

IN THE COURT OF CLAIMS OF OHIO

2014 APR 30 PM 3:34

TRANSAMERICA BUILDING )  
 COMPANY, INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 OHIO SCHOOL FACILITIES )  
 COMMISSION, )  
 )  
 Defendant. )

Case No. 2013-00349

Judge McGrath

Referee Wampler

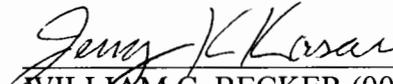
**ORIGINAL**

**DEFENDANT OHIO SCHOOL FACILITIES COMMISSION'S MOTION FOR SUMMARY JUDGMENT**

Defendant the Ohio School Facilities Commission ("OSFC") respectfully moves the Court, pursuant to Ohio Rule of Civil Procedure 56(C), for an order granting summary judgment in its favor. The reasons supporting this Motion are fully explained in the accompanying Memorandum in Support.

Respectfully submitted,

MIKE DeWINE  
Ohio Attorney General

  
WILLIAM C. BECKER (0013476)

CRAIG BARCLAY (0023041)

JERRY KASAI (0019905)

Assistant Attorneys General

Court of Claims Defense

150 East Gay Street, 18th Floor

Columbus, OH 43215-3130

Telephone: (614) 466-7447

Facsimile: (614) 644-9185

Email: [william.becker@ohioattorneygeneral.gov](mailto:william.becker@ohioattorneygeneral.gov)

[William.becker@ohioattorneygeneral.gov](mailto:William.becker@ohioattorneygeneral.gov)

[Craig.barclay@ohioattorneygeneral.gov](mailto:Craig.barclay@ohioattorneygeneral.gov)

[Jerry.kasai@ohioattorneygeneral.gov](mailto:Jerry.kasai@ohioattorneygeneral.gov)

Attorneys for Defendant OSFC

**ON COMPUTER**

## MEMORANDUM IN SUPPORT

### I. INTRODUCTION AND FACTS

This matter concerns the failure of a contractor on a public construction project, to not only timely file its claim within the statute of limitations, but also timely notice its claim for extra compensation, pursuant to the requirements of the contractual dispute resolution process. As the Tenth District Court of Appeals has made clear, the failure to properly follow the contractual dispute resolution process for presenting a claim constitutes a waiver of the claim. *Cleveland Constr., Inc. v. Kent State Univ.* 10<sup>th</sup> Dist. No. 09AP-822, 2010-Ohio-2906; *Stanley Miller Constr. Co. v. Ohio School Facilities Comm.*, 10<sup>th</sup> Dist. Nos. 10AP-298, 10AP-299, 10AP-432, 2010-Ohio-6397. For that reason, Plaintiff has waived all its claims for additional compensation in this matter.

Additionally, Plaintiff's expert witnesses unequivocally fail to establish that Defendant OSFC was responsible for the causation of any damages which may have been incurred by Plaintiff Transamerica Building Company, Inc. ("TA").

Finally, claims for fraud against the State are not recognized in Ohio.

The relevant facts for purposes of this Motion are that, Defendant OSFC, entered into a contract with Plaintiff Transamerica Building Company, Inc. ("TA"), on or about December 1, 2010, to perform certain general trades work ("Contract") for the construction of the Residential Portion for the new Ohio State School for the Blind and Ohio School for the Deaf ("Project.") Amended Complaint at ¶s 1, 14, 15. The Project utilized the services of Lend Lease, Inc. ("CM") to act as the construction manager in

providing management and administration services for the Project and SHP Leading Design (“AE”) as the architect for the Project. *Id.* at ¶s 18, 23.

Plaintiff has alleged that it was disrupted and delayed by Defendant, and its agents, through a lack, or failure to:

- a. coordinate of the work;
- b. design that properly and accurately addressed jobsite conditions;
- c. provide plans and specifications that were full and accurate;
- d. provide plans and specifications that included all items necessary to complete the work;
- e. provide timely responses to RFIs;
- f. properly schedule, coordinate and sequence the Project; and
- g. properly administer the Project.

Amended Complaint at ¶ 29. According to the Complaint, Plaintiff incurred damage totaling \$3 million as a result of the breaches of Defendant. *Id.* at ¶s 64, 68, 72, 108.

Plaintiff first gave notice of its claim on February 17, 2011, in a letter signed by Josh Wilhelm, TA’s Project Manager. Exhibit A, attached. In that Notice Letter, Mr. Wilhelm stated:

Per your conversation yesterday with Bill Koniewich and as we discussed at the previous progress meetings (January 24<sup>th</sup> and February 7<sup>th</sup>) we have not yet received the revised/corrected/updated drawings for use on the OSD&B project. These drawings have been pending for 6+ weeks. It has impeded our ability to produce accurate shop drawings, complicated the submittal process, and resulted in our RFI answers being tied to the new drawings. Additionally, we are increasingly concerned that materials anticipated to be ordered and delivered per the Construction Schedule will be late and may subject us to costs due to material escalation. Ultimately, the lack of drawings will prevent us from performing as required. Thus **per section 8.1.1 of the contract** we are required to notify you, and the Architect, (Through you); that our ability to execute the project per the contract schedule is being hindered. (Emphasis added.)

*Id.* See also, Amended Complaint at ¶ 33.

On March 8, 2012, over a year subsequent to its Article 8 notice of claim, Plaintiff TA submitted its claim document to OSFC. Attached as Exhibit B (Exhibit 42 from

Deposition of Josh Wilhelm). Plaintiff's claim was in the amount of \$2.17 million and also sought the liquidated damage amount of \$801,755 it claimed was being wrongfully withheld. *Id.* On July 9, 2012, a claim meeting was held with TA pursuant to Article 8 of the General Conditions of Contract. Exhibit C. On September 5, 2012, the CM denied TA's claim. Exhibit C. On September 18, 2012, TA appealed the denial of its claim. Exhibit D. On May 3, 2013, a mediation was held between Defendant OSFC and TA in lieu of the appeal under Article 8 of the GC. On June 14, 2013, Plaintiff filed its Complaint in this matter. On August 1, 2013, Plaintiff filed an Amended Complaint.

## **II. LAW AND ARGUMENT**

### **A. Standard of Review**

Civ.R. 56(C) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Mitchell v. Ross*, 14 Ohio App. 3d 75, (8<sup>th</sup> Dist. 1984).

In applying Civ.R. 56, the Ohio Supreme Court has consistently held that, before such a motion can be granted, the moving party must show that: (1) there is no genuine issue of fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the non-moving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Mootispaw*

*v. Eckstein*, 76 Ohio St. 3d 383, 667 N.E.2d 1197 (1996); *Welco Industries, Inc. v. Applied Cas.*, 67 Ohio St. 3d 344, 617 N.E.2d 1129 (1993).

**B. Plaintiff Filed This Matter Outside of the Statute of Limitations Period**

The applicable statute of limitations for civil actions against the State is two years from the accrual of the action. R.C. 2743.16(A) provides:

Subject to division (B) of this section, civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties.

At the latest, Plaintiff's claim accrued on February 17, 2011, when it filed its Notice of Claim with the Defendant. Exhibit A. Two years from February 17, 2011, would be February 17, 2013. This action was filed on June 14, 2013, more than two years subsequent from Notice of the Claim.<sup>1</sup> For this reason, Plaintiff has failed to meet the two year statute of limitations applicable to claims against the State.

**C. Plaintiff Has Waived Its Claims By Failing To Follow the Dispute Resolution Process Set Forth in Article 8 of the General Conditions of Contract**

**1. Applicable Law and Contract Provisions**

Article 8 of the General Conditions of Contract ("GC"), entitled "Dispute Resolution Process" addresses the process a contractor is required to follow to make a claim for additional compensation. GC 8.1.1 states "the Contractor shall initiate every Claim by giving written notice of the Claim to the Architect, through the Construction Manager, within ten (10) days after the occurrence of the event giving rise to the Claim."

---

<sup>1</sup> Even if Plaintiff had followed the required GC Article 8 process, these claims would still be outside the statute of limitations.

Exhibit E. Pursuant to GC 8.2 and 8.3, the contractor is required to certify and substantiate the claim. *Id.* GC 8.2.1 provides:

The Contractor **shall certify each Claim within thirty (30) days after providing written notice** of the Claim under GC paragraph 8.1 or before Contract completion, whichever is earlier, by providing the notarized certification specified in GC subparagraph 8.2.1.1, signed and dated by the Contractor: (Emphasis added).

Likewise, GC 8.3 provides that the claim must be substantiated within 30 days of the written notice of the claim. Both of those sub-divisions contain the language that the “the Contractor’s failure to comply with the requirements of this GC paragraph ... shall constitute an irrevocable waiver of any related Claim.” *Id.*

GC 8.8 addresses the job site level meeting with the CM and the Architect. *Id.* If there is no agreement on the claim, then the CM is to issue a written analysis and recommendation of the claim under GC 8.3.3. *Id.* If the contractor is not satisfied with the recommendation of the CM, it has the opportunity to appeal the decision to the OSFC under GC 8.9. *Id.* The OSFC’s determination of the appeal on the claim is the final disposition under the contractual process. *Id.* at GC 8.9.3. R.C. 153.12(B) provides that “...after administrative remedies provided in the contract and any alternative dispute resolution... are exhausted, the contractor may bring an action in the court of claims...” Only after the contractor has exhausted the contractual remedies for a claim can it file suit.

It is well established law that contractual provisions concerning a dispute are enforceable, and the failure of a contractor to follow the express provisions of GC Article 8 results in the waiver of any claim. “[W]hen a contract has an express provision governing a dispute, that provision will be applied; the court will not rewrite the contract to achieve a more equitable result.” *Dugan & Myers Constr. Co., Inc.v. Ohio Dept. of*

*Adm. Servs.*, 113 Ohio St. 3d 226, 2007-Ohio-1687, ¶39, citing *Ebenisterie BeauboisLtee v. Marous Bros. Constr., Inc.*, (October 17, 2002) N.D. Ohio E.D. No. 02CV985, 2002 WL 32818011. With respect to this language contained within a public university’s similar version of Article 8, the 10<sup>th</sup> Appellate District stated:

[C]ourts cannot decide cases of contractual interpretation on the basis of what is just or equitable. *N. Buckeye Edn. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St. 3d 188, 2004-Ohio-4886, ¶ 20. See also, *Dugan & Meyers Constr. Co. v. Ohio Dept. of Adm. Servs.*, 113 Ohio St. 3d 226, 2007-Ohio-1687, ¶29 (holding that a contract “does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties thereto” and that “it is not the province of the courts to relieve parties of improvident contracts”). When a contract is unambiguous, a court must simply apply the language as written. *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St. 3d 387, 2007-Ohio-5026¶ 18]. Consequently, we conclude that the trial court erred when it, in effect, deleted the second sentence of Section 8.1.1 from the parties’ contract.

*Cleveland Constr., Inc. v. Kent State Univ*, 10<sup>th</sup> Dist. No. 09AP-822, 2010-Ohio-2906, ¶ 31. The second sentence referred to in the above quote states “[t]o the fullest extent permitted by law, failure of the Contractor to timely provide such notice shall constitute a waiver by the Contractor of any claim for additional compensation or for mitigation of Liquidated Damages.” *Id.* at ¶ 27, emphasis added. See also, *Stanley Miller Constr. Co. v. Ohio School Facilities Comm.* 10<sup>th</sup> Dist. App. Nos. 10AP-298, 10AP-299, 10AP-432, 10AP-433, 2010-Ohio-6397.

This Court has followed the mandates of the appellate court that the provisions of GC Article 8 must be followed, and failure to do results in a waiver by the contractor for any claim. On the remand of the *Stanley Miller* case, this Court stated, “putting the merits of Stanley Miller’s claim aside, the court finds that Stanley Miller waived its claim to additional cold weather costs inasmuch as it did not provide timely notice **and** contemporaneous statement of damages.” *Stanley Miller Constr. Co. v. State of Ohio, et*

*al.*, Ct. of Cl. No. 2006-05632-PR at pages 10-11, emphasis added.<sup>2</sup> As is apparent, this Court has followed the mandates of the Court of Appeals and required that contractors follow the procedures as set out in GC Article 8.

