

ORIGINAL

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IN THE COURT OF CLAIMS OF OHIO

TRANSAMERICA BUILDING COMPANY, :
INC., :

Plaintiff, :

v. :

OHIO SCHOOL FACILITIES :
COMMISSION, :

Defendant/Third-Party :
Plaintiff, :

v. :

STEED HAMMOND PAUL, INC. dba :
SHP LEADING DESIGN, :

Third-Party Defendant, :

and :

LEND LEASE (US) CONSTRUCTION, :
INC., :

Third-Party Defendant/Third :
(Fourth) Party Plaintiff, :

v. :

G. STEPHENS, INC., :

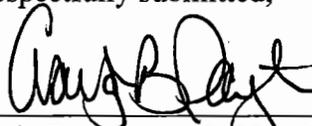
Third-Party (Fourth-Party) :
Defendant. :

MOTION FOR SUMMARY JUDGMENT ON THE CLAIMS FILED BY
DEFENDANT/THIRD-PARTY PLAINTIFF OHIO SCHOOL FACILITIES
COMMISSION AGAINST THIRD-PARTY DEFENDANT/THIRD (FOURTH) PARTY
PLAINTIFF LEND LEASE (US) CONSTRUCTION, INC.

ON COMPUTER

Now comes the Third-Party Defendant/Third (Fourth) Party Plaintiff, Lend Lease (US) Construction, Inc. ("Lend Lease") and submits this Motion, pursuant to Ohio Civ.R. 56, for summary judgment seeking dismissal of the claims of Defendant/Third-Party Plaintiff, Ohio School Facilities Commission ("OSFC"). For reasons appearing more fully in the attached Memorandum, Lend Lease submits that the claims of indemnity and contribution filed by OSFC against Lend Lease cannot be maintained as a result of the application of undisputed contract provisions, Ohio law, and more particularly, the recognition of the Economic Loss Doctrine in Ohio courts. Accordingly, reasonable minds can come to but one conclusion and that conclusion is adverse to OSFC on its claims of indemnity and contribution filed against Lend Lease. Those claims should accordingly be dismissed and judgment should be entered in favor of Lend Lease.

Respectfully submitted,



Craig B. Paynter (0023419)
cpaynter@taftlaw.com
James D. Abrams (0075968)
jabrams@taftlaw.com
Celia M. Kilgard (0085207)
ckilgard@taftlaw.com
Taft Stettinius & Hollister LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-4213
Telephone: (614) 221-2838
Facsimile: (614) 221-2007

*Attorneys for Third-Party Defendant/Third (Fourth)
Party Plaintiff Lend Lease (US) Construction, Inc.*

MEMORANDUM IN SUPPORT

FACTS

This case arises out of the construction by OSFC of the project known as the Ohio Blind and Deaf School Project (the "Project"). TransAmerica entered into a contract with OSFC for the Project; TransAmerica was to serve as one of several prime contractors on the Project. (TransAmerica Compl. ¶¶ 7, 8, Ex. A attached thereto). As clarified in its Amended Complaint, TransAmerica filed its action against OSFC to "recover money damages for breach of a construction contract, equitable adjustment, breach of warranties, fraud, fraud in the inducement, negligent misrepresentation and negligence arising from or relating to TransAmerica's work as the general trades prime contractor" on the Project. (¶ 1 of the Amended Compl. of TransAmerica). TransAmerica complains of continual delays and disruptions it encountered on the Project. (¶ 29 of the Amended Compl. of TransAmerica). In its prayer, TransAmerica demands judgment from OSFC of monies in the amount of \$824,605.42 and an equitable adjustment in an amount exceeding \$3 million, interest, prejudgment interest, and other monetary relief. (Amended Compl. p. 21). These claims for damages were echoed without substantive change in TransAmerica's Pretrial Statement filed on September 6, 2014. There are no allegations of any personal injury or physical damage to persons or property set forth in the TransAmerica Complaint.

OSFC has also contracted with Third-Party Defendant, Lend Lease, as the construction manager-agent for the Project. (¶ 13 of the TransAmerica Compl.; ¶ 11 of the Third-Party Complaint of OSFC against Lend Lease (hereinafter "OSFC Third-Party Complaint"). (Ex. B to the OSFC Third-Party Complaint). It is beyond peradventure that no privity of contract existed

between TransAmerica and Lend Lease for the work performed at the Project. (Affidavit of James A. Swartzmiller, Jr., ¶ 6, attached as Exhibit 1).

In the OSFC Third-Party Complaint, OSFC itself described the allegations set forth by TransAmerica, reiterating in the TransAmerica claims that SHP and Lend Lease:

- a. failed to provide plans that were accurate, complete and buildable;
- b. delayed the Project through incomplete and inaccurate plans;
- c. failed to properly schedule, coordinate and sequence the Project;
- d. failed to respond timely and sufficiently to request for information and submittals;
- e. delayed the Work of Plaintiff in failing to award later bid packages timely;
- f. failed to properly obtain approvals and inspections delaying the Work;
- g. performed additional Work above the Contract;
- h. made false representations to Plaintiff amounting to fraud, fraud in the inducement, and negligent misrepresentation; and
- i. negligently breached an alleged duty of care owed to Plaintiff with respect to the management of the Project.
- j. wrongfully assessing liquidated damages and withholding contract balance.

(¶ 18 of the OSFC Third-Party Complaint).

