

G. OSFC's Misrepresentations, Prevention of Performance, and Cover-Up

228. The OSFC, through its agents, SHP and LL, failed to fulfill its implied duty of good faith to not inhibit TransAmerica's performance and to not destroy the fruits of TransAmerica's Contract. (Bill Koniewich and Josh Wilhelm)

229. 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.

230. The OSFC, through its agents SHP and LL, concealed from TransAmerica and other contractors the true nature of the defects in the construction documents including the failures of SHP and Berardi to develop full and accurate plans and specifications suitable for use in construction.

231. OSFC, through SHP and LL, made material misrepresentations to TransAmerica on at least a dozen occasions that revised and fully integrated construction sets would be provided, but they never were. TransAmerica reasonably relied on those promises.

232. The OSFC, through its agents SHP and LL, concealed from TransAmerica and other contractors the true status of the building permitting process as construction progressed. (Don McCarthy)

233. The OSFC had an affirmative duty to disclose to TransAmerica and other contractors the true status of the building permit process and true nature of the shortcomings in the construction documents.

234. The true status of the building permit process and shortcomings in construction documents were material to TransAmerica's undertaking. (Bill Koniewich)

235. After submitting its bid, LL interviewed TransAmerica and failed to disclose the numerous problems with the plans, or that DIC's comments regarding the fire ratings of the dormitories were still not resolved and would lead to additional fire rated walls and ceilings. (Bill Koniewich and TA-0145)

236. The OSFC, through LL, covered up the SHP's failure to obtain timely plan approvals from DIC when it would not permit TransAmerica to either schedule or attend the DIC inspections. (Josh Wilhelm)

237. SHP and LL masked the true status of the plans examination and permit process. This made efficient work impossible, hindered TransAmerica's ability to provide notice, and forced TransAmerica to incur substantial, unnecessary costs. (Bill Koniewich, Josh Wilhelm, and Don McCarthy)

238. Material information was withheld from TransAmerica after it was awarded the Contract, which resulted in significant additional costs beyond those that could be identified from the documents available at the bid. (Bill Koniewich, Josh Wilhelm, and Don McCarthy)

H. OSFC's Breach of Contract

239. OSFC failed to act consistent with its duty of good faith and fair dealing and breached its Contract in several respects, including but not limited to the following:

(a) **Failed to provide a buildable design pursuant to R.C. §153.01 throughout construction.** GC paragraph 1.1.2 – parties shall comply with Applicable Law.

(b) **Misrepresented that updated construction plans would be timely provided.** GC 2.2.5 – If any change to the Work is made to accommodate unforeseen circumstances, the Construction Manager or

Architect shall initiate the appropriate action and notify the Commission. GC 4.2.6 – Construction Manager shall render decisions in connection with the Contractor’s responsibilities under the Contract Documents and submit recommendations to the Commission for enforcement of the Contract as necessary.

(c) **Administered the Project in an unprofessional and adversarial manner.** GC 4.4.2 – Purpose of the partnering arrangement is to “build cooperative relationship,” “avoid or minimize disputes,” “nurture a more collaborative ethic characterized by trust.” GC 4.4.3 - Lead to “an attitude that fosters risk sharing.”

(d) **Allowed an unlicensed architect to administer the construction phase with ambiguous, incomplete and defective plans.** GC paragraph 3.2.1 – Architect shall assist with administration of the Contract as provided for in the Agreement for Professional Design Services, which required a licensed architect for construction administration.

(e) **Directed TransAmerica to proceed with various changes, including those related to wall and ceiling assembly fire ratings, but then refused to compensate TransAmerica for the additional costs arising from the flawed set of plans.** GC paragraph 7.1.1 – Commission may order changes in the Work. GC paragraph 7.3.8 – A fully executed change order modifies the Contract. GC paragraph 7.2.2.9 – If the Commission and Contractor do not agree on the adjustments of the Contract Sum and Contract Time associated with a Field Work Order within sixty (60) days, the Commission shall determine the adjustments if any.

(f) **Refused to provide TransAmerica with additional time and compensation arising from the six (6) month delay to construct the dormitories.** GC paragraph 6.3.1 – [T]ime extensions shall depend on upon the extent to which the Work on the critical path of the Construction Schedule is affected, if applicable. GC paragraph 7.2.2.9 – If the Commission and Contractor do not agree on the adjustments of the Contract Sum and Contract Time associated with a Field Work Order within sixty (60) days, the Commission shall determine the adjustments if any. GC paragraph 7.7.1 – Every adjustment to the Contract Time associated with any change in the Work shall be determined as provided in this GC paragraph 7.7.

(g) **Allowed construction to progress for almost a year before obtaining partial approval to close in the interior walls (August 23, 2011) and almost two years before obtaining the final plan approval (July 18, 2012).** GC 2.9.1 – The Architect shall secure the required structural, plumbing, HVAC, and electrical plan approvals from the local certified building department having jurisdiction.

(h) **Refused to allow TransAmerica to schedule and coordinate inspections with the DIC inspector, which was done to cover up the lack of partial plan approvals and significant pending changes.** GC 2.9.1.2 – The Contractor shall schedule and attend all intermediate and final inspections required for any permit applicable to the Work.

(i) **Constructed the Project using a flawed and manipulated schedule, which further aggravated the delays and disruptions.** GC 4.2.2 – Construction Manager shall schedule the Project and coordinate the Work with the work of all Separate Contractors and with the activities and responsibilities of Architect and the Commission to complete the Project in accordance with the Contract Documents. GC 4.2.3.2 – The Construction Schedule shall be used to plan, organize and execute the Project, record and report actual performance and progress, and show how the Contractor plans to complete the remaining Work by Contract Completion. GC 4.2.4 – The Construction Manager shall monitor the progress of the Work for conformance to the Construction Schedule and shall initiate and coordinate revisions of the Construction Schedule as required by the Contract Documents. Scheduling Specification Section 13200/1.04 CPM Construction Scheduling (D) - Project management tool commonly called Critical Path Method (CPM) will be employed for the planning, scheduling, and reporting of all work to be performed under the contract. Scheduling Specification Section 13200/1.04 CPM Construction Scheduling (E) – The project network diagram and schedule will reflect the major interfaces between the work of this Contract and the concurrent and succeeding work of the other contracts.

(j) **Failed to evaluate and wrongfully rejected TransAmerica's requests for extension of time.** GC paragraph 6.3.1 – [T]ime extensions shall depend on upon the extent to which the Work on the critical path of the Construction Schedule is affected, if applicable.

(k) **Wrongfully assessed liquidated damages against TransAmerica.** Contract paragraph 3.3 – Commission's right to withhold liquidated damages is conditioned on whether Contractor "timely requests, and the Commission grants an extension of time in accordance with the Contract Documents." GC paragraph 9.6.3 – If the Contractor remedies the basis for withholding payment, payment shall be made for amounts withheld because of them.

(l) **Withheld TransAmerica's contract balance for unsupportable backcharges during the pendency of the claim.** GC paragraph 8.13.2 – [T]he Commission shall continue to make payment of any undisputed amounts in accordance with the Contract Documents pending final resolution of a Claim.

240. The OSFC's failure to fulfill those reasonable expectations destroyed the fruits of TransAmerica's Contract by causing chaos on the Project, significant delay, and more than doubling TransAmerica's costs of construction.

241. By fundamentally altering TransAmerica's undertaking under its Contract, the OSFC materially breached the Contract entitling TA to damages.

242. The OSFC materially breached the Contract excusing TransAmerica's future performance by failing to produce sufficient plans and specifications for the project in violation of its obligation to do so under R.C. §153.01, and by concealing material information from TransAmerica.

243. The OSFC materially breached the Contract by failing to disclose to TransAmerica the serious shortcomings of its agent architect, SHP, and its agent construction manager advisor, LL in furnishing the construction documents promised under R.C. §153.01, and in mismanaging the Project.

244. OSFC, through SHP, materially breached the Contract when it failed to secure the full permit as required under GC paragraph 2.9.1.1 until July 2012 after TransAmerica had constructed much of the entire Project.

<p>2.9.1.1 The Architect shall secure the required structural, plumbing, HVAC, and electrical plan approvals from the local certified building department having jurisdiction.</p>
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245. During the construction, LL scheduled and coordinated inspections with the DIC inspector but failed to include TransAmerica. (See Josh Wilhelm and Jim Deering)

246. The OSFC materially breached the Contract when it precluded TransAmerica from scheduling and coordinating the inspections, contrary to GC paragraph 2.9.1.2

2.9.1.2 The Contractor shall schedule and attend all intermediate and final inspections required for any permit applicable to the Work. The Contractor shall schedule the State Fire Marshal or local fire authority for the life safety inspection for occupancy permits. The Contractor shall give the Architect, the Construction Manager, and the Commission reasonable notice of the dates and times arranged for inspections.