**2. Plaintiff's Failed To Submit Its Certified Claim Within 30 Days of Its Notice of Claim**

Plaintiff failed to comply with any provision of GC Article 8 on its claim in this matter. Plaintiff's notice of claim, required by GC 8.1.1 was submitted on February 17, 2011. Exhibit A. Plaintiff was required to submit the certified claim within 30 days of that date, or by March 19, 2011. GC 8.1.2. Plaintiff did not submit a certified claim until March 8, 2012, more than a year after it first noticed the claim for additional compensation. Exhibit B.

For this reason alone, the entirety of Plaintiff's claim should be dismissed for its failure to timely follow the process set forth in GC Article 8.<sup>3</sup>

**3. Plaintiff Failed to Timely Submit Notice of Its Claim**

On March 1, 2012, Plaintiff submitted an additional notice essentially with the same claims contained within its first notice. Exhibit F. It then submitted its certified claim on March 8, 2012. In that Plaintiff had previously submitted its notice of claim under GC 8.1.1 in February of 2011, this claim is untimely also. If Plaintiff believes that it could restart the 30 day time period for the filing of its certified claim by merely providing a new notice of claim in March of 2012 for a claim that dates back to February of 2011, it is mistaken. As stated in GC 8.1.1, Plaintiff was required to give notice of its claim within 10 days of the occurrence giving rise to the claim. Plaintiff even admits in

---

<sup>2</sup> This Court also found that the owners participating in a meeting or otherwise participating in Article 8 procedures did not constitute a waiver of the requirements of Article 8 by the owners.

<sup>3</sup> At the very least, any matters noticed in the February 17, 2011, Notice of Claim letter have been waived.

its claim that it has “repeatedly provided written notice” of the claims. *Id.* Repeating a notice without filing the claim within 30 days does not qualify as following the requirements of the contract. For this reason, if it is Plaintiff’s argument that it can re-give a notice on its claim to get within the 30 day requirement of GC 8.1.2 and 8.1.3, Plaintiff has failed to give notice within the required 10 days of the occurrence of the vent as required under GC 8.1.1.

In short, Plaintiff failed to follow the contractual dispute resolution process for any of its claims, and in fact, did not meet any of the requirements for any of the claims that are included within its Complaint. There are no facts Plaintiff can put forward that can dispute the timelines of its claims on the Project. For the above stated reasons Defendant OSFC requests that judgment be rendered in its favor, in that Plaintiff has waived any claim by its failure to follow the contractual dispute resolution process.

**D. OSFC Is Entitled To Immunity For Any Allegations Of Fraud.**

Counts Four and Five of Plaintiff’s First Amended Complaint are for fraud and fraud in the inducement. To establish a claim of fraud, Plaintiff must prove (1) a representation (or concealment of a fact when there is a duty to disclose); (2) that is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; and (4) with intent to mislead another into relying upon it; (5) justifiable reliance; and (6) resulting injury proximately caused by the reliance. *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St. 3d 69, 73, 491 N.E.2d 1101 (1986).

Plaintiff specifically alleges that OSFC and/or its agents made false and material representations concerning the state of the plans, specifications and building permits.

Amended Complaint at ¶s 74, 86, 94. These allegations asserted by Plaintiff are allegations of fraud which are barred as against the State of Ohio.

There are no exceptions to immunity for intentional torts, such as fraud, that would apply to governmental entities like OSFC. *See*, R.C. 2744.02(B)(5); *Wilson v. Stark Cty. Dept. of Human Serv.*, 70 Ohio St.3d 450, 452, 1994 Ohio 394, 639 N.E.2d 105 (1994); *Hubbard, et al. v. Canton City School Bd. of Educ.*, 97 Ohio St. 3d 451, 2002 Ohio 6718, 780 N.E.2d 543, ¶8. As such, OSFC cannot, as a matter of law, be primarily or secondarily liable to Plaintiff for any claims of fraud. This proposition only makes sense as a state agency hold only such authority as conferred by statute. *Burger Brewing Company v. Thomas*, 154 Ohio St. 497, 96 N.E. 2d 593 (1951). As such there is not any, nor should there be, any authority which authorizes the State to commit fraud and the State cannot be liable for alleged fraud. Any actions of alleged fraud would be committed by the individuals outside their scope of authority, making those individuals personally liable for such cause of action, and not the State.

Furthermore, a principal cannot be held liable for the intentional acts of its agent when those acts are outside the scope of the agency. *Groob v. Key Bank*, 108 Ohio St. 3d 348, 2006 Ohio 1189, 843 N.E.2d 1170, ¶42 (citations omitted). The CM's or AE's agency is limited by its contract with OSFC. That contract does not in any way provide either the CM or AE the authority to intentionally withhold information from or fraudulently misrepresent facts material to a contractor. Accordingly, as a matter of law, OSFC is entitled to summary judgment on Plaintiff's allegations of fraud and fraud in the inducement contained in Counts Four and Five of the Amended Complaint.

**E. Plaintiff's Is Unable to Prove Causation For Its Alleged Damages**

A breach of contract occurs when a party demonstrates the existence of a binding contract or agreement; the non-breaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the non-breaching party suffered damages as a result of the breach. *Garofalo v. Chicago Title Ins. Co.*, 104 Ohio App.3d 95, 108, 661 N.E.2d 218 (1995). Plaintiff is unable to demonstrate that any alleged breach of contract or negligent actions-which Defendant OSFC denies occurred-were the cause of its alleged damages.

Plaintiff has proffered two expert witnesses to present its claims, Donald P. McCarthy and Lee E. Martin. Both witnesses submitted reports detailing all of the various actions which the AE and CM on the Project did which allegedly either did not meet their respective standard of care or served to breach the contract between TA and OSFC. (Deposition of Donald P. McCarthy, Deposition Exhibit A; Deposition of Lee Martin, Deposition Exhibit B.) Both reports contain a laundry list of the actions of the CM and AE which allegedly caused disruption and impact to the Project, however neither report makes any casual connection between the alleged impacts and damages.

With respect to any specific casual connection between the alleged breaches, Mr. Martin specified in his deposition that he understood that it was within Mr. McCarthy's scope of expert testimony to determine the casual connection between any breaches and the damages associated with those breaches. With respect to the deficiencies in the plans and specifications, Mr. Martin testified:

**Q.** (By Mr. Becker) Okay. Have you done anything to try to analyze how much of that delay is attributed to what you believe were inadequacies in the plans and specifications?

**A. (By Mr. Martin) No, there again I think a lot of that was Mr. McCarthy's task.**

Exhibit G, excerpt of deposition transcript of Lee Martin at 42.

With regard to the alleged deficiencies of the CM as set forth by Mr. Martin, he again verified that he did not attempt to show the amount or cause of any damages.

**Q.** Okay. And a similar question with regard to the construction manager as it relates to the architect, you've done nothing to determine as far as TransAmerica's claim goes what damages you believe are attributable to what you consider deficiencies in the construction manager's performance; is that correct?

**A. That's correct, I have not attempted to allocate dollar amounts to the various parties.**

*Id.* at 48.

Likewise in his deposition, Mr. McCarthy confirmed that he also was unable to testify as to whether the claimed damages of Plaintiff related at all to the alleged breaches committed by the AE or CM.

**Q.** (By Mr. Becker) All right. Let me—we'll take a break here shortly, but let me wrap up another line of questioning here. If you look at the damages spreadsheet or box score on Page 94, have you done anything to determine what of these damages was caused by what you believe to be deficiencies on the AE or its consultants' part?

**A.** (By Mr. McCarthy) No.

**Q.** Same question with regard to the construction manager. Have you done anything to determine which of these damages were caused by what you believe to be the deficiencies on the construction manager's part?

**A.** No.

\* \* \*

**Q.** Okay. So I think I understand your answer, but let me make sure that I do. You've not done any sort of analysis where you attempted to overlay what you would consider a better schedule on this project to determine whether or not the project is still six months late?

**A.** I have not done any kind of forensic rebuilding of the schedule.

\* \* \*

Q. I guess my question was: Did you do anything to analyze how much time was impacted as a result of the CM controlling the inspection process?

A. No, I haven't done that.

Exhibit H, excerpt of deposition transcript of Donald McCarthy at 55, 57, 59.

As is apparent from the above testimony, neither of Plaintiff's expert witnesses can testify as to causation, from any source let alone Defendant OSFC, in its claim. In other words, Plaintiff points to things it alleges Defendant OSFC did to breach the contract, and expects this Court to award damages without having to show the cause of damages. For this reason Plaintiff cannot prove that Defendant OSFC is the cause of any damages Plaintiff may have incurred and its claims should be dismissed.

**F. Plaintiff Is Limited to the Amount of the Original Certified Claim**

The original claim of Plaintiff was \$2.17 million. In the Amended Complaint Plaintiff requests in excess of \$3 million. Plaintiff cannot increase the amount of its claim after the fact and is limited to the original certified claim amount requested. *Dugan & Meyers, Cleveland Construction*, and *Stanley Miller, supra*, all make clear that in order for a contractor to make a valid claim for additional compensation, the contractor must follow the process set forth in GC Article 8. Simply put, the contract provisions addressing additional compensation must be followed.

The only claim submitted by Plaintiff is the claim dated March 8, 2012, in the amount of \$2.17 million. No other claim was submitted that even arguably could be construed to be submitted under GC Article 8.<sup>4</sup> In that Plaintiff has not submitted any other claim other than the March 8, 2012, claim, per the requirements of GC Article 8,

---

<sup>4</sup> Defendant OSFC also contends that the March 8, 2012, Claim filing did not comply with GC Article 8.

providing that if the Contractor fails to Notice the Claim within 10 days of the occurrence of the event giving rise to the Claim it has waived such Claim, it has thusly limited itself to the amount of the that original certified claim, or to the \$2.17 million.

Further, there is no provision in Article 8 permitting claims to be amended, increased, added or modified. In short, any increase in the amount of the certified claim is an additional claim and needs to follow the claim process set forth in GC Article 8. None of Plaintiff's claims, nor its increase of the claim complied with GC Article 8. Even assuming that its original claim met the requirements of Article 8, it is limited to that claim amount in this case. Even if there were some basis for increasing the amount of its claim, any new claim would be well past the 10 day notice requirement contained in GC 8.1.1.

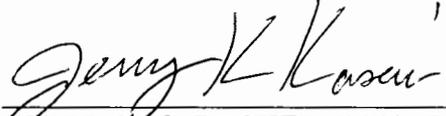
For the reasons stated above, Plaintiff's claim is limited to the original amount of its March 8, 2012, claim.

### **III. CONCLUSION**

For the foregoing reasons, OSFC respectfully requests that this Court grant its motion for summary judgment and dismiss the claims brought by Plaintiff. Plaintiff missed filing within the statute of limitations. Ohio law is clear: a contractor that fails to follow the process set forth in Article 8 of the General Conditions of Contract is barred from filing suit over such claims. There is no possible way that Plaintiff could assert that it followed the contractual dispute resolution process set forth in GC Article 8, and consequently this case must now be dismissed as a matter law. Additionally, claims of fraud are inapplicable to the State. Finally, Plaintiff is unable to demonstrate any causation attributable to Defendant OSFC for the damages it claims in its Complaint.

