IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

TANO GROUP, INC.,
Plaintiff-Appellee/Cross-Appellant,

v.

DEPARTMENT OF PUBLIC WORKS, et al.,
Defendant-Appellant/Cross-Appellee.

SUPREME COURT NO. 2008-SCC-0010-CIV
SUPERIOR COURT NO. 05-0100B

Cite as: 2009 MP 18

Decided December 31, 2009

Rexford C. Kosack, Saipan, Commonwealth of the Northern Mariana Islands, for Plaintiff-Appellee/Cross-Appellant
R. Anthony Welch, Saipan, Commonwealth of the Northern Mariana Islands, for Defendant-Appellant/Cross-Appellee
BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and JOHN A. MANGLONA, Associate Justice

CASTRO, J.:

¶ 1 Appellant Department of Public Works ("DPW") appeals the trial court's decision on the grounds that it did not have subject matter jurisdiction to hear the breach of contract and breach of the implied covenant of good faith and fair dealing claims by Tano Group, Inc. ("Tano"). DPW further appeals the trial court's decision (i) awarding consequential damages, (ii) finding a breach of the implied covenant of good faith and fair dealing, (iii) granting additional time delays, and (iv) applying the incorrect interest rate to the damage awards. Tano asserts that the trial court erred in (i) not awarding consequential damages for costs related to third-party lawsuits, (ii) not awarding damages for some breach of the implied covenant of good faith and fair dealing claims, and (iii) improperly placing the burden of proof for the reasonableness of mitigation on Tano, the non-breaching party. For the reasons set forth below, we find that the trial court did have subject matter jurisdiction to hear the breach of contract and breach of the implied covenant of good faith and fair dealings claims. We further hold that the trial court properly awarded some consequential damages and not others, correctly ruled on the breach of the implied covenant of good faith and fair dealing claims, and correctly awarded the delay days. We find, however, that error was committed in placing the burden of proof regarding the mitigation of damages on Tano, and applying the fifteen percent interest rate to Tano's damage awards. Therefore, we AFFIRM in part, REVERSE in part, and REMAND this matter to the trial court to enter judgment consistent with this opinion.

I

A. The Construction of Southern High School

¶ 2 In September 2000, Tano and DPW entered into a contract for the construction of Southern High School. The school was scheduled to be completed in August 2001 but it was not ready for use until a year later because numerous problems arose during the course of construction. Problems first arose between DPW and Tano during the design phase. This part of the contract was supposed to last ninety days, but it stretched to almost eleven months. The government made numerous changes to the design. As a result, the construction of the school was behind schedule from the beginning. To compensate, the government encouraged Tano to commence construction without a final set of plans or the necessary payment and performance bonds. Eventually, the government required Tano to obtain bonds. In late June 2001, the bond company informed the parties that a final design was needed to secure bonding. A month later Tano was bonded when a final set of plans was submitted to and approved by DPW.

¶ 3 Delays again arose in early 2002. The government failed to timely act on requests to setup permanent utility connections for water and electricity at the site as required by the contract. Tano wrote three letters to DPW, in February and March, directing PSS to take the necessary steps to set up permanent utilities. The March letter explicitly stated that Tano had been waiting for eight weeks for the power and water to be hooked up. In April, the Commissioner of Education gave notice to CUC that

construction was 96% complete, and requested an immediate connection for water and electricity. Electricity came to the site on May 8, 2002, and water was supplied on July 1, 2002.

¶ 4 The utility delays caused Tano to incur substantial standby expenses. On March 14, 2002, Tano, ready to start landscaping, moved equipment to the site for that purpose. This work could not start, however, until the site had a permanent water connection. Since water was not hooked up, Tano's landscapers and the landscaping equipment remained on standby until July 1, 2002. On April 20, 2002, Tano ran out of any work that it could complete at the school without permanent water and electricity. As a result, its plumbers, who were on site to test various plumbing systems under island water pressure, also stayed on standby until July 1, 2002. Tano's electricians, who were needed to commission the electrical equipment under island power, were on standby until May 8, 2002. For this period of time, Tano's standby costs were $107,776.04 for labor and $127,600 for equipment.

¶ 5 The construction project was finally completed in August 2002, and the government issued a certificate of occupancy. Classes started one week later. Despite the school being completed for the start of the school year, by November 2002 DPW had still not closed out the contract. DPW failed to make the final progress payment and failed to release the retention payment. The retention payment was a ten percent withholding by the government on each progress payment. Under the terms of the contract, once it was closed, Tano was entitled to receive the retention money. Tano also sought additional sums for standby costs, and necessary work that exceeded the scope of the contract.

B. Tano's Financial Difficulties and the Parties' Initial Attempts at Resolution

¶ 6 When the project was completed, the parties tentatively agreed to enter into arbitration concerning the disputes that arose over the course of the contract. The Director of Procurement ("Procurement") supported DPW's and Tano's decision to arbitrate. The parties agreed that each wanted to reach a full conclusion of the matter before the end of 2003. The parties also informally agreed that Tano's attorney would draft the arbitration documents. In September 2003, Tano presented the draft arbitration documents to the Office of the Attorney General. At this point, a new assistant attorney general who was assigned to represent DPW in the case maintained that there was no agreement to enter into arbitration. Consequently, the arbitration never occurred. Tano seeks $11,000 in reimbursement for the costs of drafting the arbitration documents.

¶ 7 In November 2002, Tano made several requests for payments totaling $638,469.53. It requested the $227,830.53 retention payment, the $113,089.32 final progress payment, $270,549.68 in standby costs, and $27,000 for the water tank and pump. It also requested that DPW release its payment and performance bonds. A month later, Tano filed a compensation request for 111 delay days due to the late hookup of permanent utilities at the site. That same month, Tano also filed an administrative dispute with DPW regarding a determination by the contracting officer that it would not receive 157 delay days. The

contracting officer determined that Tano would only receive sixty-four of the requested 157 delay days. The contracting officer denied delay days for shipping, a refinery fire, rain, and a permitting period for an endangered species known as the reed warbler. DPW failed to rule on any of Tano's claims for payment or requests for time delays in either 2002 or 2003.

¶ 8 That same month, Tano was in such a difficult financial position that it sold its 150 ton Hitachi crawler crane for $75,000 in order to pay its bills. It had bought the crane for $230,000. Tano hired an expert to appraise the crane, who concluded that it was actually worth $850,000. The expert based this valuation on a similar crane that was for sale in Japan for $350,000 combined with a cost of $500,000 to ship it to Saipan. The expert claimed that an increasing number of Chinese contractors were purchasing heavy equipment, and that the increase in the value was attributable to increased demand in China. In less than six months Tano again experienced serious cash flow problems and sold its automatic building machine ("ABM") for $100,000. It had bought the machine for $175,000. Tano hired the same expert to appraise the equipment. Based on a survey, the expert determined that the "present value" of the ABM was $325,000, and that its "replacement value" was $500,000.

