

ORIGINAL

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COURT OF CLAIMS
OF OHIO

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IN THE COURT OF CLAIMS OF OHIO

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 PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

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I. TRANSAMERICA'S PROPOSED FINDINGS OF FACT

A. The Contract, Executed Change Orders, and Remaining Contract Balance

1. Effective December 20, 2010, the State of Ohio, through the Ohio School Facilities Commission nka Ohio Facilities Construction Commission ("OSFC"), contracted with TransAmerica Building Company, Inc. ("TransAmerica"), Contract 023R, for the Residential General Trades Package (the "Contract") for the Ohio State School for the Blind and Ohio School for the Deaf Project (the "Project"). (JX-A/1)

2. The Project consisted of the Residential, Academic, and Campus Wide Packages. TransAmerica's scope of work only pertained to the Residential (dorms) portion of the Project.¹ (JX-B)

3. The Contract incorporated the General Conditions, Bid Plans, Addendums 10 thru 13, and balance of Project Specifications and Requirements. (JX-B, TA-901, TA-909, TA-913, JX-P-01 thru JX-P-04, JX-C thru JX-E)

4. During the Project, the OSFC and TransAmerica executed 26 separate Change Orders, which resulted in an Adjusted Contract Amount of \$4,186,169.93. (JX-F-01 thru JX-F-26)

5. To date, TransAmerica has been paid \$3,361,558.51, leaving an outstanding balance of \$824,605.42 (exclusive of TransAmerica's claim). (Bill Koniewich and TA-0732)

B. Project Chronology

6. On July 20, 2010, Bovis Lend Lease, Inc. ("LL") made the OSFC aware of the delays and additional costs that might be incurred as a result of bidding both the Residential and Academic portions of the Project without an approved building permit. (TA-084)

¹ Unless stated otherwise, references to "Project" shall mean the residential (or dormitory) portion.

7. On July 22, 2010, the OSFC received the first round of bids for both the Residential and Academic and Campus Wide Packages of the Project, which significantly exceeded the Published Estimates. (TA-0093)

8. On July 29, 2010, the plans examiner, Ohio Department of Commerce – Division of Industrial Compliance (“DIC”), issued a Partial Plan Approval for the Residential Portion, but only for the Footer, Foundation, Slab, and Shell only. (TA-091)

9. On July 29, 2010, the plans examiner, DIC, issued a Correction Letter stating that the Residential Plans could not be fully approved and noted that the plans were “incomplete.” The Correction Letter stated a compliance date of August 28, 2010. (TA-091)

10. After the first round of bids came in over budget, Steed Hammond Paul (“SHP”), LL, and OSFC proceeded to value engineer the entire Project, including both Academic and Residential portions, to address the first round of bids that exceeded the published estimates. (Josh Predovich)

11. Under the value engineering undertaken after the first bids came in over budget, SHP’s consultant, Berardi Partners, Inc. (“Berardi”) represented that the number of fire rated walls could be reduced for the dormitories, which later proved to be inaccurate. (Josh Predovich)

12. Despite not resolving the significant budget problems illustrated with the first round bids or even responding to DIC’s July 29, 2010 Correction Letter, the OSFC decided to re-bid the Residential portion of the Project.

13. On October 6, 2010, the OSFC’s Project Administrator, Rob Grinch, stated in an email to the Project Architect, SHP, that the second bid set was “flawed.” The Project Administrator went on to note the risk the OSFC assumed when it initially bid the Project

“without having the DIC Plan Review and Correction Letter process completed in July.” (Rob Grinch and TA-119)

14. Under R.C. §153.01, the OSFC, through SHP, was required to submit “full and accurate plans” “so drawn and represented as to be easily understood.” Additionally, R.C. §153.01 required the OSFC, through SHP, to provide definite and complete specifications of the work that “will enable a competent mechanical or other builder to carry them out and afford bidders all needful information.” The bid documents failed to meet the requirements of R.C. §153.01. Even Josh Predovich admitted they were “not complete.” (Josh Predovich)

15. At the pre-bid meeting for the second Residential Bid, the OSFC, through its agents, LL and SHP, represented that the Campus Wide Packages included the Security, Fire Alarm and Casework packages, which were needed to complete the dormitories. (TA-0132)

16. The Plans used for the second bid changed the building type from 5-A to 5-B. Additionally, the Plans included a different life-safety plan. This resulted in a reduction in the number of fire rated walls and ceilings, which would reduce the costs of construction. (Josh Predovich, TA-900, TA-901, and TA-1423)

17. The change in Building Type from 5-A to 5-B and the changes to the life safety plans were not part of the prior partial approval received from DIC on July 29, 2010.

18. Due to the Project’s budget problems, SHP and its consultant Berardi, noted that if the Residential portion of the Project comes in over budget, the “money will come out of the academic buildings.” (TA-0143)

19. The OSFC received a second series of bids for just the Residential Portion on October 28, 2010.

20. SHP, through Berardi, did not submit for review to DIC the change in Building Type from 5-A to 5-B and the changes to the life safety plans prior to receiving the bids for the Residential portion on October 28, 2010. DIC's July 29, 2010 correction letter was not shared with TransAmerica during the bid period or at any time during construction. (TA-0091)

21. TransAmerica submitted a bid in the amount of \$3,975,000.00, which was the second lowest bid received. The OSFC permitted the low bidder, Summit Construction Co. to rescind its bid without penalty. (Bill Koniewich)

22. TransAmerica's bid of \$3,975,000.00 was within 2% of the published estimate of \$4,054,594.00. (Bill Koniewich)

23. TransAmerica's bid was reasonable based on the information contained in the bid documents. (Clay Keith)

24. Based on bids received for the Residential Portions, the following contracts were awarded to the noted prime contractors. (TA-1200)

Bid Package	LL Estimate	Apparent Low Bidder	Bid Amount	Variance
BP 023R - Residential Building - General Trades	\$ 4,054,594.00	TransAmerica	\$ 3,975,000.00	\$ (79,594.00)
BP 024R - Residential Buildings - Windows/Glass/Glazing	\$ 519,787.00	Hall Aluminum	\$ 438,000.00	\$ (81,787.00)
BP 025R - Residential Buildings - Fire Protection	\$ 157,682.00	T P Mechanical	\$ 139,500.00	\$ (18,182.00)
BP 026R - Residential Buildings - Plumbing	\$ 682,271.00	T P Mechanical	\$ 922,498.00	\$ 240,227.00
BP 027R - Residential Buildings - HVAC	\$ 400,090.00	Vaughan Industries	\$ 715,000.00	\$ 314,910.00
BP 028R - Residential Buildings - Electric	\$ 898,199.00	Jutte Electric	\$ 786,892.00	\$ (111,307.00)
Total	\$ 6,712,623.00		\$ 6,976,890.00	\$ 264,267.00
*No bid alternates could be accepted				Overbudget

25. Shortly after receiving bids for the Residential portion, LL informed the OSFC that the Campus Wide Packages were still on hold and stated the "need to start working on the Campus wide portions of work that affect the dorm buildings to assure that we do not have any delays in progress with the dorms as we move forward." (TA-0146)

26. As of November 18, 2010, LL was forecasting a budget overrun of \$2,288,812 for the remaining portions of the Project (Campus Wide and Academic packages.) (TA-0162)

27. After TransAmerica submitted its bid, the OSFC and its agents represented to TransAmerica that it would be receiving an updated set of drawings that would reflect the various changes that had taken place, including those related to value engineering. (Bill Koniewich and TA-0163)

28. On November 30, 2010, SHP informed Berardi that it was the architect's responsibility to identify the changes that had taken place from the set of plans that TransAmerica based its bid from. At the same time, SHP informed Berardi that responding to the DIC's July 29, 2010 Correction Letter was the first priority. (TA-0166)

29. On December 9, 2010, SHP informed Berardi that it was "OUT OF TIME" with respect to responding to DIC's July 29, 2010 Correction Letter. SHP noted that "[w]hen it is determined that we got the permit review comments in July and we [were] unable to turn them around in five (5) months, **we will be paying the claim. And by we, I mean BPI.**" (TA-0176)

30. In the same December 9, 2010 email, SHP goes on to note that Berardi "promised" the contractors a construction set by mid-December. (TA-0176)