Respectfully submitted,

MIKE DeWINE  
Ohio Attorney General

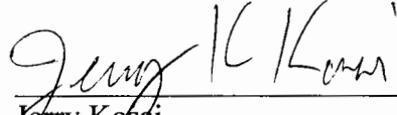
  
\_\_\_\_\_  
WILLIAM C. BECKER (0013476)  
CRAIG BARCLAY (0023041)  
JERRY KASAI (0019905)  
Assistant Attorneys General  
Court of Claims Defense  
150 East Gay Street, 18th Floor  
Columbus, OH 43215-3130  
Telephone: (614) 466-7447  
Facsimile: (614) 644-9185  
Email: [william.becker@ohioattorneygeneral.gov](mailto:william.becker@ohioattorneygeneral.gov)  
[William.becker@ohioattorneygeneral.gov](mailto:William.becker@ohioattorneygeneral.gov)  
[Craig.barclay@ohioattorneygeneral.gov](mailto:Craig.barclay@ohioattorneygeneral.gov)  
[Jerry.kasai@ohioattorneygeneral.gov](mailto:Jerry.kasai@ohioattorneygeneral.gov)

Attorneys for Defendant OSFC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was sent by regular U.S. mail,  
postage prepaid, this 30<sup>th</sup> day of April 2014 to:

Donald W. Gregory  
Michael Madigan  
Kegler, Brown Hill & Ritter  
64 East State St., 18<sup>th</sup> Fl.  
Columbus, OH 43215

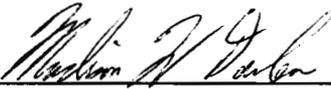
  
\_\_\_\_\_  
Jerry Kasai  
Assistant Attorney General (0019905)

## **EXHIBITS**

- A. February 17, 2011, Transamerica Notice of Claim**
- B. March 8, 2012, Claim Document of Transamerica, Exhibit 42 of Josh Wilhelm Deposition, cover page.**
- C. September 5, 2012, Denial of Transamerica's Claim**
- D. September 18, 2012, Transamerica's Appeal from the Denial of Claim**
- E. Article 8 of the General Conditions of Contract**
- F. March 1, 2012, Transamerica Notice of Claim**
- G. Excerpt from the deposition transcript of Lee Martin**
- H. Excerpt from the deposition transcript of Donald P. McCarthy**

## CERTIFICATION OF RECORD

I, Madison Dowlen, Project Manager at the Ohio Facilities Construction Commission ("OFCC"), certify that the attached document, a letter dated February 17, 2011, is a true and accurate copy of the document as it appears in the public files of the OFCC for the Ohio School for the Deaf and Ohio State School for the Blind construction Project.

 4/30/14  
\_\_\_\_\_

Madison Dowlen



**Ohio School for the Deaf & Ohio School for the Blind**

February 17, 2011

Clay Keith  
Project Manager  
Bovis Lend Lease, Inc.  
Ohio State School for the Blind and Ohio State School for the Deaf  
502 Morse Rd, Columbus OH 43214  
T: 614.732.5275 | F: 614.732.5295  
[Clayton.Keith@bovislendlease.com](mailto:Clayton.Keith@bovislendlease.com)

RE: Notice - Revised Drawings

Per your conversation yesterday with Bill Koniewich and as we have discussed at the previous progress meetings (January 24<sup>th</sup> and February 7<sup>th</sup>) we have not yet received the revised / corrected / updated drawings for use on the OSD&B project. These drawings have been pending for 6+ weeks. It has impeded our ability to produce accurate shop drawings, complicated the submittal process, and resulted in many of our RFI answers being tied to the new drawings. Additionally, we are increasingly concerned that materials anticipated to be ordered and delivered per the Construction Schedule will be late and may subject us to costs due to material escalation. Ultimately, the lack of drawings will prevent us from performing as required. Thus, per section 8.1.1 of the contract we are required to notify you, and the Architect (Through you); that our ability to execute the project per the contract schedule is being hindered.

8.1.2.1 At this time we are unable to anticipate the costs. However an adjustment of the Contract Schedule and prompt issuance of the drawings would greatly reduce the potential for more costs.

8.1.2.2 The circumstances responsible for causing impact are the lack of completed drawings. Starting approximately January 10, 2011, disruption is ongoing.

8.1.2.3 We must be afforded time to review and coordinate with our subcontractors any changes to the drawings. This will impact all activities, primarily the framing and trusses. However, due to the anticipated start date on site, coordinating a new set of drawing with even "unchanged" areas of the work will require some time, approximately 2 weeks. Additional changes, unknown changes, may cause other impacts.

8.1.2.4 The anticipated duration is unknown at this point.

8.1.2.5 To minimize the impact, we suggest adjusting the Contract Schedule to reflect the delay, promptly make corrections to shop drawings to incorporate any changes, and issue drawings promptly.

Regards,

Joshua Wilhelm  
Project Manager  
TransAmerica Building Company, Inc.  
2000 W. Henderson Road #500  
Columbus, Ohio 43220  
Tel: (614) 457-8322  
Fax: (614) 457-2078  
[jwilhelm@TAbuilding.com](mailto:jwilhelm@TAbuilding.com)  
[www.TAbuilding.com](http://www.TAbuilding.com)

March 8, 2012

Lend Lease  
Attn: Clay Keith  
502 Morse Road  
Columbus, OH 43214

SHP Leading Design  
Attn: Josh Predovich  
250 Civic Center Drive, Suite 200  
Columbus, OH 4315

Ohio School Facilities Commission  
Attn: Madison Dowlen  
10 West Broad Street, Suite 1400  
Columbus, OH 43215

Re: TransAmerica's Certified Claim For Delays and Differing Job Site Conditions for the Ohio School for the Deaf and Ohio State School for the Blind Project

Members of the Project Team:

In accordance with Article 8.3 of the General Conditions and as previously indicated would be forthcoming, TransAmerica Building Company, Inc. ("TA") provides its certified claim and further written substantiation for the additional costs caused by the significant delays and differing job site conditions that have and continue to occur at the Ohio School for the Deaf and Ohio State School for the Blind Project (the "Project"). Additionally, TA disputes the ongoing assessment of liquidated damages as these delays are the result of the Owner and its consultants failure to adhere to the Project Schedule. It is important to note that this Certified Claim is being submitted while the Project is still ongoing. Accordingly, TA has estimated future costs to complete the Project but reserves the right to revisit those costs should additional issues arise that were not foreseeable based on the information currently available to TA.

### **Narrative of the Circumstances and Identification of the Issues Giving Rise To The Claim**

TA's request for additional compensation results from the various Project delays and differing site conditions that are summarized below.

1. Numerous changes to the building design that caused significant delays to the Project.
2. Jobsite conditions that TA encountered, which were significantly different than those represented in the bid documents.
3. Failure of Lend Lease to adequately schedule, coordinate, and sequence the Project.
4. Environmental conditions of the buildings, including those related to the condition of the floor slabs.
5. Lack of exterior aluminum doors due to ongoing hardware delays.
6. Lack of complete information to locate numerous additional access panels.
7. Lack of information required to finish the Fire Department Connection Chases.
8. Continued damage to existing finishes.
9. Additional time needed to accommodate the now delayed casework installation being performed by others.
10. Improper holding of payments due to wrongful application of liquidated damages.
11. A non-professional and adversarial management style from the Lend Lease that is inconsistent to the General Conditions partnering provisions and not conducive to a successful Project.
12. Refusing to grant time extensions for delays outside of TA's control, which resulted in additional acceleration, trade stacking, and inefficiencies.
13. Delays caused by the insufficient design and untimely responses of the Project Architect, ST



TA has repeatedly provided written notice with respect to a number these items. The most recent notice was provided on March 1, 2012, which is attached and provides additional detail for many of the issues cited above. In addition, TA has repeatedly requested extensions of time, but those requests have either been ignored or rejected. Below, TA has provided a breakdown of its claim as it stands today.

Increased Project Management and Superintendent Time During The Base Contract	\$120,709.43
Extended General Conditions from February 14 to May 31, 2012	\$347,945.70
Extended Home Office Overhead from February 14 to May 31, 2012	\$88,215.56
Loss of Labor Productivity for Drywall and Painting Activities	\$756,582.75
Loss of Labor Productivity for Carpentry Activities	\$857,347.31
<b>TOTAL</b>	<b>\$2,170,800.75</b>

As you can see, TA has estimated certain components of its claim based on various forecasted durations. Due to the Project's unpredictable pace and that we have little control over others involved with the Project, it is impossible to precisely forecast the duration of these delays. Furthermore, the lack of a realistic schedule makes predicting the Project's progress very difficult. Should the Project fall further behind than those estimated durations or should additional issues arise, TA reserves the right to supplement these figures.

In addition to the delay and inefficiency damages noted above, TA is also demanding the present amount of liquidated damages noted below to be released immediately. In addition, TA intends to seek interest on these payments that have been wrongfully withheld.

Current Contract Amount Being Wrongfully Withheld	\$801,754.75
---	--------------

### Relevant Correspondence and Other Related Information

TA references the past notices it has provided on this Project, which includes the March 1, 2012 and February 7, 2012 letters.

### Copies of TA's Job Cost Report

TA is willing to make available its job cost report and other related documents to support this claim. But due to the confidential and proprietary nature of this information TA has concern with this information being made available and used others for reasons other than to evaluate this claim. Accordingly, TA would be willing to make this information available for review at the jobsite or at another location. Should this not be acceptable, please let us know and we will discuss a reasonable solution that will allow the CO-Owners to further evaluate this claim but maintain the confidential nature of this information.

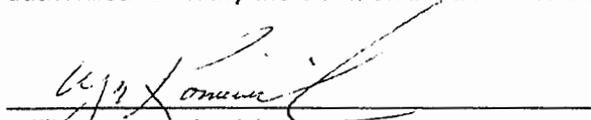
With this certified claim submission, TA expects the Project Team to either schedule a meeting to implement the job site dispute resolution procedures or provide a written recommendation within thirty (30) days as outlined in Article

8.8 of the General Conditions. To aid in that effort, TA would be agreeable to meeting with a neutral facilitator with Project Management Consultants routinely used by the OSFC for disputes like this. Should no such meeting be scheduled or recommendation provided, TA will presume the OSFC has waived the remaining Article 8 provisions and is free to enforce its full legal rights.

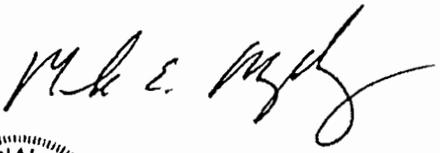
Sincerely,

  
William J.N. Koniewich - President

The undersigned Contractor certifies that the claim is made in good faith; that the supporting data is accurate and complete to the best of the Contractor's knowledge and belief; that the supporting data fully complies with all of the requirements stated in subparagraph 8.3.3 of the General Conditions; that the amount requested is a fair, reasonable, and necessary adjustment for which the Contractor believes the State is liable; and that the undersigned is duly authorized to certify the Claim on behalf of the Contractor.

  
William J.N. Koniewich - President  
TransAmerica Building Company, Inc.



  
Mark E. Murphy  
Notary Public, State of Ohio  
My Commission Expires 09-27-2014

## CERTIFICATION OF RECORD

I, Madison Dowlen, Project Manager at the Ohio Facilities Construction Commission ("OFCC"), certify that the attached document, a letter dated September 5, 2012, is a true and accurate copy of the document as it appears in the public files of the OFCC for the Ohio School for the Deaf and Ohio State School for the Blind construction Project.

 4/30/14

Madison Dowlen





September 05, 2012

Via Certified Mail

William J. N. Koniewich, President  
TransAmerica Building Co., Inc.  
2000 West Henderson Road  
Columbus, OH 43220

Re: TransAmerica's Alleged Certified Claim for Delays and Differing Job Site Conditions for the Ohio School for the Deaf and the Ohio State School for the Blind – Residential Dorm Buildings Project

Dear Mr. Koniewich:

This letter is in response to your March 8, 2012 letter and information presented at the Article 8 meeting held on July 19, 2012 on the above-mentioned project. This letter will serve as the written analysis and recommendation of the Construction Manager pursuant to Article 8.8.3 of the General Conditions. If you are not in agreement with this analysis and recommendation, you, as the Contractor, may appeal this decision to the Commission pursuant to Article 8 of the General Conditions.

#### Introduction

The Notice to Proceed on this dormitory project for the Ohio School for the Deaf and the Ohio State School for the Blind was issued in December of 2010. The project originally contemplated a 13 month construction schedule with completion being scheduled for January of 2012. As of August 14, 2012, the construction schedule had not completed. TransAmerica ("TA") serves as the General Trades Contractor.

