

IN THE COURT OF CLAIMS OF OHIO

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TRANSAMERICA BUILDING COMPANY, :
INC., :

Case No. 2013-00349

Plaintiff, :

Judge McGrath

v. :

Referee Wampler

OHIO SCHOOL FACILITIES :
COMMISSION, nka Ohio Facilities :
Construction Commission, :

Defendant. :

PLAINTIFF TRANSAMERICA BUILDING COMPANY, INC.'S
PRETRIAL STATEMENT

I. INTRODUCTION

The crux of this dispute involves the flawed set of plans provided by the OSFC that did not comply with the OSFC's obligations under R.C. §153.01, which required public projects to be built from "full and accurate plans" and "details to scale and full-sized, so drawn and represented as to be easily understood." In fact, when the Project began there was only a partial building permit in place with a correction letter noting "incomplete plans" and a full building permit approval was not obtained until nearly two (2) years later. This resulted in the Project being "designed on the fly" as construction was on-going. The failure of the OSFC to comply with R.C. §153.01 and provide an accurate set of plans was repeatedly acknowledged throughout construction. For example, Lend Lease ("LL"), the Construction Manager, referred to the drawings as "useless trash" and "garbage" in an email shortly after TransAmerica was awarded the Project.

In addition to the problems with the plans, OSFC, LL, and the Project Architect ("SHP") struggled with constructing the overall Project (the dormitory, academic and campus wide

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packages) within the \$43,980,000 budget. This Project was unique from other school projects as it was funded under separate legislation from the OSFC's school program. At one point during the construction of the dormitory portion, there was an overall forecasted budget overrun in excess of \$7,766,734. Procedurally, TransAmerica filed suit on June 14, 2013 and later amended its complaint to include claims for fraud, fraud in the inducement, negligent misrepresentation, and negligence. The OSFC has asserted counterclaims against TransAmerica for various backcharges and liquidated damages.

II. PROJECT BACKGROUND

The Project involved the construction of twelve (12) dormitories that were wood framed and closely resembled separate residential structures. The Project was administered under the OSFC's multi-prime delivery method with the OSFC contracting separately with the Project Architect, Construction Manager, and Prime Contractors. SHP served as the lead architect but had a number of lower tier consultants assisting. Berardi & Partners, Inc. ("BPI") was one such consultant and was primarily responsible for finalizing the construction set of plans for the dormitories.

Unlike most OSFC Projects, there was no school district involved and the OSFC served as the lone owner entity. After submitting its bid on October 28, 2010, TransAmerica was awarded the General Trades Contract in the amount of \$3,975,000.00. TransAmerica was issued its Notice to Proceed on December 10, 2010. Based on the bid documents, a 13-month construction duration was expected for the dormitories with completion occurring in January 2012. Construction was not complete as of August 2012 for reasons beyond TransAmerica's control.

III. LEGAL AND FACTUAL ISSUES

1. TransAmerica's Article 8 Compliance

TransAmerica fulfilled its obligations under Article 8 when considering the OSFC's failure to deliver complete plans. First, without complete plans, TransAmerica had no means of obtaining the information necessary to submit a certified claim. Indeed, it was not until March 8, 2012 that TransAmerica had enough information to submit its first certified claim in the amount of \$2,170,800.75. Even as of March 2012, there was no possible way for TransAmerica to realize the full magnitude of the design problems when the Project Team was withholding plans and the true status of the plan review process. It was only after TransAmerica received responses to a series of public records requests that it fully realized the substandard state of the design.

Moreover, TransAmerica provided continual written notice to the OSFC (and its agents) that the failure to provide accurate completed plans—the same plans the OSFC was required to provide under R.C. §153.01—would result in significant delays and increased costs. TransAmerica first provided notice to the OSFC as early as February 17, 2011, before TransAmerica even mobilized to the job site. As will be shown at trial, TransAmerica continued throughout the Project to provide the OSFC notice that the construction documents were incomplete and inaccurate.

While TransAmerica provided the OSFC consistent notice, the OSFC continually and repeatedly promised a forthcoming set of updated plans which, in the end, were never presented to TransAmerica. Instead, the Project was constructed from RFI responses and sketches rather than “full and accurate” drawings mandated by R.C. §153.01. Indeed, between January and July of 2011, SHP provided the plans examiner a complete set of plans labeled as “Construction Set.”

However, that “complete” set was never provided to TransAmerica at any point in time during construction. Instead of issuing those updated plans as promised, the plans were withheld for fear they would just create more confusion and expose the OSFC to additional costs. The sketches and discrete sheets that TransAmerica did receive do not fully reflect the work that was ultimately performed. Additionally, the sketches and discrete sheets, many of which required multiple revisions, are far from easily understood and do not satisfy R.C. §153.01.

