

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

2015 APR 29 PM 4:38

**TRANSAMERICA BUILDING COMPANY,
INC.,**

Plaintiff/Counter Defendant

v.

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

Defendant/Counter Plaintiff/
Third-Party Plaintiff/Counter
Defendant

v.

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

Third-Party Defendant/Counter
Plaintiff/Fourth-Party Plaintiff

and

STEED HAMMOND PAUL INC., etc.,

Third-Party Defendant/Fourth-
Party Plaintiff

v.

BERARDI PARTNERS, INC., et al.,

Fourth-Party Defendants.

Case No. 2013-00349

Judge McGrath

Referee Wampler

**TRANSAMERICA'S REPLY TO OSFC'S MEMORANDUM IN OPPOSITION TO
MOTION IN LIMINE REGARDING OSFC'S DELAY DAMAGES**

Plaintiff TransAmerica Building Company, Inc. ("TransAmerica") makes this brief reply to the Ohio School Facilities Commission's ("OSFC") Memorandum in Opposition to TransAmerica's Motion in Limine seeking to preclude the OSFC and its agents from putting forth

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evidence in support of its delay damages (including liquidated damages) against TransAmerica. In its Memorandum in Opposition, the OSFC makes the argument that it is not required to perform a schedule analysis to assert its delay damages, including those for liquidated damages. However, such a position ignores the OSFC's requirement under paragraph 6.3 of the General Conditions to evaluate time extensions based on the impact to the Project's critical path.

<p>6.3 CRITICAL PATH</p> <p>6.3.1 Notwithstanding any other provision of the Contract Documents, time extensions shall depend upon the extent to which the Work on the critical path of the Construction Schedule is affected, if applicable.</p>
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In order to properly assess liquidated damages, the contract required the OSFC to determine the extent to which the Work on the critical path had been affected after TransAmerica requested a time extension. The OSFC's requirement to evaluate the Project's critical path starts with paragraph 3.3 of the Contract, which required the OSFC to evaluate TransAmerica's requests for extension of time "in accordance with the Contract Documents."

<p>3.3 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.</p> <table style="margin-left: auto; margin-right: auto;"> <thead> <tr> <th style="text-align: left;"><u>Contract Amount</u></th> <th style="text-align: left;"><u>Dollars Per Day</u></th> </tr> </thead> <tbody> <tr> <td>\$1 to \$50,000</td> <td>\$150</td> </tr> <tr> <td>More than \$50,000 to \$150,000</td> <td>\$250</td> </tr> <tr> <td>More than \$150,000 to \$500,000</td> <td>\$500</td> </tr> <tr> <td>More than \$500,000 to \$2,000,000</td> <td>\$1,000</td> </tr> <tr> <td>More than \$2,000,000 to \$5,000,000</td> <td>\$2,000</td> </tr> <tr> <td>More than \$5,000,000 to \$10,000,000</td> <td>\$2,500</td> </tr> <tr> <td>More than \$10,000,000</td> <td>\$3,000</td> </tr> </tbody> </table>	<u>Contract Amount</u>	<u>Dollars Per Day</u>	\$1 to \$50,000	\$150	More than \$50,000 to \$150,000	\$250	More than \$150,000 to \$500,000	\$500	More than \$500,000 to \$2,000,000	\$1,000	More than \$2,000,000 to \$5,000,000	\$2,000	More than \$5,000,000 to \$10,000,000	\$2,500	More than \$10,000,000	\$3,000
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On this Project, TransAmerica, on at least three (3) occasions, provided written requests for an extension of time. When evaluating whether TransAmerica was entitled to an extension request, the OSFC was required to review the request through the lens of the critical path of the Construction Schedule. The Contract precludes the OSFC from simply assessing liquidated damages without making this determination. In its Memorandum in Opposition, the OSFC

concedes it failed to perform *any* analysis of the critical path—expert or otherwise—as required under Article 6.3.1 of the General Conditions. The reason why is because the OSFC cannot show that TransAmerica delayed the Project based on the same schedules the OSFC’s own construction manager used to manage the Project. Accordingly, the OSFC should be precluded from offering testimony or evidence in support of its liquidated damages claim when it cannot show TransAmerica delayed the critical path. Any testimony attempting to support its liquidated damages assessment would be speculative and only serve to delay the trial.

Importantly, the OSFC does not dispute that TransAmerica requested time extensions at multiple times during the Project. However, the OSFC fails to provide any support that it evaluated those requests based on impacts to the Project’s critical path or that it was somehow excused from doing so. Instead the OSFC argues it had no requirement to evaluate the critical path in order to assess liquidated damages, which can only be done through a proper schedule analysis.

The OSFC’s position that it is not required to perform a schedule analysis to support its delay damages, including its liquidated damages, is in stark contrast to the position it has taken when trying to avoid responsibility for TransAmerica’s delay damages. In its Motion for Summary Judgment, the OSFC unsuccessfully argued that TransAmerica could not recover due to its failure to sufficiently establish a causal link between the multitude of OSFC shortcomings (including those of its agents) to the damages being claimed by TransAmerica. The OSFC made this argument despite the fact TransAmerica issued multiple page reports from its experts, Don McCarthy and Lee Martin. When TransAmerica provided additional support of its delay damages by way of Don McCarthy’s supplemental report after unsuccessfully trying to mediate the dispute on multiple occasions, the OSFC sought and obtained a continuance of the December 2014 trial claiming it was severely prejudiced by such a late disclosure. For the OSFC to now claim it has no

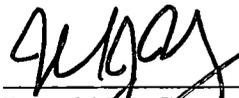
requirement to perform a schedule analysis of its own greatly overlooks the importance it has previously placed before this Court regarding TransAmerica's obligation to support its claim well in advance of the impending trial date.

Based on the OSFC's failure to perform any schedule analysis to support its delay damages, TransAmerica requests that the Court issue an order precluding the OSFC from putting forth evidence in support of its delay damages (including liquidated damages) against TransAmerica.

Alternatively, TransAmerica seeks an order clarifying the following:

- The OSFC should be precluded from disclosing at this late stage any purported schedule analysis to support its delay damages. Should the Court allow such testimony, TransAmerica should have an opportunity to voir dire such witness to demonstrate that he or she is unqualified to testify as an expert regarding the Project's schedule and the impacts that took place.
- OSFC should be precluded from providing undisclosed expert testimony from Mr. Englehart, which would include any new schedule analysis that has not been previously disclosed in his reports or deposition testimony.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *TransAmerica's Memorandum in Opposition to Motion in Limine regarding OSFC's Liquidated Damages* was sent via e-mail and by regular U.S. mail, postage prepaid, this 29TH day of April, 2015 to:

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