#### Analysis

##### Notice of Claims

The Claims asserted by TA involve many issues that occurred early in the project and are only now bringing what they allege to be a Certified Claim. TA's claim includes a laundry list of alleged delays and impacts. TA asserts that it has given numerous notices throughout the project. However, Article 8.1.1 provides in relevant part, "that the Contractor shall initiate every claim by giving written notice of the Claim, to the Architect, through the construction manager, within (10) days after the occurrence of the event giving rise to the Claim." In addition, each written notice of a Claim shall provide the following information in accordance with Article 8.1.2:

8.1.2 The Contractor's written notice of a Claim shall provide the following information to permit timely and appropriate evaluation of the Claim, determination of responsibility, and opportunity for mitigation:

8.1.2.1 Nature and anticipated amount of the impact, including all costs for any interference, disruption, hindrance, or delay, which shall be calculated in accordance with GC paragraph 7.6 and is a fair and reasonably accurate assessment of the damages suffered or anticipated by the Contractor;

8.1.2.2 Identification of the circumstances responsible for causing the impact, including, but not limited to, the date or anticipated date, of the

Lend Lease (US) Construction Inc.  
Ohio State School for the Blind and Ohio School for the Deaf  
Project Site  
502 Morse Road  
Columbus, OH 43214

Telephone 614 732 5275  
Facsimile 614 732 5295  
[www.lendlease.com](http://www.lendlease.com)



- commencement of any interference, disruption, hindrance, or delay;
- 8.1.2.3 Identification of activities on the Construction Schedule that will be affected by the impact or new activities that may be created and the relationship with existing activities;
- 8.1.2.4 Anticipated impacts and anticipated duration of any delay, impact, interference, hindrance or disruption, and any remobilization period; and
- 8.1.2.5 Recommended action to avoid or minimize any delay, interference, hindrance, impact, or disruption.

In addition, Article 8.1.3 requires that the Contractor promptly provide information that is requested by the Construction Manager or Architect and finally, Article 8.1.4 provides, failure to provide written notice of the claims in accordance with the provisions of this Article constitutes an irrevocable waiver of the Claim by the Contractor. In this matter, TA has failed to provide notice as outlined above and as a result waived its right to initiate any of its alleged Claims that it has described in its Certified Claim.

#### **Merits of Claim**

In the purported Certified Claim letter of March 8, 2012, TA has cited 13 items as the basis for the total claim amount of \$2,170,800.75. In accordance with Article 8.8.4, the Construction Manager is submitting a written analysis and recommendation of all 13 items presented by TA.

#### **1. Numerous Changes to the Building Design that Caused Significant Delays to the Project.**

TA's assertion that they are entitled to damages relative to building design changes include three specific points: (1) impact caused by changes to the building design; and, (2) impact from a lack of a final set of conforming documents; and, (3) a claim impact as a result of the set of drawings being "unbuildable". This final item was only asserted at the Article 8 meeting. During the course of construction on this project, every change to the building design has been documented by a RFI, proposal request or field directive. At the time that each of these items set forth in the contract was executed, TA was given an opportunity to respond and to detail any additional compensation or time impact caused by these changes. These cost and time compensations were memorialized in the form of change orders to the contract, time extensions and schedule updates. These were in turn signed by all the contractors. As a result, TA has waived its right to additional time and/or compensation. Further, TA has been paid for and/or received a time extension for all change orders to the original contract for which TA provided proper documentation and substantiated its cost.

TA also claimed an impact as the result of failing to be provided a conforming set of construction documents. The General Conditions relative to this project provide no such requirement. Section 1.5 of the General Conditions provides,

"The Contractor shall maintain in good order at the Site one (1) copy of Drawings, Specifications, approved Shop Drawings, catalog data, manufacturer operating and maintenance instructions, certificates, Warranties from manufacturers, lists of approved Material Suppliers and Subcontractors, Change Orders, Requests for Information and responses thereto and other modifications, including As-Built Drawings."

In fact, the conforming set of documents would not have provided any additional information that was not already provided in the original bid drawings plus drawings and specifications associated with RFIs, Change Orders and Proposal Responses. All these items were available to TA for its review throughout the project.

Recently, TA has asserted as a basis for its claim that the project documents were unbuildable. While the owners are uncertain as to what that actually means, the timing is peculiar since the project is a couple of months from completion and has been ongoing since December of 2010. Now, 19 months later, TA asserts that the project



documents were/are "unbuildable" as the project nears completion. TA has had the opportunity before and after bidding the project to request clarification on any questions about the project documents. Section 2.3.1 of the Instructions to Bidders provides,

If the Bidder finds any perceived ambiguity, conflict, error, omission or discrepancy within the Contract Documents, including without limitations the Drawings, Specifications, and Addenda, or between any of the Contract Documents and Applicable Law, the Bidder shall submit a written Request for Interpretation ("RFI") to the Architect, through the Construction Manager, for any interpretation or clarification.

Finally, Section 2.3.4 of the Instruction to Bidders provides:

The successful Bidder shall not be compensated for a claim alleging insufficient data, incomplete, ambiguous, conflicting or erroneous Contract Documents, or assumed conditions regarding the nature, extent, or character of the Work, if the Bidder did not submit a related RFI prior to bid opening.

TA did not submit an RFI at the beginning of the project during or after the bid process and is, therefore, precluded from bringing a Claim alleging a need for increased compensation based on the insufficiency of the contract documents.

## **2. Job Conditions that TA Encountered, Which Were Significantly Different than Represented in the Bid Documents**

TA has failed to present any information to help identify or substantiate the merits of this claim. There was no additional documentation provided and at the Article 8 meeting it was described as being a repeat of item number 1 above. As a result, TA has failed to comply with Section 8.3 *et seq.*, and in accordance with Section 8.3.5, "The Contractor's failure to comply with the requirements of this GC paragraph 8.3 shall constitute an irrevocable waiver of any related Claim.

## **3. Failure of Lend Lease to Adequately Schedule, Coordinate and Sequence the Project**

TA is asserting schedule related issues as the basis for some of its Claim. However, TA was given every opportunity throughout the project to give its input on the schedule and was asked to provide two week look aheads. Two schedule updates were issued each month and Recovery Schedules were also issued. At all times Contractor input was sought. In fact, there were numerous occasions where the two week look ahead provided by TA were inaccurate and provided coordination issues with the other contractors onsite.

## **4. Environmental Conditions of the Building, Including those Related to the Condition of the Floor**

TA has failed to present any additional information to help identify or substantiate the merits of this claim. Essentially, this appears to be a repeat of 1 and 3 above. As a result, TA has failed to comply with Section 8.3 *et seq.*, and in accordance with Section 8.3.5, "The Contractor's failure to comply with the requirements of this GC paragraph 8.3 shall constitute an irrevocable waiver of any related Claim."

## **5. Lack of Aluminum Doors**

Simply put, TA has not complied with the original scope of work as bid. Pursuant to the Scope of Work, the General Trades Contractor was responsible for providing all door hardware needed to the glass and glazing contractor in a timely manner so that work can be incorporated per the project schedule. In May of 2011, TA was notified that they were missing half of the door hardware submittal. In fact as of March 5, 2012, the Progress Meeting



Minutes showed that the door hardware submittal was still outstanding. TA is asserting as part of its claim that it should be paid for the completion of the hardware and that no credits should be issued against its payment for door hardware that was pulled from its contract. This item was pulled from its contract for, among other things, inconsistent information, lack of communication and an inability to confirm delivery dates.

#### **6. Lack of Complete Information to Locate Additional Access Panels.**

TA has claims that they were impacted by changes to attic access panels throughout the course of the project. Once again, at each instance where the Contractor was instructed to change the attic access panels, it would have been allowed to raise any claim for additional compensation and/or time. In addition, TA's assertion does not address any impact on the project that the lack of coordination between TA and the other contractors on the project related to the work on the attic access panels or the rework that TA had to do after installing incorrect panels. Finally, this part of the Claim is related to work that was also pulled from TA's contract after the following sequence of events:

- PR-24 was issued on August 15, 2011, which identified the access panels required in the bedroom spaces.
- These locations were modified during onsite coordination reviews in September, 2011.
- PR-36 was issued in December, 2011 when additional access panel locations were recommended by the plumber and HVAC trades.
- TA issued an e-mail March 15, 2012 with sketches dated February 29, 2012, asking for confirmation. Lend Lease reviewed the e-mail and responded on March 19, 2012.
- Lend Lease discovered that the access panels provided to the job were not correctly rated as installed.
- TA was aware of the fire rated requirements for the panel.
- On April 10, 2011, and updated submittal for the correct panels was approved by Lend Lease.
- Pricing was submitted by TA on April 20, 2011, and revised and submitted again on April 25, 2011.
- After numerous requests for updated delivery and installation schedules, the access panels were pulled from TA's contract.

TA now seeks to be reimbursed, as part of its claims, for self-inflicted wounds related to the door hardware that were part of TA's original contract scope.

#### **7. Lack of Information Required to Finish the Fire Department Connection Chases**

This request relates to work in the chases in the Vestibules of each dorm required to house the fire department connection piping, fire alarm panel and door access control power supply. TA was informed to hold off on work related to these vestibules and has had the majority of the work related to the chases pulled from its contract.

In October, 2011, the Architect determined that the vestibules in all 12 dorms would require a chase to hide certain equipment. At this state of the project, drywall activities on the exterior walls of the vestibule were



commencing on the first 4 buildings. Contractors were directed to hold on finishing until certain information could be confirmed by the technology contractor. There were 2 proposal requests for the work: PR-34 for General Trades work, and PR-37 for electrical work. These requirements were further modified on March 12, 2012. In May of 2012 the final finish work was removed from TA's contract. Change order pricing is still in dispute and this matter is still open and ongoing.

#### **8. Continued Damage to Existing Finishes**

TA has not been held liable for damages to work that was done by others through no fault of TA. Specifically, the area of damages for which TA has been held accountable and back charges have been issued are for the in wall plumbing issues that have drywall screws penetrating the pipe causing delays in testing. This additional testing and drywall repair was documented and issued via change order numbers 32 and 33.

#### **9. Additional Time Needed to Accommodate Delayed Casework Installation**

All work performed by TA could have been completed prior to casework delivery. Per the original schedule completion dates, TA was to finish all of its work prior to plan delivery dates. TA has not included reference to any specific activities that were impacted by the late casework installation and as a result has failed to substantiate this claim.

#### **10. Improper holding of payments due to wrongful application of Liquidated Damages.**

Section 8.7.1 of the General Conditions provides,

" If the Contractor fails to achieve one or more of the completion milestones set forth in the Contract Documents, the Contractor shall pay to or credit the Commission the associated liquidated damages per diem sum(s) set forth in the Contract Documents for each day that the contractor fails to achieve one or more of the Completion Milestones."

Further, Section 3.3 of TA's contract provides

"The Contractor's failure to complete all work within the period of time specified, or failure to have the applicable portion of work completed upon any milestone, shall entitle the Commission to retain or recover from the contractor, as Liquidated Damages, and not as a penalty, the applicable amount set forth in the following table for each and every day thereafter until Contract Completion or the date of completion of the applicable portion of the Work, unless the Contractor timely requests, and the Commission grants an extension of time in accordance with the Contract damages."

In the end 8 of the 12 roof and window enclosure requirements were missed. Of the four that were not missed, each had to have the roof reinstalled by a certified installer. This resulted in major milestones being missed on each of the 12 dormitory building with some being up to four months behind schedule. The contract provided for a liquidate damage amount of \$2,000.00 per day. The Amount of \$3000 per day was previously withheld. Any amount withheld above the \$2,000.00 per day provided by the Contract will be returned to the Contractor.

#### **11. A Non-Professional and Adversarial Management Style from Lend Lease**

This part of the claim involves an isolated incident that was resolved by a letter dated March 6, 2012. Outside the one incident, TA has presented no information to substantiate this portion of the claim and as a result has waived right to this claim or any related claim.