¶ 9 In November 2003, at a meeting between Tano, DPW, and other government officials, Tano requested, among other things, the release of its payment and performance bonds. DPW responded that it would look into the matter. At another meeting a month later, Tano again inquired about the bonds. The government responded that it forgot and would look into the procedure for releasing bonds. DPW never acted upon Tano's request for the release of its bonds. Furthermore, the government never responded to the claims for payment and time delays.

¶ 10 Eight months later in July 2004, the contracting officer issued a "determination letter" specifying what sums were owed to Tano. The contracting officer determined that the contract price should be reduced by $418,617. After this deduction, the remaining amount owed was $49,303 plus $3,882.58 in interest. Since the school was completed, Tano maintained that DPW owed it $638,469.53 for the retention payment, the final progress payment, standby costs, and the water tank and pump. The contracting officer's determination letter did not specifically address these items, the request for time delays, or the request that DPW release the construction bonds.

¶ 11 Tano disputed the determination letter a month later. It mailed DPW and Procurement a "dispute letter" in response to the determination letter specifying all of its claims. Tano argued that the government was attempting to close out the contract without addressing all of the claims it made since the school was completed. In November 2004, Tano again met with DPW and various government officials to discuss the dispute letter. While the government promised to address Tano's claims, no action ever resulted from the meeting. A month later, DPW requested that Procurement hear the dispute. Tano joined DPW in this

request. Three months later, Procurement responded that it was unable to hear the dispute because of the limited resources at the office's disposal. Procurement recommended arbitration.

C. Procurement's Involvement

¶ 12 In March 2005 Tano filed its initial complaint against DPW with the trial court. Both parties claimed that the other failed to meet the terms of the contract. DPW filed a motion to dismiss asserting that Tano failed to exhaust its administrative remedies pursuant to the Administrative Procedure Act. The trial court granted the motion and remanded the case to Procurement for an administrative decision. Procurement issued an administrative decision in June finding that Tano was entitled to: (1) a final progress payment of $113,089.32; (2) a retention payment of $227,830.53; (3) no standby costs; (4) a payment of $27,000 for the supply and installation of a water tank and pump; (5) none of the additional ninety-three delays days for shipping, weather, and wildlife permitting beyond the sixty-four delay days already granted for period of January 5, 2002 to March 10, 2002; and (6) a credit of 111 delays days related to the late hookup of utilities at the site from April 20, 2002 to August 9, 2002. Procurement also determined that Tano was liable for $60,000 in liquidated damages for forty unjustified days of delay at $1,500 a day. Tano was also subject to a deduction of $127,000 from the contract for collateral equipment not purchased. Procurement did not award any interest, but stated that the Federal Acquisition Regulations specified the correct interest rate. Procurement's final judgment awarded Tano $367,000, with deductions of $187,000, for a total award of $180,000.

D. Judicial Review of Procurement's Decision

¶ 13 Tano next filed its First Amended Complaint ("amended complaint") alleging (1) breach of contract, (2) breach of contract and review of administrative decision, and (3) breach of the covenant of good faith and fair dealing. Tano then sought to limit judicial review of Procurement's decision to only those issues that Tano appealed in its amended complaint. Since DPW did not seek to appeal Procurement's decision, the trial court granted Tano's request. DPW did not object to the trial court exercising subject matter jurisdiction over the dispute.

¶ 14 Tano's amended complaint was comprised of three counts. "Count I" sought compensation for the breach of the contract. Specifically, Tano sought to recover (1) $113,089.32 as the final progress payment, (2) $227,830.53 for the return of the retention payment, and (3) $27,000 for the water tank and pump. Tano also sought consequential damages stemming from the government's failure to timely pay these amounts.

¶ 15 "Count II" also concerned breach of contract claims, but it sought to reverse alleged errors in Procurement's decision. Specifically, Tano argued that (1) the failure to award $270,549.68 in standby costs was incorrect, (2) the ninety-three delay days were wrongfully denied, (3) the $60,000 in liquidated damages awarded to DPW was in error, (4) Procurement made a $919.85 mathematical error in DPW's

favor, (5) Procurement incorrectly deducted $127,000 from the contract price, and (6) Procurement incorrectly denied Tano's request for interest. Tano also sought consequential damages stemming from the government's failure to timely pay these sums.

¶ 16 "Count III" alleged that the government breached the implied covenant of good faith and fair dealing that exists in every contract. Tano alleged that the government breached the covenant by (1) failing to close out the contract for two and a half years, (2) failing to respond to Tano's claims for payment and time delays, (3) refusing to release Tano's payment and performance bonds, and (4) breaking its promise to submit the dispute to binding arbitration.

¶ 17 Tano sought compensation for the sale of its Hitachi crawler crane and its ABM, and lost profits as consequential damages. Tano alleged it was unable to secure new construction jobs that it was well-suited to bid on because the government failed to pay it the outstanding amount due on the contract and release its performance and payment bonds. Without cash flow and the ability to become bonded, Tano could not secure any new projects. Tano provided a list of several construction projects that it would have bid on if it had been in a financial position to do so. Tano additionally requested an award for costs related to third-party lawsuits. Tano claimed that DPW's failure to close-out the contract caused it to default on payments it owed to suppliers on contracts unrelated to the construction of Southern High School.

E. The Trial Court's Decision

¶ 18 The trial court awarded Tano: (1) interest for the $180,000 awarded by Procurement from December 23, 2002 until it received payment on August 25, 2005; (2) $127,000 that Procurement subtracted from the contract price; (3) $60,000 in liquidated damages that Procurement deducted from Tano's award; (4) interest on the $127,000 and $60,000 sums above and interest on the $919.85 that Procurement incorrectly subtracted from the award; (5) consequential damages in the amount of $155,000 for the sale of the crane, $75,000 for the sale of the ABM, and $252,290 in lost profits; (6) $19,975.60 in standby costs for security guards and $13,282.41 in interest on that amount for a total of $33,259.01; and (7) damages for the breach of the implied covenant of good faith and fair dealing, but the damages awarded in the six counts above represented those damages, so no new amount was awarded in order to avoid a double award in Tano's favor. The trial court found that the fifteen percent rate of interest from 4 CMC § 1817, which Tano suggested, was applicable to the contract.