31. On December 9, 2010, Berardi finally responded to DIC's July 29, 2010 Correction Letter. (Josh Predovich and TA-0179)

32. On December 10, 2010, OSFC, through its Construction Manager LL, issued a Notice to Proceed to TransAmerica. (TA-0182)

33. On December 13, 2010, DIC rejected Berardi's fire rating design and issued another correction letter. (Josh Predovich and TA-0183)

34. On December 15, 2010, SHP falsely represented that "[a]ll revisions to drawings required by permit review have been addressed in Bid Documents and all have been realized as bid cost." (TA-0187)

35. SHP's December 15, 2010 statement was later proven not to be accurate based on subsequent changes that DIC required before issuing its August 2011 partial plan approval allowing drywall enclosure to take place. This fact was reluctantly admitted by the project "architect" Josh Predovich who admitted this "turned out not to be true." (TA-0187 and Josh Predovich)

36. At the time SHP's representative Josh Predovich made his December 15, 2010 statement regarding all DIC required revisions were realized as bid costs, **he was not a licensed architect**. In fact, Mr. Predovich was not licensed as an architect during the course of design and construction of the dormitories even though he was acting as the primary representative of SHP during the course of the job. (Josh Predovich)

37. As of December 2010, SHP failed to inform the OSFC or the bidders that the fire rating changes incorporated into the October 2010 Bid Set had not been submitted or approved by DIC prior to bids being received.

38. On December 29, 2010, a LL Superintendent, Joe Rice, referred to the drawings as "useless trash" and that "we'll have to plant a forest to make up for the senseless killings of trees to print this garbage." Even Jim Smith of LL stated that Mr. Rice seemed to be "very knowledgeable." (TA-0194)

39. On December 29, 2010, TransAmerica provided its comments to the schedule, which requested the proper incorporation of the casework and technology components, which were part of the Campus Wide Packages that had yet to be bid and awarded. (TA-0915)

40. SHP and Berardi made at least three attempts to update the drawings as promised, but those attempts were not sufficient for LL to recommend their distribution to the prime contractors. (Josh Predovich and Clay Keith)

41. LL's concern was that the SHP and Berardi attempts to update the drawings did not fully address the problems and deficiencies previously noted in late 2010 and 2011. (Josh Predovich and Clay Keith)

42. LL expressed concerns that additional costs and confusion would result by issuing the SHP/Berardi updated drawings to the prime contractors on a Project that had significant budget problems. (Josh Predovich and Clay Keith)

43. Commencing in January 2011, SHP and Berardi began making submissions to DIC attempting to resolve the fire rating issues. However, SHP and Berardi failed to include TransAmerica in this correspondence despite the fact TransAmerica was proceeding with shop drawings, including those for trusses and wall panels. (Josh Predovich, TA-0212, and TA-2014)

44. It took until August 2011 for SHP and Berardi to resolve issues with the fire ratings of the dormitories despite the fact construction had already significantly progressed. (TA-0440)

45. On January 25, 2011, after TransAmerica made the decision to use pre-fabricated wall panels, which was permitted under the contract documents, SHP and LL identified multiple dimensional discrepancies (or "busts") between the Architectural and

Structural plans. SHP and LL failed to include TransAmerica in these emails, thus precluding TransAmerica from resolving these dimensional issues prior to the walls being released for fabrication. (TA-0219, TA-0220, TA-0223, and TA-0226)

46. On January 21, 2011, when SHP provided support for additional compensation. OSFC's Project Manager noted in red ink "[q]uality of documents" and "never rec'd bld permit corrections until later" on SHP's request. (Rob Grinch and TA-0731)

47. On February 7, 2011, SHP promised in the weekly Progress Meeting that new drawings would be available through Key Blue Print "by the end of this week." (JX-I-03/5 and LL handwritten notes on TA-0733/5)

48. On February 15, 2011, LL expressed its frustrations to SHP and noted the need to "GET US DRAWINGS WE CAN USE TO BUILD THE BUILDINGS AND QUIT WORRYING ABOUT FINISH SUBMITTALS, OH YEAH A PERMIT APPROVED TOO." TransAmerica was not copied on the email. (Josh Predovich and TA-0237)

49. In response to the email noted above, SHP's representative Josh Predovich stated that "**I now have one more e-mail from you that I have to delete from my mailbox before the inevitable public records request that will be coming for each phase of this project.**" LL's Project Manager Clay Keith continued to express frustration in his response when he stated the "lack of focus displayed by [Berardi]" and noted that the updated drawings promised to the contractors over two (2) months ago had still not been provided. (TA-0236)

50. Josh Predovich stated that he may well have deleted Clay Keith's e-mail but asserted that he was under no obligation to preserve documents unless and until there was a public records request. (Josh Predovich)

51. On February 17, 2011, TransAmerica provided notice under GC Article 8 that the lack of updated drawings would potentially have both a cost and schedule impact. (TA-0245)

52. TransAmerica provided its February 17, 2011 Article 8 notice prior to mobilizing on site and within ten (10) days of the February 7, 2011 Progress Meeting where the OSFC, through LL and SHP, represented that an updated set of plans would be provided within the week.

53. The OSFC, SHP, and LL all received TransAmerica's February 17, 2011 Article 8 notice. (TA-0245)

54. TransAmerica provided a second Article 8 notice on February 23, 2011, which was also received by OSFC, SHP, and LL. (TA-0245)

55. In response to TransAmerica's two (2) February Article 8 notice letters, LL acknowledged internally to SHP and the OSFC the need for the updated drawings and impact to the Project if such drawings were not furnished immediately in its February 24, 2011 email:

(a) "Multiple RFI's have been answered and closed that refer to the construction set that is to be issued for the answer."

(b) "It has been expected and reasonable that the contractor is counting on these drawings to complete the coordination of their work."

(c) "There is an opportunity that within the approved contractor baseline schedule that if the drawings are issued immediately that it would be very difficult for a contractor to prove any delay or impact to the schedule and therefore be unreasonable to extend the schedule duration."

56. With its March 1, 2011 letter, LL acknowledged receiving TransAmerica's two (2) February 2011 Article 8 notices. (TA-0256)

57. In response to TransAmerica's notice of forthcoming cost impacts and delays due to the lack of updated drawings, LL made the following statements:

(a) "Per the SHP letter the drawings will be available from Key Blueprint after 12:00 today, March 1, 2011."

(b) "These updated drawings, when received do not unconditionally expose the Owner to any additional costs, unless they can be identified and justified above and beyond the information provided on bid day."

(c) **"TransAmerica is making assumptions that Additional changes, unknown changes, may cause other impacts. This cannot be considered as a potential claim."**

(d) "To bring closure to the notification received on February 17, 2011 and on February 23, 2011, the project team does not see any justification for costs or time extension to the current project schedule due to the updated drawings **provided that they are available as noted on March 1, 2011.**"

(e) "If there are additional changes above and beyond the items included in this response those items will have to be handled individually per the contract specifications with proper notification and documentation."

(f) "Please consider this notification closed at this point." (TA-0256)

58. In its February 28, 2011 letter, SHP acknowledged that the "issuance of this set will help to eliminate confusion, to that end, we are willing to complete this work at our cost." SHP promised that the "construction sets will be available for order from Key Blueprint on March 1st after 12pm." (TA-0256)

59. The updated set of plans referenced in LL's March 1, 2011 letter and SHP's February 28, 2011 letter were not made available on March 1, 2011 as promised. (TA-0256)

60. The updated set of plans referenced in LL's March 1, 2011 and SHP's February 28, 2011 letters were never provided to TransAmerica while it was constructing the Project. (Bill Koniewich and Josh Wilhelm)

61. TransAmerica continually and reasonably relied upon the representations of the OSFC and its agents that the updated construction set of plans would be timely produced as promised until July 2011. But they never were. (Josh Wilhelm and Bill Koniewich)

62. On March 10, 2011, an Executive Partnering Session involving representatives of the OSFC, SHP, LL and other high level state employees was held to discuss the "Potential Cost Overage for Project," which was forecasted to \$7,766,734.00. (TA-0260)

63. High level state employees in attendance included Rick Hickman with the OSFC, Robert Blair and Rand Howard with DAS, Paul Johnson and Francis Pompey with ODE. (TA-0260)

64. At no time during the March 2011 Executive Partnering Session did SHP or LL express any concerns regarding the Residential Portion of the Project other than the impact the Campus Wide Packages would have on completing the dormitories.