For its claim against Lend Lease, OSFC recited that if found liable for negligence, breaches of contract, fraudulent or negligent misrepresentations, or breaches of express or implied warranties for the alleged injuries and damages claimed by Plaintiff, which negligence,

breaches and misrepresentations are specifically denied, Lend Lease is liable to OSFC for contribution and indemnification for causing such injuries. (§ 23 of the OSFC Third-Party Complaint).

LEGAL STANDARDS

1. MOTION FOR SUMMARY JUDGMENT

The parties and this Court are sufficiently familiar with the standard which is applied in determining motions for summary judgment under Ohio Civ.R. 56. In fact, this Court, and more specifically the assigned Referee, has ruled in this very proceeding on the Motion for Summary Judgment previously presented by OSFC. The decision of the Referee was rendered October 1, 2014, and set forth the analysis:

“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. . . . A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party’s favor.”

Referee’s Decision at pp. 9-10, citing *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317. The Court went on to hold:

“Under Civ.R. 56, the non-moving party, OSFC, (sic) must negate an essential element of TA’s (moving party) cause, or establish an affirmative defense or immunity against liability through the submission of affidavits or other evidence as required by Rule 56(C).”

Referee's Decision at p. 10¹ (pertinent copies of which are attached hereto).

Lend Lease submits that the pleadings themselves, with the attached contracts, allow it to establish its dispositive defenses against liability to OSFC, rendering OSFC's claims against Lend Lease subject to summary judgment under Ohio Civ.R. 56(C). The analysis which must be brought to bear is relatively simple and straightforward, as compared to the lengthy procedural developments in this case.

2. CONTRIBUTION AMONG JOINT TORTFEASORS

In Ohio, the right of contribution exists only in favor of a tortfeasor who has paid more than that tortfeasor's proportionate share of the common liability, and that tortfeasor's total recovery is limited to the amount paid by that tortfeasor in excess of that tortfeasor's proportionate share. See Ohio Rev. Code §§ 2307.22, *et seq.*; *see also, Waverly City Bd. of Edn. v. Triad Architects*, 2008 WL 5423269 (the right of contribution is a legal concept that applies only to joint tortfeasors).

Courts of Ohio recognize the Economic Loss Doctrine. The Economic Loss Doctrine stems from the principle that, in the absence of privity of contract between two disputing parties, the general rule is "there is no . . . duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things." *Floor Craft Covering, Inc. v. Parma Community Gen. Hosp. Assn.* (1990), 54 Ohio St.3d 1, 3; *see also Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-

¹ The Court held that OSFC was entitled to judgment as a matter of law on Counts Four (Fraud), Five (Fraud in the Inducement), and Six (Negligent Misrepresentation) of TransAmerica's Amended Complaint.

Ohio-5409. Stated another way, in the absence of privity of contract, no cause of action exists in tort to recover purely economic damages.

3. INDEMNITY

Unlike contribution, which is a tort concept, the right to indemnity in Ohio arises from contract, express or implied. *See generally Waverly City School Dist. Bd. of Edn. v. Triad Architects, Inc.*, 2008-Ohio-6917, 10th Dist. Franklin No. 08AP-329 (Dec. 30, 2008). The nature of an indemnity relationship is determined by the intent of the parties as expressed by the language used. *Worth v. Aetna Cas. & Sur. Co.*, 32 Ohio St.3d 238 (1987). When the terms of the contract are clear and unambiguous, no genuine issues of material fact remain, and the trial court may enter judgment as a matter of law. *Battelle Mem. Inst. v. Newsco Pipeline Services, Inc.*, 56 F.Supp.2d 944 (S.D. Ohio 1999). Finally, indemnity agreements in Ohio must be strictly construed against indemnity. *Seifert Technologies, Inc. v. CTI Engineers, Inc.*, 2010-Ohio-5917 (2010), citing *Linkowski v. General Tire & Rubber Co.*, 54 Ohio App.2d 56 (9th Dist. 1977).

ANALYSIS AND DISCUSSION

CONTRIBUTION

- 1. Commission of a tort by Lend Lease is a necessary element for it to be found to be a joint tortfeasor; if Lend Lease is not a tortfeasor, a right of contribution from Lend Lease does not exist.**

As set forth above, contribution is a tort concept which exists between two parties who are both tortfeasors. Due to the application of the Economic Loss Doctrine, no duty is owed by Lend Lease to TransAmerica. Where no duty is owed, none can be breached. Therefore, Lend Lease cannot be a tortfeasor, joint or otherwise, with OSFC vis-à-vis TransAmerica.

Consequently, the conclusion is inescapable that Lend Lease could not be a joint tortfeasor from whom contribution could be sought by OSFC under any set of facts.

TransAmerica cannot maintain an action, in tort or otherwise, against Lend Lease due to the absence of privity and the application of the Economic Loss Doctrine. Where a tort action against Lend Lease cannot be maintained by TransAmerica, no contribution as a joint tortfeasor can be owed by Lend Lease to OSFC.

INDEMNITY

2. The claims of TransAmerica are outside the scope of the express contract indemnity provision and no implied indemnification is available.

Ohio law recognizes both express and implied obligations to indemnify. However, as set forth above, the availability of an implied indemnification contract can be limited or eliminated by the relationship of the parties or the parties' contractual obligations.