While the OSFC may argue it is entitled to strict compliance with respect to Article 8 in an attempt to preclude TransAmerica’s claim, it is significant that the OSFC paid the delay costs of two (2) other prime contractors when neither contractor *ever* submitted a certified claim, let alone within the thirty (30) day time period. The OSFC waived its right to strictly enforce Article 8 by refusing to do what is required under Ohio law: to provide “full and accurate” construction plans to TransAmerica. The OSFC continued to waive the Article 8 provisions when its consultants (its agents), LL and SHP, promised on multiple occasions that an updated set of plans would be provided in response to TransAmerica’s initial Article 8 notice. Taking all of this conduct together, the OSFC waived its ability to require strict compliance with the Article 8 notice requirements.

Finally, to the extent Article 8 acts as a bar to damages caused by delays that are the fault of the public owner OSFC, the Article 8 provisions are unenforceable in violation of the public policy set forth in R.C. §4113.62. Ohio case law makes clear that the OSFC will not be able to escape liability for the delays it (and those under its control) caused by simply relying on the “boiler plate” notice provisions. See, e.g., *Cleveland Constr. Inc. v. Ohio Public Emps.Retirement Syst.*, 10 Dist. No. 07AP-574, 2008-Ohio-1630, ¶ 19. This is especially true in this case when both SHP and LL, as the agents for the OSFC, (1) made misrepresentations

regarding issuing an updated set of plans, (2) spent a considerable amount of time creating an updated set of plans that was issued to the plans examiner, (3) but then withheld that set from TransAmerica.

2. Prior Executed Change Orders Do Not Preclude or Limit TransAmerica's Claim

The OSFC, primarily through LL, has repeatedly stated that TransAmerica released portions of its claim when it agreed to 26 change orders throughout the course of the Project, which totaled \$211,163.93. However, TransAmerica's entire claim, even its carpentry claim for early design issues, will survive this argument for any of the following reasons:

- a. TransAmerica's claims for additional costs are for items beyond the description of work stated in the change orders.
- b. TransAmerica reserved its right for cumulative impacts on the two (2) Change Orders that arguably related to early design issues.
- c. TransAmerica's carpentry claim for early design issues remains compensable when the OSFC withheld the updated construction set of plans.
- d. R.C. §4113.62 preserves TransAmerica's delay damages caused by the OSFC and will result in a different outcome than in *Dugan & Meyers*.

3. TransAmerica's Claims For Fraud, Fraud In the Inducement, and Negligent Misrepresentation

TransAmerica's claims for fraud, fraud in the inducement, and negligent misrepresentation are based on the OSFC and its agents' false and material representations to TransAmerica concerning the state of the plans and specifications. By putting the Project out for bid, the OSFC represented that the plans and specifications were complete, accurate and constructable pursuant to R.C. §153.01 when the OSFC and its agents knew, or *at a minimum* should have known, otherwise. Additionally, during an eight-month (8) period, the OSFC, through SHP and LL, repeatedly promised that an updated and coordinated set of plans would be

provided to TransAmerica, but never provided an updated and coordinated set. Instead, the OSFC, through SHP and LL, withheld those plans to serve its own purpose, which was to avoid the confusion and additional costs that would result if they were issued.

4. OSFC's Liquidated Damages Claim

The OSFC appears to argue that because TransAmerica was not meeting deadlines established in a recovery schedule, which was based on LL's manipulated actual completion dates, TransAmerica should pay liquidated damages. However, this argument ignores the fact that it was the OSFC's own conduct in not providing a completed plan set that caused the significant Project delays. The OSFC also ignores the delays attributable to the activities of the campus wide packages, which were significantly delayed because of the Project's budget problems. As the 10th District Court of Appeals has consistently held, "[u]nilateral and mutual delays...cannot be the basis for [the] recovery of liquidated damages, absent a reasonable basis for apportioning those damages." *Mount Olivet Baptist Church, Inc. v. Mid-State Builders, Inc.*, 10th Dist. No. 84AP-363, 1985 Ohio App. LEXIS 9120, at *22; *see also Masterclean, Inc. v. Ohio Dep't of Admin Servs.*, 10th Dist. No. 98AP-727, 1999 Ohio App. LEXIS 2188, at *37. In fact, this Court recently applied this principle in *Applied Contr. Corp. v. Ohio Dep't of Transp.*, (Ct. Cl.) 2011-Ohio-5320, when it found that the state was not entitled to liquidated damages because it "failed to prove by a preponderance of the evidence that any portion of the delay was attributable solely to [the contractor]." *Id.* at ¶108.

