

IN THE COURT OF CLAIMS OF OHIO

2014 APR 17 PM 3:03

TRANSAMERICA BUILDING
CO., INC.

Plaintiff,

v.

OHIO SCHOOL FACILITIES
COMMISSION

Defendant.

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Case No. 2013-00349

ORIGINAL

Judge Patrick McGrath

Referee Samuel Wampler

**DEFENDANT'S OBJECTIONS TO
THE ORDER OF THE REFEREE DENYING
DEFENDANT'S MOTION TO QUASH
AND MOTION FOR PROTECTIVE ORDER**

Defendant filed a Motion for Protective Order and Motion to Quash the subpoenas of its two former Executive Directors who were no longer Executive Directors of the Ohio School Facilities Commission (OSFC) while the construction of the Deaf and Blind school was occurring. Thus, they had no knowledge of Plaintiff's claims that arose during the course of construction.

Initially, Plaintiff requested a referee hear its construction claims and make a report and recommendation to the Court pursuant to R.C. 2743.03(C)(3). It was that referee who denied Defendant's motion for protection from these depositions.

Defendant objects to referees who have limited statutory authority to hear a construction claim from deciding discovery disputes. These referees do not have the authority of a magistrate. Although R.C. 2743.03(C)(3) talks about proceedings before a construction referee following the procedure of Civ. R. 53, it does not authorize these construction referees to sit as

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magistrates. Thus, it would only be a magistrate or judge who could make decisions regarding discovery disputes and other judicial proceedings of the case.

In any event, at best, the referee can only make a report and recommendation, much like a magistrate. The parties can object which the Defendant does as follows.

Plaintiff couldn't help but argue the merits of their case in their memorandum contra. They argue that they have been damaged by a lack of a "conformed set of plans." First, there was no contractual obligation to provide the Plaintiff with a "conformed set of plans" that captured changes made post-bid. Secondly, such a "conformed set of plans" was available in the construction manager's trailer on site. Finally, there was nothing preventing Plaintiff from putting together a "conformed set of plans" the same way that the construction manager did.

In any event, these "conformed set of plans" are not relevant to Defendant's Motion. Neither of the two former Executive Directors were present when these "conformed set of plans" became an issue and when the Plaintiff claimed they were damaged by not having such plans available to them – even though they weren't.

Plaintiff has failed to argue one word or site one exhibit showing how either of these two former Executive Directors have any relevant knowledge of Plaintiff's claims. They site to the fact that one of the former Executive Directors was around for the selection of the architect and construction manager and the other one was around when the decision was made not to go forward with the PLA (Project Labor Agreement). This has nothing to do with Plaintiff's claims. It may matter how the architect or CM responded to Plaintiff's claims, but it doesn't matter how they were selected in the first place – and their response to Plaintiff's claims would have come after these two former Executive Directors had left the OSFC.

Likewise, it makes no difference how the budget was arrived at (also referenced in the exhibits attached to Plaintiff's Memo Contra) for this project which included more than Plaintiff's scope of work. The funds were certified for Plaintiff's contract and if Plaintiff proves that they are entitled to additional funds then those funds will be found to pay any judgment.¹

Plaintiff claims that Defendant has cited no authority to support their Motions. That is not true. Defendant has cited to Ohio Civ.R. 26(B)(1) – all the authority it needs - which states that the Plaintiff is entitled to discover that which is relevant and non-privileged. Defendant is entitled to a protective order pursuant to Ohio Civ.R. 23(C) for protection from Plaintiff's attempt to depose two former Executive Directors of the OSFC who were not present when the Plaintiff did the work which they claim entitled them to additional money beyond their lump sum, low bid contract.

The referee's decision also indicated that defense counsel did not satisfy the rules with regard to Motions for Protective Order and Motions to Quash Subpoenas with regard to the efforts that were made to resolve this discovery dispute. Plaintiff had not raised this in their memo contra. Defendant accepts that it could have been clearer in its original motion. However, its original motion did articulate that Defense counsel had asked Plaintiff's counsel what relevant, non-privileged information these two former Executive Directors had with regard to Plaintiff's claims and the only thing that Plaintiff's counsel could articulate was the recitation of the email that Defendant attached to its original Motion for Protection. To the extent that a certification is required with regard to Defendant's Motion to Quash these subpoenas, it is hereby attached so that the Court can deal with the merits of Defendant's Motion to Quash.

¹ One thing is certain – Plaintiff is not entitled to double their original lump sum bid which is what they seek to do with their claim.

Alternatively, Defendant requests that the deposition of these former Executive Directors of the OSFC be postponed until after the current Executive Director is deposed (May 12th) and it is determined what questions he couldn't answer that can only be answered by these former Executive Directors.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General



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COUNSEL FOR DEFENDANT
OHIO SCHOOL FACILITIES COMMISSION

CERTIFICATION

STATE OF OHIO)
)
FRANKLIN COUNTY) SS:

Now comes the undersigned, counsel for the Defendant, who hereby certifies that he had an in person conversation with Plaintiff's counsel as to what relevant information the two former Executive Directors of the Ohio School Facilities Commission had with regard to Plaintiff's claim and the only articulated justification from Plaintiff's counsel for the taking of these two depositions was reference to the email which defense counsel attached to its Motion for Protective Order and Motion to Quash Subpoenas.

April 17, 2014
Date

W.C. Becker
WILLIAM C. BECKER
Principal Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant's Objections to the Order of the Referee Denying Defendant's Motion to Quash and Motion for Protective Order was sent by electronic mail and regular U.S. Mail, postage prepaid, this 17 day of April, 2014, to:

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