¶ 19 Tano was not awarded the $11,000 it claimed in arbitration expenses. The court found that the breakdown of negotiations to enter into arbitration did not amount to a breach of the implied covenant of good faith and fair dealing. Tano was not awarded any costs associated with the third-party lawsuits either. The trial court found that the evidence did not sufficiently show a connection between the government's failure to pay and Tano's subsequent failure to pay its suppliers for other construction

projects. Tano was also not awarded standby costs other than for security guards. The trial court found that Tano did not put forth any evidence showing that it made a reasonable attempt to mitigate those losses.

¶ 20 The final judgment was issued in January 2008. The total amount of damages and pre-judgment interest totaled $900,436.54. In addition to the damages awarded from the October amended findings of fact, conclusions of law, and order, the final judgment awarded Tano: (1) $21,935.16 in litigation costs; (2) $919.85 that was erroneously dropped by Procurement in its award plus $478.57 in interest on that amount from December 23, 2002 through June 12, 2006; (3) $124,342.19 in interest on the $187,000 that was improperly deducted by Procurement for the period of December 23, 2002 through May 30, 2007; and (4) $72,147.92 in interest on the $180,000 that Procurement awarded Tano for the period of December 23, 2002 to August 25, 2005.

¶ 21 Both parties subsequently appealed the trial court's decision. DPW first claims that there was no subject matter jurisdiction for the lower court to consider Counts I and III of Tano's amended complaint.[1] DPW appeals (1) the award of $230,000 for the sale of the equipment, (2) the award of $252,290 for lost profits, (3) the award of sixteen rain delay days, (4) the finding that it breached the implied covenant of good faith and fair dealing, and (5) the trial court's decision to award interest, claiming that interest was not due because the sum was unascertainable, and in the alternative that if interest is due, that the wrong interest rate was applied to the awards. Tano appeals other aspects of the decision. Tano seeks to recover (1) $27,834.35 in costs related to its defense of third-party lawsuits, (2) $11,000 it spent in preparing arbitration documents, and (3) $215,400.14 in standby labor and equipment expenses.

II

A. Subject Matter Jurisdiction Concerning Counts I and III

¶ 22 DPW claims that the trial court lacked subject matter jurisdiction to hear Tano's breach of contract and breach of the implied covenant of good faith and fair dealing claims.[2] It asserts that these issues were not in the record that Procurement examined and that Procurement's decision only concerned equitable adjustments to the contract. DPW does not argue, in the alternative, that if subject matter jurisdiction exists that a breach of contract was improperly found. It does challenge certain damage

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[1] DPW's brief states that breach of contract damages could not be awarded because there was no subject matter jurisdiction. DPW fails to make an alternative argument for why it did not breach the contract if the Court finds that subject matter jurisdiction exists. DPW did make this type of alternative argument for the breach of the implied covenant of good faith and fair dealing claim. In the conclusion section of DPW's sole brief, for the first and only time, it asks the Court to reverse the award of damages for the breach of contract. DPW failed to provide either Tano or this Court with an argument for why the trial court's finding that a breach of contract occurred was incorrect. Without an explanation of why we should reverse the trial court, we are unable to address this issue. A conclusory *sentence fragment* in the conclusion section of a brief does not amount to a claim that this Court is capable of addressing.

[2] These were respectively Counts I and III of Tano's amended complaint.

awards stemming from the breach of contract claim. DPW appeals the finding of a breach of the implied covenant of good faith and fair dealing generally. The specific parts of Counts I and III are discussed later in this opinion. Presently, we must only determine if subject matter jurisdiction was properly exercised over these aspects of the case. Whether subject matter jurisdiction to hear and rule on Tano's Counts I and III existed requires this Court to review the lower court's review of an agency action. We review the trial court's review of agency action de novo; in other words, we are not bound by the findings of the lower court when it reviewed the agency action. *In re San Nicolas*, 1 NMI 329, 333 (1990).

¶ 23 Pursuant to 1 CMC § 9112(b), "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, is entitled to judicial review of the action within 30 days thereafter in the Commonwealth Superior Court." Furthermore, agency action includes an agency's failure to act. 1 CMC § 9101(c). Since an agency's failure to act constitutes agency action for the purpose of judicial review, Procurement did not have to rule on a claim for Tano to seek judicial review of the decision; the claim only had to be before Procurement. If the breach of contract and the breach of the covenant of good faith and fair dealing claims were before Procurement, then Tano was entitled to seek judicial review of those issues.

¶ 24 Procurement heard the dispute in an atypical way because it was ordered to do so by writ of mandate. It had the record that was initially presented to the trial court for review. Tano's initial complaint filed in March 2005, which laid out all of its grievances against DPW, including the breach of contract and breach of covenant of good faith and fair dealing, was sent to Procurement. Therefore, these claims were part of the record that Procurement reviewed.

¶ 25 In its decision, Procurement awarded sums for the final progress payment, the retention payment, and payment for the water tank and pump. Procurement additionally ruled on standby costs, a request for delay days stemming from weather, shipping, and wildlife permitting, and a request for delay days stemming from the permanent utility connections not being brought to the construction site. Procurement also deducted $187,000 from Tano's final award for liquidated damages and collateral equipment. While Procurement did not explicitly state that it ruled on Tano's breach of contract claims, its decision directly addressed those issues. The awards for the final progress payment, retention payment, and standby costs constitute awards stemming from the breach of contract claims. Procurement did not make any rulings that touched upon the breach of the covenant of good faith and fair dealing, but those claims were before Procurement, as they were contained in the initial complaint that was sent when it was ordered to hear the dispute. Therefore, the nature of the award further supports the conclusion that the record Procurement reviewed contained the breach of contract and breach of the implied covenant of good faith and fair dealing claims.

¶ 26 Procurement's ruling also went beyond mere equitable adjustments to the contract. Equitable adjustments are changes made to a contract to reflect a change in the scope of the work performed. Here, the only equitable adjustment that Procurement made was awarding costs for the installation of the water tank and pump because that was the only work Tano performed that exceeded the scope of the contract. Procurement's other findings all concerned aspects of the contract within the initial scope of work. Based upon the documents presented to Procurement, and in light of its findings, the breach of contract and breach of the covenant of good faith and fair dealing claims were before it for review, and the decision addressed more than equitable adjustment claims. Therefore, Tano legitimately sought judicial review of these issues.