247. By failing to comply with the implied duty of good faith and fair dealing, the OSFC materially breached its Contract with TransAmerica.

248. The OSFC failed to satisfy its duty of good faith and fair dealing when it:

(a) Proceeded with the Project based on separate Deaf and Blind campuses but then failed to exercise the political will to obtain additional funding. (Richard Hickman and Mike Shoemaker)

(b) Provided additional compensation to SHP despite its own Project Administrator's determination that the Project's bid documents were flawed and questioning the quality of documents. (Rob Grinch)

(c) Requested that SHP submit a request for additional compensation that was passed on to TransAmerica but then later acknowledged that SHP's services fell below the standard of care. (Josh Predovich, Rick Koehler, and TA-0685)

(d) Assessed liquidated damages in the wrong amount. (Bill Koniewich and Madison Dowlen)

(e) Proceeded with replacement of a dormitory roof without providing access to its own expert or TransAmerica. (Jim Luckino and Gary Mays)

(f) Wrongfully withheld TransAmerica's funds during the spring of 2012 while demanding that TransAmerica complete its work and denying its claim for failure to "provide notice" and "lack of documentation."

249. OSFC is liable for SHP's material breach of Contract per GC paragraph 1.1.6, which states "to extent that there are obligations set forth herein to be undertaken by the Construction Manager or Architect the obligation shall be that of the Commission, respectively, to cause the Construction Manager or Architect to undertake such obligations."

(a) SHP breached its Contract with the OSFC when it failed to provide plans that were complete and unambiguous, which was acknowledged by SHP during the trial. (Josh Predovich)

(b) SHP breached its Contract with the OSFC when it failed to “provide and maintain a licensed architect to oversee Contract Administration and Close-out Phases. The designated professional contract administrator shall remain assigned to project until completion of the entire project.” This fact was not known by TransAmerica during the course of the Project. (Josh Predovich and Appendix D in the SHP/OSFC Agreement No. 3 for Professional Design Services. (JX-N-03/40))

250. SHP did not fulfill its contractual obligation to provide design documents that were “complete and unambiguous” and that could be used to suitably construct the Project.

251. LL managed the Project in an adversarial and unprofessional manner.

252. OSFC, through its agents, SHP and LL, failed to fulfill its implied duty of good faith to not inhibit TransAmerica’s performance and to not destroy the fruits of the Contract.

253. In causing that significant impact on TransAmerica’s work, the OSFC fundamentally altered TransAmerica’s undertaking under its Contract, amounting to a cardinal change.

254. The OSFC’s breach of its Contract could not have been known by TransAmerica until at least July 2011 when the OSFC for the first time admitted it would not provide the long promised updated construction drawings.

I. TransAmerica’s Damages

255. TransAmerica’s job costs relied upon by Don McCarthy were accurate, which were used in calculating TransAmerica’s damages. (Alan Starr and TA-0659, TA-0659 Tab C1, TA-0659-42 Tab C-1, TA-0659-44 Tab C2, TA-0659-57 Tab C3)

256. Through its expert Don McCarthy, TransAmerica provided reasonable and supportable evidence for the damages identified below:

Description	Amount
Extended General Condition Costs	\$ 119,367.78
Additional and Extended Trade Supervision Costs	\$ 125,620.46
Extended Project Management Costs	\$ 166,451.39
Extended Equipment Rental Costs	\$ 34,351.92
Unprocessed Change Order & Scope Adjustments	\$ 22,029.67
Loss of Productivity for Rough Carpentry	\$ 1,320,299.99
Additional Drywall Costs For Out-of-Sequence Work, Excessive Construction Damage, and Extended Punchlist	\$ 498,003.90
Additional Painting Costs For Out-of-Sequence Work, Excessive Construction Damage, and Extended Punchlist	\$ 486,742.67
Extended Home Office Overhead Costs	\$ 124,458.13
TOTAL ADJUSTED CLAIM AMOUNT	\$ 2,897,325.92

257. The Court finds that \$2,897,325.92 is a reasonable amount of damages that is supported by the evidence for the total, actual cost of impact from changes in the coordination, interference, acceleration and delay of the schedule caused by the OSFC and its agents. (Don McCarthy, TA-1200, and TA-1201)

258. OSFC acknowledged that TransAmerica was entitled to delay damages when it issued PR 35, which was a pricing request for Recovery Schedule 3 that extended the Project duration.

259. Mr. McCarthy calculated TransAmerica's Loss of Productivity for Rough Carpentry using the measured mile method and supported such method using various documents in the Project Record, including:

- (a) Project Photos (TA-0735)
- (b) Daily Reports (JX-K-01/377)
- (c) Trade Contractor Meeting Minutes (JX-J-17)
- (d) Project Schedules (TA-1200)

260. Andy Englehart, an expert for the OSFC, agreed that Mr. McCarthy's measured mile analysis was an "apples to apples" comparison with respect to the activities of the measured mile and least impacted period. (Andy Englehart)

261. Mr. Englehart performed no schedule analysis nor attempted to quantify TransAmerica's damages. He did not quantify any losses associated with alleged shortcomings in TransAmerica's performance. (Andy Englehart)

262. Mr. McCarthy provided evidence that TransAmerica's rough carpentry framing budget of \$663,494.00 after buyout was almost identical to LL's rough carpentry budget of \$658,290.00. (Clay Keith, Don McCarthy, and TA-0050)

263. The hourly rate of \$41.77 used to calculate TransAmerica's Loss of Productivity for Rough Carpentry was accurate and supported by the evidence. (Alan Starr)

264. The OSFC's expert did not voice criticism of TransAmerica's hourly rate of \$41.77. (Andy Englehart)

265. Mr. McCarthy performed a schedule analysis, following the AACE International Recommended Practice 29R-03 guidelines, and identified 148 days of delay attributable to the actions and inactions of the OSFC. (Don McCarthy and TA-1201)

266. Mr. McCarthy calculated the following categories as time-based damages based on the 148 days of delay he identified and from the costs incurred by TransAmerica during this time period:

- (a) Extended General Conditions
- (b) Additional and Extended Trade Supervision Costs
- (c) Extended Equipment Rental Costs
- (d) Additional Drywall Costs
- (e) Additional Painting Costs

(Don McCarthy and TA-1200 and 1201)

267. Mr. McCarthy properly accounted for the 27 day time extension granted with Change Order No. 13, which was memorialized in Recovery Schedule 2 and resulted in a Project completion date of February 14, 2012. (Don McCarthy and TA-1201)

268. Mr. McCarthy quantification of the 148 compensable delay days is conservative when taking into account that the Project duration was extended for at least 184 days, which represents the number of days from the February 14, 2012 completion date provided in Change Order No. 13 and the August 16, 2012 Certificate of Occupancy.

269. Mr. McCarthy properly quantified TransAmerica's home office overhead losses using the generally accepted ODOT HOOP Method. TransAmerica's home office overhead losses were caused by the extended Project duration resulting from the delays of the OSFC and those under its control. (Don McCarthy and Alan Starr)

270. With his Supplemental Report issued on October 24, 2014, Mr. McCarthy continued to conservatively quantify TransAmerica's damages when he reduced TransAmerica's compensable delay period from 197 days to 148 days. (Don McCarthy and TA-1201)

271. By reducing the compensable delay period, the amount stated in TransAmerica's November 2012 Supplemental Claim was reduced by \$150,986.21 to the amount presented at trial of \$2,897,325.92. (Don McCarthy and TA-1201)

272. The 148 day compensable time period during which TransAmerica is entitled to recover its delay costs commenced on March 6, 2012 and concluded on August 1, 2012. (Don McCarthy)

273. Due to the OSFC delays, which TransAmerica quantified as 148 delay days, TransAmerica incurred the following time based costs:

- (a) Extended General Conditions - \$119,367.78
- (b) Additional and Extended Trade Supervision - \$125,620.46
- (c) Extended Project Management Costs - \$166,451.46
- (d) Extended Equipment Rental Costs - \$34,351.92

274. TransAmerica's time based costs were derived from its job costs report and encompass the additional costs TransAmerica incurred because of the OSFC's delays. (Don McCarthy and Alan Starr)

275. With respect to TransAmerica's Additional and Extended Trade Supervision, TransAmerica was forced to provide additional supervision by way of non-working foreman to manage the multitude of changes and chaotic nature of construction. Those foreman include Jason Kuhn, Jack Fowler and KC Saint. TransAmerica properly attributed 70% of these individual's time to non-working supervisory activities. (Don McCarthy)

276. TransAmerica was forced to incur extended costs for its Superintendent, Bruce Bowman, to stay on the job from February 14, 2012 through June 19, 2012.

