ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

2014 JUL 15 PM 3:17

IN THE COURT OF CLAIMS OF OHIO

GRAND VALLEY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.,	)	
Plaintiffs,	)	
vs.	)	Case No. 2014-00469-PR
BUEHRER GROUP ARCHITECTURE & ENGINEERING. INC. et al.	)	Judge Patrick M. McGrath
Defendants,	)	

MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE MOTION FOR JUDGMENT ON THE PLEADINGS OF PLAINTIFFS/COUNTERCLAIM DEFENDANTS OHIO SCHOOL FACILITIES COMMISSION AND GRAND VALLEY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION ON THE COUNTERCLAIM OF DEFENDANT/COUNTERCLAIM PLAINTIFF JACK GIBSON CONSTRUCTION COMPANY

Now comes the Plaintiffs/Counterclaim Defendants, the Ohio School Facilities Commission ("OSFC") and the Grand Valley Local School District Board of Education ("Grand Valley" or "School District") (collectively "Co-owners") by and through counsel, and respectfully requests this Court, pursuant to Ohio Rules of Civil Procedure 12 (C) or 56(C), grant the Co-owners judgment on the pleadings, or in the alternative summary judgment. The reasons supporting this motion are fully explained in the accompanying Memorandum in Support.

Respectfully submitted,

MIKE DeWINE
Ohio Attorney General

DAVID A. BEALS (0038495)
JERRY KASAI (0019905)
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215
Phone: 614.466.7447
Fax: 614.466.9185

ON COMPUTER

David.beals@ohioattorneygeneral.gov
Jerry.Kasai@ohioattorneygeneral.gov
Attorneys for Plaintiff OSFC

David J Riley by g/c

DAVID J. RILEY (0000000)
The Riley Law Firm
24502 Cornerstone
Westlake, OH 44145
(440) 801-1960
Rileylaw@roadrunner.com
Attorney for Plaintiff Grand Valley Local
School District Board of Education

MEMORANDUM IN SUPPORT

I. INTRODUCTION AND SUMMARY

This matter is an action by the State and the School District to recover the cost to fix numerous construction and design defects in a new Kindergarten through 12 School Facility ("Project") constructed and designed by the Defendants in this case for benefit of the Grand Valley School District. This matter was originally filed in February of 2014, in the Ashtabula County Common Pleas Court against: Buehrer Group Architecture & Engineering ("Buehrer"), the architect for the Project; Jack Gibson Construction Company ("Gibson"), the general trades prime contractor on the Project; McMillan Construction Company ("McMillan"), the paving and site prime contractor; along with Hartford Insurance Company and Merchants Bonding Company, the respective sureties for Gibson and McMillan.

Since completion, the Project had experienced water infiltration and roof problems, with an anticipated cost for remediation of the problems in excess of $6 million. The Project has also had issues with distressed pavement in the parking lots of the Project which will also require replacement.[1] Suit was filed by Plaintiffs against Defendants for the damages incurred in the remediation. Defendant/Counterclaim Plaintiff Gibson filed a counterclaim against Plaintiffs and removed the case to the Court of Claims. Defendant Gibson's Counterclaim alleges it had a "contract" with Plaintiffs, in the form of a Memorandum of Understanding ("MOU"), in the amount of $156,276.13 to perform work for Plaintiffs, and that Plaintiffs only paid Gibson $17,487.00 for this work. *See* Answer & Counterclaim of Gibson at ¶ 7, 13, 15; *See also* Exhibit 1 to the Counterclaim.

Defendant Gibson makes these allegations despite the fact that there are no dollar amounts listed in the MOU in question; offers no other proof of the existence of a contract to its Counterclaim; and there is no evidence offered of a certification from the School District Treasurer which indicates that funds for the contract are available as required by R.C. 5705.41.

As a matter of law, Defendant Gibson has not plead or provided evidence that it possessed an actual contract. It attached to its Counterclaim a document titled "Memorandum of Understanding" as the alleged "contract" which is the basis of its Counterclaim. However, the MOU in question is not an enforceable contract. There is no contract price listed; a scope of work is not detailed; and there are no terms of what would constitute a meeting of the minds, let alone an enforceable contract. Finally, there is no indication that the Plaintiffs ever approved or funded the alleged contract in accordance with R.C. 5705.41. Despite Defendant Gibson's allegations, the "contract" the Counterclaim is based on never existed. As such, any agreement

[1] The Co-owners have reached a settlement in principal with Merchants and McMillian.