A. *Express Indemnification*

The contract between Lend Lease and OSFC contains an express indemnity provision, which contains a three-prong test [i.e. (a), (b) and (c)] of applicability, all of which must be met to trigger the obligation. OSFC has attached the Lend Lease agreement to its Third-Party Complaint. The indemnity provision is found at Section 6.2.1 and provides as follows:

6.2.1 Indemnification by Construction Manager Generally. To the fullest extent permitted by law, the Construction Manager shall and does agree to indemnify and hold harmless the Commission and their members, officers, employees and representatives from and against all claims, damages, losses, liens, causes of action, suits, judgments and expenses (including attorney's fees and other costs of defense), of any nature, kind or description, which (a) arise out of, are caused by or result from performance of the Construction Manager's services hereunder ***and (b) are attributable to bodily injury, personal injury, sickness,***

disease or death of any person, or to damage to or destruction of property, including the loss of use and consequential damages resulting therefrom, but (c) only to the extent they are caused by any negligent acts of the Construction Manager, (Emphasis and italics added).

Provisions of the type set forth in the Lend Lease agreement are sometimes referred to as limited indemnity obligations and are to be contrasted with what are otherwise known as broad-based or broad indemnity obligations. In this case the provision is not “broad” as is sometimes seen, but is more “narrow” and tailored to certain prescribed conditions under which OSFC could seek to recover monies from Lend Lease. Bruner & O'Connor on Construction Law, Section 10:2, pp. 733-734.² Clearly, this is not a broad indemnity obligation but is, instead, more narrow and restricted and applies in only limited circumstances.

As the emphasized language above indicates, the second prong (b) of the indemnity obligation is only triggered where there is either one of two conditions met: (1) bodily injury, personal injury, sickness, disease or death of any person; or (2) damage to or destruction of property, including the loss of use and consequential damages resulting therefrom. (See ¶ 6.2.1.) Purely, economic losses of the kind specifically claimed by TransAmerica are not the type which trigger this obligation; the prerequisite allegations and triggering conditions are not present. *See Seifert Technologies, supra* (claims brought were outside the scope of the indemnification provision); *Crowninshield/Old Town Community Urban Redev. Corp. v. Campeon Roofing & Waterproofing, Inc.*, 129 Ohio App.3d 819 (1st Dist. 1998) (claim for indemnity outside the scope of the provision). Lend Lease submits that the conclusion is inescapable that it cannot be

² The type of indemnity provision in the Lend Lease agreement seems to lend itself to affording the construction manager an opportunity to secure insurance protection for such indemnity by requiring a bodily injury, personal injury, sickness, disease or death of any person, or, alternatively, damage to or destruction of property (i.e., an insurable event or occurrence).

compelled by the contract terms to indemnify OSFC for the claims of TransAmerica (assuming arguendo, that TransAmerica is ultimately successful in prosecuting its claims).

B. Implied Indemnification

While ordinarily an argument might exist that an implied indemnity contract between OSFC and Lend Lease could exist, such is not the case in this dispute. First, if there is a particular term covered within an express contract, then implied indemnity won't apply. *See generally Cleveland Clinic Health Systems-East Region v. Innovative Placements, Inc.*, N.D. Ohio No. 1:11-CV-2074, 2012 WL 19998049 (June 4, 2012). Clearly, the express contract indemnity provision at 6.2.1 will govern the indemnity claim. Perhaps more importantly, the Lend Lease agreement contains an integration clause which declares that the entire understanding between OSFC and Lend Lease is set forth in the contract documents:

9.5.1 Entire Agreement. This Agreement and the Contract Documents represent the entire and integrated agreement between the Commission and the Construction Manager and supersede all prior negotiations, representations or agreements, either written or oral.

(Contract at 9.5).

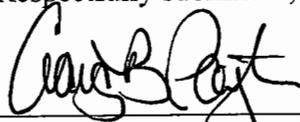
The provisions of the contract are clear. The provisions detail a restricted indemnity obligation. The contract provides that the complete understanding of the parties is set forth in the contract documents. The contract contains no provision reserving to OSFC the right to implied indemnity. Therefore, none exists. Even if OSFC could somehow argue the contract provisions are ambiguous and could result in such an interpretation, the contract is a form contract which was drafted solely by OSFC and provided to Lend Lease for signature. (Aff. of Swartzmiller at ¶ 5). Therefore, any ambiguity is to be interpreted against the drafter, OSFC.

(See generally Bruner & O'Connor, at Section 10:15, p. 767, as well as against indemnity. *Seifert Technologies, supra.*)

CONCLUSION

For all of the foregoing reasons, Lend Lease seeks judgment, under Ohio Civ.R. 56, in its favor and against OSFC for dismissal of OSFC claims for indemnity and contribution. The provisions of this contract can and must be applied here as a matter of law. (*See Dugan & Meyers Constr. Co. v. ODAS*, 113 Ohio St.3d 226 (2007).) They should not be altered, ignored, or interpreted simply because they might result in hardship to OSFC in this case as the language is clear and unambiguous. (*Cleveland Constr. Inc. v. Kent State Univ.* (10th Dist. No. 09AP-872), 2010-Ohio-2906, ¶ 31). Even when construing the evidence most strongly in OSFC's favor, reasonable minds can come to but one conclusion which is adverse to OSFC. The OSFC claims for indemnity, as well as contribution, must fail and Lend Lease is entitled to judgment on those claims as a matter of law.