277. Due to the multitude of changes, chaotic nature and extended duration, TransAmerica incurred extended project management costs for Josh Wilhelm, Bill Koniewich, and Alan Starr to be on the job longer and more involved than was reasonably expected based on the bid documents. (Bill Koniewich, Josh Wilhelm, and Alan Starr)

278. TransAmerica established that a compensable delay of 148 days occurred beyond the original 303 day Project duration.

279. TransAmerica also established that it was not compensated for the additional time - as the parties agreed- to resolve the delays and extended project duration through the Article 8 process.

280. TransAmerica is entitled to recover its delay damages, including both its Extended Project Management and Home Office Overhead costs, that flowed directly from the

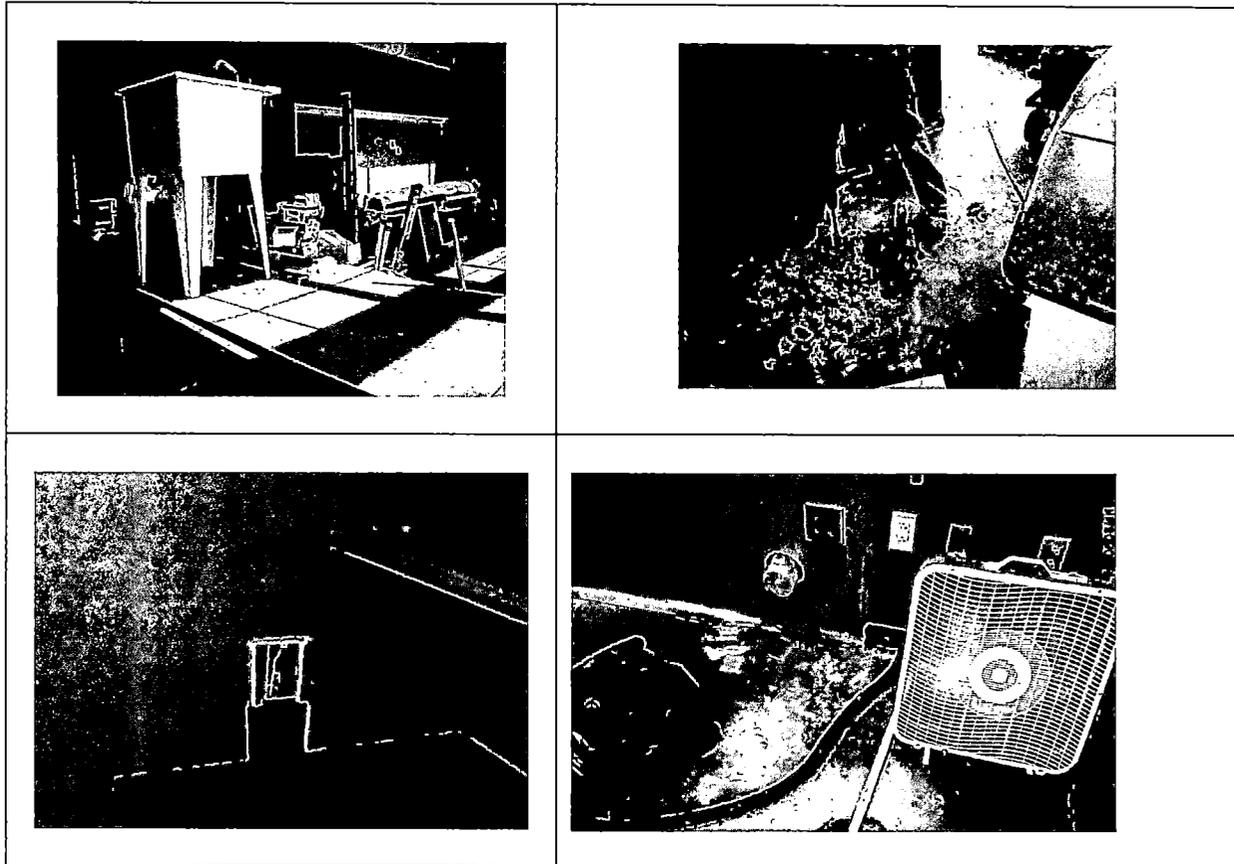
extended Project duration **in addition** to the 10% markup for overhead provided for in GC paragraph 7.6.5.6 for the specific components of its claim.

281. Under GC paragraph 7.1.8, the general conditions allow for a “reconciliation of Unit Prices” and the 10% markup represents a Unit Price that should be reconciled based on the Project’s original bid duration of 303 days being extended by TransAmerica’s 148 days of compensable delays. This extension represents a 48% increase in time from what was bid and therefore remains uncompensated under the contract’s standard 10% markup. This 48% increase in duration triggers GC paragraphs 7.1.8.3 and 7.1.8.4, which permits the Unit Price to be equitably adjusted if the actual quantity differs from the scheduled quantity by more than 20%.

282. Contrary to R.C. §4113.62, OSFC will avoid liability for the delays it caused if it is permitted to reject TransAmerica’s requests for extensions and pricing for additional time and yet claim TransAmerica has been compensated under GC paragraph 7.6.5.6 for any portion of the compensable delays that occurred. R.C. §4113.62 precludes an owner from being released from liability or any other remedy for the delays it causes. In this case, TransAmerica has not been compensated for a single day of delay based on the OSFC’s representations that TransAmerica’s time requests would be resolved through the Article 8 process, which ended with LL rejecting the entire claim.

283. Due to the extended punchlist process and construction damage caused by the late installation of the casework, fire alarm and security packages, TransAmerica incurred additional costs to for its drywall and painting subcontractor to remain on site and repair the damage caused by others. (Don McCarthy)

284. With its June 22, 2012 letter (TA-0603), TransAmerica documented the extended punchlist process and on-going construction damage numerous times and provided the following pictures in support:



285. Based on Recovery Schedule No. 2, incorporated into Change Order No. 13, prime contractors had twenty (20) days to complete the punchlist for each dormitory. However the punchlist process extended well beyond the twenty (20) days for reasons beyond TransAmerica's control. (JX-F-13)

Ohio School for the Deaf/Blind Dome			
Activity ID	Activity Name	Original	Final
A10959	OSSB-Dorm 3-Close-In Inspections	0	
A10949	OSSB-Dorm 5 Assemble Contractor Punchlist	2	1
A10928	OSSB-Dorm 5 Assemble Arch Punchlist	2	1
A10383	OSSB-Dorm 5 Punchlist	20	1
A10950	OSSB-Dorm 1 Assemble Contractor Punchlist	2	2

286. Mr. McCarthy determined TransAmerica's additional painting and drywall costs had been incurred prior to August 1, 2012 and therefore the reduction in compensable time period did not affect his prior calculations. (Don McCarthy)

287. TransAmerica further supported its damages by showing how quickly costs for what would appear to be modest changes added up when multiplied over two sites and twelve buildings. (Josh Wilhelm and TA-0734)

288. TransAmerica identified \$603,392.71 in discrete changes that it did not receive compensation for. (Josh Wilhelm and TA-0734)

289. TransAmerica's job cost report attached to its Supplemental Claim was accurate and properly identified its costs up to that point in time. (Alan Starr)

290. TransAmerica is entitled to prejudgment interest commencing on April 7, 2012, which is thirty days after submitting its March 8, 2012 claim. *J&H Reinforcing & Structural Erectors, LLC v. Ohio Sch. Facilities Comm'n*, Ct. of Cl. No. 2010-07644, 2012-Ohio-5298, affirmed *J&H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Facilities Comm'n*, 10th Dist. No. 12AP-588, 2013-Ohio-3827

291. Alternatively, TransAmerica is entitled to prejudgment interest on its award of damages commencing on August 16, 2012, which is the date of substantial completion based the certificate of occupancy of the Project. R.C. 2743.18(A); *Royal Elec. Constr. Corp. v. Ohio State Univ.* (1993), 1993 Ohio App. LEXIS 6181, Ct. of Cl. No. 90-05520, unreported, at 23-24, reversed and remanded in (Dec. 21, 1993), Franklin App. Nos. 93AP-399 and 93AP-424, unreported, 1993 WL 532013, reversed in (1995), 73 Ohio St. 3d 110, 652 N.E.2d 687.

