

2015 APR 28 PM 3: 22

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

Case No. 2013-00349  
Judge McGrath  
Referee Wampler

**MEMORANDUM IN OPPOSITION OF DEFENDANT/COUNTERCLAIM  
PLAINTIFF/THIRD-PARTY PLAINTIFF OHIO SCHOOL FACILITIES  
COMMISSION TO THE MOTION IN LIMINE OF PLAINTIFF  
TRANSAMERICA BUILDING COMPANY, INC.**

**I. INTRODUCTION**

Now comes the Defendant/Counterclaim Plaintiff/Third-Party Plaintiff, the Ohio School Facilities Commission (“Defendant” or “OSFC”), by and through counsel, and presents this Memorandum in Opposition to the Motion in Limine (“Motion”) of Plaintiff Transamerica Building Company, Inc. (“TA” or “Plaintiff”). This case involves the construction of twelve new Dormitories for the Ohio School for the Deaf and Ohio State School for the Blind (“Project”). Plaintiff TA was the general trades prime contractor on the Project. Plaintiff filed suit claiming damages for alleged design deficiencies, poor scheduling, coordination and other delays.

Essentially, Plaintiff TA requests in its Motion that Defendant OSFC be prevented from presenting testimony of anything to do with “delay” in relation to the backcharges and liquidated damages assessed against Plaintiff, since OSFC has not presented an expert “schedule analysis.” In reality, TA is attempting to prevent any evidence showing TA’s own failures on the construction of the Project, including the default of its roofing

**ON COMPUTER**

sub, substantial amounts of defective work requiring re-work, the inability to find a solvent drywall sub (which TA loaned \$400,000), TA's inability to find competent labor, or any of the many other failings of TA on the Project.

Plaintiff TA's Motion in Limine should be denied. Even taking the Motion at its face value; 1) the imposition of contractual liquidated damages is a factual issue under the contract and not contingent on a schedule analysis; 2) a "schedule analysis" would not be applicable to many of the deduct change orders objected to by Plaintiff TA; and 3) it misstates the use and purpose of expert testimony. Additionally, this Court's Local Rules govern the proffering of supplemental testimony from experts and Plaintiff should not be permitted to supersede this Court's Rules.

## **II. ARGUMENT**

### **A. The Imposition of Liquidated Damages is a Factual Issue Governed by the Contract**

Plaintiff TA claims that Defendant OSFC should be prevented from presenting any witnesses on the issue of delay concerning the imposition of liquidated damages. However, Plaintiff TA's argument ignores the plain language of its Contract with Defendant OSFC. Article 3 of the Contract Form between TA and OSFC addresses the imposition of liquidated damages and provides:

The Contractor's failure to complete all Work within the period of time specified, or failure to have the applicable portion of the Work completed upon any Milestone date, 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 Documents. Complaint at Exhibit A.

As is set forth above, there is no provision in the Contract which requires OSFC

to perform, either prior to, or after the imposition of the liquidated damages, a schedule analysis. The only requirement is that TA not complete the applicable portion of the Work on a timely basis, and had not timely requested nor was granted a time extension. As a factual matter, Plaintiff TA did not complete its Work on a timely basis and had not requested or received an extension of time, so the imposition of the liquidated damages was valid. There is no further analysis necessary as the Contract language itself calls out the situation when Liquidated Damages are appropriate.

**B. Expert Testimony is Not Required to Show Delay or Breaches by TA**

An important fact that Plaintiff TA glosses over is that the Project was composed of 12 separate buildings, each with its own critical path, i.e. 12 separate schedules, or mini-projects. The Project schedule had the work being performed on the individual buildings consecutively, rather than concurrently.<sup>1</sup> In other words, the buildings would proceed to be constructed consecutively, and would continue that way in the absence of adding additional labor. Since Plaintiff TA, due to its own failures, fell behind on the first building, it would necessarily start and finish the remaining buildings late. Defendant OSFC contends that the delays were due to Plaintiff TA's failures of its roofing subcontractor, TA's failure to frame the buildings in accordance with its own plan, the significant re-work of non-conforming work required in the framing of each building, and the issues with its drywall subcontractor, which TA had to loan \$400,000, with no evidence that it was repaid to date. Its self-imposed injuries would cascade through the balance of the mini-projects.