65. At no time during the March 2011 Executive Partnering Session was it expressed by either SHP or LL that the construction type and life safety plans used to construct the dormitories had been changed from what was partially approved back in July by DIC. (TA-0260)

66. At no time during the March 2011 Executive Partnering Session was it expressed by either SHP or LL that DIC had not approved the construction type and life safety plans used in the October 2010 Bid Plans. (TA-0260)

67. At no time during the March 2011 Executive Partnering Session did the OSFC, LL, or SHP express any of the following:

(a) DIC had not approved the construction type and life safety plans used in the October 2010 Bid Plans.

(b) TransAmerica had submitted an Article 8 notice regarding forthcoming delays and cost impacts before it mobilized.

(c) In response to its Article 8 notices, the OSFC, through LL and SHP, promised TransAmerica that an updated construction set would be available on March 1, 2011.

(d) TransAmerica had not received the updated construction set that the OSFC, SHP, and LL had repeatedly promised prior to the Executive Partnering Session.

(e) That the plans were flawed and creating serious problems for the contractors. (TA-0260)

68. On March 16, 2011, TransAmerica received its truss shop drawing submittal back from SHP and stamped as "Reviewed as Noted." SHP extensively marked up the truss shop drawings with changed dimensions. TransAmerica could not verify the accuracy of these changed dimensions without the updated architectural plans. (Josh Wilhelm and TA-0265)

69. Eighteen (18) days after the March 2011 Executive Partnering Session, LL expressed its frustrations to SHP in a March 28, 2011 email that did not include either the OSFC or TransAmerica. In the email, Clay Keith stated the following:

(a) "SHP has had 4 months to get the promised set of "Construction Drawings" in a form that is close to correct and has failed to do so."

(b) "SHP needs to take control of this situation and give us and the contractors the information needed to proceed with faith in your drawings."

(c) "We are on the brink of turning this project over to a new PA and will have to give him an update on the status of the project and it will not look good if we have to present all of this information we have been asking for from SHP for months with no response."

(d) "We have not copied the Owner on all of this information in the hopes SHP would get caught up, but will be forced to get them involved if we do not have information in our hands by the end of the week." (TA-0279)

70. In an April 4, 2011 email, LL and SHP discussed the Campus-Wide Packages and that the future casework package could not be properly coordinated with the ongoing work. (TA-0292)

71. In the April 4, 2011 email, LL continued to note that RFI responses included references to the previously promised updated construction set that to date had not been provided to TransAmerica.

72. On April 4, 2011, TransAmerica again notified LL that the lack of updated construction set will likely result in major costly errors. (TA-0294)

73. On April 15, 2011, TransAmerica again notified LL that the updated construction set still had not been provided. TransAmerica noted that the “drawing should be updated so that future coordination with the Primes and our subsequent trades is correct and we are all working from the same dimensions.” (TA-0304)

74. In response to TransAmerica’s April 15, 2011 email, LL acknowledged to SHP that **“TransAmerica has also submitted correspondence to cover themselves if there is a field issue or error. These drawings were originally promised to the contractors in December.”** (TA-0304)

75. On April 15, 2011, SHP represented to LL and OSFC that the updated construction set would be issued by the end of the week. (TA-0304)

76. On April 15, 2011, SHP provided its first response to RFI 132, which altered the interior dimensions but was not incorporated into a change order. The April 15, 2011 response to RFI 132 was later determined to be insufficient and required additional modifications. (Josh Wilhelm, TA-0307, and TA-308)

77. Despite concerns about the quality of SHP’s documents (written in RED ink) from the OSFC’s Project Administrator Rob Grinch, the OSFC issued SHP a contract amendment in the amount of \$487,545.00. (TA-0731 and TA-0351)

78. On May 6, 2011, TransAmerica again notified LL that the updated construction set had not been issued and they continue to experience “problems as we begin erecting the buildings next week.” TransAmerica went on to note that the “best solution is to have the corrected construction set issued.” (TA-0324)

79. In response to TransAmerica’s May 6, 2011 email, LL again notified SHP that “we are going to get hit with costs for every wall that is wrong on OSSB 5 and it will come back to confusion on the drawings.” (TA-0325)

80. On May 9, 2011, LL issued a five (5) day notification to the electrical prime contractor, Jutte Electric. In LL’s notification it asserts that “many of the contractors are pushing to get ahead of schedule.” (TA-0329)

81. On May 17, 2011, TransAmerica noted additional problems with the previous responses provided to RFI 132 and in particular noted there was a 1-1/4” difference between the Architectural and Structural plans. (TA-0337)

82. During the May 19, 2011 Core Meeting, which TransAmerica was not permitted to attend, it was noted that the Campus Wide Packages will delay the contractors currently on site from getting final inspections, which included TransAmerica. (JX-H-34)

83. Despite the acknowledged delays to the Campus Wide Packages, LL, SHP, and the OSFC still believed that “being able to occupy the Dorms on January 2012 is possible” and pushed TransAmerica to expedite its work.

84. However, LL’s Project Schedule failed to properly incorporate the Campus Wide Packages and thus masked the true impact to the schedule and ultimately the completion date. (Don McCarthy, TA-1200 and TA-1201)

85. On May 23, 2011, LL notified OSFC that the casework portion of the Project has become “very urgent.” LL went on to state that the “casework for the dorms will have a direct impact on the completion of this project and **could cause delay claims.**” (TA-0345)

86. On May 24, 2011, LL requested TransAmerica provide its wall panel layout drawings so that it could determine “if the corrective action is needed due to design documents provided or due to errors on the panel fabrication and layout process.” (TA-0347)

87. That same day, TransAmerica provided LL with its wall panel drawings (which were not required to be provided as a submittal) but never received a reply from LL as to whether any corrective action was due to design document errors. (TA-0347)

88. On June 1, 2011, SHP acknowledged that the updated construction set was still outstanding and informed Berardi that they expect the “construction set issue to come to head Monday” and that “[t]his is **past critical.**” We have framing up with drawings still outstanding.” (TA-0358)

89. On June 6, 2011, approximately six (6) months after promising an updated construction set, SHP again requested that Berardi provide an exact date the construction set will be provided. SHP acknowledged that “**the contractors have been complaining and sending letters that the lack of the construction set is delaying the job. You need to get this completed.**” (TA-0359)

90. On June 24, 2011, Berardi uploaded revisions to the plans but those plans were never provided to TransAmerica.

91. LL again expressed its frustrations to SHP (while concealing those same frustrations from TransAmerica) in a July 7, 2011. In the email, LL's Project Manager, Clay Keith, admits:

(a) "It appears the only focus on the construction set is the as-built of all the issues and deficiencies that have been pointed out since DD. It makes it even more frustrating when Jim Smith and [m]self are afraid to address deficiencies due to the situation just being reviewed by either structural, MEP or yourself and find out it is OK not to build per the plans and specs."

(b) **"This is not how we should be managing this construction and it is going to bite us in the you know what."**

(c) **"I feel we need to get this train back on the track and it starts with clear and accurate drawings."**

(d) "We are not reviewing drawings anymore to give you correction list after correction list."

(e) "You need to do a thorough review of your consultant's drawings and if they pass your approval issue them. My fear is if they are like previous versions it cause more confusion than is currently on site."

92. The July 7, 2011 email is a further admission from the OSFC's agent LL that the Project was being built from plans that were not "full and accurate" or "easily understood" as required by §153.01.