292. Judgment should be entered in favor of TransAmerica and against OSFC, in the total amount of **\$3,721,931.34**, which includes TransAmerica's contract balance of \$824,605.42, together with pre- and post-judgment interest and costs.

J. TransAmerica's Article 8 Compliance, OSFC's Waiver, and Prevention of Performance

293. During the Pre-Bid Meeting and prior to receiving the second round of bids for the dormitories on October 28, 2010, the OSFC, through SHP and LL, failed to disclose the following. (Bill Koniewich and TA-0133)

(a) That on October 6, 2010 the Project Administrator had wrote an email titled "Flawed Bid Set" and was "perplexed the documents were issued in such a state when a lead architect, consulting architect, and Construction Manager firm all reviewed the documents in advance of the being disseminated to the public." (TA-0119)

(b) The Residential Portion would be bid without the plans having been submitted to DIC. (Predovich)

(c) SHP would conduct construction administration without a licensed architect.

6. **SHP Leading Design** (lead design professional) shall provide and maintain a licensed architect to oversee Contract Administration and Close-out Phases. The designated professional contract administrator shall remain assigned to project until completion of entire project.

(Predovich and JX-N-03/40, see Appendix D, in the SHP/OSFC Agreement No. 3 for Professional Design Services).

294. On November 12, 2010 and prior to TransAmerica executing the Contract, TransAmerica submitted a series of questions including asking "[w]ill a set of drawings be done that incorporates all the additions and deletions from Addendums 10-13?" (TA-0152)

295. Prior to TransAmerica executing the Contract, LL's Project Manager acknowledged on November 19, 2010 that Rolando Matias with Berardi represented to TransAmerica the "dorm drawings were going to be updated with all addendums." Mr. Matias

acknowledged such representation was made and that he would have “all changes incorporated onto the documents by mid-December.” (TA-0166)

296. During the Pre-Construction Meeting on December 15, 2010 the “Status of Updated Plans from SHP” was discussed. As of this meeting, TransAmerica was led to believe that an updated set of plans was still forthcoming. (Bill Koniewich and TA-0188)

297. On December 29, 2010, LL failed to disclose to TransAmerica the status of the previously promised updated plans and that its Superintendent had deemed the latest drawing as “garbage” and “useless trash.” (TA-0194)

298. TransAmerica proceeded with fabrication of the trusses and wall panels as depicted in the bid set, which contained a different life safety plan and fire rating designation than the set that DIC reviewed and was the basis of its July 29, 2010 partial approval for foundation and shell.

299. On February 7, 2011, during the Weekly Progress Meeting, LL, SHP, and OSFC, represented that new drawings should be received from SHP by the end of the week. At that same meeting, it was discussed that TransAmerica will submit shop drawings for SHP to review and mark-up. TransAmerica went on to note concerns about lead time for trusses and rebar. (JX-I-03)

Project Drawings	
003-002	02/07/011 - 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 Dwgs: Per SHP, we should be receiving new dwgs by the end of this week available at Key Blue Prints in pdf format. - Trusses dwgs are under review, TransAmerica will submit shop drawings and SHP will review/mark-up. TransAmerica concerned about lead times on trusses (6-8 weeks) and rebar. - Drawings of all utilities around dorms need to be issued to dorms contractors.

300. TransAmerica complied with the ten (10) notice requirement in GC paragraph 8.1.1 with its February 17, 2011 letter after not receiving the previously promised

drawings. TransAmerica noted its discussions about the promised updated drawings at the Progress Meetings, including the most recent February 7, 2011 meeting. (TA-0245)

Per your conversation yesterday with Bill Koniewich and as we have discussed at the previous progress meetings (January 24th and February 7th) we have not yet received the revised / corrected / updated drawings for use on the OSD&B project. These drawings have been pending for 6+ weeks. It has impeded our ability to produce accurate shop drawings, complicated the submittal process, and resulted in many of our RFI answers being tied to the new drawings. Additionally, we are increasingly concerned that materials anticipated to be ordered and delivered per the Construction Schedule will be late and may subject us to costs due to material escalation. Ultimately, the lack of drawings will prevent us from performing as required. Thus, per section 8.1.1 of the contract we are required to notify you, and the Architect (Through you); that our ability to execute the project per the contract schedule is being hindered.

301. With its February 17, 2011 Article 8 Notice letter, TransAmerica provided written notice prior to mobilizing. (Josh Wilhelm and TA-0245)

302. TransAmerica's written notice stated the need for the previously promised updated drawings and that a cost and schedule impact could result. At that same time, TransAmerica indicated it could not provide additional cost and schedule impact information without having reviewed the updated set. (TA-0245)

303. TransAmerica's February 17, 2011 Article 8 Notice letter was timely and satisfied the purpose of Article 8, which is to give the owner notice of a possible pending problem and opportunity to mitigate its costs.

304. On February 23, 2011, TransAmerica provided another notice for many of the same reasons stated in February 17, 2011 notice, including the failure to receive the previously promised updated set of plans. (TA-0245)

305. TransAmerica's February notices complied with and satisfied its requirement to provide written notice under the Contract, including Article 8. (Josh Wilhelm and Bill Koniewich)

306. The OSFC, SHP, and LL all acknowledged receipt of the TransAmerica's Article 8 notices and the LL Project Manager stated it was reasonable for TransAmerica to rely

on receiving an updated set of plans. (TA-0245 and specifically the February 23, 2011 email from Clay Keith)

307. In a February 23, 2011 email from Clay Keith, the Project Team was made aware of the forthcoming impact if the updated drawings were not “immediately” provided when Mr. Keith stated 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.” (TA-0245)

308. OSFC and its agents knew the impact the lack of complete, buildable and permitable plans was having on the Prime Contractors. For example, SHP’s February 28, 2011 acknowledged that “issuance of this set will help to eliminate confusion; to that end, we are willing to complete this work at our cost.” (SHP February 28, 2011 letter included in TA-0256)

309. Despite previously acknowledging the impact, the OSFC and its agents failed to issue the updated drawings “immediately” when it failed to issue the updated set while construction was on-going.

310. On March 1, 2011, LL responded to TransAmerica’s Article 8 notices and stated “the project team does not see any justification for costs or time extension to the current project schedule due to the updated drawings provided they are available as noted on March 1, 2011.” (TA-0256)

311. With its March 1, 2011 response letter, LL acknowledged the timeliness of TransAmerica’s Article 8 notice letter and that the owner had an opportunity to mitigate its costs when it stated:

Specification section 8.1.2.2. The disruption or concern is mitigated as of March 1, 2011 with the updated drawings available.

312. With its March 1, 2011 response, LL also acknowledged that TransAmerica did not know the impact and instead “was making assumptions” regarding possible impacts.

Specification section 8.1.2.3. TransAmerica is making assumptions that Additional changes, unknown changes, may cause other impacts. This cannot be considered as a potential claim. If there are additional changes associated with the updated drawings above and beyond the addenda items or RFI's noted then those issues need to be handled individually. TransAmerica has also noted that it could take up to two weeks to coordinate the updated drawings. Again, I will reference that these drawings are to incorporate addenda items that should have been coordinated at bid time and also RFI's as noted above with little to no impact to the project.

313. The OSFC cannot now insist that TransAmerica’s notice did not comply with the ten (10) day notice requirement when LL’s response letter asserted that TransAmerica was forced into simply making assumptions with its preliminary notice letter. (TA-0256)

314. The OSFC, through LL’s March 1, 2011 letter, preemptively rejected TransAmerica’s claim “weeks before the certified and substantiated claim was to be submitted under the contract.” (October 1, 2014 Decision of Referee, pages 18 – 19)

315. The OSFC, through LL and SHP, went on to prevent TransAmerica from providing additional information to support its claim when it failed to provide the updated drawings on March 1, 2011, or at any time during construction. (Bill Koniewich and Josh Wilhelm)

316. LL’s March 1, 2011 letter also stated that “[i]f 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.” (TA-0256)

317. Based on the representations made in LL’s March 1, 2011 letter, TransAmerica reasonably believed that an updated set of plans would be provided on March 1st

or shortly thereafter and that it would an opportunity to review those plans to determine the cost and schedule impact. (Josh Wilhelm)

318. LL's March 1, 2011 statement that "[i]f 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" triggered GC paragraph 8.3.4 where the parties are permitted to "reasonably extend the thirty (30) day period for substantiation of a Claim."