Expert witnesses are not necessary to demonstrate a delay, or to demonstrate that

---

<sup>1</sup> Although Plaintiff attempted at one point to work on different buildings at the same time, contrary to the schedule, it was never able to accomplish that due to insufficient manpower.

Plaintiff TA had missed a contractually required milestone. Evidence Rule 701 addresses when a lay witness may give an opinion. It provides:

**RULE 701. Opinion Testimony by Lay Witnesses**

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Therefore, a lay witness may give testimony in the form of an opinion if the opinion is based on the perceptions of the witness and helpful to the determination of a fact in issue. Certainly, it does not take an expert to testify as to the implications that could arise, or did arise, from a default of TA's roofing sub or the necessity to re-do defective work. No "schedule analysis" is necessary to hold that opinion, as it is a fact held by that witness since it comes from one's personal perceptions. The mere fact that OSFC will not present "expert" testimony on a "schedule analysis" does not mean that those present on the Project cannot testify as to any delay or the perceived basis for those delays.

As was held in *Commercial Contractors, Inc v. U.S.*, 29 Fed. Cl. 654, 39 Cont. Cas. Fed. (CCH) P76, 582 (1993):

A critical path analysis would be helpful to determine the effect of delays on the construction project. The preconstruction conference check list, however, indicates that bar charts or the critical path method, with revisions, could be utilized for progress schedules. Although an actual critical path analysis may not be necessary, plaintiff does have to provide some evidence of injury from the delays. In order to hold defendant liable for delays, plaintiff must supply specific proof that plaintiff's performance was affected by the Government's undue delays. See *Commerce Int'l Co. v. United States*, 167 Ct.Cl. 529, 338 F.2d 81, 89 (1964).

See also, *Hoffman Construction Company of Oregon v. United States*, 40 Fed. Cl. 184 (1998), *aff'd in part and rev'd in part*, 178 F.3d 1313 (Fed. Cir. 1999) (In explaining that delay can be shown in other ways than a scheduling analysis, the court stated, “[e]ven if a critical path analysis *per se* is unnecessary, a contractor must supply some form of specific proof that its performance was affected by the Government's undue delays”. *Id.* at 199. )

Contrary to Plaintiff TA's assertions, Defendant OSFC need not present a “schedule analysis” to demonstrate the validity of its actions in the imposition of deduct change orders to Plaintiff TA for claims paid to other prime contractors, or for liquidated damages. Defendant OSFC does need to present evidence for its actions, yet is not limited to just a “schedule analysis.” Such evidence would simply be the self-imposed injuries Plaintiff TA inflicted upon itself on the first building and Plaintiff TA's failure to finish and start the remaining buildings on a timely basis. Plaintiff TA's own schedule analysis will also back this up.

Additionally, Evidence R. 702, with respect to the testimony of experts provides, in part:

**Rule 702. Testimony By Experts**

A witness may testify as an expert if all of the following apply:

- (A) The witness' testimony either relates to matters *beyond the knowledge or experience possessed by lay persons* or dispels a misconception common among lay persons. (Emphasis added.)

\*\*\*

Plaintiff's Motion in Limine assumes that only an expert can assist the Court in understanding how Plaintiff's failure to have a roofing subcontractor could have an effect on the progress of the work on the Project, or how Plaintiff's other miscues on the Project

could have affected its ability to progress its work. Those that were present during the construction and witnessed the activities of the construction are the most qualified to testify as to what happened on the Project. Additionally, whether Plaintiff missed a contractual milestone date is contingent on the Plaintiff progressing its work properly. If Plaintiff TA was wrongfully assessed LDs for missing its milestones, it was incumbent on Plaintiff TA to request an extension of time under GC Article 6 or for acceleration costs under GC Article 8. At best, Plaintiff's argument goes to the validity of an opinion, as opposed to the admissibility of that opinion.