93. During a six (6) month time period, LL, SHP and OSFC repeatedly represented to TransAmerica during the weekly Progress Meetings that an updated construction set would be provided. Those representations were false and relied upon by TransAmerica to its detriment. (Bill Koniewich, Josh Wilhelm and JX-I-21/10-12)

94. These repeated representations, starting on February 7, 2011 and ending on July 11, 2011, are summarized in the meeting minute excerpt below, taken from the July 11, 2011 Progress Meeting. (JX-I-21/10-12)

Project Drawings	
003-002	<p>7/11/11</p> <ul style="list-style-type: none"> - Josh P noted that construction drawings will be issued on July 18th. A CD will be submitted to all contractors with information. <p>7/5/11</p> <ul style="list-style-type: none"> - SHP got LL comments on ES buildings, waiting to hear back from Berardi when docs will be revised. No actual dates have been provided. - Clay noted there are four "prototypes" built right now; do we actually need drawings at this point? Josh P doesn't want to waste all those man hours invested trying to get the drawings corrected. <p>6/27/11</p> <ul style="list-style-type: none"> - SHP received all HS drawings. Josh P and Jim S to meet to go over ES drawings. Clay suggested meeting today after this meeting. <p>06/20/11</p> <ul style="list-style-type: none"> - All Contractors are responsible to keep record drawings updated <p>06/13/11</p> <ul style="list-style-type: none"> - Josh P to have ES sets from Berardi and wants to review with Jim prior to Contractor release - Josh P expects one set of HS by the end of this week, other set of HS by the end of next week. - Josh W asked how these will be issued as he is concerned that corrections made will not show up on new sets. Josh P has been working with Berardi to insure that this happens. Review will be made by LL Team before distribution to Contractors. <p>06/06/11</p> <ul style="list-style-type: none"> - Construction sets have not been received yet. SHP to follow up with Berardi after this meeting and follow up with e-mail to the Team. <p>5/23/11</p> <ul style="list-style-type: none"> - During Scheduling meeting. SHP confirmed ES drawings will be received from printer tomorrow. A copy will be forwarded to LL for review. HS drawings potentially downloaded today to SHP's FTP site. Josh to confirm status. <p>5/16/11</p> <ul style="list-style-type: none"> - SHP got ES' drawings and it is downloaded to the FTP site. HS' drawings will be downloaded tomorrow after revision. Land Lease requested a set for review before releasing to contractors. - TA requested a set, Clay noted he prefers LL team to go over these drawings prior anyone else so docs can send back to Berardi/SHP if issues found. We are trying to avoid contractors to look at documents that could have issues and potentially create more confusion. - Construction set and previous marked up drawings to be returned by SHP to LL tomorrow. - Bill (TA) noted concern regarding potential dimension issues once Wood trusses are delivered on site. SHP confirmed availability all next week if needed.
	<p>05/09/11</p> <ul style="list-style-type: none"> - SHP received the set last week from Berardi. There are still issues with these drawings, SHP met with Berardi last Friday to discuss issues found on documents. SHP cannot promise when drawings will be completed since Berardi didn't provide date to SHP. - Bill Koniewicz (TA) is concerned due to so many unknowns related to these drawings. Josh noted questions had been answered via RFI and PR's; contractors have the answers. SHP understands the importance of the situation and will provide set to reflect all these changes. - Bill suggested confirming underground before pouring the slab. TP Mechanical needs documents to rough-in plumbing. - Clay noted that SHP needs to cut the time when the information will be reflected on drawings, there are many changes that need to be reflected on this set, we cannot keep updating the set to reflect the latest RFI's / PR's. We don't want this set to be as-builts by the time the first building is completed. Contractors need to have the information needed on the field without having to go to several documents to get the information from. - SHP will provide sets by Monday 5/16/11. SHP is aware this situation is critical and need to take action ASAP. <p>05/02/11</p> <ul style="list-style-type: none"> - PR#10 will change construction set. (Issued Friday) SHP is expected to have it by Wednesday and out to the printer on Thursday 5/5/11. <p>4/25/11</p> <ul style="list-style-type: none"> - Construction set is still pending; SHP noted subcontractor had a major issue with the server and it is delaying the submission of the Construction Dwg's. SHP received partial information over the weekend. <p>04/18/11</p> <ul style="list-style-type: none"> - Construction set to be issued by the end of this week. SHP noted that all dimensions in need of clarification must be submitted ASAP. <p>03/07/11</p> <ul style="list-style-type: none"> - Contractor's requested updated drawing sets and CAD files as agreed in previous meetings. Bovis' direction was to post bid set of drawings since changes were addendum and RFI. - Contractors directed that Architectural drawing dimensions are correct and could be used for coordination. - Rob asked why this is an issue and requested that updated construction sets are completed to be able to release them to Contractors. - Contractors agreed to proceed with posted bid sets until construction sets are complete. <p>02/07/011</p> <ul style="list-style-type: none"> - CAD Files: SHP noted all of the requested DWG's had been sent. \$50/sheet for additional information. - Structural sheets sent are matching the bid set. - Final Dwg's: Per SHP, we should be receiving new dwgs by the end of this week available at Key Blue Prints in pdf format. - Drawings of all utilities around dorms need to be issued to dorms contractors.

95. During the July 18, 2011 Progress Meeting, LL, SHP and the OSFC for the first time informed TransAmerica that “[e]verything that is in the project drawings has been issued via PR, therefore Construction set of drawings will not be issued.”

96. TransAmerica’s Project Manager Josh Wilhelm in the same meeting noted “they were hoping for a construction set, however there are 6 buildings being built as we speak.”

97. Upon being informed that the updated construction set would not be provided, TransAmerica proceeded with the understanding it would be compensated in

accordance with the General Conditions' proposal request and change order process, consistent with the OSFC's implied duty to act fairly and in good faith when administering the Project.

98. TransAmerica could not force the OSFC to issue the updated construction set and reasonably relied on the OSFC, LL, and SHP representations that TransAmerica would be compensated through the proposed request and change order process.

99. On July 18, 2011, TransAmerica received Proposal Request No. 18, which directed TransAmerica to "[p]rovide pricing for revisions to fire separation walls between dorm sleeping units **per the attached sketches.**" (Josh Wilhelm, TA-0395, and TA-0396)

100. The attached sketches did not contain a full set of detailed plans with revised dimensions, **as required by O.R.C. §153.10**, but instead only included revised life safety plans.

101. The OSFC, SHP, and LL, withheld information relating to required fire rating changes from TransAmerica prior to July 18, 2011 knowing such information would generate additional costs and delays on a Project that was already significantly over budget. (Josh Predovich and Clay Keith)

102. At the time TransAmerica was directed to provided pricing for Proposal Request No. 18, OSFC, through LL and SHP, knowingly withheld from TransAmerica the full set of plans that had been previously provided to DIC and that culminated in the DIC August 23, 2011 partial plan approval. (TA-902)

103. On July 18, 2011 and in response to Jutte Electric filing for bankruptcy, LL's Project Manager Clay Keith executed an affidavit stating the following: (TA-0392)

(a) [Jutte Electric] has defaulted on the Contract.

(b) [Jutte Electric] does not have enough personnel on the job site to adequately perform its work in accordance with its schedule.

(c) [Jutte Electric] has failed to provide temporary electric to the job site and to other contractors so they could perform their work.

(d) [Jutte Electric] has been consistently late with its shop drawings and submittals, which are crucial to it, and to the other contractors in prosecuting, and planning the work.

(e) Electrical rough in work is behind at the Project site and materials are missing for [Jutte Electric] to be able to complete this work. This delays the entire Project. For example, drywall work, including drywall frame construction and drywall hanging, cannot begin until electrical rough in is completed.

(f) The delay in drywall work will likely also cause delay in other work by other trade contractors, such as plumbing, fire protection, and all finish work which can be done only after the drywall work.

(g) As the owner, the [OSFC] may be liable to the other trade contractors for the delays. Due to the size of each separate contract associated with the Project, further delay could cost the [OSFC] several hundred thousand dollars.

104. On July 18, 2011, OSFC Project Administrator Madison Dowlen notified SHP that the Campus Wide Bid Packages, which included the fire alarm, security, and casework packages for the dormitories, were to have been completed by July 1, 2011 and that if “contractors submit claims as a result of drawings and specifications being received late, SHP will be expected to pay those costs.” (TA-0393)

105. On July 27, 2011, LL acknowledged the impact the late plan submission approvals were having on the Project when LL informed SHP that the DIC inspector “is not going to sign off or approve any further inspection requests until revised/updated/stamped drawings are available for review.” LL went on to say:

(a) “[N]eedless to say the inspection did not go well and it was very embarrassing.”

(b) “This needs to be resolved ASAP or work will stop in OSSB 5, OSSB 3, OSD 7, and OSD 1 including all interior non-load bearing framing and MEP work.”