TransAmerica also points out that the OSFC did not attempt to assess liquidated damages until December 6, 2011, nearly five (5) months after the building enclosure milestone for Blind Dorm 5. Indeed, the reason OSFC did not assess liquidated damages for almost half a year is

because the buildings were in fact substantially enclosed, such that there was no delay to other prime contractors.

5. OSFC's Defective Claim Relating To The Roof

Recently, the OSFC has made allegations regarding defective workmanship relating to the roof. While TransAmerica will concede portions of the roof are not in compliance, TransAmerica will present evidence that the water infiltration problems being experienced are the result of the Project's design rather than anything TransAmerica did wrong. Additionally, TransAmerica will present evidence as to the costs of remedying these problems, which is much less than presently claimed by the OSFC.

6. TransAmerica's Damages

TransAmerica's damages arising from its breach of contract claim against the OSFC totals **\$3,872,899.55**, which includes its outstanding contract balance of \$824,605.42 plus its claim that presently totals \$3,048,294.13. TransAmerica's expert, Don McCarthy, will provide expert testimony regarding TransAmerica's damages, including its Additional Labor Cost component that was calculated using the Measured Mile Method. The remaining damage components were calculated based on time-based costs due to the construction duration having been extended by approximately six (6) months. In addition to its breach of contract claim, TransAmerica will seek recovery of its total losses on the Project by way of its claims for fraud, fraud in the inducement, and negligent misrepresentation, which represents damages in excess of \$4,800,000.00.

IV. LAY WITNESSES

In addition to any witness previously deposed, TransAmerica reserves the right to call the following individuals, either in its own case-in-chief or on cross examination:

Representatives of TransAmerica

Bill Koniewich
Brad Koniewich
Alan Starr
Josh Wilhelm
Bruce Bowman
Jim Dering (former employee)
Gerald Dering (former employee)

Representatives of OSFC

Rob Grinch (former Project Administrator)
Madison Dowlen
Richard Hickman
Michael Shoemaker (former Executive Director)
Richard Murray (former Executive Director)

Representatives of SHP

Josh Predovich

Representatives of Lend Lease

Jim Swartzmiller
Clay Keith
Jim Smith

Representatives of Glen Stephens, scheduling consultant to Lend Lease

Glen Stephens
Patrick Pattillo

Representatives of Berardi Partners, Inc.

Rolando Matias

Representatives of Jutte Electric

Ben York
Ken Jutte

V. EXPERTS WITNESSES ON BEHALF OF TRANSAMERICA

Mr. Don McCarthy
McCarthy Consulting
84 West Riverglen Drive
Worthington OH 43085

Lee E. Martin AIA, LEED AP
Robson Forensic
4150 Tuller Road
Suite 216
Dublin OH 43017

James S. Luckino A.I.A., C.S.I.
Archatas Inc.
6797 North High Street
Suite 129
Worthington OH 43085
(To the extent the OSFC pursues its
defective roofing claim.)

TransAmerica reserves the right to call Frederick G. Koehler, previously disclosed as an expert on behalf of the OSFC.

VI. EXHIBITS

1. The Project Contract Documents, which would include the following:
 - a. Project Manual
 - b. Executed Contracts
 - c. General Conditions
 - d. Project Drawing and Specifications
 - e. Change Orders
2. Various correspondence, including e-mails, issued by the Project Team and the prime contractors
3. Project Schedules (including those in an electronic format)
4. Core and Project Meeting Minutes
5. Photographs taken during construction
6. Building Permits and related documents
7. Reports authored by TransAmerica experts, Don McCarthy and Lee Martin.

Counsel intends to submit a more comprehensive list of exhibits to opposing counsel and to seek an agreement on joint exhibits to the maximum degree possible.

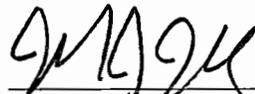
VII. OUTSTANDING MOTIONS

The OSFC's Motion for Summary Judgment has been fully briefed and the Court was previously waiting on the outcome of the parties' mediation. With this Pretrial Statement, TransAmerica requests the Referee to issue his decision on the motion as no settlement has been reached as of the date of this statement.

VIII. TRIAL

Trial is presently scheduled for December 8, 2014 and counsel for TransAmerica expects the trial to last between ten and twelve days.

Respectfully submitted,



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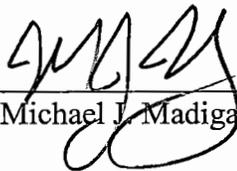
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Attorneys for TransAmerica Building Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Pretrial Statement was sent via e-mail and by regular U.S. mail, postage prepaid, this 5th day of September, 2014 to:

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Jerry K. Kasai
Craig D. Barclay
Assistant Attorneys General
Court of Claims Defense
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