Defendant Gibson believed existed, if it did not follow the legal contracting process is void. *Buchanan Bridge Co. v. Campbell, et all Commissioners,* 60 Ohio St. 406, 54 N.E. 2d 372 (1899). Therefore, Defendant Gibson's Counterclaim fails to substantiate a claim on its face.

What Defendant Gibson failed to reveal in its Counterclaim was that the School District had issued Gibson a purchase order in the amount of $20,000, to remediate defective work that was not due to Gibson's defective workmanship and Gibson agreed to fix its own defective work at its cost. Exhibit 1 Affidavit of Lisa Moodt at ¶ 5. Exhibit 2. The full amount of that purchase order to Gibson has been paid. Exhibit 1 at ¶ 9. No other purchase orders or commitments from either the School District or from OSFC were made and no other funds were encumbered for payments to Defendant Gibson. *Id.* at ¶s 7,8. A public authority is only obligated up to the amount approved and encumbered through the lawful process. R.C. 5705.41; *Buchanan Bridge, supra.* Gibson is not entitled to anything over and above the approved purchase order, absent a showing of approval of funding by the School District.

Further, if Gibson is somehow claiming this is a change order to their original contract, they are foreclosed by the Ohio Supreme Court's ruling in *Foster Wheeler v. Franklin County Convention Center Authority*, Ohio St. 3d, 78 Ohio St. 3d 353, 678 N.E. 2d 519 (1997), as there was no signed change order authorizing the alleged "extra" work performed by Gibson in excess of the $20,000 purchase order. Finally, if this is a claim for additional work performed under the original contract, Gibson is foreclosed from making this claim for its failure to follow the administrative claim process set forth in their Contract. *See, Cleveland Constr., Inc. v. Kent State Univ.,* 10th Dist. No. 09AP-822, 2010 Ohio 2906, ¶ 30*; Stanley Miller Constr. Co. v. Ohio Sch. Facilities Comm'n,* 10th Dist. Nos. 10AP-298, 10AP-299, 10AP-432, 10AP-433.

II. LAW AND ARGUMENT

A. Gibson's Counterclaim Fails to Demonstrate It Possessed a Contract

On its face, the Gibson's Counterclaim does not state a claim upon which relief can be granted. The Counterclaim alleges that the MOU entered into between Plaintiff OSFC and Defendant Gibson is the contract which is the basis for Gibson's Counterclaim. The MOU, attached to the Counterclaim is not a contract. A cursory review of the MOU reveals that it is missing the critical terms necessary to form a contract. There is no specific scope of work listed in the MOU and there is not a price to be paid for any scope of work. There are no time periods for performance or any other terms in the MOU that can be considered binding on any of the parties to it. Additionally, the statutory requirement that a certification of funds signed by the fiscal officer as required by R.C. 5705.41 is not present. Without such certification, there cannot be a contract.

It is well settled that for a valid contract to exist "there must be meeting of the minds of the parties, and there must be an offer on one side and an acceptance on the other side." *Noroski v. Fallet,* 2 Ohio St 3d 77, 79, 442 N.E. 2d 1302 (1982); Restatement Second Contracts § 7. Yet none of these elements are plead or contained within the document Gibson claims is a contract. From the face of the Counterclaim and from the MOU attached to the Counterclaim, it is obvious there was no contract, only an agreed framework to proceed where an agreement may be reached, i.e. a "memorandum of understanding."

Defendant Gibson is counterclaiming for over $156,000, yet there is no mention of that amount, or any amount, in the MOU. The MOU is obviously a framework to proceed towards an agreement or a settlement, rather than a contract as Defendant Gibson is claiming. If it was a

contract, there would be a Resolution of the School Board or a Resolution of OSFC approving the contract. No resolutions from either were attached to the Counterclaim.

Assuming *arguendo* that the MOU could be considered a contract, it is well-settled that contracts entered into in disregard of statutes are void, and no recovery can be had for the value of work performed. *Buchanan Bridge Co. v. Campbell,* 60 Ohio St. 406, 54 N.E. 372 (1899). "Courts will leave the parties to such unlawful transaction where they have placed themselves, and will refuse to grant relief to either party." *Id.* at syllabus. Defendant Gibson has not pled that any of the legal requirements for a public authority to enter into a contract exist, as it is non-existent. In other words, per *Buchanan Bridge*, Defendant Gibson is entitled to nothing on a void contract such as is attached to its Counterclaim.