## 12. Refusing to Grant Time Delays

Again, TA has failed to substantiate its claim in accordance with the General Conditions. TA asserts that failure to grant the time extensions cause it to be inefficient, caused acceleration and caused trade stacking. They have provided no documentation to support these claims. In addition, TA has been given additional time on this project for changes that have added additional time to the contract.

## 13. Delays Caused by the Insufficient Design and Untimely Responses of the Project Architect SHP.

TA has already claimed delays in regard to the original design documents and that issue has previously been discussed. The Contractor has asserted that untimely response by the Architect have impacted their work on the project yet have provided no instances of any impact over the course of the project. The Contractor was given numerous opportunities to voice its concern including at progress meetings. However, the Contractor remained silent about the issue.

### Conclusion

The Construction Manager has provided this recommendation and analysis. It has determined that the Claim of TA is denied in whole. TA has failed in many instances to provide proper notice. It has failed to provide documentation as required in order to substantiate its claim. Many of the impacts claimed by TA are self-inflicted. Finally, many of the claims of TA are directly related to work that was not completed by them and removed from its contract. This list is not meant to be exhaustive as there are or may be additional reasons for denying each and every claim asserted by TA. This decision represents the recommendations and analysis of the Construction Manager as set forth in Article 8.3.3 of the General Conditions.

Thank you, in advance, for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Clayton Keith".

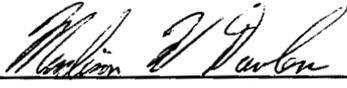
Clay Keith  
Senior Project Manager  
Lend Lease (US) Construction Inc.

[Clayton.Keith@lendlease.com](mailto:Clayton.Keith@lendlease.com)

Cc:  
Madison Dowlen, OSFC  
Jon Walden, OSFC  
Jim Swartzmiller, Lend Lease  
Josh Predovich, SHP Leading Design

## CERTIFICATION OF RECORD

I, Madison Dowlen, Project Manager at the Ohio Facilities Construction Commission ("OFCC"), certify that the attached document, a letter dated September 18, 2012, is a true and accurate copy of the document as it appears in the public files of the OFCC for the Ohio School for the Deaf and Ohio State School for the Blind construction Project.

 4/30/14

Madison Dowlen



**Ohio School for the Deaf & Ohio School for the Blind**

September 18, 2012

Lend Lease  
Attn: Clay Keith  
502 Morse Road  
Columbus, OH 43214

SHP Leading Design  
Attn: Josh Predovich  
250 Civic Center Drive, Suite 200  
Columbus, OH 4315

Ohio School Facilities Commission  
Attn: Madison Dowlen  
10 West Broad Street, Suite 1400  
Columbus, OH 43215

Re: TransAmerica's Appeal to the Commission for its Additional Cost and Delay Claim for the Ohio School for the Deaf and Ohio State School for the Blind – Residential Dorm Buildings Project

**Project Team:**

In response to the September 5, 2012 letter from Lend Lease, TransAmerica disagrees with the denial of its claim for additional costs arising from the lack of a suitable design and the various delays, acceleration, and out-of-sequence work that have taken place on the Project. Lend Lease's analysis ignores prior statements made during the Project (some in response to notices provided by TransAmerica) where members of the Project Team acknowledged the detrimental impact the lack of a complete and coordinated set of plans was having on the Project. Accordingly, TransAmerica is providing written notice in the form of this letter of its appeal of such recommendation to the Ohio School Facilities Commission pursuant to Article 8.9.1 of the General Conditions.

Lend Lease's first reason for denying TransAmerica's claim is based on a perceived failure to comply with the notice provisions stated in Article 8.1.1. But Lend Lease fails to acknowledge TransAmerica's notices that were issued as early as February 2011 and that Lend Lease acknowledged the legitimacy of those notices by expressing concerns to SHP about the lack of a complete and coordinated set of plans for the Project. Denying the claim for a "lack of notice" also ignores the fact that the OSFC has both failed to adhere to its own obligations under the same Article 8 provisions and prevented TransAmerica for complying with the OSFC's self-serving and flawed interpretation of the Article 8 provisions. For example, Article 8.8.4 required Lend Lease to issue its recommendation within fourteen (14) days after the July 19, 2012 jobsite resolution meeting, yet it took Lend Lease forty-eight (48) days to issue its September 5, 2012 recommendation. During that time, Lend Lease failed to ask for a single piece of additional information beyond that previously submitted by TransAmerica, which including its March 2012 job cost report and bid information. Also, Lend Lease failed to provide a single "contemporaneous" document from the Project supporting its denial despite the requirement to do under Article 8.8.3.7.



www.TAbuilding.com

In the forty-eight (48) days that elapsed from the jobsite resolution meeting, Lend Lease has apparently recognized that at least a portion the liquidated damages currently being withheld is in error (\$3,000 presently being withheld rather than the \$2,000 as permitted by the contract) yet Lend Lease has presented no specific information as to when these funds will be released to TransAmerica. Keep in mind, any liquidated damages claim by the OSFC against TransAmerica is additionally flawed based on the underlying facts of the Project that establish when the roofing work was sufficiently completed and the improper scheduling presently being used to support the liquidated damages claim.

Lend Lease's analysis also fails to acknowledge the prior representations made that SHP (and its consultants) would be issuing an updated and coordinated set of plans and how the failure to do so prevented TransAmerica from providing earlier pricing of the impacts that were occurring on the Project. Because of this, TransAmerica continues to reserve its right to assert that the OSFC has waived its reliance on the Article 8 provisions.

Going forward, TransAmerica is preparing to submit an update certified claim no later than October 5, 2012 because of the unforeseen delays and issues on the Project that have continued to evolve, which have resulted in additional damages beyond those identified in TransAmerica's March 8, 2012 Certified Claim (notably from an extended punchlist process and excessive construction damage). Please contact the undersigned to schedule the Article 8.9.2 meeting with the Commission within the next thirty (30) days as required. Should no such meeting with the Commission be conducted or decision rendered within the next thirty (30) days, TransAmerica will construe that as further indication that the OSFC has waived the Article 8 provisions.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. J. N. Koniewich', is written over a printed name.

William J. N. Koniewich

President  
TransAmerica Building Co., Inc.  
2000 W. Henderson Rd. #500  
Columbus, OH 43220  
614-457-8322 office  
614-457-2078 fax  
[wjnk@TAbuilding.com](mailto:wjnk@TAbuilding.com)  
[www.TAbuilding.com](http://www.TAbuilding.com)

## CERTIFICATION OF RECORD

I, Madison Dowlen, Project Manager at the Ohio Facilities Construction Commission ("OFCC"), certify that the attached document, an excerpt of Article 8 of the General Conditions of Contract for the Deaf & Blind School Project, is a true and accurate copy of that portion of the General Conditions of Contract as it appears in the public files of the OFCC for the Ohio School for the Deaf and Ohio State School for the Blind construction Project.

 01/30/14

Madison Dowlen



- 7.8.5 If the Contract has been terminated, in whole or in part, the records relating to the Work terminated shall be made available to the Commission for a period of seven (7) years from the date of any applicable final settlement or payment, as applicable.
- 7.8.6 Records that relate to disputes, litigation, or settlement of claims arising out of the performance of the Work shall be made available until the dispute, litigation or claims have been finally decided or settled.

## **ARTICLE 8 - DISPUTE RESOLUTION**

### **8.1 INITIATION OF A CLAIM**

- 8.1.1 Except as provided under GC subparagraph 2.14, the Contractor shall initiate every Claim by giving written notice of the Claim to the Architect, through the Construction Manager, within ten (10) days after the occurrence of the event giving rise to the Claim.
  - 8.1.1.1 The ten (10) day time limit on a Claim arising from a determination of the Commission concerning a Field Work Order begins to run on the date on which the Commission issue its determination under GC subparagraph 7.2.2.6 or GC subparagraph 7.2.2.9 (as applicable).
  - 8.1.1.2 The ten (10) day time limit on a Claim arising from the response of the Architect to a Request for Information begins to run on the date on which the Architect issues the Architect's response to the Request for Information.
  - 8.1.1.3 The ten (10) day time limit on a Claim arising from the Architect and Construction Manager's determination concerning a Differing Site Condition begins to run on the date on which the Architect and Construction Manager issue their determination under GC subparagraph 7.5.
- 8.1.2 The Contractor's written notice of a Claim shall provide the following information to permit timely and appropriate evaluation of the Claim, determination of responsibility, and opportunity for mitigation:
  - 8.1.2.1 Nature and anticipated amount of the impact, including all costs for any interference, disruption, hindrance, or delay, which shall be calculated in accordance with GC paragraph 7.6 and be a fair and reasonably accurate assessment of the damages suffered or anticipated by the Contractor;
  - 8.1.2.2 Identification of the circumstances responsible for causing the impact, including, but not limited to, the date or anticipated date, of the commencement of any interference, disruption, hindrance, or delay;
  - 8.1.2.3 Identification of activities on the Construction Schedule that will be affected by the impact or new activities that may be created and the relationship with existing activities;
  - 8.1.2.4 Anticipated impacts and anticipated duration of any delay, impact, interference, hindrance or disruption, and any remobilization period; and

- 8.1.2.5 Recommended action to avoid or minimize any delay, interference hindrance, impact, or disruption.
- 8.1.3 The Contractor shall promptly provide any additional information requested by the Construction Manager or the Architect.
- 8.1.4 The Contractor's failure to provide written notice of a Claim as and when required under this GC paragraph 8.1 shall constitute the Contractor's irrevocable waiver of the Claim.

## **8.2 CERTIFICATION OF THE CLAIM**

- 8.2.1 The Contractor shall certify each Claim within thirty (30) days after providing written notice of the Claim under GC paragraph 8.1 or before Contract Completion, whichever is earlier, by providing the notarized certification specified in GC subparagraph 8.2.1.1, signed and dated by the Contractor:
  - 8.2.1.1 "The undersigned Contractor certifies that the Claim is made in good faith; that the supporting data is accurate and complete to the best of the Contractor's knowledge and belief; that the supporting data fully complies with all of the requirements stated in subparagraph 8.3.3 of the General Conditions; that the amount requested is a fair, reasonable, and necessary adjustment for which the Contractor believes the State is liable; and that the undersigned is duly authorized to certify the Claim on behalf of the Contractor."
- 8.2.2 The Contractor's failure to comply with the requirements of this GC paragraph 8.2 shall constitute an irrevocable waiver of any related Claim.

## **8.3 SUBSTANTIATION OF CLAIMS**

- 8.3.1 Within thirty (30) days after providing written notice of a Claim, the Contractor shall submit in writing five (5) copies of all information and statements required to substantiate a Claim as provided in this GC Article 8 and all other information which the Contractor believes substantiates the Claim. The Contractor shall file the four (4) copies by delivery of one (1) copy to the Architect, one (1) copy to the Construction Manager and one (1) copy to the Commission.
- 8.3.2 The date the Contractor is required to file its substantiated and certified Claim with the Commission shall begin the statute of limitations to file a lawsuit related to the Claim.
- 8.3.3 The Contractor shall substantiate all of its Claims by providing the following minimum information:
  - 8.3.3.1 A narrative of the circumstances, which gave rise to the Claim, including, without limitation, the start and finish date of the event or events and the actual, or anticipated, finish date;
  - 8.3.3.2 Detailed identification of the Work (e.g., activity codes from the Construction Schedule) affected by the event giving rise to the Claim;

- 8.3.3.3 Copies of relevant correspondence and other information regarding or supporting Contractor entitlement;
- 8.3.3.4 Copies of the Contractor's most recent job cost reports itemized by activity codes, including segregated general and administrative expenses for the most recent reporting period, and for the period of the Contract, if available, and similar information for any Subcontractor claim included; and
- 8.3.3.5 The notarized certification described under GC subparagraph 8.2.1.1.
- 8.3.4 The Commission and Contractor may agree, in writing, to reasonably extend the thirty (30) day period for substantiation of a Claim required under GC subparagraph 8.3.1.
- 8.3.5 The Contractor's failure to comply with the requirements of this GC paragraph 8.3 shall constitute an irrevocable waiver of any related Claim.