(c) **“We just agreed to a 15 day no cost co and I just sent emails to TA regarding manpower and pushing them to get work completed. This will blow up in our face very quickly and not sit well with Madison.”**

(Clay Keith and TA-0410)

106. Based on its July 27, 2011 email to only SHP, LL acknowledged the impact to Transamerica arising from SHP’s failure to obtain timely plan approvals, which explains why LL did not permit TransAmerica to schedule DIC inspections. (TA-0410)

107. On August 12, 2011, SHP conceded to DIC’s plan reviewer that the ice shield detail was not in compliance with the building code. (TA-0428)

108. At the time SHP’s Josh Predovich made the August 12, 2011 representation to DIC he was not a licensed architect.

109. Mr. Predovich corresponded with DIC and facilitated subsequent plan approvals when the initial permit submission was made under Berardi’s license.

Submitter: JOSH PREDOVICH 250 CIVIC CENTER DR STE 200 COLUMBUS, OH 43215
Design Professional: GEORGE BERARDI 396 LIVINGSTON AVE COLUMBUS, OH 43215

(TA-0091)

110. However, LL’s Project Superintendent did not recall being directed by SHP to install the ice shield to a different detail than what was shown on the plans. (Jim Smith)

111. On August 23, 2011, DIC issued a second partial plan approval beyond foundations and shell that was previously issued on July 29, 2010. With this second partial plan approval, some “close-in” work could proceed. (TA-0440 and TA-0443)

112. Prior to DIC's August 23, 2011 partial plan approval, inspections for rough-in work could not proceed.

113. On August 24, 2011, SHP informed LL (and only LL) that it could call for inspections. (TA-0445)

114. In addition to waiting on the rough-in inspections to proceed, TransAmerica could not fully enclose its drywall enclosure of interior walls until the sprinkler shop drawings were approved by DIC. (Josh Wilhelm)

115. On September 30, 2011, TransAmerica received Proposal Request No. 28, which directed TransAmerica to provide pricing for the following discrete change. (TA-0477)

<p>Provide pricing for additional draft stopping and fire rated wall and ceiling termination requirements per the attached sketches. Include rework of study carrel ceilings at student bedrooms including the removal of installed framing, proper installation of fire rated drywall details, reinstallation of framing and finishing with single layer of drywall. Contractor to correct sequence of work at dorms where this framing has not yet been installed.</p>
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116. The attached sketches did not contain a full set of detailed plans with revised dimensions, as required by R.C. §153.10.

117. On October 7, 2011, TransAmerica noted another Article 8 Notice letter stating that Proposal Request No. 18 had been priced and submitted at least four (4) times and that no resolution had been reached despite the work proceeding. (TA-0484)

118. As of October 21, 2011, the final approval of the sprinkler shop drawings had not occurred based on SHP's submission of revised sprinkler pipe shop drawings to DIC for review and approval. (TA-0497)

119. As of October 21, 2011, TransAmerica could not fully enclose the interior of the buildings with drywall until all necessary approvals were granted by DIC, including those

related to the sprinkler system, which was beyond the control of TransAmerica. (Josh Predovich and TA-0497)

120. The pricing proposals TransAmerica submitted for Proposal Requests No. 18 and 28 were initially not acceptable and LL and SHP unilaterally marked up such pricing to conform to what it believed were the discrete changes that TransAmerica was directed to price based on the proposal requests. (TA-0711)

121. TransAmerica requested additional time with Proposal Requests No. 18 and 28, which was not granted by the OSFC.

122. Proposal Requests No. 18 and 28 culminated in Change Orders 25 and 26. TransAmerica signed Change Order 25 on November 8, 2011 and Change Order 26 on December 2, 2011. TransAmerica started to invoice for Change Order 25 and 26 with Pay Application No. 10 as noted below:

ITEM NUMBER	DESCRIPTION OF WORK	SCHEDULED VALUE	WORK COMPLETED		MATERIALS PRESENTLY STORED	TOTAL COMPLETED & STORED TO DATE	%	BALANCE TO FINISH	RETAINAGE
			PREVIOUS APPS.	THIS PERIOD					
Change Order #23		(1,401.04)		0.00	0.00	0.00	0.00%		0.00
Change Order #24		7,131.35	0.00	0.00	0.00	7,131.35	0.00%	7,131.35	0.00
Change Order #25		35,473.82	0.00	26,408.91	0.00	26,408.91	100.00%	751.88	886.45
Change Order #26		62,193.53	0.00	52,864.50	0.00	52,864.50	85.00%	9,329.03	0.00
Change Order #27		0.00	0.00	0.00	0.00	0.00	0.00%	0.00	0.00

(JX-G-10)

123. On December 5, 2011, TransAmerica received Proposal No. 35, which was a proposal request for Recovery Schedule No. 3 that extended the Project duration by ten (10) days.

DESCRIPTION:

All Contractors to review changes per Recovery Schedule 3 (attached) and submit costs associated with the revised recovery schedule. Costs should be reflective and supported with documentation for the additional 10 days added to the schedule. This change should be all inclusive of any cost associated from Recovery Schedule 2 to completion of project based on the sequence and dates set forth in the attached Recovery Schedule 3.

(TA-0519)

124. On December 6, 2011, TransAmerica received LL's letter imposing liquidated damages. (TA-0520)

125. Starting with Pay Application No. 10 for work performed through December 10, 2011, the OSFC began wrongfully withholding liquidated damages against TransAmerica, which resulted in a current payment due of (\$157.08). (JX-G-10)

Contractor Pay Application Summary			JX-G-10/1
Project Name	Ohio State School for the Blind and Ohio School for the Deaf		
Bid Package #	BP023R - Residential General Trades / TransAmerica Building Company, Inc.		
Date	Through 12/10/11		
1	Original Contract Amount	\$ 3,975,000.00	
2	Net Changes to Date	\$ 211,163.93	
3	Current Contract Amount	\$ 4,186,163.93	
4	Labor Completed to Date	\$ 1,033,687.94	
5	Material Completed to Date	\$ 1,463,275.87	
6	Total Work Completed to Date	\$ 2,497,263.81	
7	Stored Material to Date	\$ 394,291.65	
8	Less Retained to Date	\$ 107,433.47	
9	Total Amount Due	\$ 2,389,830.34	
10	Less Previous Payments	\$ (2,093,987.42)	
11	Less amount retained to cover lien	\$ -	
12	Less amount assessed for Liquidated Damages	\$ (296,000.00)	* \$206,000 was to be held last month but was not.
13	Less other amounts withheld	\$ -	* An additional \$90,000 this month brings the total to \$296,000.
14	Current Due	\$ (157.08)	
15	Balance to complete	\$ 1,294,608.47	

126. With Change Order No. 25, the OSFC agreed that the additional time request would be determined pursuant to the delay claim resolution and in accordance with paragraph 8.3.4 of the General Conditions. (JX-F-25)

127. Change Order No. 25 contained the notations about TransAmerica's request for additional time being resolved in accordance with the delay claim. (JX-F-25)

128. Change Order 25 was signed by the OSFC on December 16, 2011, which was the last change order signed with TransAmerica. (JX-F-25)

129. On January 6, 2012, TransAmerica provided pricing for Recovery Schedule 3, which was never accepted nor incorporated into an executed change order. (TA-0522)

130. Under GC paragraph 7.2.1.3, TransAmerica was required to leave its proposal open for forty-five (45) days.

131. On January 17, 2012, LL acknowledged entitlement for the ten (10) project extension but rejected TransAmerica's pricing. LL requested that TransAmerica "review and revise your request for PR 35 accordingly." (TA-0528)

132. On February 7, 2012, TransAmerica provided another Article 8 notice and requested an extension of time.

133. On February 15, 2012, a meeting was conducted on-site between SHP, LL and TransAmerica to discuss the status of progress. During the meeting, TransAmerica questioned LL's motives for not scheduling inspections based on TransAmerica's request and confirmation it would have all items completed prior to the inspector's arrival. In response, LL's Project Manager Clay Keith responded to TransAmerica in an unprofessional manner blaming TransAmerica for the Project's delays and disruptions. (Josh Wilhelm, Bill Koniewich, Clay Keith, and TA-0543)

