Contractor's and/or its Subcontractors' failure to comply with any of the provisions of this Contract or the Law*".

(111) This raises two issues: (i) whether Ammann & Whitney is a member of the class of "*indemnitees*" contemplated by, and within the meaning of, Article 7.4; and/or (ii) whether it has any status as a possible "*third party*" beneficiary of that contractual provision.

(112) Article 6.1.2 of the Ammann & Whitney Inspection Services Contract provides that "(i)*n general, the Engineer shall serve as the* ***representative*** *of the Department* [of Design and Construction] *at the site and,* ***subject to review by the Commissioner****, shall be responsible for the inspection , management and administration of the performance of the work . . .* " [emphasis added].

(113) The Change Order process, set out in Article 25 of the Trocom Construction Contract and Article 6.4.13 of the Ammann & Whitney Inspection Services Contract, provides a good example of the strict limitations on Ammann & Whitney's "*representative*" authority, while it is performing its essential managerial and administrative functions. Those provisions serve to mandate that "(c)*hanges may be made . . . only as duly authorized in writing by the Commissioner . . .* [39]"; that "(t)*he Resident Engineer shall not . . . have the power to issue an Extra Work order, except as specifically designated in writing by the Commissioner*"[40]; that "(t)*he Engineer or Architect or Project Manager shall not . . . have the power to issue an Extra*

[39] Article 25.1 of Trocom Construction Contract

[40] Article 31.1 of Trocom Construction Contract

Work order, except as specifically designated in writing by the Commissioner"[41]; and that, while Ammann & Whitney may review and evaluate requests for Change Orders, "*the Commissioner will make all final determinations*"[42].

(114) Article 12 of the Ammann & Whitney Inspection Services Contract provides that "(e)*xcept as provided for in Article 6.1.2, where the Engineer is acting as the representative of the Commissioner and not independently, the relationship of the Engineer to the City shall be that of independent contractor, and the Engineer shall have no authority to bind the City in any way with third parties*".

(115) I find that the strict limits placed on the "*representative*" capacity of Ammann & Whitney mean that it is not able to bring itself within the four corners of the indemnity provision contained in, and is not an "*agent*" within the meaning of, Article 7.4 of the Trocom Construction Contract. Additionally, the circumstances contemplated by Article 12 emphasize Ammann & Whitney's role as "*independent contractor*", which clearly creates no right of action against Trocom for indemnity. Accordingly, at most, Ammann & Whitney may be a "*third party*" claimant.

(116) In this regard, though, it is to be noted that Article 7.6 provides that "(t)*he provisions of this Article shall not be deemed to create any new right of action in favor of third parties against the Contractor or the City*". Ammann & Whitney, as a "*third party*" claimant or beneficiary, would therefore have no right of indemnity under Article 7.

(117) The Trocom Construction Contract is a standard form, which is used for municipal construction projects. Its indemnity clause is essentially intended to protect the City against damages arising as a result of a breach of contract by its contractor. Ammann & Whitney is not expressly named in Article 7.4 as "*agent*", "*indemnitee*", beneficiary, or otherwise. Given my findings as to the extensive nature of the responsibilities and professional services which were to have been undertaken by Ammann & Whitney in connection with the Project in general, and Trocom's work in particular, this failure to name Ammann & Whitney could be interpreted as an

[41] Article 32.2 of Trocom Construction Contract

[42] Article 6.4.13 of Ammann & Whitney Inspection Services Contract

indication that Trocom and the City of New York did not intend to confer a right of indemnification upon Ammann &Whitney. Furthermore, some case authorities have held that the obligation to indemnify is to be strictly construed, and that the status of an indemnitee is to be interpreted narrowly[43].

(118) I am also mindful of the fact that Article 7.4 of the Torcom Construction Contract provides indemnification for damages "*allegedly arising out of or in any way related to the* ***operations of the Contractor*** *and/or its Subcontractors* ***in the performance of this Contract or from the Contractor's*** *and/or its Subcontractors'* ***failure to comply with any of the provisions of this Contract*** *or the Law*" [emphasis added]. The fact that there has been an apportionment of liability, pursuant to which Ammann & Whitney has been assessed as being 25% at fault, also militates against Ammann & Whitney enforcing the indemnity clause in the Trocom Construction Contract.

(119) In conclusion, I find that, in seeking to enforce its claims for recovery of its attorneys' fees and expenses, Ammann & Whitney, is not entitled to rely upon Article 7.4 of the Trocom Construction Contract.

Attorneys' Fees and Expenses, Arbitration Fees, and Arbitrator Compensation and Expenses (Subrules 24 (f) and (g) of the JAMS Engineering and Construction Rules and Procedures)

(120) As stated above, I have concluded that I have the jurisdiction, authority and discretion with respect to the award of attorneys' fees and expenses, arbitration fees, and Arbitrator compensation and expenses[44].

(121) Given my disposition that both parties have a measure of responsibility and liability for the damages claimed by Fireman's Fund, and that there should be an apportionment of liability between the parties, I am exercising my discretion not to award attorneys' fees and expenses, arbitration fees, and Arbitrator compensation and expenses in favor of either party, and hold that each party is to bear its own such fees, expenses and costs.

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[43] See, for example, *R. W. Beck and Associates, Inc. v. Job Line Constr. Inc.*, 122 Idaho 92, 831 P.2d 560, 562 (1992); *Dawson v. Eldredge*, 84 Idaho 331, 372 P.2d 414, 418 (1962); *Gulf Oil Corp. V. Mobile Drilling Barge or Vessel Margaret*, 441 F. Supp. 1, 1978 A.M.C. 868 (E.D. La. 1975), aff'd 565 F.2d 958)

[44] Subrules 24 (f) and (g) of the *JAMS Engineering and Construction Rules and Procedures*

V. AWARD

(122) In conclusion, and as articulated above, I therefore order that there shall be an apportionment of liability as follows:

Trocom -- 75%

Ammann & Whitney -- 25%

and that, with respect to the settled claim of Fireman's Fund, Trocom is responsible for payment of $93,750.00 (i.e., 75%), and Ammann & Whitney is responsible for payment of $31,250.00 (i.e., 25%), for a total of $125,000.00.

(123) Furthermore, I have also exercised my discretion in ordering that neither party shall recover attorneys' fees and expenses, arbitration fees, or Arbitrator compensation and expenses from the other party, and that each party is to bear its own such fees, expenses and costs.

(124) This Award resolves all claims between the parties submitted for decision in this arbitration proceeding.

(125) In closing, I would like to thank counsel for their cooperation, and for their fine effort in presenting this complex and somewhat contentious case.

Signed as of the 25th day of November, 2010

Harvey J. Kirsh, Arbitrator