#### **8.4 SUBSTANTIATION OF CLAIMS FOR INCREASE OF THE CONTRACT SUM**

- 8.4.1 The Contractor shall substantiate each Claim for an increase of the Contract Sum with:
  - 8.4.1.1 Written documentation as described under GC paragraph 7.6 of the actual additional direct and indirect costs to the Contractor due to the event giving rise to the Claim;
  - 8.4.1.2 A written statement from the Contractor that the increase requested is the entire increase in the Contract Sum associated with the Claim;
  - 8.4.1.3 The general substantiation documentation described under GC paragraph 8.3; and
  - 8.4.1.4 A detailed written Proposal as described under GC paragraph 7.6 for an increase in the Contract Sum which would fully compensate the Contractor for all costs of acceleration of the Work needed to completely overcome the associated delay together with a statement consistent with GC subparagraph 8.4.1.2.
- 8.4.2 The Contractor's failure to comply with the requirements of this GC paragraph 8.4 shall constitute an irrevocable waiver of any related Claim.

#### **8.5 SUBSTANTIATION OF CLAIMS FOR EXTENSION OF THE CONTRACT TIME**

- 8.5.1 The Contractor shall substantiate each Claim for an extension of the Contract Time with:
  - 8.5.1.1 Written documentation as described under GC paragraph 7.7 of the actual delay to the critical path of the Construction Schedule due to the event giving rise to the Claim;
  - 8.5.1.2 A written statement from the Contractor that the extension requested is the entire extension of the Contract Time associated with the Claim; and

8.5.1.3 The general substantiation documentation described under GC paragraph 8.3.

8.5.2 In addition to the requirements of GC subparagraph 8.5.1, if adverse weather conditions are the basis for a Claim for additional time, the Contractor shall document the Claim with data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on a critical element of the scheduled construction. The support for and evaluation of all adverse weather Claims shall be based upon average weather conditions during the ten (10) years immediately preceding the dates at issue in the Claim as those weather conditions were recorded at the government-controlled weather-recording facility nearest to the Site.

8.5.3 The Contractor's failure to comply with the requirements of this GC paragraph 8.5 shall constitute an irrevocable waiver of any related Claim.

## **8.6 DELAY AND DELAY DAMAGE LIMITATIONS; DERIVATIVE CLAIMS**

8.6.1 Notwithstanding any other provision of the Contract Documents to the contrary, the Contractor shall not be entitled to an increase in the Contract Sum, or an extension of the Contract Time:

8.6.1.1 On account of the impact of any normal adverse weather on any of the Work or on account of the impact of any abnormal adverse weather on Work not on the critical path;

8.6.1.2 To the extent that a delay occurs concurrently with a delay attributable to the Contractor; or

8.6.1.3 On account of the delay of any Work not on the critical path.

8.6.2 Notwithstanding any other provision of the Contract Documents to the contrary, the Contractor shall not be entitled to an increase in the Contract Sum or any type of damages on account of a delay in the commencement or progress of Work on the critical path unless the delay is caused by (1) the Commission, and (2) the delay was not authorized or permitted under the Contract.

8.6.3 Notwithstanding any other provision of the Contract Documents to the contrary, the Contractor shall not be entitled to an increase in the Contract Sum or any type of damages arising from a delay in the commencement or progress of any of the Work caused by the occurrence or non-occurrence of an event beyond the Commission's control such as acts of God or the public enemy, acts of the government, fires, floods, epidemics, labor disputes, unusual delivery delays, weather, acts or neglects of a Separate Contractor, or acts or neglects of the Contractor.

8.6.4 Notwithstanding any other provision of the Contract Documents to the contrary, the Contractor is solely responsible for prosecuting against a Separate Contractor any claim, suit, or appeal necessary to recover from the Separate Contractor damages caused by the Separate Contractor.

8.6.5 If the Contractor makes a Claim seeking other than an extension of the Contract Time from the Commission on account of the acts or neglects of a Separate Contractor, the Commission may pursue the Claim against the Separate Contractor in the joint interest

of the Commission and the Contractor. The Commission is not obligated to prosecute any such claim, suit, or appeal.

## **8.7 LIQUIDATED DAMAGES**

8.7.1 If the Contractor fails to achieve one or more of the Completion Milestones set forth in the Contract Documents, the Contractor shall pay to or credit the Commission the associated liquidated damages per-diem sum(s) set forth in the Contract Documents for each day that the Contractor fails to achieve one or more of the Completion Milestones.

8.7.1.1 If the Contractor fails to achieve two or more Completion Milestones, the Commission shall be entitled to recover the sum of the associated per diem rates.

8.7.2 Nothing contained in this GC paragraph 8.7 shall preclude the Commission's recovery from the Contractor of actual damages.

8.7.3 In addition to other rights that the Commission may have relative to liquidated damages, the Commission may deduct the liquidated damages from the Contract Sum as the damages accrue. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall immediately pay the amount of the insufficiency to the Commission.

## **8.8 JOB SITE DISPUTE RESOLUTION PROCEDURE**

8.8.1 To avoid or minimize the filing of Claims, the Contractor and the Construction Manager, with the assistance of the Architect, shall endeavor to timely and proactively identify, address and resolve matters involving Persons or events that may give rise to a Claim.

8.8.2 The Construction Manager, with the assistance of the Architect, shall within thirty (30) days of receipt of the Contractor's substantiated and certified Claim, schedule a meeting with the Contractor to implement the job site dispute resolution procedures the parties agreed to implement under the partnering arrangement.

8.8.3 If no agreement can be reached between the Contractor, the Construction Manager, the Architect the Commission, as a result of implementing the process the parties agreed to for job site dispute resolution, the Construction Manager and the Architect shall review the Claim and prepare a written analysis of its content, which shall include:

8.8.3.1 A narrative of the Construction Manager and the Architect's examination of the facts giving rise to the Claim;

8.8.3.2 Identification of relevant Contract Documents and language;

8.8.3.3 An analysis of whether the Contractor complied with the requirements of the Contract Documents pertaining to Claim initiation and substantiation including, without limitation, the issues of entitlement to, and calculation of, adjustments of the Contract Sum or Contract Time;

- 8.8.3.4 An analysis of claimed additional labor, materials, and equipment for the scope of the Work items described;
  - 8.8.3.5 An analysis of any time extension for any interference, disruption, hindrance, impact, or delay claimed (to include the calculation of any concurrent delays affecting entitlement);
  - 8.8.3.6 A concluding opinion and recommendation regarding Contractor entitlement to, and the appropriateness and reasonableness of all, or any part of, the Claims; and
  - 8.8.3.7 An appendix containing copies of contemporaneous documentation supporting the concluding opinion.
- 8.8.4 The Construction Manager shall submit the written analysis and recommendation to the Contractor, Architect, and Commission no more than fourteen (14) days after the meeting held pursuant to GC subparagraph 8.8.2.
  - 8.8.5 If the parties agree with the Construction Manager's written analysis and recommendation, they shall enter into a Change Order; otherwise, they shall proceed with the dispute resolution process set forth in GC paragraphs 8.9 and 8.10.

## **8.9 APPEAL TO COMMISSION**

- 8.9.1 The Contractor may appeal the written analysis and recommendation of the Construction Manager by providing written notice to the Commission within fourteen (14) days of the date of the Construction Manager's written analysis and recommendation.
- 8.9.2 The Commission shall, within thirty (30) days of receipt of the Contractor's notice of appeal, schedule and conduct a meeting in an effort to resolve the dispute or render a decision on the dispute, unless an agreement is made between the Contractor and the Commission to extend such time limit. The purpose of the meeting shall be to settle the issues in dispute. ORC Chapter 119 shall not be applicable to any such meeting.
- 8.9.3 The Commission shall determine the final disposition of the Contractor's appeal and provide a written decision to the Contractor within thirty (30) days of any meeting scheduled pursuant to GC subparagraph 8.3.1, unless an agreement is made between the Contractor and the Commission to extend such time limit.
- 8.9.4 If the Contractor agrees with the Commission's decision, the decision shall be incorporated into a Change Order.
- 8.9.5 In lieu of an appeal to the Commission, the parties may agree to utilize Alternative Dispute Resolution, as described in GC paragraph 8.10.

## **8.10 ALTERNATE DISPUTE RESOLUTION**

- 8.10.1 The ("ADR") procedure shall be accepted by all of the Project's key stakeholders during the partnering process, described in GC paragraph 4.4.

- 8.10.2 The accepted ADR methods shall be described in the partnering agreement, but shall not include binding arbitration; alter any of the requirements for Claim initiation, certification, and substantiation; or alter the process described under this GC Article 8.
- 8.10.3 Only non-binding forms of ADR may be considered or utilized.
- 8.10.4 If the Commission agrees to ADR, it shall not, under any circumstances, be deemed to have waived any of the requirements contained in the Contract Documents, including without limitation, the requirements of this GC Article 8.

## **8.11 AUDIT OF THE CLAIM**

- 8.11.1 All Claims shall be subject to audit at any time following the filing of the Claim, whether or not the Claim is part of a lawsuit.
- 8.11.2 The audit may be performed by employees of the Commission or by a consultant engaged by the Commission.
- 8.11.3 The audit may begin upon ten (10) days notice to the affected Contractor, Subcontractor, or Material Supplier.
- 8.11.4 The Contractor shall cooperate with the request.
- 8.11.5 Failure of the Contractor, Subcontractor, or Material Supplier to produce sufficient records to allow the Commission to audit and verify a Claim shall constitute an irrevocable waiver of the Claim or the portion of the Claim that could not be completely audited.
- 8.11.6 Upon request from the Commission; the Contractor shall make available to the Commission all Contractor, Subcontractor, and Material Supplier documents related to the Claim including, without limitation, the following documents:
  - .1 Daily time sheets and superintendent's daily reports;
  - .2 Union agreements, if any, and employer agreements;
  - .3 Insurance, welfare, fringes, and benefits records;
  - .4 Payroll register;
  - .5 Earnings records;
  - .6 Payroll tax returns;
  - .7 Material invoices, purchase orders, Subcontractor contracts, and all material and supply acquisition contracts;
  - .8 Material cost distribution worksheets;
  - .9 Equipment records (list of Contractor equipment, rates, etc.);
  - .10 Vendor rental agreements and Subcontractor invoices;
  - .11 Subcontractor payment certificates;

**Ohio School for the Deaf & Ohio School for the Blind**

March 1, 2012

Clay Keith  
Project Manager  
Bovis Lend Lease, Inc.  
Ohio State School for the Blind and Ohio State School for the Deaf  
502 Morse Rd, Columbus OH 43214  
T: 614.732.5275 | F: 614.732.5295  
[Clayton.Keith@bovislendlease.com](mailto:Clayton.Keith@bovislendlease.com)

RE: Notice / Delays and Request for Extension of Time

8.1.1 With this letter, TransAmerica provides written notice of the significant ongoing delays currently being encountered regarding the following:

1. Environmental conditions of the buildings (See pricing for mitigation attached)
2. Lack of exterior aluminum doors due to ongoing hardware delays. (See 2-28-12 E-Mail & Chain)
3. Lack of complete information to locate numerous additional access panels. (PR#24, PR#36, multiple meetings & revisions due to conflicts, See attached marked up drawings)
4. Lack of information required to finish the Fire Department Connection Chases. (PR#37 plus numerous meetings/correspondence)
5. Damage to existing finishes. (See PR#40 and E-mail and pictures from 2-27-12)
6. Extension of time based on Casework Schedule. (See attached e-mail / letter from 2-22-12)
7. Improper holding of pay-applications (January & February 2012)

It is critical that these items be rectified so that our finish activities can proceed. TA also provides notice it will not be held responsible for liquidated damages as it is being delayed by the above items which greatly affect our ability to finish the project. The support for this notice and request of t extension of time is attached and provided below.