319. As a result of the representations made in the LL March 1, 2011 letter, the thirty (30) day time period to submit a claim would not be triggered until, at a minimum, when the updated set of plans were issued.

320. At the same time, LL's March 1, 2011 statement that "[i]f 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" was a representation that TransAmerica was to continue with construction and that it would be fairly compensated through the price request and change order process under Article 7.

321. TransAmerica reasonably relied on such representations when it submitted change order pricing for the discrete changes that included additional time, which the OSFC, through LL and SHP, eventually rejected and instead determined would be decided through the Article 8 claim process.

322. The updated drawings were not made available as promised on March 1, 2011, or at any time during construction.

323. The OSFC waived any rights, including those detailed in GC Article 8, including paragraphs 8.2 and 8.3, when it first represented that an updated set would be provided but then failed to provide the updated drawings on March 1, 2011 or at any time during construction.

324. The OSFC cannot be absolved of liability by insisting that TransAmerica strictly comply with all provisions of GC Article 8 when the OSFC, and its agents, first represented that an updated set of plans would be provided, but withheld such a set after LL and SHP determined that the release of the set would lead to additional confusion and costs on a Project that was already significantly over budget. (Josh Predovich and TA-0260)

325. To the extent the OSFC alleges TransAmerica failed to strictly satisfy the Article 8 provisions, the OSFC knowingly prevented such performance by first representing on multiple occasions that an updated set of plans would be provided, but then withheld such plans for fears those plans would reveal the true state of the design errors and omissions, and cause confusion and additional costs.

326. Despite not receiving the updated construction set as represented by the OSFC, LL, and SHP, TransAmerica continued to comply with the Article 7 and 8 provisions when it provided additional written notices of delays and cost impacts due to the lack of updated drawings. For example, TransAmerica provided the following written notices regarding the cost and schedule impacts due to the failure to provide the updated drawings:

(a) Josh Wilhelm's April 4, 2011 email noting the lack of updated drawings when he stated "[t]his is costing TransAmerica time and additional cost due to increased surveying time calculating and closing dimensions which should be given to us."

(b) Josh Wilhelm's April 15, 2011 email where he stated the updated set had not been provided and expressed concerns "that the drawings should be updated so that future coordination with other Primes and our

subsequent trades is correct and we are all working from the same dimensions.” (TA-304 and TA-305)

(c) Josh Wilhelm’s April 26, 2011 email stating the impact the late casework could have. (TA-0315)

(d) Josh Wilhelm’s May 6, 2011 email stating they are still are running into dimensional issues in the architectural drawings and expressing concerns that “we will continue to have these problems as we begin erecting the buildings next week” and that the “best solution is to have the corrected construction set issued.” (TA-0324)

(e) Josh Wilhelm’s May 17, 2011 email identifying dimensional errors. (TA-0339)

327. Failure to provide the updated construction set of the plans by the OSFC and its agents as promised on at least a dozen occasions prevented TransAmerica from submitting any additional claim information from what it provided on numerous occasions.

328. Between April and July of 2011, while TransAmerica was providing notice of impacts caused by the failure to provide the updated set of plans, LL and SHP acknowledged the impact this was having based on the following emails that did not include TransAmerica:

(a) LL stated that TransAmerica had “submitted correspondence to cover themselves if there is a field issue” and that “[t]hese drawings were originally promised to the contractors in December.” (April 15, 2011 Clay Keith email included in TA-304)

(b) Clay Keith’s May 6, 2011 email stating “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 and Clay Keith May 6, 2011 email)

(c) Jim Smith’s email on May 25, 2011 noting the problems with the drawings, which was followed by Clay Keith’s email stating that “[i]t is hard to have any confidence in the specs, drawing notes, or drawings at his point after so many issues” and that **“you are putting us in a very frustrating and difficult position to defend you and the Owner.”** (TA-0352)

(d) Clay Keith's July 7, 2011 email stating that "we need to get this train back on the track and it needs to start with **clear and accurate drawings.**" (TA-380)

329. During the time period from February thru July 2011, LL, SHP and OSFC repeatedly promised to TransAmerica, during the weekly Progress Meetings, that an updated construction set of plans would be provided. (JX-I-21/10-12)

330. 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.**" The attached sketches did not contain a full set of plans with revised dimensions, but instead only included revised life safety plans. (Josh Wilhelm, Josh Predovich, TA-0395, TA-0396)

331. The OSFC, through LL and SHP, made multiple changes to Proposal Request No. 18 due at least in part to additional fire rating requirements initiated by DIC's plan examiner. (Josh Wilhelm and TA-0409)

332. For example, on August 9, 2011 TransAmerica received a revised sketch providing further detail as to the fire rating requirements for internal walls. (TA-0424)

333. The multiple changes that the OSFC, through LL and SHP, made to PR No. 18 prolonged the time period it took for this work to ultimately be incorporated into a change order. Meanwhile every response by TransAmerica to a proposal request had to remain open for forty-five (45) days pursuant to GC paragraph 7.2.1.3.

334. On August 12, 2011, TransAmerica submitted questions regarding PR No. 18, which needed to be answered before TransAmerica could provide accurate pricing. (TA-0427)

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

DESCRIPTION:

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.

336. The attached sketches to PR No. 28 did not contain a full set of plans with revised dimensions.

337. Seven days after receiving PR. No. 28, TransAmerica provided another Article 8 Notice letter on October 7, 2011 stating that “[t]here have been and continue to be major changes in the scope, to which time is not being awarded/factored into the Project.” (Josh Wilhelm and TA-0484)

338. TransAmerica’s October 7, 2011 notice also noted that the “largest impact has been the addition of fire rated wall systems, draft walls, partitions, etc.” (TA-0484)

339. TransAmerica’s October 7, 2011 notice specifically referenced PR No. 18 and 28. TransAmerica noted that PR 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)

340. In its October 7, 2011 notice letter, TransAmerica noted that PR 18 had been re-issued on August 9, 2011. TransAmerica also noted that PR 18 had been priced four times between August 22, 2011 and September 27, 2011. (TA-0484)

341. With its October 7, 2011 notice letter, TransAmerica itemized the time it was seeking with each of the outstanding proposal requests, including PR 18 and 28. The

additional time for per dorm ranged between 24 days (for Deaf 7 and Blind 1) and 16 days (for Blind 6, Deaf 3, Blind 7, and Deaf 1). (TA-0484A)

342. Additionally on October 7, 2011, TransAmerica provided a recovery schedule plan that referenced the October 7, 2011 Article 8 notice letter. The recovery schedule information TransAmerica provided noted that the schedule should be adjusted per the additional time requested with the various outstanding proposals. (TA-0483)

343. TransAmerica's October 7, 2011 Article 8 notice letter regarding the changes relating to the fire rating changes was timely since it was required under GC paragraph 7.2.1.3, to "hold the Proposal valid and open for acceptance for at least forty-five (45) days." Based on GC paragraph 7.2.1.3, TransAmerica still believed it would be fully compensated through the change order process during the time period it was pricing these proposals. (Josh Wilhelm)

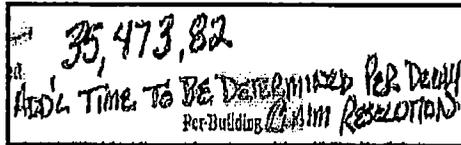
344. Prior to October 7, 2011, it was not necessary for TransAmerica to provide notice under Article 8 regarding the changes to the fire ratings since there were pricing proposals that were pending.

345. The pricing TransAmerica submitted for Proposal Requests No. 18 and 28 was initially unacceptable, and LL and SHP 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)

346. With both Proposal Requests No. 18 and 28, TransAmerica requested additional time that was not granted by the OSFC. (Josh Wilhelm)

347. Proposal Requests No. 18 and 28 culminated in Change Order 25 and 26 respectively. (JX-F-25 and JX-F-26)

348. With Change Order No. 25, the OSFC agreed that TransAmerica's additional time request would be determined pursuant to the delay claim resolution as shown by handwritten revisions on the change order, which is further evidence the OSFC was in agreement to extend the time period for TransAmerica to submit its certified claim in accordance with Article 8 GC paragraph 8.3.4. (JX-F-25)



35,473,82
ADD'L TIME TO BE DETERMINED PER DELAY
PER-BUILDING CLAIM RESOLUTION

349. Change Order No. 25 was executed on December 16, 2011 by the OSFC and was the last change order executed by TransAmerica, LL, SHP, and the OSFC. (JX-F-25)

350. The OSFC waived any rights it had under the Contract or General Conditions when it, through LL and SHP, directed TransAmerica to proceed with the work stated in Proposal Requests No. 18 and 28 without agreeing to a change order prior to the work commencing.