¶ 27 DPW's answer to Tano's amended complaint also admitted that subject matter jurisdiction existed for both of these claims pursuant to 1 CMC § 9112(b). Appellee's Excerpt of Record ("ER") at 50. Since the government admitted that subject matter jurisdiction existed concerning these claims at the time, and the trial court agreed, the present allegations that Counts I and III were not a part of the record that Procurement used to issue its administrative determination is groundless. Subject matter jurisdiction was properly exercised for the breach of contract and breach of the covenant of good faith and fair dealing claims.

B. Consequential Damages

¶ 28 DPW claims that Tano's award of consequential damages for the sale of its equipment and for lost profits constitutes error. Tano argues that clear error was committed in not awarding it consequential damages for certain costs stemming from third-party lawsuits.

¶ 29 A damage award is a finding of fact, and it is reviewed under the clear error standard. *Ito v. Macro Energy, Inc.*, 4 NMI 46, 54 (1993). A finding of fact is clearly erroneous only when the reviewing court is left with the definite and firm conviction that a mistake occurred. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). If there are two permissible views of the evidence, the choice of one view over the other is not clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). The trial court's assessment of witness credibility can also almost never amount to clear error. *Lac du Flambeau v. Stop Treaty Abuse-Wisconsin, Inc.*, 41 F.3d 1190, 1194 (7th Cir. 1994). Thus, we will not disturb a damage award simply because we would have awarded damages differently. *Meader v. United States*, 881 F.2d 1056, 1060 (11th Cir. 1989).

¶ 30 According to the Restatement (Second) of Contracts: Measure of Damages in General § 347:

> A party has a right to damages based on his expectation interest as measured by
> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
> b) any other loss, including incidental or consequential loss, caused by the breach, less
> (c) any cost or other loss that he has avoided by not having to perform.

Comment a of Restatement § 347 notes that a party should receive damages that would place him or her in as good of a position as if the contract was carried out. This will be impossible sometimes, such as when the breaching party causes the non-breaching party to miss an invaluable opportunity.

¶ 31 Restatement (Second) of Contracts: Unforeseeability and Related Limitations on Damages § 351 states:

> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
> (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
>
> (a) in the ordinary course of events, or
> (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

Comment b of Restatement § 351 points out that to the extent the loss occurs outside of the ordinary course of events, recovery is inappropriate unless it was foreseen by the party because of special circumstances that the party knew of at the time they entered into the contract. *Freund v. Washington Square Press, Inc.*, 34 N.Y.2d 379, 420-21 (1974) summarizes these principles as follows:

> In other words, so far as possible, the law attempts to secure to the injured party the benefit of his bargain, subject to the limitations that the injury -- whether it be losses suffered or gains prevented -- was foreseeable, and that the amount of damages claimed be measurable with a reasonable degree of certainty and, of course, adequately proven.

1. The Third-Party Lawsuits

¶ 32 Tano seeks $27,834.35 in damages for costs it incurred in defending lawsuits brought against it by some of its suppliers. Tano seeks the interest on the judgments as well as attorney's fees for the plaintiffs' attorneys in those suits. Tano argues that DPW's failure to close out the contract caused it to default on debts it owed to these third-parties, and as a result, incur additional expenses from defending against the lawsuits they brought. Tano's evidence consisted of a spreadsheet listing each lawsuit filed against it with the amounts owed, and various complaints filed by third-parties seeking payment. Tano argues that, but for DPW's failure to close out the contract, it would have had enough cash flow to pay these debts.

¶ 33 The trial court held that none of this evidence was sufficient to support a finding in Tano's favor. It found that the spreadsheet listing all of the lawsuits inadequately justified an award. It also found that the complaints Tano filed as evidence did not link DPW's default on the contract to its liability on the third-party lawsuits. None of the complaints explicitly or implicitly mentioned the contract.

¶ 34 The decision did not make an explicit statement that the third-party lawsuit damages were unforeseeable. Nevertheless, Tano's evidence merely listed the third-party lawsuits and did not explain how or why these damages were foreseeable to DPW. Also, none of this evidence adequately proved DPW caused these losses. The evidence was essentially a summary of Tano's legal bills stemming from

late payment on other construction contracts. Tano's evidence inadequately proved that DPW should be held liable for these costs. Finding that Tano presented insufficient evidence to support an award of damages for its costs stemming from the third-party lawsuits was not clear error.

2. The Sale of the Equipment

¶ 35 The next question is whether the award of $230,000 in consequential damages for the sale of the crane and ABM was proper. DPW maintains that Tano sold the equipment because of its poor financial health generally, and not its failure to close out the contract with Tano. Tano argues that the only reason it sold the equipment was that it had to pay bills that would have been paid with the $367,919.85 it was owed by DPW. The trial court found that the government starved Tano for cash, and as a result, was forced to sell the equipment at prices that were far below the market value. In reaching this decision, Tano's financial position in November 2002 and March 2003 was examined. The testimonies of Ackerman, and Tano's president, Bracken, that Tano did not want to sell either its crane or ABM, and that it would like the equipment back, was also accepted as true.

¶ 36 There was nothing inappropriate about examining Tano's financial position in November 2002 and March 2003 and coming to the conclusion that Tano's was in dire financial straits because DPW owed it $367,919.85. Furthermore, we have no reason to question the testimony of Bracken and Ackerman. The evidence supports a finding that DPW's failure to pay Tano caused it to sell its equipment, and that it was foreseeable to DPW that the failure to pay Tano such a large sum would force it to sell valuable assets in order to remain financially liquid. Therefore, the award of damages for the sale of the crane and ABM was not clear error.

3. Lost Profits

¶ 37 The final item of contested consequential damages is the $252,290 in lost profits. The trial court found it foreseeable that a company would be unable to bid on new projects if all of its payment and performance bonds were tied up with another project. As a result, the company would lose profits that it might otherwise earn. It found that this was the position Tano was in because the government did not release the bonds until 2005 when it was ordered to do so. It was therefore foreseeable to DPW that the failure to release Tano's bonds would cause it to be unable to obtain new work. It also found that a construction company needs cash flow in order to bid on new construction projects. The trial court found that Tano's cash flow was severely restricted because it was owed $367,919.85. It found that having such a large sum of money tied up would foreseeably result in Tano not being able to bid on new projects, and thus, the company would lose profits.

¶ 38 Additionally, it acknowledged that Tano was well-suited to bid on several construction projects during the years of 2002 to 2005. Tano presented evidence of many projects that were similar to projects it completed in the past. While the court stated that Tano would not have won all of the bids, it recognized

that Tano likely would have bid on and won some of the projects. It found that Tano's evidence regarding lost profits was sufficient to award damages. As a result, Tano was awarded $252,290 in lost profits.