Plaintiff also argues that this is similar to the argument made in Defendant OSFC's Motion for Summary Judgment regarding Plaintiff TA's failure to proffer any testimony on causation. Lack of causation and the existence, or non-existence, of a schedule analysis are two different things. A schedule analysis is not the only method for proving causation. When Defendant OSFC filed its Motion for Summary Judgment, Plaintiff had not proffered any testimony which would connect the alleged breaches of contract to damages.

For this reason Plaintiff's argument regarding causation is misplaced and should be rejected.

**C. The Contract Provisions Governing Liquidated Damages Or the Imposition of Backcharges Do Not Require a Schedule Analysis As a Condition Precedent**

The General Conditions of Contract of Plaintiff TA's Contract provides at GC

9.6.1:

The Architect and the Construction Manager may recommend to the Commission that payments be withheld from, or Liquidated Damages be assessed against and withheld from, a Contractor's Application for

-Payment. (Complaint at Ex. A (incorporated by reference), attached hereto as Exhibit A.)

There is no provision in the Contract that makes a “schedule analysis” a condition precedent to the imposition of liquidated damages or the withholding of payments. The role of courts in examining contracts is to ascertain the intent of the parties. *City of St. Marys v. Auglaize County Board of Commissioners*, 115 Ohio St. 3d 387, 390, 875 N. E. 2d 561 (2007). “Where the terms in a contract are not ambiguous, courts are constrained to apply the plain language of the contract.” *Id.* If such language in the General Conditions of Contract indeed existed, Plaintiff TA would be citing to that provision of the Contract. However, Plaintiff does not, because there is no language which specifies that a schedule analysis must be done to assess liquidated damages or to withhold payment.

### III. CONCLUSION

Simply put, TA’s Contract required it to meet certain milestone dates. Upon the failure to meet those contractual milestone dates, Defendant OSFC had the contractual right to assess liquidated damages or withhold funds for indemnification purposes. An expert schedule analysis may be helpful in defending the imposition of those contractual provisions, however it is not required *per se* in proving the validity of the imposition of the back charges or liquidated damages. For these and the other above stated reasons Defendant OSFC requests that Plaintiff’s Motion in Limine be denied.

Respectfully submitted,

MIKE DeWINE  
Ohio Attorney General

*Jerry Kasai*

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

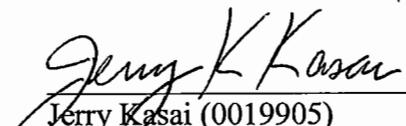
I hereby certify that a copy of the foregoing Memo in Opposition was sent by email and regular U.S. mail, postage prepaid, and email this ~~27<sup>th</sup>~~ day of April 2015 to:

Donald W. Gregory  
Michael Madigan  
Kegler Brown Hill & Ritter  
65 East State Street, 18<sup>th</sup> Floor  
Columbus, OH 43215  
[dgregory@keglerbrown.com](mailto:dgregory@keglerbrown.com)  
[mmadigan@keglerbrown.com](mailto:mmadigan@keglerbrown.com)  
*Counsel for Transamerica*

David M. Rickert  
Dunlevey Mahan & Furry  
110 North Main Street  
Dayton, OH 45402-1738  
[dmr@dmfdayton.com](mailto:dmr@dmfdayton.com)  
*Counsel for SHP*

Bradley J. Barmen  
Mannion & Gray  
1375 E. Ninth Street, 16<sup>th</sup> Fl.  
Cleveland, OH 44114  
[bbarmen@mansiongray.com](mailto:bbarmen@mansiongray.com)  
*Counsel for Beradi*

Craig B. Paynter  
James D. Abrams  
Celia M. Kilgard  
Taft Stettinius & Hollister LLP  
65 East State Street, Suite 1000  
Columbus, Ohio 43215-4213  
[cpaynter@taftlaw.com](mailto:cpaynter@taftlaw.com)  
[jabrams@taftlaw.com](mailto:jabrams@taftlaw.com)  
[ckilgard@taftlaw.com](mailto:ckilgard@taftlaw.com)  
*Counsel for Lend Lease*

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