351. To the extent it is found the OSFC did not waive its rights by proceeding with the work described in Proposal Requests 18 and 28 prior to issuing a change order, the OSFC still waived its rights under Article 7 and 8 when it failed to comply with GC paragraph 7.2.29, which states:

(a) "If the Commission and Contractor do not agree on the adjustments of the Contract Sum and Contract Time associated with a Field Work Order within sixty (60) days after the Field Work Order is issued, the Commission shall determine the adjustments, if any, of the Contract Sum and Contract Time. If the Contractor does not agree with the Commission's determination, the Contractor shall initiate a Claim under GC Article 8 within ten (10) days of the date on which the Commission issues their determination."

352. The OSFC failed to issue a determination within sixty (60) days of Change Order No. 25 being issued, thereby waiving any rights it may have under Article 8 regarding TransAmerica's request for additional time.

353. On December 5, 2011, the OSFC, through LL and SHP, issued Proposal Request No. 35 directing TransAmerica to submit costs associated with the Recovery Schedule No. 3 and a ten (10) project duration extension. (TA-0519)

354. On January 6, 2012, TransAmerica provided pricing for Recovery Schedule 3, which was not accepted by the OSFC. (TA-0522)

355. Recovery Schedule 3 was never incorporated into a change order. (Josh Wilhelm)

356. On February 7, 2012, TransAmerica provided another Article 8 notice and requested an extension of time. (TA-0539)

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

358. With its February 22, 2012 letter, TransAmerica noted the sequence of the casework package with the other activities, which was the same as previously identified on April 26, 2011 and is another example where the OSFC and its agents failed to substantively act on schedule information provided by the prime contractors, including TransAmerica. (Josh Wilhelm)

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

360. On March 8, 2012, TransAmerica provided a notarized Certified Claim, in the amount of \$2,170,800.75, and cited the following reasons as the basis for the Claim. (TA-0563)

- 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.

361. TransAmerica's March 8, 2012 Certified Claim was properly notarized and complied in all aspects with GC Article 8. (Bill Koniewich)

362. TransAmerica's Certified Claim was based on the Project achieving completion by May 31, 2012, which did not occur for reasons beyond TransAmerica's control. (Bill Koniewich and TA-0563)

363. TransAmerica's Certified Claim reserved rights by stating that the "lack of realistic schedule makes predicting the Project's progress very difficult. Should the Project fall further behind than those estimated durations or should additional issues arise, TA reserves the right to supplement these figures." (TA-0563)

364. 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)

365. The remaining construction of the dormitories was delayed for a variety of reasons beyond TransAmerica's control, including for the delays attributable to the casework, technology, and fire alarm packages.

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

367. During the spring and summer of 2012, TransAmerica provided numerous notices regarding the delays and adverse impacts to the punchlist process:

(a) On May 24, 2012, TransAmerica provided an update to the punchlist process and noted that SHP's punchlist for various portions of the Project had yet to be received. TransAmerica also noted that it "has not been permitted back" in Blind 5, Deaf 7, Blind 1, and Deaf 3 and that it cannot complete any remaining items until it has access. (Josh Wilhelm and TA-0597)

(b) On June 22, 2012, TransAmerica provided another update to the punchlist process and noted issues related to hardware and construction damage from other contractors. TransAmerica provided pictures to support its statements. (Josh Wilhelm and TA-0603)

(c) On July 20, 2012, TransAmerica provided notice that there was ongoing construction damage and that it would not be responsible for the costs to repair such damage. TransAmerica "continued to reserve the right to include any costs associated with finish the remaining items on the punchlist due for what has been an extremely extended punchlist process that currently has no end in sight." (Bill Koniewich and TA-0624)

(d) On August 16, 2012, TransAmerica again provided an update to the punchlist process and noted the "extended punchlist process and the issues SHP has noted as 'punchlist items' are the direct cause of the Project Team's failure to issue a suitable design and the chaotic and out-of-sequence construction that followed." TransAmerica went on to note the delayed inspection process and the decision to install the fire alarm and security work after TransAmerica had completed much of its finish work. (Josh Wilhelm and TA-0629)

368. The Residential portion of the Project did not obtain its certification of occupancy until August 16, 2012. This represents, at minimum, an extended Project duration of

184 days based on the completion date of February 14, 2012 provided in Change Order No. 13 and Recovery Schedule No. 2. (TA-0632 and JX-F-13)

369. On July 18, 2012, a jobsite resolution meeting was conducted in response to TransAmerica's March 8, 2012, which was attended by counsel for TransAmerica, OSFC, and SHP. (Bill Koniewich)

370. OSFC waived its insistence that TransAmerica strictly comply with Article 8 provisions when it failed to conduct a jobsite resolution meeting within thirty (30) days as provided in paragraph 8.8.2. (Bill Koniewich)

371. OSFC is not excused for failing to comply with the thirty (30) day requirement in paragraph 8.8.2 due to the scheduling conflicts of the various counsel when the OSFC attempted to schedule the meeting well after the thirty (30) day requirement had expired. (Bill Koniewich and OSFC exhibit SS)

372. On September 5, 2012, TransAmerica received LL's written analysis and recommendation. (Bill Koniewich and TA-0638)

373. LL's written analysis and recommendation denied TransAmerica's claim in its entirety, but failed to mention the following:

(a) LL's April 15, 2011 acknowledgment to SHP that TransAmerica had provided "correspondence to cover themselves if there is a field error." (TA-0304)

(b) On September 4, 2012, the OSFC's Executive director denied the Project Administrator's request for additional Project funding, which cited TransAmerica's claim as one of the reasons. (Richard Hickman and TA-0637)

(c) Josh Predovich of SHP believed that TransAmerica "was entitled to something" but had not seen documentation to support what the amount should be. (Josh Predovich)

(d) Failed to address the repeated misrepresentations that an updated set of drawings would be provided.

374. The OSFC, through LL, waived its insistence that TransAmerica strictly comply with each provision of Article 8 when it waited 48 days to issue LL's recommendation and analysis despite paragraph 8.8.2 requirement that such analysis be issued 14 days after the jobsite resolution meeting.

375. Despite the OSFC failure to timely follow the Article 8 process, TransAmerica timely appealed LL's written analysis and recommendation on September 18, 2012. TransAmerica's appeal letter noted failures of the OSFC to following the Article 8 provisions, including:

(a) Failure to timely issue LL's written recommendation and analysis within fourteen (14) days after the jobsite resolution meeting.

(b) Failure to provide a single "contemporaneous" document from the Project supporting its denial despite the requirement under Article 8.8.3.7 to do so. (Bill Koniewich and TA-0642)

376. TransAmerica's September 18, 2012 appeal letter also noted that the "OSFC has both failed to adhere to its own obligations under the same Article 8 provisions and prevented TransAmerica from complying with the OSFC's self-serving and flawed interpretation of the Article 8 provisions." (TA-0642)

377. During the summer of 2012, TransAmerica received information through public records requests that was previously unavailable. (Bill Koniewich)

378. Only upon reviewing public records not accessible during construction, did TransAmerica begin to become aware of the following:

(a) The OSFC assumed the risk involved with bidding out the Project without having a permit in place.

(b) The significant changes to the dormitories fire ratings that occurred from what DIC based its initial partial plan approval on back in July 2010.

(c) Delays and impacts of the incomplete permit process.

(d) The OSFC's Project Administrator had determined that the set of drawings TransAmerica based its bid on was "flawed."

(e) Recognition that the OSFC, LL and SHP all found Berardi's drawings not be "full and accurate."

(f) Confirmation that LL recognized the impacts that the lack of updated drawings, permits, and Campus Wide Packages would have on the construction of the dormitories, which TransAmerica had cited during construction as delaying its progress.

(g) The significant budget problems of the Project that were discussed during the March 2011 Executive Partnering Session, after TransAmerica mobilized and provided its Article 8 notice.

(h) OSFC's Project Administrator's request for additional project funding, which cited TransAmerica's claim as at least part of the justification, which was denied by the Executive Director.