¶ 39 The record supports these findings. The Restatement (Second) of Contracts § 351(3) holds that "[a] court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation." However, the record contained a significant amount of evidence that DPW's conduct directly and undeniably precluded Tano from bidding on and likely winning contracts that it was well-suited to perform. DPW's actions denied Tano necessary cash flow, and DPW tied up Tano's bonds for years without cause. Furthermore, it is foreseeable that a construction company would be unable to secure new work due to such circumstances. This evidence satisfies the requirements for an award of lost profits. Therefore, we find that the award of lost profits in light of the combined effects of inadequate cash flow and an inability to obtain new bonds was not clear error.

C. Breach of the Covenant of Good Faith and Fair Dealing

¶ 40 Whether the trial court improperly found that the government breached the implied covenant of good faith and fair dealing in the contract, and thereby caused Tano damage, is a mixed question of law and fact. This Court will review application of contract law, as it applies to the covenant of good faith and fair dealing, under the de novo standard of review and any findings based on extrinsic evidence under the clear error standard of review. *Camacho v. L & T Int'l Corp.*, 4 NMI 323, 326 (1996).

1. The Proposed Arbitration

¶ 41 According to the Restatement (Second) of Contracts § 205, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Additionally, Comment c, entitled "Good Faith in Negotiation," states that bad faith in negotiation is not within the purview of the section, and that "remedies for bad faith in the absence of [an] agreement are found in the law of torts or restitution." Moreover, *Steiner v. Ziegler-Tamura, Co.*, 138 Idaho 238, 242 (2002), held that "[t]he covenant requires the parties to perform, in good faith, the obligations required by their agreement, and a violation of the covenant occurs when either party violates, nullifies or significantly impairs any benefit of the contract." In this instance, unlike *Steiner* and the Restatement, there was no contract. Thus, even if the government's conduct amounted to bad faith, we will not provide Tano with monetary compensation because it brought suit under the incorrect legal theory.

¶ 42 By Tano's own admission in its brief, there was no finalized agreement to arbitrate. Tano created the arbitration documents on the basis of a conversation and an informal agreement to enter into binding arbitration. Tano's excerpts of record contained no documents that constitute a memorialization of this informal agreement. When the new assistant attorney general started his representation of DPW, he felt

that arbitration was not in the best interest of the Commonwealth. He was not under a contractual obligation to enter into arbitration. If Tano wanted to ensure that it would be compensated for its arbitration preparations should the government back out prematurely, it should have procured a formal arbitration agreement before expending money.

¶ 43 Additionally, Tano does not claim that the government committed a tort when it failed to enter into binding arbitration. It claims that the government breached the implied covenant of good faith and fair dealing as it exists in contract law. As the Restatement specifies, a cause of action for bad faith in negotiation exists in tort law. Neither the law of the Commonwealth nor the Restatement allow for a recovery of damages under a covenant of good faith and fair dealing theory for the breakdown of negotiations to enter into arbitration. Therefore, the trial court properly applied the applicable law and correctly refused to award Tano $11,000 in damages for its arbitration expenses.

2. The Sale of Equipment

¶ 44 As stated above, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205. The trial court found that the government breached the covenant of good faith and fair dealing when it failed to pay Tano what it was owed on the contract, and as a result, Tano was forced to sell its crane and ABM.[3] The government's conflict with Tano did not justify its stonewall tactics. The government simply dragged its feet and refused to pay or even to respond to Tano's good faith efforts to resolve the dispute.

¶ 45 Regarding these factual findings, it was foreseeable that withholding $367,919.85 from a construction company would result in consequential damages. This finding was based upon testimony and documentary evidence. Also, the reason Tano sold the crane and ABM was to cover debts that the government's payment would otherwise have satisfied. If Tano was paid what it was owed on the contract, then it would not have sold its equipment far below the fair market value in order to pay its bills. The trial court's determination that a breach of the covenant occurred is based on similar determinations as the award of consequential damages for the sale of the equipment; thus, the same reasoning applies. We, therefore, affirm the finding of a breach of the covenant of good faith and fair dealing for the equipment because the trial court neither committed clear error in its review of the evidence, nor incorrectly applied the law.

D. Time Delays

¶ 46 A finding by this Court that Tano was improperly awarded rain delay days would not impact Tano's liability for liquidated damages for completing the school late. DPW failed to appeal a sufficient number of delay days to hold Tano liable for liquidated damages. DPW appealed the award of sixteen rain

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[3] The trial court did not award damages for the breach as it relates to the equipment because such an award would be duplicitous in light of the consequential damages awarded for the sale of the equipment.

delay days. Even if the rain delay days were granted in error, enough total delays days were granted that a finding that the rain delay days were awarded in error would not change the ultimate award.[4] DPW's counsel conceded this claim at oral argument. Thus, in upholding the trial court's ruling on this issue, we decline to discuss whether the award of the sixteen delays days was erroneous.

E. The Burden of Proof for Mitigation

¶ 47 Tano contends that the trial court improperly placed the burden of proof regarding the reasonableness of it mitigations efforts upon it instead of DPW. Tano maintains that mitigation is an affirmative defense, and as a result, the party asserting it bears the burden of proof. Whether the non-breaching party to a contract bears the burden of proof to show that it reasonably attempted to mitigate standby costs is a question of law; questions of law are reviewed de novo. *Agulto v. Northern Marianas Inv. Group, Ltd.*, 4 NMI 7, 9 (1993).

¶ 48 In *Manglona v. Government of the Commonwealth of the Northern Mariana Islands*, 2005 MP 15, we considered a commercial landlord's mitigation obligations when a tenant breaches the lease. In *Manglona*, the government was the lessee, and it repudiated the lease and abandoned the premises. The plaintiff landlord continued to bill the government for the monthly rental payments. The Court held that the non-breaching landlord had a duty "to make reasonable efforts to mitigate his damages." *Id.*¶ 63. The Court found that this was the position adopted by a majority of United States jurisdictions. *Id.* The question from *Manglona* that is relevant to this appeal is our previous determination of which party bears the burden to establish that the landlord plaintiff made a reasonable effort to mitigate damages and find another tenant for the vacant property. We held that it was the breaching lessee's burden to prove that the non-breaching landlord acted unreasonably in attempting to mitigate the damages and re-lease the premises. *Id.* ¶ 60. Therefore, in the context of a commercial lease, it is the breaching party that bears the burden of proving that the non-breaching party unreasonably attempted to mitigate damages.