Respectfully submitted,



Craig B. Paynter (0023419)

cpaynter@taftlaw.com

James D. Abrams (0075968)

jabrams@taftlaw.com

Celia M. Kilgard (0085207)

ckilgard@taftlaw.com

Taft Stettinius & Hollister LLP

65 East State Street, Suite 1000

Columbus, Ohio 43215-4213

Telephone: (614) 221-2838

Facsimile: (614) 221-2007

*Attorneys for Third-Party Defendant/Third (Fourth)
Party Plaintiff Lend Lease (US) Construction, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Motion for Summary Judgment on the Claims Filed By Defendant/Third-Party Plaintiff Ohio School Facilities Commission Against Third-Party Defendant/Third (Fourth) Party Plaintiff Lend Lease (US) Construction, Inc.* was served by regular U.S. Mail, postage prepaid, this 10th day of April 2015, upon the following:

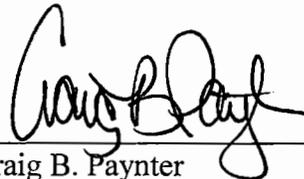
Donald W. Gregory
Michael J. Madigan
Kegler Brown Hill & Ritter Co., LPA
65 East State Street, Suite 1800
Columbus, Ohio 43215
*Attorneys for Plaintiff
TransAmerica Building Company, Inc.*

William C. Becker
Craig Barclay
David Beals
Assistant Attorneys General
Mike DeWine
Ohio Attorney General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130
*Attorneys for Defendant/Third-Party
Plaintiff Ohio School Facilities
Commission*

David M. Rickert
Dunlevey Mahan & Furry
110 North Main Street
Dayton, Ohio 45402-1738
Attorney for Third-Party Defendant SHP

George Carr, Of Counsel
Janik LLP
9200 South Hills Boulevard, Suite 300
Cleveland, Ohio 44147
*Attorney for Third-Party (Fourth-Party)
Defendant G. Stephens, Inc.*

Bradley J. Barmen
Mannion & Gray Co., LPA
1375 East 9th Street, 16th Floor
Cleveland, Ohio 44114
*Attorney for Fourth-Party Defendant
Berardi Partners, Inc.*



Craig B. Paynter

IN THE COURT OF CLAIMS OF OHIO

TRANSAMERICA BUILDING COMPANY, :
INC., :

Plaintiff, :

v. :

OHIO FACILITIES CONSTRUCTION :
COMMISSION, :

Defendant/Third-Party :
Plaintiff, :

v. :

STEED HAMMOND PAUL, INC. dba :
SHP LEADING DESIGN, :

Third-Party Defendant, :

and :

LEND LEASE (US) CONSTRUCTION, :
INC., et al., :

Third-Party Defendants/Third :
(Fourth) Party Plaintiff. :

Case No. 2013-00349

Referee Samuel Wampler

AFFIDAVIT OF JAMES A. SWARTZMILLER, JR. *JR JS*

I, James A. Swartzmiller, being first duly sworn, do hereby state and depose as follows:

1. I have been employed by Lend Lease (US) Construction, Inc. ("Lend Lease") since November 2002, most recently in the capacity of Vice President, Project Executive since June 2006.

2. During my tenure with Lend Lease, I have been actively engaged in the construction project of Ohio School Facilities Commission (now known as Ohio Facilities Construction Commission) ("OSFC").

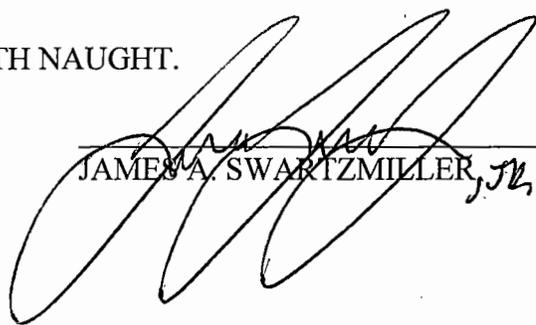
3. I have been engaged in the construction of Ohio State School for Deaf/Ohio School for the Blind project since the preconstruction activities of the Project in April 2007 (the "Project") and continuing to the present day.

4. Attached to this Affidavit are true and accurate excerpts of the Construction Management-agent Contract between OSFC and Lend Lease for the Project.

5. My experience in dealing OSFC on construction management-agent contracts is that OSFC observes a policy against negotiating terms of those form documents with vendor construction management firms, such as Lend Lease.

6. Lend Lease did not have a contract with TransAmerica Building Company, Inc. for work to be performed on the Project.

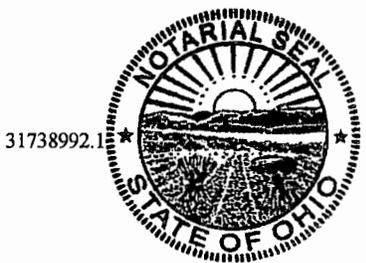
FURTHER, AFFIANT SAYETH NAUGHT.



JAMES A. SWARTZMILLER, JR. JAS

STATE OF OHIO)
)ss:
COUNTY OF FRANKLIN)

Sworn to before me and subscribed in my presence this 2nd day of April 2015.





ANNE L. WATSON, Notary Public
Notary Public, State of Ohio
My Commission Expires 11-02-19

FINAL AGREEMENT OHIO SCHOOL
FOR FACILITIES COMMISSION
CONSTRUCTION MANAGEMENT SERVICES JAN -4 PM 1:30

This Interim Agreement for Construction Management Services (this "Agreement"), is made as of November 18, 2009, by and between the State of Ohio through the *Ohio School Facilities Commission* (the "Commission"), whose contact person and address is set forth below, and *Bovis Lend Lease, Inc.* (the "Construction Manager"), whose contact person and address is set forth below.

The Commission, under the terms and conditions set forth herein, does employ the Construction Manager to provide management services with respect to the School and Residential Facilities for the Ohio State School for the Blind and Ohio School for the Deaf Project (the "Project").