(Bill Koniewich and Josh Wilhelm)

379. Based upon the additional information obtained through the public records requests, TransAmerica submitted its Supplemental Certified Claim on November 7, 2012. (Bill Koniewich, Josh Wilhelm and TA-0659)

380. TransAmerica's Supplemental Certified Claim described in detail the following reasons for justification of entitlement:

(a) Lack of Buildable Design by SHP

(b) Lack of Proper Scheduling and Coordination by LL.

(c) Excessive Construction Damage and Extended Punchlist Process

(d) Differing Jobsite Conditions that TransAmerica Unexpectedly Encountered

(e) Significant delays extending the Project's Completion from February 14, 2012 to August 31, 2012

381. TransAmerica's Supplemental Certified Claim identified \$3,048,294.13 in damages that TransAmerica sought to recover, which did not include TransAmerica's outstanding Contract Balance. (Bill Koniewich)

382. TransAmerica's Supplemental Certified Claim identified how such damages were calculated. (Bill Koniewich)

383. 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, required under GC paragraphs 8.9.2 and 8.9.3. (Bill Koniewich)

384. The OSFC waived strict compliance with GC Article 8, and prevented TransAmerica's performance, when it:

- (a) Decided to bid the Project, both times, without having resolved the DIC plan review.
- (b) Failed to provide the promised updated construction set of drawings.
- (c) Withheld information from TransAmerica regarding the problems with the drawings issued by Berardi, including the numerous dimensional problems.
- (d) Concealed the status of the permit and inspection process from TransAmerica.
- (e) Made significant changes to the dormitories' fire ratings, did not inform TransAmerica until months later, directed TransAmerica to perform such changes, and later arbitrarily denied TransAmerica's request for additional time.
- (f) Denied TransAmerica's claim at the same time acknowledging that it could not obtain additional Project funding.
- (g) Permitted LL to coordinate and administer the Project with a significantly flawed schedule.
- (h) Blamed TransAmerica for delays and inefficiencies when it knew that the problems were caused by the OSFC and its agents.

385. The OSFC's conduct, including the conduct of LL and SHP, is inconsistent with its duty of good faith and fair dealing and insistence that TransAmerica strictly comply with each and every provision of GC Article 8. (Bill Koniewich)

386. The OSFC acted in a manner inconsistent with an intent to claim a right to strict notice and certification requirements under Article 8 where the OSFC paid the Claims of TP Mechanical and Vaughan without insisting upon strict compliance of the GC Article 8. (Bill Koniewich)

387. The OSFC is estopped from insisting upon TransAmerica's strict compliance with notice and certification requirements in Article 8 of its Contract.

388. Even assuming for the sake of argument only that TransAmerica fell short of strict notice and certification requirements in its contract, the OSFC, through its agents SHP and LL, prevented TransAmerica from providing such notice or certification by misrepresenting to TransAmerica the true nature of the design problems, by mismanaging the project in an adversarial and unprofessional manner and without good faith, and by misrepresenting on over a dozen separate occasions that a fully-integrated construction set of drawings would be issued, which was then withheld.

K. Change Orders Do Not Absolve OSFC for Damages TransAmerica Claims

389. 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.**"

390. The attached sketches did not contain a full set of plans with revised dimensions, but instead only included revised life safety plans.

391. OSFC, SHP, and LL were aware of these changes as early as January 2011 but failed to direct TransAmerica to proceed with such changes until construction had progressed for over six (6) months when Proposal Request No. 18 was issued on July 18, 2011.

392. Based on Proposal Request No. 18, OSFC, SHP, and LL directed TransAmerica to proceed with these changes without a signed change order and then arbitrarily reduced TransAmerica's pricing for such changes and rejected its request for additional time.

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

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.

394. The attached sketches to Proposal Request No. 28 did not contain a full set of plans with revised dimensions.

395. Proposal Requests No. 18 and 28 culminated in Change Orders 25 and 26 respectively, which provided compensation for the discrete changes identified in the description portion (noted below) and the attached itemized cost sheets, but nothing more. (JX-F-25 and JX-F-26)

<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 35%;">Change Order No.</td> <td style="width: 35%;">882-11087-023R - 025</td> <td style="width: 30%;">Contract Days Changed</td> </tr> <tr> <td>Change Order Date:</td> <td>11/04/11</td> <td>Revised Completion Date</td> </tr> <tr> <td>Contractor Name:</td> <td>TransAmerica Building Company, Inc</td> <td>Check Reason for Change Order</td> </tr> <tr> <td>Project Name:</td> <td>OSBD - Residential Dorms</td> <td>Design Clarification or Correction</td> </tr> <tr> <td></td> <td></td> <td>Field Condition</td> </tr> <tr> <td></td> <td></td> <td>Field Dispute Resolution</td> </tr> <tr> <td></td> <td></td> <td>School District Board Request</td> </tr> <tr> <td></td> <td></td> <td>Local Funded Initiative (use state)</td> </tr> <tr> <td>Location: Ohio State School for the Blind Ohio School for the Deaf</td> <td></td> <td>% Project Construction Fund</td> </tr> <tr> <td></td> <td></td> <td>Other</td> </tr> <tr> <td></td> <td></td> <td>Original Contract</td> </tr> <tr> <td></td> <td></td> <td>Previous Changes</td> </tr> <tr> <td></td> <td></td> <td>This Change</td> </tr> <tr> <td></td> <td></td> <td>Revised Contract</td> </tr> <tr> <td colspan="3" style="text-align: center;">Description / Justification (Add more pages if necessary)</td> </tr> <tr> <td colspan="3">CE#0057 - Cost for additional draft stopping and fire rated wall and ceiling termination requirements as detailed in PR#28.</td> </tr> </table>	Change Order No.	882-11087-023R - 025	Contract Days Changed	Change Order Date:	11/04/11	Revised Completion Date	Contractor Name:	TransAmerica Building Company, Inc	Check Reason for Change Order	Project Name:	OSBD - Residential Dorms	Design Clarification or Correction			Field Condition			Field Dispute Resolution			School District Board Request			Local Funded Initiative (use state)	Location: Ohio State School for the Blind Ohio School for the Deaf		% Project Construction Fund			Other			Original Contract			Previous Changes			This Change			Revised Contract	Description / Justification (Add more pages if necessary)			CE#0057 - Cost for additional draft stopping and fire rated wall and ceiling termination requirements as detailed in PR#28.			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 35%;">Change Order No.</td> <td style="width: 35%;">882-11087-023R - 026</td> <td style="width: 30%;">Contract Days Changed</td> </tr> <tr> <td>Change Order Date:</td> <td>11/28/11</td> <td>Revised Completion Date</td> </tr> <tr> <td>Contractor Name:</td> <td>TransAmerica Building Company, Inc</td> <td>Check Reason for Change Order</td> </tr> <tr> <td>Project Name:</td> <td>OSBD - Residential Dorms</td> <td>Design Clarification or Correction <input checked="" type="checkbox"/></td> </tr> <tr> <td></td> <td></td> <td>Field Condition</td> </tr> <tr> <td></td> <td></td> <td>Field Dispute Resolution</td> </tr> <tr> <td></td> <td></td> <td>School District Board Request</td> </tr> <tr> <td></td> <td></td> <td>Local Funded Initiative (use state)</td> </tr> <tr> <td>Location: Ohio State School for the Blind Ohio School for the Deaf</td> <td></td> <td>% Project Construction Fund</td> </tr> <tr> <td></td> <td></td> <td>Other</td> </tr> <tr> <td></td> <td></td> <td>Original Contract</td> </tr> <tr> <td></td> <td></td> <td>Previous Changes</td> </tr> <tr> <td></td> <td></td> <td>This Change</td> </tr> <tr> <td></td> <td></td> <td>Revised Contract</td> </tr> <tr> <td colspan="3" style="text-align: center;">Description / Justification (Add more pages if necessary)</td> </tr> <tr> <td colspan="3">CE#0041 - Additional cost to provide revisions to fire separation walls between dorm sleeping units as detailed in PR#18. Add \$82,193.53</td> </tr> </table>	Change Order No.	882-11087-023R - 026	Contract Days Changed	Change Order Date:	11/28/11	Revised Completion Date	Contractor Name:	TransAmerica Building Company, Inc	Check Reason for Change Order	Project Name:	OSBD - Residential Dorms	Design Clarification or Correction <input checked="" type="checkbox"/>			Field Condition			Field Dispute Resolution			School District Board Request			Local Funded Initiative (use state)	Location: Ohio State School for the Blind Ohio School for the Deaf		% Project Construction Fund			Other			Original Contract			Previous Changes			This Change			Revised Contract	Description / Justification (Add more pages if necessary)			CE#0041 - Additional cost to provide revisions to fire separation walls between dorm sleeping units as detailed in PR#18. Add \$82,193.53		
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CE#0057 - Cost for additional draft stopping and fire rated wall and ceiling termination requirements as detailed in PR#28.																																																																																																	
Change Order No.	882-11087-023R - 026	Contract Days Changed																																																																																															
Change Order Date:	11/28/11	Revised Completion Date																																																																																															
Contractor Name:	TransAmerica Building Company, Inc	Check Reason for Change Order																																																																																															
Project Name:	OSBD - Residential Dorms	Design Clarification or Correction <input checked="" type="checkbox"/>																																																																																															
		Field Condition																																																																																															
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Location: Ohio State School for the Blind Ohio School for the Deaf		% Project Construction Fund																																																																																															
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Description / Justification (Add more pages if necessary)																																																																																																	
CE#0041 - Additional cost to provide revisions to fire separation walls between dorm sleeping units as detailed in PR#18. Add \$82,193.53																																																																																																	