Additionally, there is no contract implied in fact. To possess an implied contract, there must also be a meeting of the minds of the parties and on mutual assent existed to which the parties intended to be bound. *Hocking Valley & Toledo Ry. Co. v. Gaffney*, 65 Ohio St. 104, 61 N.E. 152 (1901). Even if there were a meeting of the minds, the most it could have been for is the $20,000 Purchase Order. Defendant Gibson was aware of the amount of the Purchase Order and knew what its limit was. If Gibson performed work in excess of $20,000, it did so at its own risk.

Finally, there is no estoppel. First, Plaintiff has not pled facts which equate to an equitable estoppel claim. Equitable estoppel "is generally held that [to be] a representation of a past or existing fact made to a party who relies upon it reasonably may not thereafter be denied by the party making the representation if permitting the denial would result in injury or damage to the party who so relies." *Hortman v. City of Miamisburg,* 110 Ohio St. 3d 194, 2006-Ohio

4251, 852 N.E. 2d 716, ¶ 19. There was no guaranty or representation of facts, pled in the Counterclaim, that Gibson claims to rely upon. However, more importantly, even if Plaintiff could somehow muster a claim that would fit the elements of equitable estoppel, it is well-settled that, as a general rule, the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function. *Ohio State Board of Pharmacy v. Frantz,* 51 Ohio St.3d 143, 146, 555 N.E.2d 630 (1990); *Sekerak v. Fairhill Mental Health Ctr.*, 25 Ohio St.3d 38, 39,495 N.E.2d 14, 15 (1986); see, also, *Besl Corp. v. Pub. Util. Comm.* (1976), 45 Ohio St.2d 146, 150, 341 N.E.2d 835, 838.

For these reasons Defendant Gibson's Counterclaim fails to state a claim for relief on its face because Gibson cannot demonstrate that it had a contract with Plaintiff. The MOU, simply put, is not a contract.

B. Accord & Satisfaction/The Purchase Order To Gibson Has Been Entirely Paid

If there was a meeting of the minds, or an offer and acceptance for an amount, that amount was $20,000. Defendant Gibson was given a purchase order dated May 22, 2013, from the School District in the amount of $20,000 the purpose of "payment to enhancements to flashing/brick remediation-not to exceed." Exhibit 2. The Purchase Order possessed the proper certification from the School District's Treasurer. *Id.* It also provides that:

> This contract may not be modified or terminated orally, and no modification or termination, nor any claimed waiver of any of the provisions hereof" (*Id.* at1.)

No amendments or additional purchase orders were issued to Gibson after the $20,000 purchase order and Defendant Gibson cannot present any additional purchase orders or any other contracts. Exhibit 1 at ¶s 7,8. As of the present, the entirety of the $20,000 purchase order has

been paid to Defendant Gibson. *Id.* at ¶ 9. Defendant Gibson cannot prove that this was work that it was requested to do, or that it performed the work under an assumption they would be paid for the extra work. Without an additional signed purchase order, Gibson has no entitlement to any additional compensation. *Foster Wheeler v. Franklin County Convention Center Authority*, Ohio St. 3d, 78 Ohio St. 3d 353, 678 N.E. 2d 519 (1997).

In *Foster Wheeler*, the plaintiff was performing environmental remediation work on the construction of the new Franklin County Convention Center. The site formerly held a train station with a portion of the site being used to soak railroad ties with creosote, a now hazardous material. The plaintiff came across creosote soaked soil. The environmental engineer allegedly directed plaintiff to continue to work and remove the hazardous soil and assured plaintiff that it would be paid for the additional work being performed. *Id.* at 358. When the plaintiff did submit a request for a change order for the additional work it had performed, the change order request was denied. *Id. at 359.* Plaintiff sued for the work it performed. The Supreme Court found that the plaintiff in *Foster Wheeler* was not entitled to any additional compensation due to the fact that it was not issued a written change order for the extra work it performed. The Court stated:

> It is universally recognized that where a building or construction contract, public or private, stipulates that additional, altered or extra work must be ordered in writing, the stipulation is valid and binding upon the parties, and no recovery can be had for such work without a written directive therefor in compliance with the terms of the contract, unless waived by the owner or employer. (*Id.* at 360, citations omitted).

In this case, the facts are even stronger, as there is no allegation in the Counterclaim that the Co-owners directed Gibson to perform work without a written change order, i.e. a waiver. Gibson accepted the Purchase Order and knew that its specified a limit "not to exceed" $20,000. If Gibson performed work over and above the $20,000 Purchase Order, it did so at its own risk.