The Construction Manager acknowledges that professional design services will be provided by *Steed Hammond Paul Inc.* (the "Architect"), whose contact person and address is set forth below:

Project Name: School and Residential Facilities for the Ohio State School for the Blind and Ohio School for the Deaf

The Ohio School Facilities Commission:

Contact Person: Rob Grinch
Address: 10 W. Broad Street, 14th Floor
Columbus, Ohio 43215
Phone Number(s): (614) 466-6290
Fax Number(s): (614) 995-9908

Construction Manager:
Contact Person: Bovis Lend Lease, Inc.
Address: 111 West Rich Street, Suite 280
Columbus, Ohio 43215
Phone Number(s): 614-621-4148
Fax Number(s): 614-621-4148

Architect:
Contact Person: Andrew Maletz
Address: 1014 Vine Street, Suite 2100
Cincinnati, Ohio 45202
Phone Number(s): 513-381-2112
Fax Number(s): 513-381-1521

WHEREAS, the Ohio General Assembly has appropriated funds in Am. Sub. H.B. No 699 for the planning and design phase of the Project; and

WHEREAS, the Commission is administering the Project and desires to consult with designated representatives of the Ohio State School for the Blind and the Ohio School for the Deaf in accordance with a Memorandum of Understanding between them; and

WHEREAS, the Construction Manager desires, and is capable, to provide construction management services for the Project, including without limitation, services required to plan, schedule, coordinate, manage and administer the Project; and

WHEREAS, unless adjusted herein, all Direct Personnel Expenses, Basic Fees and Reimbursable Expenses and any Additional Fees payable to the Construction Manager under this Agreement will not exceed *One Million Nine Hundred Thirty Three Thousand and Thirteen Dollars (\$1,933,013)*. The amount of \$1,933,013 shown for this Agreement is the total amount for work associated with the Final Agreement only and is exclusive of Interim Agreement #1 and Interim Agreement #2.

NOW, THEREFORE, in consideration of the mutual promises herein contained, the Commission and the Construction Manager agree as follows:

ARTICLE I RESPONSIBILITIES OF CONSTRUCTION MANAGER

1.0 The Construction Manager shall obtain a copy of the Ohio School Design Manual ("Design Manual"). The Construction Manager shall endeavor to ensure that the plans and materials proposed for use in the project comply with the standards established by the Design Manual. The Construction Manager agrees that any variance from the Design Manual will be submitted to the Commission for approval. The Basis of design and construction includes the United States Green Building Council's Leadership in Energy and Environmental Design (LEED) - for Schools Silver Certification with a preferred investment in attaining points in the Energy and Atmosphere category.

1.1 Construction Manager's Services.

1.1.1 Scope of Services: Applicable Law. The Construction Manager shall provide construction management services for the Project in accordance with the terms of this Agreement. The Construction Manager shall provide such services in accordance with the applicable Sections of the Ohio Revised Code and any applicable State rules and regulations, any applicable federal and local statutes, ordinances, rules and regulations, and the Project's Program of Requirements (comprised of, without limitation, the Master Plan, Bracketing Forms, Project Budget and Cost Estimates) as incorporated by reference herein.

- b. Commercial general liability coverage for bodily injury and property damage, including limited contractual liability coverage, in not less than the following amounts:
 - i. General Aggregate Limit:
\$2,000,000 each occurrence;
 - ii. Each Occurrence Limit:
\$1,000,000 each occurrence; and
- c. Commercial automobile liability coverage, including non-owned and hired, in an amount not less than \$1,000,000.

6.1.2 Certificates. The Construction Manager shall provide the Commission with certificates of insurance evidencing the required coverages and amounts, including without limitation any certificates of renewal of insurance. The certificates of insurance shall contain a provision that the policy or policies will not be canceled without thirty (30) days' prior written notice to the Commission.

6.2 Indemnification.

6.2.1 Indemnification by Construction Manager Generally. To the fullest extent permitted by law, the Construction Manager shall and does agree to indemnify and hold harmless the Commission and their members, officers, employees and representatives from and against all claims, damages, losses, liens, causes of action, suits, judgments and expenses (including attorney's fees and other costs of defense), of any nature, kind or description, which (a) arise out of, are caused by or result from performance of the Construction Manager's services hereunder and (b) are attributable to bodily injury, personal injury, sickness, disease or death of any person, or to damage to or destruction of property, including the loss of use and consequential damages resulting therefrom, but (c) only to the extent they are caused by any negligent acts of the Construction Manager, anyone directly or indirectly employed by the Construction Manager or anyone for whose acts the Construction Manager is legally liable. This Subparagraph is intended to be, and shall be construed as consistent with, and not in conflict with, Section 2305.31 of the Ohio Revised Code.

6.2.2 Intellectual Property Indemnification. To the fullest extent permitted by law, the Construction Manager shall and does agree to indemnify and hold harmless the Commission and their members, officers, employees and representatives from and against all claims, damages, losses, liens, causes of action, suits, judgments and expenses (including attorney's fees and other costs of defense), of any nature, kind or description, which result from any claimed infringement of any copyright, patent or other intangible property right caused by the Construction Manager, anyone directly or indirectly employed by the Construction Manager or anyone for whose acts the Construction Manager is legally liable. The Construction Manager shall not be required to indemnify and hold harmless such persons for such matters when the claimed infringement occurs in materials provided by the Commission or the Architect.