¶ 49 While we have not yet directly addressed which party bears the burden of proof regarding the reasonableness of mitigation efforts in the context of a construction contract, other jurisdictions hold that the burden rests with the breaching party. In *Prusky v. ReliaStar Life Insurance Company*, 532 F.3d 252, 258-59 (3rd Cir. 2008), the court stated that mitigation is an affirmative defense, and that the breaching party bears the burden of proof. To prove a failure to mitigate, the breaching party must show: "(1) what reasonable actions the plaintiff ought to have taken, (2) that those actions would have reduced the damages, and (3) the amount by which the damages would have been reduced." *Id.* (citing *Koppers Co.*,

[4] When Tano sought judicial review of Procurement's decision, it sought fourteen days for shipping delays, eighteen days for rain delays, and sixty-one days for wildlife permitting delays. The trial court granted all of these requests less two rain days. This result gave Tano ninety-three extra delay days. Accounting for the forty days that it was late in completing the project, Tano still enjoys fifty-three extra delay days. Therefore, a finding that the sixteen rain delays days were improperly awarded fails to impact the case because Tano would still enjoy a thirty-seven day buffer insulating it from pecuniary liability.

Inc. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1448 (3rd Cir. 1996)). Reasonableness is determined by examining all of the facts and circumstances of the case in light of the situation at the time the problem arose. *Id*. Damages not reasonably avoided will not be chargeable to the defendant. *Id*.

¶ 50 In *Chapple v. Big Bear Super Market Number 3*, 108 Cal. App. 3d 867, 876 (1980), a property owner sued a contractor for damages stemming from the improper installation of an air conditioner in a movie theater. The court found that the defendants failed to "carry their burden of proof to establish [that plaintiff] failed to mitigate [her] damages" by only demonstrating that she rejected one bid to fix the air conditioner. The case placed the burden of proof on the defendants who breached the construction contract to prove that the non-breaching plaintiff failed to reasonably mitigate damages stemming from the breach. Furthermore, *United States use of E & R Construction Company v. Guy H. James Construction*, 390 F. Supp. 1193, 1213 (M.D. Tenn. 1972) (affirmed without opinion in 489 F.2d 756 (6th Cir. 1974)), held that the burden of proof concerning the reasonableness of mitigation in a construction contract context rested with the breaching defendant.

¶ 51 We find that the breaching party bears the burden of proof in establishing the unreasonableness of the non-breaching party's mitigation efforts. This holding is also consistent with *Manglona*. The government breached its duty under the contract by failing to bring permanent utilities connections to the site on time. Tano was awarded delay days by Procurement for this delay, and that award was upheld at trial because the delays were outside of Tano's control. As a result, the trial court should have placed the burden of proof on DPW to establish the unreasonableness of Tano's mitigation efforts regarding the standby costs for this time period. Instead, it erroneously stated that Tano did not provide any evidence demonstrating that its mitigation attempts were reasonable, and therefore, refused to award standby costs. Failure to mitigate is an affirmative defense, so DPW bears the burden of proof in establishing as much. If DPW cannot prove that Tano's mitigation efforts were unreasonable, then Tano must be awarded standby costs for equipment and labor. Therefore, we reverse and remand, and direct the trial court to place the burden of proof on DPW regarding the reasonableness of Tano's mitigation efforts.

F. Interest Rate

¶ 52 DPW appeals the award of interest on the amounts it was ordered to pay Tano. DPW asserts that no interest is due, and in the alternative, that if interest is due the trial court applied the wrong rate. Whether the trial court properly awarded interest, and whether it correctly applied the right interest rate as specified in 4 CMC § 1817 and made applicable to the contract via 1 CMC § 2553(k) is a question of law. Questions of law are reviewed de novo. *Agulto v. Northern Marianas Inv. Group, Ltd.*, 4 NMI at 9.

¶ 53 DPW argues that it does not owe Tano interest on the unpaid portion of the contract because the amount owed is unascertainable. In *Kaiser Aluminum & Chemical Corporation v. Bonjorno*, 494 U.S. 827, 836 (1990), the United States Supreme Court held that interest is calculable on damages that are

ascertainable.[5] Ascertainable damages are damages that are supported by evidence. The extent of Tano's damages is supported by a voluminous evidentiary record. The trial court detailed every penny of Tano's losses. Any argument that Tano's damages are unascertainable is unsupported by the record. Thus, under *Kaiser*, interest would accrue on the sum DPW owed Tano.

¶ 54 In *Anselmo v. Sebastiani*, 26 P.2d 1, 5-6 (Cal. 1933), the California Supreme Court held that (1) interest is due on any liquidated amount, (2) an amount is liquidated when it is capable of being made certain by calculation, and (3) an amount is capable of being made certain by calculation when the data necessary for determining the amount due is supplied by the plaintiff to the defendant.[6] Interest is also due regardless of whether one of the parties disputes the amount owed. *Id*. Here, the record indicates that Tano provided substantial documentation detailing all of its losses to DPW numerous times over the course of several years. These records indicate that Tano's losses were certain and capable of definite calculation, and the trial court found as much. Therefore, even though DPW disputes the amount owed, under *Anselmo* interest accrues because the amount owed constitutes a liquidated sum.

¶ 55 Restatement (Second) of Contracts § 354(1) holds that interest is due on definite sums of money, and that interest is also due on unascertainable sums if justice so requires. Illustration three of Restatement § 354 explains that one party disputing an amount owed under a contract does not stop prejudgment interest from accruing once a court determines that the disputed amount is owed. Here, DPW owed Tano an ascertainable sum because Tano kept detailed records of all of the amounts that the government owed it on the contract. Tano provided all of these records to DPW before and at the start of the litigation. Tano's losses were precisely calculated. The Restatement supports Tano's position that DPS owes interest on the ascertainable sum even though they dispute the amount. Therefore, based upon *Kaiser*, *Anselmo*, and the Restatement, we find that DPW owes Tano interest on the unpaid disputed amount because Tano's damages are ascertainable.

¶ 56 Next, DPW argues in the alternative that the wrong interest rate was applied to the unpaid balance it owed Tano. When the parties entered into the contract in September 2000 the statutory interest rate that the government paid to private contractors for unpaid bills was fifteen percent as specified in 4 CMC § 1817 and made applicable to the contract by 1 CMC § 2553(k). Tano maintains that not applying a fifteen percent interest rate would constitute an impairment of contract in violation of Article I, Section 10, Clause 1 of the United States Constitution. At the time the contract was entered into 1 CMC § 2553(k) stated that:

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[5] *Bouten Constr. Co. v. H.F. Magnuson Co.*, 992 P.2d 751, 757 (Idaho 1999) (pre-judgment interest is due on amounts that are ascertainable).

[6] *Duale v. Mercedes-Benz USA, LLC*, 148 Cal. App. 4th 718, 729 (2007) (pre-judgment interest is owed on amounts that are reasonably capable of determination).