134. During the February 15, 2012 on-site meeting, LL's Project Manager did not inform TransAmerica that he had made repeated complaints to SHP about the lack of permits and the impact that issue was causing with scheduling inspections. (Josh Wilhelm, Bill Koniewich, and TA-0543)

135. TransAmerica documented these concerns to the OSFC on February 16, 2012. (Josh Wilhelm, Bill Koniewich, and TA-0543)

136. On February 17, 2012, SHP was still deciding how the architectural baffles were to be installed, which was three (3) days after the scheduled completion date identified in Recovery Schedule 2. (Josh Wilhelm and Exhibit TA-0545)

137. On February 22, 2012, TransAmerica provided input to Recovery Schedule 4 and noted its General Conditions were being extended by 86 days. (Josh Wilhelm and Exhibit TA-0551)

138. On February 29, 2012, TransAmerica noted the hardware changes that had taken place, which prevented the installation of the exterior doors by Hall Aluminum, another prime contractor. (Josh Wilhelm and Exhibit TA-0554)

139. On March 1, 2012, TransAmerica provided another Article 8 notice and requested an extension of time. TransAmerica's March 1, 2012 notice referenced the lack of a complete design and the delays and disruptions it had created for TransAmerica. (TA-0555, 0556, and 0557)

140. On March 6, 2012, LL's Project Manager Clay Keith apologized for his unprofessional conduct during the February 15, 2012 meeting. LL's Project Manager went on to state that "I have never been aggravated so much by the lack of ability to get accurate information in regarding to planning, execution and progress as I have from Josh Wilhelm," but Mr. Keith failed to note the impact the quality of documents issued by SHP and Berardi had on the Project, which he previously acknowledged internally. (Clay Keith and TA-0561)

141. On March 8, 2012, TransAmerica provided a Certified Claim in the amount of \$2,170,800.75, and cited the following reasons as the basis for the Claim.

Narrative of the Circumstances and Identification of the Issues Giving Rise To The Claim

TA's request for additional compensation results from the various Project delays and differing site conditions that are summarized below.

1. Numerous changes to the building design that caused significant delays to the Project.
2. Jobsite conditions that TA encountered, which were significantly different than those represented in the bid documents.
3. Failure of Lend Lease to adequately schedule, coordinate, and sequence the Project.
4. Environmental conditions of the buildings, including those related to the condition of the floor slabs.
5. Lack of exterior aluminum doors due to ongoing hardware delays.
6. Lack of complete information to locate numerous additional access panels.
7. Lack of information required to finish the Fire Department Connection Chases.
8. Continued damage to existing finishes.
9. Additional time needed to accommodate the now delayed casework installation being performed by others.
10. Improper holding of payments due to wrongful application of liquidated damages.
11. A non-professional and adversarial management style from the Lend Lease that is inconsistent to the General Conditions partnering provisions and not conducive to a successful Project.
12. Refusing to grant time extensions for delays outside of TA's control, which resulted in additional acceleration, trade stacking, and inefficiencies.
13. Delays caused by the insufficient design and untimely responses of the Project Architect, SHP.

(Josh Wilhelm, Bill Koniewich, and TA-0563)

142. In response to complaints about its framing, TransAmerica conducted inspections during early March using levels and squares where it was determined the walls were in fact constructed within specification. (Josh Predovich, Josh Wilhelm, and TA-0565)

143. SHP admitted it could not identify a wall that was not in conformance with the specification, but nonetheless first issued and then failed to retract its nonconformance letter. (Josh Predovich)

144. On March 15, 2012, TransAmerica provided another Article 8 notice and requested an extension of time. TransAmerica stated it was being "delayed in our installation of finishes resulting from uncontrolled conditions, incomplete aluminum exterior doors, and the late completion of the casework." (Josh Wilhelm and TA-0566)

145. On March 22, 2012, TransAmerica provided pricing and further justification for the time and costs to repair various damage and modifications due to the

casework package. LL acknowledged TransAmerica was entitled to additional compensation, but no change order was ever issued. This is another example where TransAmerica was directed to proceed with work before receiving a signed change order. (Josh Wilhelm and TA-0574)

146. On April 5, 2012, LL and SHP noted former OSFC Director Shoemaker's comment about "we do not want to do the Ready, Fire, Aim. We want to be Ready, Aim, Fire." (Clay Keith and TA-0584)

147. On April 9, 2012, OSFC Project Administrator was informed that an energy grant in the amount \$330,755 was no longer available and commented that "[w]ithout this grant I am concerned about the project budget." (Madison Dowlen and TA-0587)

148. The Residential portion of the Project was delayed for a variety of reasons beyond TransAmerica's control, including the delays attributable to the casework, technology, and fire alarm packages.

149. The delays attributable to the casework, technology, and fire alarm packages also resulted in an extended and more difficult punchlist process for TransAmerica. (Josh Wilhelm)

150. During the spring of 2012, TransAmerica expressed its objection to the continued withholding of payment and noted that it had not been paid for work performed during the following months: (Bill Koniewich and TA-0580)

(a) Pay Application No. 10 for work performed in November 2011. (Bill Koniewich and TA-0581-A)

(b) Pay Application No. 11 for work performed in December 2011. (Bill Koniewich and TA-0581-B)

(c) Pay Application No. 12 for work performed in January 2012. (Bill Koniewich and TA-0581-C)

151. TransAmerica was directed to make numerous changes to its pay applications, which further prolonged the time period OSFC wrongfully withheld TransAmerica's funds. (Bill Koniewich, Alan Starr and TA-0585 thru TA-0585-C)

152. During the spring of 2012, while the OSFC was wrongfully withholding funds, TransAmerica also submitted backup information to further support its March 8, 2012 Certified Claim. (Bill Koniewich and TA-0592)

153. Based on TransAmerica's March 8, 2012 job cost report submitted with its backup information TransAmerica had incurred \$5,766,389.42 in costs but had only been paid \$2,389,830.33 based on the January invoice. (Bill Koniewich and TA-0592 (bates number TRAN000087), TA-0585-B, and JX-G-11)

154. The wrongful withholding of funds by the OSFC created a negative cash flow (in excess of \$3.3 million) for TransAmerica, which resulted in significant financial strain and hardship with its parent company, the Hadler Companies. (Bill Koniewich)

155. The OSFC Project Administrator approved pay applications that incorrectly authorized withholding the per diem rate of liquidated damages for \$3,000 rather than \$2,000, which is the amount stated in the Contract. (Bill Koniewich, JX-G-10, JX-G11, and JX-A)

156. During the spring and summer of 2012, SHP made numerous submissions regarding the fire alarm shop drawings, which were needed to obtain occupancy of the dormitories. (Josh Predovich and Exhibits TA-0596, and TA-0611)

157. During the spring and summer of 2012, TransAmerica provided numerous notices regarding the delays to the punchlist process. (Bill Koniewich, Josh Wilhelm, TA-0597 TA-0603, TA-0624, and TA-0629)

158. Starting in the summer of 2012, TransAmerica began receiving information through public records requests that was not available to it earlier. (Bill Koniewich)

159. On July 18, 2012, DIC issued the Certificate of Final Plan Approval for the dormitories, **which was almost two years after the partial plan approval was granted on July 29, 2010.** (Rick Koehler, Madison Dowlen, and Lee Martin and Exhibits TA-0091 and TA-0619)

160. On July 19, 2012, a jobsite resolution meeting was conducted on TransAmerica's claim, well beyond the thirty (30) day requirement in GC paragraph 8.8.2. (Bill Koniewich)

161. DIC issued the Certificate of Occupancy for all the dormitories on August 16, 2012. (Lee Martin, Bill Koniewich and TA-0632)

162. On September 4, 2012, the OSFC Project Administrator requested additional Project funding and noted TransAmerica's claim as one of the justifications. Less than 20 minutes later, the OSFC Project Executive denied the request and stated a "budget adjustment and more money is not possible for this state agency." (Madison Dowlen, Rick Hickman and TA-0637)

163. On September 5, 2012, **the very next day after the OSFC's Executive Director stated that additional funding was not possible,** TransAmerica received LL's written analysis and recommendation, which denied TransAmerica's claim in its entirety. (Bill Koniewich, Clay Keith, and TA-0638)

164. On September 12, 2012, LL provided various "Budgetary Considerations," which noted the continued withholding of liquidated damages against