6.3 Financial Assurance. Except when a modification is requested in writing by the Construction Manager and approved in writing by the Commission, the Construction

9.4 **Successors and Assigns.** The Commission and the Construction Manager, each bind themselves, their successors, assigns and legal representatives, to the other party to this Agreement and to the successors, assigns and legal representatives of the other party with respect to all terms of this Agreement. The Construction Manager shall not assign, or transfer any right, title or interest in this Agreement without the prior written consent of the Commission.

9.5 **Extent of Agreement.**

9.5.1 **Entire Agreement.** This Agreement and the Contract Documents represent the entire and integrated agreement between the Commission and the Construction Manager and supersede all prior negotiations, representations or agreements, either written or oral.

9.5.2 **Amendments.** This Agreement may be amended only by an amendment prepared by the Commission and signed by both the Construction Manager and the Commission..

9.5.3 **Multiple Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be regarded as an original and all of which shall constitute but one and the same instrument.

9.5.4 **Captions.** The captions or headings in this Agreement are for convenience only and in no way define, limit or describe the scope or intent of any provisions or sections hereof.

9.5.5 **Precedence.** If there are any inconsistencies between the provisions of the Contract Documents, or this Agreement, the provisions of the Contract Documents shall prevail. In addition, the Construction Manager should refer to the provision of the Ohio School Design Manual for guidance wherever appropriate, including without limitation all exhibits thereto, for applicable procedures, policies and forms.

9.5.6 **Conditions to Validity.** None of the rights, duties and obligations contained in this Agreement shall be binding on any party until all legal requirements have been complied with, including without limitation that the Director of Budget and Management of the State first certifies that there is a balance in the appropriation not already obligated to pay existing obligations, as required by Section 126.07, Ohio Revised Code, all necessary funds are available from the applicable state agencies or instrumentalities and, when required, the expenditure of such funds is approved by the Controlling Board of the State of Ohio or other applicable approving body.

9.6 **Governing Law.**

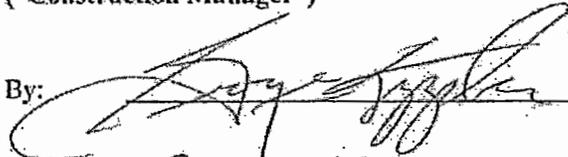
9.6.1 **Law of Ohio.** This Agreement shall be governed by the law of the State of Ohio to the exclusion of the law of any other jurisdiction and the State of Ohio shall have jurisdiction over any action hereunder or related to the Project to the exclusion of any other forum.

9.6.2 **Capitalized Terms.** Capitalized terms in this Agreement shall have the same meaning as those in the Standard Conditions, unless otherwise defined herein or unless another meaning is indicated by the context.

IN WITNESS WHEREOF, the parties hereto have executed this Final Agreement as of the date and year written above.

Bovis Lend Lease
("Construction Manager")

By: _____



GEORGE KEPPNER

(Print Name)

Title: _____

SVP

Tax ID #: _____

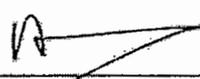
56-0315630

Date: _____

12/10/09

OHIO SCHOOL FACILITIES COMMISSION

By: _____

 2/10/2010

Richard C. Murray
Executive Director

Date: _____



Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

TRANSAMERICA BUILDING
COMPANY, INC.

Plaintiff/Counter Defendant

v.

OHIO SCHOOL FACILITIES
COMMISSION, etc.

Defendant/Counter Plaintiff

Case No. 2013-00349

Referee Samuel Wampler

DECISION OF THE REFEREE

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On April 30, 2014, defendant Ohio School Facilities Commission ("OSFC") filed a motion for summary judgment ("Motion" or "MSJ") pursuant to Civ.R. 56, supported by its memorandum of law and argument, deposition testimony, specified allegations in the first amended complaint and various certified documents.¹ On May 14, 2014, plaintiff TransAmerica Building Company, Inc. ("TA") filed its opposition ("Brief in Opp."), supported by its memorandum of law and argument, excerpts of deposition testimony, affidavit and various certified documents referred to in the affidavit. On May 23, 2014, OSFC filed its reply to the opposition of TA ("Brief in Reply"), including objections to the admissibility of certain documents submitted by TA in its opposition to OSFC's Motion. OSFC's Motion is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

EVIDENCE IN SUPPORT OF AND IN OPPOSITION TO THE MOTION:

OSFC, as the moving party, did not offer any evidence outside the pleadings by way of affidavit. OSFC did file certified documents in support of its motion, i.e. Exhibits A, C,

¹OSFC did not file an affidavit, but instead relied on allegations of the amended complaint, deposition testimony and certified records to support its motion.

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D and E. OSFC also submitted Exhibits B and F that were not certified and it submitted excerpts from deposition testimony, transcripts of which are on file with the court. TA did not object in its Brief in Opp. to any of the documents submitted by OSFC, nor did it file a motion to strike such exhibits. Generally speaking, summary judgment cannot be granted on the basis of documents that are not incorporated into a properly framed affidavit.

Specifically, Civ.R. 56(C) provides:

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.

Some of the documents, although certified, were not properly incorporated into an affidavit, which is required by Civ.R. 56.