8.1.2.1 TA will be impacted by extending our time on the project plus additional labor hours as further explained below. TA's general condition costs should follow the previous estimates; however the duration is not yet known due to the ongoing nature of these delays. Currently, TA is forecasting 86 days per the Casework schedule. However, the ability to install flooring per that schedule is dependent on either acceptable conditions or approval of attached moisture mitigation processes. The duration is also dependent on being able to repair and finish damaged / modified walls, finish access panels, complete chases, and finish work adjacent to permanent doors. If required by LL, overtime by the finish trades in order to complete the preceding work within the durations outlined in the casework schedule there will be additional costs. TA is also being impacted by improper and punitive actions of Lend Lease on TA's payments. TA is struggling with completing the project with additional manpower, 2<sup>nd</sup> shift, overtime and lack of pay. As of 2-29-12, neither the January or February pay applications have been forwarded to the State for review / payment. Additionally, liquidated damages are punitively being withheld. TA will seek to recover these funds, including any interest due.

8.1.2.2 Lack of controlled conditions and the lack of a complete design. The refusal or inability to provide complete construction drawings has continued to delay work on this project. Incomplete design and significant untimely changes have been and continues to be a major impact in the performance of our contract. Most recently, the incomplete chase walls design (Ongoing), the lack of instruction in the access panels (8-16-11, 12-8-12, Current), the errors in casework height vs. electrical drawings (2-27-12), and the incorrect and incomplete hardware schedule (Most Recent Found Error 2-27-12, believed resolved previously 12-19-11).

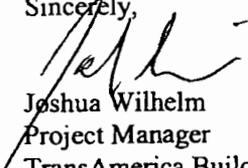


8.1.2.3 All finish activities are impacted. Due to the above multiple delays at portions of each building TransAmerica is stopped with chases not able to be framed, drywall to be unable to be hung, finished, primed, and painted. The M.E.P. Prime contractors will need to complete rough-in in these chases also. This includes the future packages of Security and Fire Alarm. The Fire Alarm panel needs to be installed and inspected prior to this chase being completed. TA believes, this will not happen for some time. Additionally, the power door openers are not wired. Likely, demolition of drywall and framing will be required at (3) doors per building to allow for rough-in, which could not have occurred prior to the subsequent phase (Security and Fire Alarm). Likely the area around these doors will not be able to be finished until that future work is complete. Flooring is also stopped in vestibules due to chases (Unknown size) and conditioned space. Flooring in the remainder of the buildings is stopped due to lack of controlled environment / proper installation requirements. Ceilings in multiple rooms are not finished due to ongoing access panel changes (Location and size). The drywall returns at many exterior doors is not finished due to the permanent door not being installed. The temporary door and temporary frame must be removed prior to finishing many of these returns. To remove them without a permanent door would open the building up to more outside air / conditions. In the last week it has now become apparent that there will also be rework required at under cabinet lighting locations. Due to differences in rough-in height given to the electrical contractor in several RFI's and the height of the casework, these will need to be relocated, requiring TA to patch, sand, re-prime and repaint at each location. This occurs at kitchens as well as dorms. This additional work was not been calculated into the "Recovery / Casework" scheduling, it was not known at that time.

8.1.2.4 TA anticipates extended duration on project for TA and all Other Primes. At a minimum, TA estimates the schedule will need to be extended at least another 86 days. Additionally, the 22 weather days from 2011 previously requested should be incorporated into any revised schedule. Further, TA reserves the right to adjust this extension request as additional information becomes available or if additional delays are encountered.

8.1.2.5 TA recommends that the owner promptly process and pay TA for it's completed work, without any liquidated damages. Additionally, TA recommends the owner / LL provide conditioned air and/or approve alternate materials where possible depending on manufacturer's requirements. TA requests that significant effort be put into closing all open design issues. Also, the scope and schedule of the next phase should be known to TA and the other Dorm Prime Contractors; since their work is integral to completing these buildings. An accurate realistic schedule should be assembled to include and reflect that work. TA strongly believes its extension request should be granted and that a realistic recovery schedule be issued in which all prime contractors are in agreement with and can work towards. Should TA's extension request be denied or ignored, TA will continue to be forced to constructively accelerate its activities, which further increases the cost impact for these delays.

Sincerely,



Joshua Wilhelm  
Project Manager

TransAmerica Building Company, Inc.  
2000 W. Henderson Road #500  
Columbus, Ohio 43220  
Tel: (614) 457-8322  
Fax: (614) 457-2078  
[jwilhelm@TAbuilding.com](mailto:jwilhelm@TAbuilding.com)  
[www.TAbuilding.com](http://www.TAbuilding.com)

cc, SHP, OSFC, BK, BK, AS, MM

**Ohio School for the Deaf & Ohio School for the Blind**

March 1, 2012

Clay Keith  
Project Manager  
Bovis Lend Lease, Inc.  
Ohio State School for the Blind and Ohio State School for the Deaf  
502 Morse Rd, Columbus OH 43214  
T: 614.732.5275 | F: 614.732.5295  
[Clayton.Keith@bovislendlease.com](mailto:Clayton.Keith@bovislendlease.com)

RE: Notice / Delays and Request for Extension of Time

8.1.1 With this letter, TransAmerica provides written notice of the significant ongoing delays currently being encountered regarding the following:

**ATTACHEMENT:**

1. **Environmental conditions of the buildings (See pricing for mitigation attached)**

**Deposition of Lee E. Martin, AIA**

1

1                   IN THE COURT OF CLAIMS OF OHIO  
 2                   - - -  
 3 TransAmerica Building           :  
 4 Company, Inc.,                   :  
 5                   Plaintiff,                   :  
 6                   vs.                               :  
 7 Ohio School Facilities           :  
 8 Commission,                    :  
 9                   Defendant.                   :  
 10                   - - -

**DEPOSITION OF LEE E. MARTIN, AIA**

11  
 12 Taken at Kegler, Brown, Hill & Ritter  
 13 65 East State Street, Suite 1800  
 14 Columbus, Ohio 43215  
 15 Thursday, February 13, 2014  
 16 10:00 a.m.  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24

3

1                   Thursday Morning Session,  
 2                   February 13, 2014.  
 3                   - - -

**STIPULATIONS**

4                   - - -  
 5  
 6                   It is stipulated by and between counsel for the  
 7                   respective parties that the deposition of Lee E. Martin,  
 8                   AIA, a witness herein, called by the Defendant under the  
 9                   applicable Rules of Civil Procedure, may be taken at  
 10                  this time by the notary pursuant to notice and  
 11                  stipulations of counsel; that said deposition may be  
 12                  reduced to writing in stenotypy by the notary, whose  
 13                  notes may thereafter be transcribed out of the presence  
 14                  of the witness; that proof of the official character and  
 15                  qualification of the notary is waived.  
 16                  - - -  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24

2

**A P P E A R A N C E S**

**APPEARING ON BEHALF OF THE PLAINTIFF:**

1                   Don Gregory, Esq.  
 2                   Kegler, Brown, Hill & Ritter  
 3                   65 East State Street, Suite 1800  
 4                   Columbus, Ohio 43215

**APPEARING ON BEHALF OF THE DEFENDANT:**

5                   William C. Becker, Jr., Assistant Attorney General  
 6                   Craig D. Barclay, Assistant Attorney General  
 7                   Jerry K. Kasai, Assistant Attorney General  
 8                   Office of Ohio Attorney General Mike DeWine  
 9                   Court of Claims Defense Section  
 10                  150 East Gay Street, 18th Floor  
 11                  Columbus, Ohio 43215

**ALSO PRESENT:**

12                  Mr. William J. N. Koniewich  
 13                  - - -  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24

4

**I N D E X   T O   E X H I B I T S**

1  
 2                   - - -  
 3                   DEFENDANT'S EXHIBITS                   IDENTIFIED  
 4                   A Invoice for Professional Services           7  
 5                   B Architect's Report - Robson Forensic       8  
 6                   C Robson Forensic Screen Shot               26  
 7                   D Robson Forensic Screen Shot               27  
 8                   E Lee Martin, AIA Curriculum Vitae           33  
 9                   F Policy on Minimum Phase Submission       54  
 10                  Requirements  
 11                  G Volume I - Key Documents                 55  
 12                  H Volume II - Key Documents                 55  
 13                  I Mediation PowerPoint                     55  
 14                  J Series of Emails                           56  
 15                  K Robson Intake Form                        56  
 16                  L Robson Case Number Assignment Form       57  
 17                  M Robson Engagement Letter                 58  
 18                  N Notes                                     58  
 19                  O Notes                                     58  
 20                  P Notes                                     58  
 21                  Q Flash Drive                               63  
 22                  R CD   63  
 23                  - - -  
 24



1 office.

2 Q. Not something you got a copy of though it sounds  
3 like?

4 A. No, I believe I got a copy of the PowerPoint  
5 mediation presentation, I believe that's in the material  
6 I brought today.

7 Q. So when it comes to the claim or the dollars or  
8 damages that TransAmerica is seeking, you've done  
9 nothing to try to link that up with the criticisms that  
10 you have of the plans and specs; am I right about that?

11 A. Well, I think the report indicates that there are  
12 delay and disruption consequences to the manner in which  
13 the project was begun and managed. I believe  
14 Mr. McCarthy speaks to some of those issues in specific  
15 details where I speak to them more in broad categories.

16 Q. Right. That doesn't really answer my question,  
17 but it does bring up another question, and that is did  
18 you have any assistance in writing your report in this  
19 case?

20 A. No.

21 Q. It's all your work?

22 A. Yes.

23 Q. All right. Now, back to the question, you  
24 realize there was a delay in this project, correct?

1 A. There were several delays. Which delay  
2 specifically are you referring to?

3 Q. I'm not referring to any specific delay, but the  
4 project was six months late in the end, right?

5 A. Yes, it finished late.

6 Q. Okay. Have you done anything to try to analyze  
7 how much of that delay is attributed to what you believe  
8 were inadequacies in the plans or specifications?

9 A. No, there again I think a lot of that was  
10 Mr. McCarthy's task.

11 Q. Do you know how much money TransAmerica is asking  
12 for in this case?

13 A. I believe it's \$3 million and slightly more.

14 Q. Do you know what their original contract was,  
15 what they were supposed to build the project for to  
16 begin with?

17 A. Approximately \$4 million, slightly less than  
18 that.

19 Q. Have you done anything to analyze of this  
20 \$3 million claim how much of that you believe is  
21 attributed to what you consider to be bad plans or  
22 specifications?

23 A. No, as far as a ratio or a breakdown, no, I've  
24 not done that.

1 Q. Right. Okay. We can probably go through the  
2 rest of this pretty quickly. You have also -- well, let  
3 me back up. Le's not do this quickly. Have you formed  
4 opinions about what the construction manager should have  
5 done in this case that they didn't?

6 A. Yes.

7 Q. Okay. What is it that you believe the CM should  
8 have done that it didn't?

9 A. Well, first and foremost I think they should have  
10 not allowed the job to proceed under uncertainty like  
11 they did. I believe that at the same time the  
12 contractors were working out in the field with bid sets  
13 of drawings there were other sets of drawings that were  
14 being submitted to the state for building permits that  
15 were different than the bid sets and there was never any  
16 reconciliation, as best I can tell, until the very end  
17 of the project of those drawings so they were proceeding  
18 on two different pathways it seemed like to me for a  
19 significant portion of the project, and that's  
20 unprecedented in my experience.

21 But as I say, first and foremost I think the  
22 construction manager should have delayed the start of  
23 construction until the drawings were reconciled, were  
24 complete, easily understood and acceptable to the

1 building department.

2 Q. And is this something that you think should have  
3 been done after the contracts were executed?

4 A. Well, ideally it would have been done at the end  
5 of construction document phase like the design manual  
6 says.

7 Q. Okay. So is that your opinion in this case that  
8 it should have been done before the project went out to  
9 bid?