TransAmerica along with the option of not placing the top coat of asphalt paving. (Clay Keith, Bill Koniewich, and TA-0641)

165. On September 18, 2012, TransAmerica timely appealed LL's written analysis and recommendation. (Bill Koniewich and TA-0642)

166. On October 1, 2012, OSFC issued a deduct change order to TransAmerica for the TP Mechanical Contractors, Inc. "Settlement of Claim for Delay." TP Mechanical was compensated for the delays beyond Recovery Schedule 3 despite not submitting a Certified Claim. (Bill Koniewich, Clay Keith, and TA-0644)

167. On October 1, 2012, OSFC issued a deduct change order to TransAmerica for Vaughan Industries, LLC "Settlement of Claim for Delay." Vaughan was compensated for the delays beyond Recovery Schedule 3 on the Project despite not submitting a Certified Claim. (Bill Koniewich, Clay Keith, and TA-0645)

168. On October 5, 2012, the OSFC issued a deduct change order to TransAmerica for, at least in part, the installation of shoe mold, which was not required per details A-603 and A-703. (Bill Koniewich, TA-0647, and TA-901)

169. On October 10, 2012, TransAmerica timely objected to the backcharges asserted by the OSFC. (Bill Koniewich, Clay Keith, and TA-0649)

170. On November 7, 2012, TransAmerica submitted its Supplemental Certified Claim and identified \$3,048,294.13 in damages, exclusive of its outstanding contract balance. (Bill Koniewich, Josh Wilhelm and TA-0659)

171. During the winters of 2013 and 2014, TransAmerica provided notices regarding the ice build-up caused by SHP's inadequate roof design. (Josh Wilhelm, TA-0667, TA-0687, and TA-704)

172. After TransAmerica submitted its appeal and Supplemental Certified Claim, the OSFC and TransAmerica mutually agreed to conduct a mediation, which would satisfy the OSFC's remaining obligation to conduct a meeting before the Commission and issue its final decision both required under paragraph 8.9.2 and 8.9.3. (Bill Koniewich)

173. On May 23, 2013, TransAmerica received a partial payment in the amount of \$240,000.00 attributable to the wrongful assessment of Liquidated Damages.

C. Testimony of TransAmerica

174. Lee Martin, former State architect and experienced in public works from the owner and architect perspective confirmed that SHP failed to satisfy the standard of care and that "he had never seen anything like this in 35 years."

175. Bill Koniewich, President of TransAmerica, explained how the OSFC's actions forced TransAmerica to "finance the job" and caused a "disaster" for TransAmerica, "almost putting us (TransAmerica) out of business." In fact, as of March 2012, TransAmerica had invested in excess of \$3.3 million into the Project that had not been reimbursed by the OSFC.

176. Bill Koniewich testified that TransAmerica put together a team with significant public construction experience and had a plan to address the numerous Project requirements, including safety and background checks. The key to this plan was the work was to progress in the systematic fashion that was represented in the bid documents, which in fact turned out not to be true.

177. Josh Wilhelm, Project Manager of TransAmerica, knows the job as well as anyone. He confirmed that TransAmerica never received the long-promised construction plans, and that TransAmerica was forced to build from a hodgepodge of conflicting and evolving drawings and sketches, but summarized as a "piecemeal design on the fly." He had no choice but

to assemble binders of RFI's sketches, and other design documents and clarifications, because the drawings were conflicting and unreliable. He also confirmed that TransAmerica was barred from inspections, an unusual event. The punchlist process was extended and difficult, including the demand that TransAmerica caulk from "wall to floor." TransAmerica was made the scapegoat for problems and the atmosphere on the project was best described as "toxic."

178. Jim Deering, an experienced carpenter, who joined TransAmerica's payroll on the Project, also confirmed he was not invited to inspections and that he had never had to build a project in this fashion. He had no access to the LL trailer to review drawings. And he was instructed by LL to layout the walls on the foundations to accommodate the dimensional problems with the unreliable drawings. This resulted in compounding dimensional and quality issues later when "follow on" work later took place.

179. Jim Deering also testified that SHP's designation to use 2x4's for many of the walls (as called for in the specification) was undersized based on the height of the walls and resulted in more bowed walls than is commonly encountered.

180. Jim Deering testified regarding the time it took to go from the Deaf to Blind site, which were separated by 1.4 miles.

181. Don McCarthy, after an extensive investigation and analysis, identified the numerous flaws in the LL schedules, including but not limited to the fact that the critical path went through the not to be constructed dormitories 4 and 8. He explained why the permit changes were harmful to the Project and that there was nothing more important than "guarding the permit process" to ensure project success. He explained that the owner team approach was to "say we have serious design problems but need to go faster," which created a "CATCH 22" situation for TransAmerica.

182. Jim Luckino, an experienced architect familiar with roof and building envelope issues, explained why ice damming, and not the work of TransAmerica, is the likely cause of water leaks. He explained how SHP failed to satisfy the building code with respect to the specific detail on ice/water shield installation.

D. Testimony of OSFC, SHP, and LL

183. Rick Koehler, the State's expert, admitted that SHP failed to satisfy the standard of care and that the parties "would not be here" but for Berardi.

184. The first Project Manager for the OSFC, Rob Grinch, expressed his concerns about the "quality of docs" (in red ink) prepared by SHP. He also stated that campus wide packages like the casework drifted without direction during the political void experienced during a change in administrations.

185. Mike Shoemaker, former Executive Director of the OSFC, confirmed that:

- (a) A contractor's work is only as good as the drawings.
- (b) The decision to move from a consolidated campus to separate campuses increased the overall project cost without a corresponding increase in the budget.
- (c) There was no more money available for the Project in any event.

186. Rich Murray, former Executive Director of the OSFC succeeding Mr. Shoemaker, confirmed that:

- (a) There was pressure to then get the Project underway.
- (b) He expected LL and SHP to manage the Project to stay within the budget – which could not increase under any circumstances.

187. Madison Dowlen, the second Project Manager for the OSFC, was uninformed at best in that he did not even know the impact of a lack of building permit approval.

While he warned SHP that it would be “paying the claim” he seemed to forget that later and took no meaningful action to evaluate TransAmerica’s claim, fairly or otherwise.

188. Josh Predovich, Project “Architect” for SHP, admitted that:

- (a) The plans became a “moving target.”
- (b) That the Berardi reasons for not timely delivering quality plans were “excuses.”
- (c) That his December 15, 2010 statement that all the permit design changes were realized in bid cost “turned out not to be true.”
- (d) SHP put plans out for bid that were not approved by DIC, with material changes required in the exterior walls and more.
- (e) He may have deleted Clay Keith’s critical February 15, 2011 e-mail, and that he had no obligation to comply with the public records act. (Josh Predovich and TA-0236 and TA-0237)
- (f) It was reasonable for TransAmerica to expect a construction set of drawings.
- (g) The drawings were not complete or unambiguous.
- (h) TransAmerica was delayed through no fault of its own.

189. Josh Predovich testified that any modifications to the wall panels would not have taken significant time as he (mistakenly) believed it was as simple as removing the top and bottom 2” x 4” studs and cutting the panels down to size. (Josh Wilhelm)

190. Clay Keith, LL Project Manager, expected TransAmerica to do what SHP could not or would not do – create clear and understandable, unambiguous design documents. He still failed or refused to understand that having no drawings in the field was a “symptom,” not a “cause” of the problems. Furthermore, he gave no substantive answer when asked what TransAmerica was expected to build from when SHP could not provide an updated set of plans as previously promised.

191. Jim Smith, LL Superintendent, was tough on TransAmerica but uninformed about the true status of the construction documents which he thought “never changed” and that the “fire ratings never changed.”

192. Rick Hickman, former Executive Director of the OSFC after Mr. Murray, confirmed the budgeting challenges of the Project, and that every dollar spent on the dorms would be one less dollar available on the Campus-Wide Packages and Academic buildings, increasing the projected budgetary shortfall on the project. He made it clear that although his Project Administrator Madison Dowlen asked for a budget adjustment to deal with the TransAmerica claim, no additional funds were available – period. He never took a position on TransAmerica’s claim. SHP did set up a meeting with him to discuss OSFC’s dissatisfaction and possibly “eating costs” but he recalled little about the meeting.