> The duties and responsibilities of the Department of Finance include, but are not limited to, the following:
>
> . . .
>
> (k) To promptly pay and disburse funds and payment for outstanding obligations, excluding tort obligations, owed by the Commonwealth to vendors, suppliers and other individuals whom the Commonwealth has a legal obligation to pay. The payment shall be authorized, or documented as to why payment cannot be authorized, no later than 30 days. *The unpaid balance of any indebtedness of the Commonwealth shall accrue interest equal to the amount set in 4 CMC § 1817 on the unpaid balance until the indebtedness, plus interest, is paid in full.* (emphasis added)

In the year 2000, 4 CMC § 1817 provided that:

> In addition to the penalty imposed by 4 CMC § 1815, *interest of 15 percent per annum* shall be imposed on all unpaid taxes, penalties, fees and charges imposed by this division. (emphasis added)

In 2005, however, 4 CMC § 1817 was amended and repealed the fifteen percent rate of interest.[7]

¶ 57 We apply our longstanding rule that the law in effect at the time of judgment controls its decisions. *Sablan v. Iginoef*, 1 NMI 190, 201 (1990).[8] The United States Supreme Court also follows this legal principle in interpreting federal law. In general, federal courts "apply the law in effect at the time it renders its decision." *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 273 (1994) (internal citations omitted). Exceptions exist to this principle because sometimes applying the law in effect at the time of judgment works an impermissible retroactive effect. *Id*. "The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Id*. at 271. We must therefore determine whether the repeal of the interest rate found in 4 CMC § 1817 constitutes an impairment of a contract.

¶ 58 The contract specified that disputes would be interpreted according to Commonwealth law, or where no Commonwealth law existed, pursuant to federal law. Under our law at the time the contract was entered into, DPW was obligated to pay a fifteen percent interest rate to Tano for any late payments. On January 1, 2005, however, the amended 4 CMC § 1817 became effective and repealed the fifteen percent interest rate found in 4 CMC § 1817. The law explicitly stated that it applied retroactively. DPW contends that since the Commonwealth's interest rate for late payments was repealed, the federal interest rate for late payment is applicable to the contract. Tano maintains that 1 CMC § 2553(k) and 4 CMC § 1817

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[7] Even though 4 CMC § 1817 in its current form makes no reference to an interest rate, 1 CMC § 2553(k) still notes that the applicable interest rate for late payments is found in 4 CMC § 1817. The legislature should address this statutory discrepancy.

[8] *Wacangan v. Arriola*, 3 CR 556, 560 (D. NMI App. Div. 1988) (unless a manifest injustice would result, a reviewing court applies the law as it exists at the time of its decision).

became part of the contract, and that any attempt to substitute a different interest rate would constitute a violation of the contracts clause of the United States Constitution.

¶ 59 The Covenant[9] defines the legal relationship between the Commonwealth and the United States. 48 U.S.C. § 1801. The Covenant states that "the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: . . . Article I, Section 10, Clause 1 . . ." Covenant § 501(a) (48 U.S.C. § 1801). Therefore, U.S. Supreme Court cases interpreting this clause are binding precedent upon this Court.

¶ 60 Article I, Section 10, Clause 1 of the United States Constitution, commonly referred to as the "contracts clause," holds that "no state shall enter into any . . . Law impairing the Obligation of Contracts." Despite this rigid language, "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934). The contract clause does not "require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977). As a preliminary matter a court must determine whether a contract exists and whether there has been an impairment of the contract. *Id*. at 17. The central inquiry though is "whether the impairment is substantial." *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). In determining whether an impairment is substantial, a court should consider: (1) whether the parties objectively relied on the abridged term[10] or if the abridged term substantially induced the parties to enter into the contract;[11] (2) whether the statute abolished the contract or "merely modified" it;[12] and (3) whether the abridged right was the "central undertaking" or "primary consideration" of the parties.[13] If a statute substantially impairs a state's own financial obligations, the "impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." *U.S. Trust Co.*, 431 U.S. at 26.[14] In these cases of substantial impairment to a state's financial obligations,

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[9] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. § 1801 note (1976).

[10] *Allied Structural Steel Co.*, 438 U.S. at 246.

[11] *City of El Paso v. Simmons*, 379 U.S. 497, 514 (1965).

[12] *U.S. Trust Co.*, 431 U.S. at 19.

[13] *City of El Paso*, 379 U.S. at 514; *See generally City of Charleston v. Public Service Commission of West Virginia*, 57 F.3d 385, 392-93 (4th Cir. 1995) (discussing factors to consider in determining whether impairment is substantial).

[14] *Transport Workers Union of America, Local 290 v. Southeastern Pennsylvania Transportation Authority*, 145 F.3d 619, 621 (3rd Cir. 1998) ("if it is determined that a substantial impairment of a contractual relationship has occurred, the court must further inquire whether the law at issue has a legitimate and important public purpose and whether the adjustment of the rights of the parties to the contractual relationship was reasonable and appropriate in

"complete deference to legislative assessment of reasonableness and necessity [are] not appropriate because the State's self-interest is at stake."[15] *Id*. at 26.

¶ 61 There is no dispute that a contract existed between Tano and DPW. Both parties also agree that 1 CMC § 2553(k) and 4 CMC § 1817 were applicable to the contract when it was entered into in 2000. An impairment of the contract also occurred because a statutory penalty provision changed. The question is whether the repeal of the interest rate in 4 CMC § 1817 constituted a substantial impairment of the contract between DPW and Tano. In determining whether a substantial impairment occurred, we first consider whether the parties objectively relied on the abridged term[16] or if the abridged term substantially induced the parties to enter into the contract.[17] In *City of El Paso*, a state statute provided for the forfeiture of real estate if a purchaser failed to pay interest on its contract to purchase public land. The statute allowed, however, the reinstatement of the property once the owner made the interest payment. Originally, the period for reinstatement was unlimited, but the legislature amended the statute and set a five-year time limit on the right of reinstatement. The Court stated "[w]e do not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of a defeasible right to reinstatement . . . ." 379 U.S. at 514. The Court upheld the statute amending the period of reinstatement as not impairing an obligation of contract.