Per the ruling of *Foster Wheeler,* Gibson has no entitlement to anything over the $20,000 it has been paid. For that reason Defendant Gibson, as a matter of law, has no entitlement to any funds as it has already been paid everything it was due and the Counterclaim should be dismissed.

III. CONCLUSION

For the above stated reasons, Defendant Gibson's Counterclaim should be dismissed and this matter should be remanded back to the Ashtabula County Common Pleas Court. On the face of its Counterclaim, Defendant Gibson does not demonstrate that it possessed a contract, nor can Defendant Gibson show any entitlement to any amount in excess of the $20,000 Purchase Order it was issued and paid. Defendant Gibson should not be permitted to use a non-existent Counterclaim to evade the jurisdiction of the Common Pleas Court.

Respectfully submitted,
MIKE DeWINE
Ohio Attorney General

DAVID A. BEALS (0038495)
JERRY KASAI (0019905)
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215
Phone: 614.466.7447
Fax: 614.466.9185
David.beals@ohioattorneygeneral.gov
Jerry.Kasai@ohioattorneygeneral.gov
Attorneys for Plaintiff OSFC

David J Riley by JK

DAVID J. RILEY (0000000)
The Riley Law Firm
24502 Cornerstone
Westlake, OH 44145
(440) 801-1960
Rileylaw@roadrunner.com
Attorney for Plaintiff Grand Valley Local
School District Board of Education

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Judgment on the Pleadings/Summary Judgment was sent via regular U.S. Mail and email, to the following counsel this 15th day of July 2014:

Joseph A. Gerling (0022054) Scott A. Fenton (0068097) Lane Alton & Horst LLC Two Miranova Place, Ste 500 Columbus, OH 43215 jgerling@lanealton.com sfenton@lanealton.com Counsel for Gibson	Brian C. Lee, Esq. Jason D. Winter Riannon A. Ziegler Reminger Co., LPA 101 W. Prospect Ave, Ste 1400 Cleveland, OH 44115 Phone: 216-430-2287 Fax: 216-687-1841 blee@reminger.com jwinter@reminger.com rziegler@reminger.com Counsel for Buehrer
Stephen P. Withee (0069176) Ashley L. Oliker (0085628) Frost Brown Todd LLC 10 West Broad Street, Ste 2300 Columbus, OH 43215 swithee@fbtlaw.com aoliker@fbtlaw.com Counsel for Merchants	Patrick F. Roche Davis & Young 1200 Fifth Third Center 600 Superior Avenue East Cleveland, OH 44114 Phone (216) 348-1700 proche@davisyoung.com Counsel for Boak
Brian L. Buzby (0023124) Porter Wright Morris & Arthur LLP 41 S. High Street Columbus, OH 43215 bbuzby@porterwright.com Counsel for Hartford	Brian McMillan McMillan Construction 26457 State Route 58 Wellington, OH 44090
Jay William Pustelak DBA Pustelak, Inc 9070 Peach Street Waterford, PA 16441	Velotta Asphalt Paving Co. PO Box 1930 4964 Campbell Rd Willoughby, OH 44096
Hirshman Construction Services, Inc. 86222 Saddlebrook Dr. Hermitage, PA 16148	

DAVID A. BEALS (0038495)

IN THE COURT OF CLAIMS OF OHIO

GRAND VALLEY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.,	)	
Plaintiffs,	)	
vs.	)	Case No. 2014-00469-PR
BUEHRER GROUP ARCHITECTURE & ENGINEERING. INC. et al.	)	Judge Patrick M. McGrath
Defendants,	)	

AFFIDAVIT OF LISA MOODT

STATE OF OHIO)
) ss
COUNTY OF ASHTABULA)

Now comes, Lisa Moodt, first being duly cautioned and sworn, says and deposes the following:

1. I have personal knowledge of all the matters set forth in this Affidavit.

2. I am employed by the Grand Valley Local School District Board of Education, ("Grand Valley") as the Treasurer.

3. As the Treasurer for the School District, I am responsible for the issuance and payment of purchase orders to contractors and vendors for any work, goods or services provided to the School District.

4. Purchase orders cannot be issued to vendors or contractors unless the legal requirements for issuance can be met, including the certification from the Treasurer of the School District that funds exist for the purpose of payment on any purchase order.

5. On or about May 22, 2013, I approved, as Treasurer of the School District, along with the School District's Superintendent, the issuance of Purchase Order No. 3301018 to Jack

EXHIBIT
tabbies
1

Gibson Construction Company in an amount not to exceed $20,000. The purchase order to Gibson was for work to be performed in remediating defective construction work at the Grand Valley K-12 School which was not caused directly by Gibson.