Civ.R. 56(E) provides in part:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

"The proper procedure for introducing evidentiary matter not specifically authorized by Civ.R. 56(C) is to incorporate it by reference in a properly framed affidavit pursuant to Civ.R. 56(E)." *Buzzard v. Public Emples. Retirement Sys.*, 139 Ohio App. 3d 632, 636 (Ohio Ct. App., Franklin County 2000). OSFC failed to incorporate its certified documents into a properly framed affidavit. However, because TA has not objected to their admission

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or the court's consideration of any of these materials, they may be considered in ruling on OSFC's motion.²

In support of its Brief in Opp., plaintiff submitted the affidavit of William Koniewich, the President of TransAmerica Building Company, Inc., which states that it is based on "personal knowledge of the events that led to the dispute. . ." Attached to the affidavit are documents, many of which are accompanied by a "certification of record" by Mr. Koniewich wherein he states that such document is a "true and accurate" copy of the document as it appears in the "project files for the Ohio School for the Deaf and Ohio State School for the Blind construction Project." It would be reasonable to infer that Mr. Koniewich is referring to the project file maintained by TA and as president of TA it would be reasonable to conclude that he is competent to authenticate records contained in the file, at least as to those documents which, on their face, would be the types of records that would typically appear in such a project file. OSFC has objected to the admissibility of exhibits B, C, H, I, J, K, L, M, N, P, Q, R, S, T, U, V, W, X, and BB, contending that they were not properly authenticated and are inadmissible hearsay. OSFC did not object to any testimony offered by William Koniewich in his affidavit (Brief in Opp., Exhibit A).

Civ.R. 56(E) requires that documents be authenticated by an affiant competent to testify as to matters stated therein.

²Thus, we determined because the defendant did not raise any objection to the affidavit with the trial court, he waived that argument for purposes of appeal. Moreover, we concluded that, even if the affidavit included information that was not admissible, the trial court can consider non-complying documents in adjudicating a summary judgment motion when no objection to the documents was raised." *Citizens Banking Co. v. Parsons*, 2014-Ohio-2781, P14 (Ohio Ct. App., Franklin County June 26, 2014)

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Civ.R. 56(E) provides, in part, "Supporting and opposing affidavits shall be made on personal knowledge." Personal knowledge is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay." *State ex rel. Shumway v. State Teachers Retirement Bd.*, 114 Ohio App.3d 280, 288 (10th Dist.1996), quoting *Brannon v. Rinzler*, 77 Ohio App.3d 749, 756 (2nd Dist.1991).

Evid.R. 901 governs authentication or identification of evidence. Evid.R. 901 provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Authentication and identification are terms implying the process of laying a foundation for the admissibility of documents. *Premier Capital, LLC v. Baker*, 11th Dist. Portage No. P-0041, 2012-Ohio-2834.

OSFC's objection to the admissibility of Exhibits B, C, L, M, N, P, S, W and X is sustained, because from the face of the documents (or in some cases some of the documents within a single exhibit) they do not appear to be communications or documents between TA and OSFC or its agents, but rather communications or documents internal to OSFC and its agents. Such documents are not likely to reside in the project file of a contractor and William Koniewich fails in his affidavit to explain how these documents ended up in TA's project file. Accordingly, they have not been properly authenticated and constitute inadmissible hearsay.

All depositions referred to by TA in its Brief in Opp. have been filed with the court. Accordingly, OSFC's objection to excerpts of the deposition of Mr. Swartzmiller (Brief Opp. Exhibit E) is overruled.

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THE PLEADINGS:

TA filed its complaint in this action on June 14, 2013 and amended its complaint on August 1, 2013. OSFC filed its answer to the amended complaint along with its counterclaim on August 20, 2013 and TA filed its answer to the counterclaim on September 9, 2013. The pleadings are closed and there are no pending motions to amend the pleadings by either party.

In its amended complaint, TA seeks damages based on seven distinct counts, four of which arise from contract and three of which sound in tort:³

- 1) breach of contract;
- 2) equitable adjustment;
- 3) breach of express and implied warranties;
- 4) fraud;
- 5) fraud in the inducement;
- 6) negligent representation; and
- 7) negligence.

FACTS:

The contract at the center of this action is typical of a contract for building projects constructed for the state of Ohio of the type involved here. At a minimum, such contracts typically consist of a form contract signed by the parties, general conditions, drawings and

³Whether the cause of action sounds in tort or contract is only relevant to the extent it is determinative of when the cause of action accrued, as explained more fully below.

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specifications.⁴ The structure of the price for this contract is also typical and is governed by three separate and distinct processes: 1) the competitive bidding process; 2) the change order process; and 3) the claims and dispute resolution process, here governed, at least in part, by Article 8 of the General Conditions (GC) and applicable statutes as discussed more fully below.

1. **Bidding.** The competitive bidding process establishes the price that the state will pay for full and complete performance of the contract by the contractor to whom the contract is awarded. R.C. 153.12.
2. **Change Order.** The state may decide to change the plans, details, bills of material, or specifications which may result in an increase or decrease in the price of the contract. See, R.C. 153.09 and 153.10. In this event, the owner must approve an increase or decrease in price if such change affects the price.⁵
3. **Claims.** The Contract Sum may also be increased or decreased or the time for completion may also be extended through the filing and processing of a claim,

⁴Unfortunately, neither party has submitted a complete copy of the contract, including all of the contract documents, and particularly a complete set of the General Conditions. OSFC refers to a contract entered into by the parties on or about December 1, 2011 in its motion for summary judgment, and refers to Paragraphs 1, 14 and 15 of the Amended Complaint filed by TA (each allegation of which it denied in its answer). However, while the Amended Complaint does refer to the contract (Exhibit "A") and indicates that a copy is attached, it is not on file with the court. It is noted that the original Complaint (which OSFC never answered) also refers to the contract (also as Exhibit "A") in Paragraph 7 and incorporates a copy of the contract entitled "Contract Form" into the pleading by such reference. For purposes of this motion the "Contract Form" attached to the original Complaint as Exhibit A is considered to be the contract which is the subject of this action. Moreover, except for establishing a contractual relationship between TA and OSFC and the approximate date it was entered into, none of the terms of the Contract Form are relevant to this decision on the Motion.