193. SHP acknowledged that TransAmerica is entitled to something on its claim, but failed to quantify that amount. (Josh Predovich)

E. OSFC’s Failure to Comply with R.C. §153.01 and Flawed Plans

194. The OSFC’s failure to furnish to TransAmerica sufficient plans and specifications as required in R.C. §153.01 created chaos on the Project, lead to inefficiencies and stacking of trades, compelled an excessive punch-list process, caused significant delay, and almost doubled TransAmerica’s costs of construction.

195. The OSFC, through its agents, SHP and LL, interfered with TransAmerica’s successful performance under its Contract by failing to furnish plans in compliance with R.C. §153.01, concealing from TransAmerica the true nature of the defects in the plans and the status of the building permits, misrepresenting to TransAmerica that problems in the construction documents would be remedied through an updated construction set, and by managing the project in an adversarial manner.

(a) For example, LL wrote that TransAmerica had submitted notices to cover themselves in the event of a claim, but then recommended to the OSFC that it deny TransAmerica's Claim based on an alleged failure to provide timely notice. (TA-0304)

196. TransAmerica reasonably expected that it would have "full and accurate" plans suitable for use in construction, that the Project would be managed in a professional manner, and that the OSFC, through its agents, would keep TransAmerica reasonably informed throughout construction with respect to the design of the buildings TransAmerica contracted to build.

197. TransAmerica resorted to framing the dormitories from multiple documents, including binders containing the various sketches that had been received at that point. (Josh Wilhelm, Jim Deering and TA-0800, TA-0801, TA-0802, TA-0803, and TA-0804)

198. Josh Predovich of SHP was not aware that TransAmerica resorted to framing the dormitories with these binders. (Josh Predovich)

199. LL and SHP expected TransAmerica to construct the dormitories from "the information available" despite the fact SHP and Berardi could not produce a suitable set of plans that could be issued to TransAmerica. (Clay Keith)

200. Prior to TransAmerica mobilizing, SHP and LL excluded TransAmerica from discussions regarding problems with the dormitory dimensions. In particular, TransAmerica did not receive the same sketch regarding the edge of slab and wall detail that SHP provided to only LL. (Josh Predovich and TA-0713)

201. Despite the numerous dimension problems, LL's Superintendent would not allow TransAmerica's framing crew to "square up" the building and instead mandated that the walls follow the lines established by the foundations, which were installed per the structural drawings. (Jim Deering)

202. The structural drawings were not coordinated with the architectural drawings, which caused TransAmerica further delays and disruptions. (Josh Wilhelm, Josh Predovich, TA-0219, TA-0220, TA-0223, and TA-0226)

203. TransAmerica was forced to lay out the buildings from truss drawings that SHP had marked-up extensively. (Josh Wilhelm and TA-0265)

204. OSFC did not provide TransAmerica with the proper plans, specifications or building site to complete the contract. (Bill Koniewich and Josh Wilhelm)

205. OSFC through SHP failed to fulfill the mandate of R.C. §153.01 to provide “full and accurate” plans drawn to scale and “so drawn to be easily understood.”

206. SHP did not complete design services in timely fashion.

207. TransAmerica had a right to rely upon the Project plans and specifications in determining the reasonable labor costs to bid on, and construct, the Project.

F. Mismanaged Project Schedule

208. OSFC's failure to coordinate the Project caused TransAmerica to make changes in the sequencing and amount of labor required for the Project.

209. LL's scheduling made it virtually impossible to recognize that the dormitories completion was being driven by the Campus Wide Packages and that construction could have stopped to resolve the various dimensional issues while the Campus Wide Packages were being resolved. Instead, LL continue to push all prime contractors to completion, including TransAmerica, based on plans that were insufficient and not in compliance with R.C. §153.01. (Don McCarthy)

210. TransAmerica, illustrated the change in building sequence and extended duration from Recovery Schedule 2, incorporated into Change Order 13, with schedule updates thereafter, through its animations. (Josh Wilhelm, Don McCarthy, TA-1410a, TA-1411a)

211. TransAmerica established that the sequence of construction materially deviated from month to month and from the sequential order represented in the bid documents.

(Don McCarthy)

212. With his Supplemental Report, Mr. McCarthy provided the following to further justify his opinions:

- (a) As-Built Schedule
- (b) Properly constructed Base Line Schedule
- (c) Updated Base Line Schedule through May 2011 (Don McCarthy and TA-1201)

213. Mr. Englehart had no opinion as to Mr. McCarthy's Baseline or Updated Base Line Schedule. (Andy Englehart)

214. Mr. McCarthy identified a number of scheduling flaws with LL's Baseline Schedule including the high number of activities on the critical path despite the fact the construction had not commenced. (Don McCarthy and TA-0722)

215. LL's longest path was flawed as proven by the May 2011 update that included only one item on the longest path, which was Dorm 8, that was not constructed. (Don McCarthy and TA-0721)

216. Conflicts existed between the scheduling provisions in the General Conditions and those contained in the specifications related to scheduling. In particular, a conflict existed as to the party that initiates the scheduling process.

(a) Under Specification Section 013200—Milestone Schedule, Section 1.05B states “[w]ithin Five (5) calendar days following the Contract Award, the **Contractor** shall submit to the CM [a schedule].”

(b) General Conditions Section 4.3.1.1 states “[w]ithin ten (10) days of the Notice to Proceed, the **Construction Manager** shall distribute a preliminary construction schedule to the Contractors.”

217. LL's schedules incorrectly continued to show the construction of Dorms 4 and 8, which were not constructed and resulted in a distorted critical path. (Don McCarthy)

218. LL's schedules were illogically constructed, manually constrained, incomplete, and impossible to use as a management planning tool.

219. LL's schedules were not in conformance with the Project Specification Section 014200 and industry accepted guidelines based on the following scheduling flaws:

- (a) Inclusion of dormitories 4 and 8, which were never constructed.
- (b) Schedule activities that lacked schedule ties. For example, LL's Baseline Scheduled showed 27 activities with no predecessors and 191 activities with no successors.
- (c) Poorly conceived Work Breakdown Structure.
- (d) Missing activities related to the campus wide bid packages, which violated the "100% rule."
- (e) Poorly described non-contractual milestone for roof and window enclosure that resulted in LL's purposeful schedule manipulation to support its desire for liquidated damages to be assessed against TransAmerica.
- (f) Improper use of constraints, including mandatory finish constraints, which caused resulted in a flawed critical path.
- (g) Failing to properly link each dormitory to the next dormitory in sequence so that Project's delays could more accurately be evaluated and the forecasted impact to the Project's completion.
- (h) Linking schedule updates with the approved schedule of values.

(Don McCarthy)

220. The schedule information contained in the bid documents represented an anticipated staggered and "military-type precision" construction of the dorms that would allow for efficiency of workers, increased learning curve, and efficiency of materials and personnel. However, the Project suffered a nearly six (6) months of delay and work proceeded inefficiently due to the failures of the OSFC, SHP, and LL. (Don McCarthy)

221. There were numerous flaws in LL's schedules that rendered them less than ideal. (Andy Englehart)

222. The failure by LL to include the activities related to the Campus Wide Packages, notably fire alarm and security, significantly limited the ability to accurately forecast the completion of the dorms in light of the delays attributable with the campus wide packages.

223. Due to the delays with the Campus Wide Packages, there was an opportunity to halt construction in order to resolve the drawing problems, but the scheduling by LL made forecasting this virtually impossible. (Don McCarthy)

224. OSFC failed to compel its agents, SHP and LL, to design, bid, permit, and award in a timely fashion the Campus Wide Packages, which were critical components to the logical construction of the Project. This created chaos on the Project. (Don McCarthy)

225. LL failed to include in the CPM schedules all interrelated components of work, including the Campus Wide Packages. This was necessary to plan and execute the work in an organized and orderly fashion. (Don McCarthy)

226. LL failed to fulfill the requirements of the General Conditions and Specification Section 013200 for developing a proper CPM schedule that could be relied upon during construction. As a result, TransAmerica incurred substantial, and unnecessary costs. (Don McCarthy)

227. LL purposefully manipulated the CPM schedule, including the Roof and Window Enclosure Complete "milestone," and wrongfully-assessed Liquidated Damages. (Don McCarthy)