¶ 62 Here, the interest rate works as a penalty provision to induce the government to promptly pay its private creditors. Short of a statement in the contract expressly indicating that the party is entering into the contract because of the interest rate applicable to late payments, the interest rate provision is not the type of term that is capable of causing objective reliance. Both parties were involved in drafting the contract, and Tano could have explicitly stated that a fifteen percent interest rate would apply to late payments; it failed to include such a provision. There is also no evidence that the interest rate induced Tano to enter into the contract. While Tano maintains that it knew it would be paid a fifteen percent interest rate in the event that the government was late in making payments, there is no objective evidence indicating this was actually the case. Furthermore, we find it highly unlikely that Tano would have refused to enter into the contract if it knew that the interest rate for late payments would be the federal rate instead of the

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light of that purpose"). *Catawba Indian Tribe of South Carolina v. City of Rock Hill*, 501 F.3d 368, 371 (4th Cir. 2007) (finding that laws that substantially impair contractual obligations must serve a legitimate public purpose).

[15] Such deference will not be given when a statute reduces a state's obligations on a financial contract because a state could always find a legitimate public purpose for spending revenue instead of paying its private creditors. *U.S. Trust Co.*, 431 U.S. at 26. *Cf. Murray v. Charleston*, 96 U.S. 432, 443-446 (1878) (city may not enact tax that effectively reduces the interest paid on municipal bonds from six percent to four percent).

[16] *Allied Structural Steel Co.*, 438 U.S. at 246.

[17] *City of El Paso*, 379 U.S. at 514.

Commonwealth's former rate. Thus, we conclude that the fifteen percent interest rate was neither objectively relied upon nor induced the parties to enter into the contract.

¶ 63 We must also consider whether the statute abolished the contract or "merely modified" it.[18] In *U.S. Trust Company*, an amendment to state law totally eliminated the state's prior promise that Port Authority revenues would be pledged to pay bondholders and, expect for specified instances, not applied to finance future mass transit infrastructure. 431 U.S. at 19. As a result, the bonds' security interest was effectively destroyed. The United States Supreme Court considered this action akin to abolishing the contract. *Id*. In *City of Charleston*, the state allowed cities and public utilities to issue sewer bonds, and as a security on those bonds, owners who did not pay their sewer charges could have a lien placed on their property. Later, the legislature amended the state law and forbade the cities and public utilities from placing liens on delinquent owners' property. The Court upheld the amendment in part on the grounds that one of the bondholders' security interests was merely modified, and that unlike *U.S. Trust Company*, the bonds' overall security was still intact because other means for collecting delinquent charges still existed. 57 F.3d at 393.

¶ 64 The amendment to 4 CMC § 1817 eliminated the statutory interest rate for late payments. It was replaced with the federal interest rate for this contract. The repeal of the statute did not abolish DPW's obligation to pay interest on the contract, it just modified the interest rate. Like the bondholders in *City of Charleston*, Tano's right to interest was not abolished by the repeal of the interest rate provision; it was merely modified. Therefore, the repeal of the interest rate in 4 CMC § 1817 constitutes a modification of the contract.

¶ 65 We must next determine whether the abridged term was the "central undertaking" or "primary consideration" of the parties.[19] In *Energy Reserve Group, Inc. v. Kansas Power & Light Company*, 459 U.S. 400, 415-16 (1983), the state's elimination of a price escalator clause in a natural gas contract was not a substantial impairment, in part, because the price escalator term was not the central undertaking of the parties. The central undertaking of the contract was the sale and purchase of natural gas. Similarly, in *City of El Paso*, 379 U.S. at 514, the Court reasoned that the statute changing the time period for reclamation from an unlimited length of time to a five year period "was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking."

¶ 66 The central undertaking of the contract between DPW and Tano was for the construction of a school. In 2000, Tano and other contractors submitted bids for the construction contract. The interest rate for late payments was an ancillary aspect of the contract. The repeal of the interest rate did not affect the

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[18] *U.S. Trust Co.*, 431 U.S. at 19.

[19] *City of El Paso*, 379 U.S. at 514.

subject matter, scope, or price of the contract, and therefore did not affect the central undertaking of the contract.[20] The primary consideration of the contract was the school, not the applicable interest rate in the event of a late payment. We find it highly unlikely that a fifteen percent interest rate for late payments was one of Tano's primary considerations in deciding to bid on the contract. We are confident that if the interest rate applicable to the contract in 2000 was the federal rate, like it is today, Tano still would have bid on the contract. Thus, the interest rate found in 4 CMC § 1817 was neither a central undertaking, nor a primary consideration of the parties. Therefore, the repeal of the fifteen percent interest rate did not operate as a substantial impairment of the contract between DPW and Tano. Since the impairment is not substantial, we will not consider whether the amendment to 4 CMC § 1817 was reasonable and necessary to serve a legitimate public purpose.[21]

¶ 67 The repeal of the interest rate does not offend the contracts clause of the United States Constitution. As amended, 4 CMC § 1817 was the applicable law before the cause of action was filed and at the time of decision. The statute also explicitly stated that it was to apply retroactively. This jurisdiction applies the law as it stands at the date of judgment to a case. *Sablan*, 1 NMI at 201. The contract between Tano and DPW stated that Commonwealth law would control the contract, and where there was no applicable local law, federal law would control the interpretation of the contract. Therefore, the trial court committed error in not applying the applicable federal interest rate. In light of the parties' contractual agreement, we remand this issue to trial court to determine and apply the correct federal interest rate owed for late payments on contracts.

III

¶ 68 For the foregoing reasons, we find that the trial court had subject matter jurisdiction to hear Tano's breach of contract and breach of the implied covenant of good faith and fair dealing claims. We further hold that the trial court properly awarded some consequential damages and not others, correctly ruled regarding Tano's breach of the implied covenant of good faith and fair dealing claim, and correctly awarded delay days. We find, however, that error was committed in placing the burden of proof regarding the mitigation of standby damages on Tano, and that the wrong interest rate was applied to Tano's damage awards. Therefore, we AFFIRM in part, REVERSE in part, and REMAND this matter to the trial court to enter judgment consistent with this opinion.

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[20] *Cf. Funkhouser v. J. B. Preston Co.*, 290 U.S. 163, 167 (1933) (upholding a statutory change in the rate of interest owed on a contract between two private parties because a change in the statutory interest rate was within the province of the state legislature because the statute concerned a remedy and not an obligation of contract).

[21] *Transport Workers Union of America, Local 290*, 145 F.3d at 621 (if a substantial impairment has occurred, a court must then consider whether the law has a legitimate and important public purpose). *Catawba Indian Tribe of South Carolina*, 501 F.3d at 371 (finding that laws that substantially impair contractual obligations must serve a legitimate public purpose).

SO ORDERED this 31st day of December 2009.

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MIGUEL S. DEMAPAN
Chief Justice

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ALEXANDRO C. CASTRO
Associate Justice

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JOHN A. MANGLONA
Associate Justice