10 A. I don't think that's one of my specific findings,  
11 but that's generally how things work in the construction  
12 industry.

13 Q. Okay. I guess --

14 A. That's how they're required to work on state  
15 projects.

16 Q. So I guess I'm really going back to you said that  
17 the construction manager should have delayed the start  
18 of the project, delayed it from what period of time to  
19 what period of time?

20 A. Well, my understanding is that bidding for the  
21 project occurred in October but that it also occurred in  
22 July. Ideally the drawings should have been correct and  
23 permitable in July of 2010 and certainly by December of  
24 2010 when the project was bid the second time.

Deposition of Lee E. Martin, AIA

45

1 **Generally speaking in the public and private sectors the**  
2 **permits are obtained after the construction document**  
3 **phase is concluded prior to bid and award.**

4 **Q.** So what I'm trying to do, however, is be specific  
5 with regard to your criticism of Lend Lease as the  
6 construction manager in this case. When do you think  
7 they should have delayed the -- first delayed this  
8 project?

9 **A. Well, again I don't think it's part of this**  
10 **claim, but the project was bid in July of 2010 so the**  
11 **construction documents should have been reconciled and**  
12 **put in a condition where they would have gotten building**  
13 **permits in July of 2010.**

14 **Q.** Okay. So if I can translate that, it sounds like  
15 what you're saying is the construction manager should  
16 have recommended that this project not be bid in July of  
17 '10?

18 **A. Until the drawings were correct, yes.**

19 **Q.** And have you made any sort of determination, done  
20 any sort of analysis as to how long that delay would  
21 have occurred?

22 **A. How long the delay would have been?**

23 **Q.** How long that would have taken?

24 **A. It would depend entirely on how long it took the**

46

1 **architects and engineers to fix their plans.**

2 **Q.** I understand that, but I'm asking you whether  
3 you've made any calculation as to how long that would  
4 have taken?

5 **A. No, I have not, considerably less than two years**  
6 **or 20 months or whatever the actual timeframe was.**

7 **Q.** You did not go back and take a look at what the  
8 plans and specifications looked like at the time of  
9 bidding and then corrected those or made them acceptable  
10 at least in terms of your standards of care; is that  
11 correct?

12 **A. Yes, I did not analyze the drawings. I dealt**  
13 **with the implications of the deficiencies as I saw them**  
14 **in the correspondence from the construction manager and**  
15 **the School Facilities Commission, Berardi and the**  
16 **structural consultants, but I did not analyze the**  
17 **drawings or attempt to quantify what would be involved**  
18 **in correcting them.**

19 **Q.** I want you to go to page 14 of your report and  
20 the third paragraph there, "The period of time from July  
21 of 2010 to March of 2011 afforded an opportunity for  
22 OFSC, SHP and Lend Lease to correct the defective plans  
23 with minimal impact on the project, but they chose to  
24 allow contractors to proceed under uncertainty, making a

47

1 delay and disruption foreseeable."

2 So was it your -- by saying that are you saying  
3 that it was okay for the project to proceed but during  
4 that period of time corrections could have and should  
5 have been made to the plans and specs?

6 **A. Well, I think more along the lines of the latter.**  
7 **I'm not suggesting at any point in this report that what**  
8 **happened was okay. In fact, I think everything I say in**  
9 **the report is that the way this project was run was an**  
10 **anomaly in many respects.**

11 I think the point of this statement was to say  
12 that the drawings could have been corrected during an  
13 extended period of time when there would have been  
14 little, if any, financial consequence to the project as  
15 opposed to correcting them on the fly over the course of  
16 roughly a year and a half when there were serious  
17 financial complications and additions to the project as  
18 a result of inefficiency and confusion and change orders  
19 and things of that nature.

20 **Q.** Well, let me ask you this, because you've got  
21 about an eight-month period there, so during that  
22 period, I'm just trying to understand what you're saying  
23 here, are you saying during that eight-month period that  
24 it's okay to have the contractors under contract and

48

1 proceeding or are you saying that they never should have  
2 allowed the project to be bid and they should have taken  
3 an additional eight months to correct the plans and  
4 specs?

5 **A. Well, all I'm trying to point out here is during**  
6 **that period of time there were no contractors under**  
7 **contract. Actually, TransAmerica did sign a contract in**  
8 **December, its notice to proceed was March, but they had**  
9 **not mobilized until March. The point of the statement**  
10 **is to say that there was a considerable period of time**  
11 **there where a reasonably competent architect and**  
12 **consultant could have corrected those documents and**  
13 **issued them as construction documents to the**  
14 **contractors.**

15 **Q.** Okay. And a similar question with regard to the  
16 construction manager as it relates to the architect,  
17 you've done nothing to determine as far as  
18 TransAmerica's claim goes what damages you believe are  
19 attributable to what you consider to be deficiencies in  
20 the construction manager's performance; is that correct?

21 **A. That's correct, I have not attempted to allocate**  
22 **dollar amounts to various parties.**

23 **Q.** Are you of the opinion that the construction  
24 manager should have been able to pick up all of the

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

IN THE COURT OF CLAIMS OF OHIO

- - -

TransAmerica Building Co.,	:	
Inc.,	:	
	:	
Plaintiff,	:	
	:	Case No.
vs.	:	2013-00349
	:	
Ohio School Facilities	:	
Commission,	:	
	:	
Defendant.	:	

- - -

DEPOSITION OF DONALD PATRICK MCCARTHY

Taken at Kegler, Brown, Hill & Ritter  
65 East State Street, Suite 1800  
Columbus, Ohio 43215-4294

Tuesday, February 4, 2014  
10:18 a.m.

- - -

Taken by: Laurel A. Aurigema, RPR



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

A P P E A R A N C E S

APPEARING ON BEHALF OF THE PLAINTIFF:

Don Gregory, Esq.  
Kegler, Brown, Hill & Ritter  
65 East State Street, Suite 1800  
Columbus, Ohio 43215-4294

APPEARING ON BEHALF OF THE DEFENDANT:

William C. Becker, Jr., Esq.  
Jerry K. Kasai, Esq.  
Craig D. Barclay, Esq.  
Assistant Attorneys General  
Court of Claims Defense  
150 East Gay Street, 18th Floor  
Columbus, Ohio 43215

ALSO PRESENT:

William Koniewich  
- - -

1 their role was per the contract and the timeliness  
2 of what they provided and the accuracy of that; and,  
3 actually, I'll just run down the list. I think I  
4 have a list in here. Let me go to mine, then I'll  
5 find it in yours.

6 Q Sure.

7 A Page 57 of my report.

8 Q And back to my question, just to confirm,  
9 does that contain the list of what you believe to be  
10 deficiencies on the construction manager's part?

11 A I do. It does.

12 Q All right. Let me -- we'll take a break  
13 here shortly, but let me wrap up another line of  
14 questioning here. If you take a look at the damages  
15 spreadsheet or box score on Page 94, have you done  
16 anything to determine what of these damages was  
17 caused by what you believe to be deficiencies on the  
18 AE or its consultants' part?

19 A No.

20 Q Same question with regard to the  
21 construction manager. Have you done anything to  
22 determine which of these damages were caused by what  
23 you believe to be deficiencies on the construction  
24 manager's part?

1 A No.

2 Q Back to your criticism of the scheduling  
3 put together by the construction manager. Have you  
4 done anything to attempt to determine how this  
5 project would have gone had the scheduling been  
6 performed like you think it should have been?

7 A Well, the scheduling wasn't -- I'm going  
8 to try to interpret what I think you said there. If  
9 you had had a properly assembled CPM schedule, it  
10 would not have solved the problems with the project.

11 Q Okay. And to -- I'm going to not get all  
12 of your words back here; but if you had what you  
13 believed you should have had by way of a schedule  
14 for this project, have you done any analysis as to  
15 whether this project would still be six months late?

16 A The project schedule as it was developed  
17 had a fatal flaw in it. It did not have the  
18 campus-wide bid packages folded into the schedule.  
19 Contracts were awarded for a project that could not  
20 be completed because those bid packages were not  
21 designed and weren't awarded.

22 So in order to do an assessment like  
23 you're talking about, which can be done, you would  
24 have had to have factored in the design, bidding,

1 procurement, installation, time frame for those  
2 campus-wide packages into a baseline schedule that  
3 was properly constituted. If you did that, you  
4 could get the overall window of time correctly.

5 The thing you can't factor into with a  
6 baseline schedule that would have that would be all  
7 of the other things that came up as the project  
8 started and pushed away from the dock and set sail.

9 Q Okay. So I think I understand your  
10 answer, but let me just make sure that I do. You've  
11 not done any sort of analysis where you attempted to  
12 overlay what you would consider a better schedule on  
13 this project to determine whether or not the project  
14 is still six months late?

15 A I have not done any kind of forensic  
16 rebuilding of the schedule.

17 Q Okay. You had made reference to the fact  
18 that you came to understand why the CM was  
19 controlling the inspections. Can you explain that  
20 to me.

21 A As I understand and I think the  
22 documentation is, that whenever there was an  
23 inspection, be it electrical, mechanical,  
24 structural, whatever inspection needed to happen,

1 Lend Lease made the phone call to the inspection  
2 department to call on those inspections. That is  
3 extremely -- I've never seen that in 30 years of  
4 doing this.

5 Normally the trades that are responsible  
6 for those inspections call in those inspections.  
7 The CM is involved in that process, but the  
8 construction manager never in my experience is the  
9 entity that is the gatekeeper for making those phone  
10 calls.

11 Q Okay. Did you do any sort of analysis to  
12 try to determine what additional cost or what  
13 additional delay TransAmerica incurred as a result  
14 of the CM calling in the inspections?

15 A Well, I think it's all part and parcel of  
16 the overall management of the project. There was a  
17 point in time, which is documented in my report and  
18 there's all kinds of information on it, that  
19 inspections couldn't be called in because the plans  
20 were not approved for work that was being done in  
21 the field. And inspections were not allowed to take  
22 place for work that was -- that could be inspected.

23 The impact of that is time. You know, and  
24 the --

1 Q I guess my question was: Did you do  
2 anything to analyze how much time was impacted as a  
3 result of the CM controlling the inspection process?

4 A No, I haven't done that.

5 Q Okay. On the punch list side of things,  
6 you're not saying that there was work that  
7 TransAmerica had to perform on the punch list that  
8 wasn't otherwise called for by the plans and  
9 specifications, are you?

10 A No. I am saying that.

11 Q Okay. Do you have any sort of list or  
12 have you identified what that work is?

13 A Well, there's an example in the report.

14 Q Can I stop you for just a minute, Don --

15 A Sure.

16 Q -- because you're changing my question a  
17 little bit. I'm not looking for an example here or  
18 there. I'm looking at whether or not you have  
19 quantified in some fashion, a list or otherwise,  
20 what you believe was unnecessary punch list work.

21 A I have not developed a comprehensive list,  
22 no.

23 Q Okay. And while we're at it, because this  
24 might be the easiest way to answer this -- or for me

1 to ask this question, Page 94 of your report where  
2 you're talking about the additional drywall and the  
3 additional painting cost and then you say what  
4 that's generally related to, have you done anything  
5 to try to quantify -- well, let me strike that.

6           Yeah. Let me go ahead and ask that  
7 question: Have you done anything to try to quantify  
8 or provide some sort of a list or summary of just  
9 what this out-of-sequence work, excessive  
10 construction damage, or extended punch list work was  
11 for drywall and painting?

12 A           An extensive list, no.

13 Q           Any sort of list where you captured what  
14 it is -- what's behind these categories here?

15 A           Developed a -- Page 95 of the report  
16 you'll see a reference to \$600,000 in discrete  
17 changes not included in formal change orders. I  
18 have developed a list -- that list, but that list  
19 is -- has a number of categories in it. Some of  
20 it's painting -- as I recall, some of it is  
21 carpentry, drywall. But I have not -- I have not  
22 sat down and attempted to building by building build  
23 any kind of a comprehensive list.

24 Q           Okay. Well, actually, what you say on