⁵Although neither party offered a complete set of the General Conditions, by statute OSFC is required to approve change orders when changes to the plans are made that affect the price.

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or by a request for extension of time. See GC Article 8, Exhibit E to OSFC's Motion and R.C. 153.16. The contractual claims process under Article 8 consists of three distinct steps:

Step 1 - initiation of the claim (written notice, GC 8.1.1 and 8.1.2);

Step 2 - submission of the claim (certification and substantiation, GC 8.2, 8.3, 8.4 and 8.5); and

Step 3 - resolution of the claim (job-site resolution, appeal to the Commission, or non-binding alternative dispute resolution, GC 8.8, 8.9 and 8.10).

Each of these three steps in the claims process is time-sensitive.⁶ Here, if TA encountered an event that it believed would impact its cost of completion or the time for completion (or both), it was required to initiate a claim for an adjustment to the price of the contract or the time for completion, or both, by written notice to OSFC within 10 days of the occurrence of the event giving rise to the claim. Under the contract, once a claim was initiated, TA had 30 days (or, such additional time as may be agreed to by the Commission and the contractor) to submit its claim, including certification and substantiation of the claim. GC 8.2.1, 8.3.1 and 8.3.5. Once the claim was submitted, within the next 30 days the construction manager, acting with the assistance of the architect, was

⁶Steps 2 and 3 must be completed within 120 days or the claim is deemed denied.

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required to schedule a meeting with the contractor to implement the dispute resolution procedure agreed to by the parties in their partnering agreement.⁷

On October 29, 2010, TA submitted its bid for the contract that is at the heart of this action. At the time that TA's bid was submitted, a complete set of construction plans had not been approved by the Department of Industrial Compliance ("DIC"). Following bid opening, OSFC, through its agents represented to TA that an updated set of construction plans would be provided. On or about December 1, 2010, OSFC and TA entered into the contract for the project. As early as January 11, 2011, TA became aware that an updated set of approved construction plans had not been furnished by OSFC or its agents. On February 17, 2011, TA notified the Lend Lease, the construction manager for OSFC ("CM") that TA had not received a set of approved construction plans and without such plans its work would likely be impacted negatively, including potential delays and disruption to its work. The CM for OSFC responded on March 1, 2011 and indicated that a set of approved construction plans would be furnished on that date. They were not. TA mobilized to the worksite without updated approved construction plans and commenced work on the project. On March 1, 2012, TA sent OSFC notice of a claim resulting from various causes, the majority of which are stated to be caused by OSFC or its agents. On March 8, 2012, TA submitted its certified and substantiated claim to the CM for OSFC. On September 5, 2012, TA's claim was denied by the CM for OSFC. On September 18, 2012, TA appealed

⁷It is not clear what the dispute resolution procedure, if any, consisted of here as no evidence of the partnering agreement has been submitted by either party.

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the CM's decision to the OSFC. Thereafter, the parties pursued resolution through mediation rather than continuing with the appeal to the OSFC. On June 14, 2013, TA commenced this action in the court of claims against OSFC.

OSFC's Motion seeks summary judgment in its favor, contending that even construing the evidence most strongly in favor of TA, reasonable minds can come to but one conclusion and that conclusion is that:

- TA failed to file this action within the applicable statute of limitations;
- TA waived its claim by failing to properly follow the contractual dispute resolution process for presenting its claim (initiation and submission);
- TA has failed to establish that OSFC caused its damages (if any); and
- TA's claims for fraud against the State are not recognized in Ohio.
- TA's claim is limited to the amount of its claim.

ANALYSIS

Civ.R. 56(C) states, in part, as follows:

"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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to

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but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004 Ohio 7108, 821 N.E.2d 564, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

"In summary, we hold that a complaint which states facts sufficient to show a cause of action upon its face, but which is not supported by affidavits as to those facts, must stand against a defendant's motion for summary judgment that is accompanied by affidavits as to facts which neither negate an essential element of the plaintiff's cause, nor establish any affirmative defense or immunity against liability." *Mason v. Roberts*, 35 Ohio App. 2d 29, 41 (Ohio Ct. App., Ashland County 1971). Under Civ.R. 56, the non-moving party, OSFC, must negate an essential element of TA's cause, or establish an affirmative defense or immunity against liability through the submission of affidavits or other evidence as required by Rule 56(C).

A. Statute of Limitations.

OSFC is correct that the statute of limitation applicable to a claim for damages against the State is R.C. 2743.16(A). In its motion, OSFC relies on the key language of the statute, specifically "shall be commenced no later than two years after the date of accrual of the cause of action . . ." However, in its argument OSFC equates accrual of TA's "claim" under the contract with accrual of its "cause of action."⁸ In order to determine

⁸Motion, at 5.

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Four, Five and Six of the Amended Complaint and be DENIED as to the remaining counts of the Amended Complaint.

A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).


SAMUEL WAMPLER
Referee

cc:

Craig D. Barclay
Jerry K. Kasai
William C. Becker
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Donald W. Gregory
Michael J. Madigan
Capitol Square Office Building
65 East State Street, Suite 1800
Columbus, Ohio 43215-4294

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