6. Attached as Exhibit 2 to this Affidavit is a true and accurate copy of Purchase Order No. 3301018.

7. Purchase Order No. 3301018 is the only purchase order, or commitment of any funds, to Gibson subsequent to the completion of Gibson's prime general trades contract for the K-12 Project.

8. No amendments or change orders have been given to Gibson on Purchase Order 3301018, nor has Gibson had any approval or had funds encumbered in excess of the $20,000 of the Purchase Order.

9. Gibson has been fully paid the $20,000 on Purchase Order No. 3301018.

Further Affiant sayeth naught.

L Moodt

Lisa Moodt

Sworn and subscribed before me on this 10 day of July 2014.

Kassandra L Brand

Notary Public Kassandra L. Brand

My commission expires 12·18·18

Send All Invoices To GRAND VALLEY LOCAL SCHOOLS
TREASURER
111 GRAND VALLEY AVE WEST, STE A
ORWELL, OH 44076
PHONE: 440-437-6260

PURCHASE ORDER

Date	Purchase Order No.
05/22/2013	3301018
	Page
	001

THESE NUMBER MUST APPEAR ON ALL LETTERS, INVOICES, SHIPPING MEMOS, BILLS OF LADING, EXPRESS RECEIPTS AND PACKAGES.
PLEASE ACKNOWLEDGE RECEIPT AND ACCEPTANCE OF THIS ORDER.
TERMS AND CONDITIONS: TIME OF DELIVERY IS OF THE ESSENCE OF THIS CONTRACT. BUYER RESERVES THE RIGHT TO REFUSE ANY GOODS AND CANCEL ALL OR ANY PART OF THIS ORDER IF SELLER FAILS TO DELIVER ALL OR ANY PART OF THE GOODS IN ACCORDANCE WITH THE TERMS OF THIS ORDER. THIS CONTRACT MAY NOT BE MODIFIED OR TERMINATED ORALLY, AND NO MODIFICATION OR TERMINATION, NOR ANY CLAIMED WAIVER OF ANY OF THE PROVISIONS HEREOF

ISSUED TO
24086 FAX:
JACK GIBSON CONSTRUCTION COMPA
2460 PARKMAN ROAD NW
WARREN, OH 44485-0000

SHIP TO
GRAND VALLEY BOARD OF ED
111 GRAND VALLEY AVENUE
SUITE A
ORWELL OH 44076-0000

ATTN:
TERMS:
REQUISITION NO. 7701

ALL SHIPMENTS MUST COME BY TRUCK OR MAIL ALL SHIPPING CHARGES MUST BE PREPAID NO C.O.D. SHIPMENTS.

QUANTITY	UNIT	DESCRIPTION	UNIT PRICE	AMOUNT
1.00		PAYMENTS TO ENHANCEMENTS TO FLASHING/BRICK REMEDIATION-NOT TO EXCEED	20,000.00	20,000.00
			PAGE TOTAL	20,000.00
			GRAND TOTAL	20,000.00

	TI	FUND	FUNC.	OBJ.	SPCC.	SUBJ.	OPU	IL	JOB	AMOUNT
VERIFICATION OF RECEIPT OF GOODS		010	5200	620	0000	000000	060	00	000	20,000.00

_____ Order Complete
_____ Items Back Ordered (Circle)
Materials Checked by: _____
Date: _____
Return to Treasurer's Office Upon Completion

IT IS HEREBY CERTIFIED THAT THE ABOVE AMOUNT REQUIRED TO MEET THE CONTRACT, AGREEMENT OBLIGATION, PAMENT OR EXPENDITURE FOR THE ABOVE, HAS BEEN LAWFULLY APPROPRIATED OR AUTHORIZED OR DIRECTED FOR SUCH PURPOSE AND IS IN THE TREASURY OR IN PROCESS OR COLLECTION TO THE CREDIT OF THE FUNDS OF THE BOARD OF EDUCATION FREE FROM ANY OBLIGATION OR CERTIFICATION NOW OUTSTANDING.

School Districts Are Exempt From Federal Excise Taxes And Ohio Sales Tax. TAX EXEMPT STATE ID: FED ID: 346003336

THIS ORDER IS VOID UNLESS TREASURER'S CERTIFICATE IS SIGNED.

Treasurer, Board of Education

Superintendent

CLERK'S COPY

EXHIBIT 2