396. The OSFC prevented TransAmerica from providing pricing beyond those identified in the attached sheets attached to Change Orders 25 and 26 when it failed to provide an updated set that included a revised architectural floor plan with corrected dimensions.

401. The OSFC cannot insist that any change order, including Change Orders 25 and 26, should be broadly interpreted when GC paragraph 6.3.1 states that “time extensions shall depend upon the extent to which Work on the critical path of Construction Schedule is affected, if applicable” and yet the Project was being built from a schedule with a flawed critical path.

402. The OSFC prevented TransAmerica from submitting pricing beyond the discrete items noted in the change order descriptions and itemized sheets when it permitted LL to construct the Project with a significantly flawed schedule, contrary to GC Article 6, that masked the true impacts and delays on the Project.

403. The Change Orders executed by Josh Predovich are not enforceable against TransAmerica because he was not a licensed architect at that time. Mr. Predovich’s review and approval of such Change Orders is contrary to the requirements in the SHP and OSFC Agreement No. 3 for Professional Design Services that required SHP to “provide and maintain a licensed architect to oversee Contract Administration and Close-out Phases.” (Josh Predovich and Appendix D in the SHP/OSFC Agreement No. 3 for Professional Design Services (JX-N-03/40))

404. TransAmerica damages included in its Certified Claims have not been paid or compensated through Change Orders.

405. On Change Order No. 12, LL unilaterally, and without TransAmerica’s approval, crossed out TransAmerica’s request for additional time.



Description / Justification (Add more pages if necessary)

CE#035- Additional Cost for roof Baffles not shown on drawings. Baffles to be installed at roof deck (All buildings)

O.K. ZERO DAYS ADDED AS THIS WORK WAS KNOWN AND PRICED PRIOR TO 15 DAY EXTENSIONS GRANTED ON 7.25.11

406. Such unilateral changes are not enforceable against TransAmerica.

407. Total labor costs in all of TransAmerica's signed change orders was \$41,690.00. (Alan Starr)

408. Change Orders do not limit TransAmerica's Claim.

(a) Change orders are for discrete items only and do not apply to TransAmerica costs arising from delays and disruptions caused by flawed plans.

(b) Change orders are limited to the description and attached limited sketches, which is consistent with parties conduct to mark-up change order pricing to conform with the proposal request to provide discrete pricing.

(c) TransAmerica was not compensated for architectural dimensional changes. In particular, see the changes referenced in RFI 132 that were than included the As-Built plans. (TA-0344 and TA-919) These change were never incorporated into a change order.

(d) Earlier change orders are just for foundation items pertaining to the structural drawings, which are not the basis of TransAmerica's claim.

(e) Change Order 13, which is extended the Project completion to February 14, 2012, does not indicate it is for design changes.

(f) TransAmerica identified discrete changes that it was not compensated for, which totaled \$603,392.71. (Josh Wilhelm and TA-0734).

409. OSFC cannot insist on an unfairly broad change order interpretation when:

(a) OSFC and its agents concealed changes while construction was on-going.

(b) OSFC and its agents directed TransAmerica to proceed before a change order was signed.

(c) OSFC and its agents then proceeded to markup and reduce pricing without providing for additional time. In at least one case, LL unilaterally marked up the change order after TransAmerica's acceptance.

(d) The OSFC represented time would be resolved through the Article 8 process, but did nothing after LL denied TransAmerica's claim asserting TransAmerica did not comply with the Article 8 provisions.

(e) Any ambiguity in the change orders must be resolved against the OSFC since it, through LL, drafted the change order description and boiler plate language. "[W]here the meaning of a contract is ambiguous, the ambiguity should be construed against the drafting party." *Albert v. Shiells*, 10th Dist. No. 02AP-354, 2002-Ohio-7021, ¶ 20 (citing *Central Realty Co. v. Clutter*, 62 Ohio St.2d 411, 413 (1980)).

410. The Change Orders are not enforceable because the OSFC intentionally withheld information from TransAmerica knowing such information would lead to additional costs. This also prevented TransAmerica from pricing the full scope of changes.

411. The "boiler plate language" of the change orders says nothing about releasing or satisfying time and with respect to most of the changes orders, including Change Order 25 and 26, no additional time is granted.

The compensation or time extension provided by this Change Order constitutes full and complete satisfaction for all direct and indirect costs, and interest related thereto, which has been or may be incurred in connection with this change to the work, including but not limited to, any delays, inefficiencies, disruption or suspension, extended overhead, acceleration, and the cumulative impact of this and other change orders issues as of this date.

Contract Days Changed	0.00
Revised Completion Date	

412. As noted below, R.C. §4113.62(C)(1) applies to change orders as well and precludes the OSFC from being released from the delays it has caused.

(a) **"Any provision of a construction contract, agreement, or understanding, or specification or other documentation that is made a part of a construction contract, agreement, or understanding, that waives or precludes liability for delay during the course of a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, or that waives any other remedy for a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, is void and unenforceable as against public policy."** R.C.

L. OSFC Failed to Prove Its Liquidated Damages Claim

413. OSFC wrongfully assessed Liquidated Damages against TransAmerica.

414. Andy Englehart offered no opinion as to the OSFC's liquidated damages claim.

415. The OSFC failed to provide any schedule analysis to support its liquidated damages claim or that TransAmerica was the cause of the delays to the Project's critical path.

416. The OSFC failed to provide any evidence that it evaluated TransAmerica's prior request for extension of time in accordance with GC paragraph 6.3.1, which required that time extensions be evaluated "to the extent the Work on the critical path of the Construction is affected."

417. The unprofessional administration of the Project is illustrated by the wrongful assessment of liquidated damages and the OSFC's refusal to acknowledge the impact and delays caused by its own shortcomings, including those of its agents.

418. The unprofessional administration of the Project is further illustrated by the rejection of conforming work, concealment of the permit process, concealment of numerous design flaws, and an overall "toxic" Project atmosphere. (Josh Wilhelm)

419. The wrongful assessment of liquidated damages by the OSFC is another example of its refusal to take responsibility for its own short-comings and failures.

420. The OSFC, through LL and SHP, instead continued to blame the problems on TransAmerica for many of the delays and disruption caused by the OSFC and its agents.

421. Clay Keith acknowledged the underlying reason to assess liquidated damages was to "get their attention" and designed to secure a proper roofing warranty certificate.

Mr. Keith failed to provide justification as to why the OSFC should be permitted to continue holding liquidated damages after the certificate was provided.

422. TransAmerica completed its work and satisfied all close out requirements, including providing roofing warranties, and yet the OSFC continued to wrongfully impose liquidated damages and withhold its contract balance. (Bill Koniewich and TA-0682)

423. The OSFC's application of liquidated damages is contrary to GC subparagraph 9.6.3, which provides:

(a) If the Contractor remedies the basis for withholding payment pursuant to paragraph GC subparagraph 9.6.2 [includes liquidated damages], payment shall be made for amounts withheld because of them.

424. According to its December 6, 2011 Notice letter, OSFC based its assessment of Liquidated Damages on the "Roof and Window Enclosure Milestone."

425. Specification 013200 (Milestone Schedule) does not include "Roof and Window Enclosure Complete" as a milestone.

426. The "Roof and Window" milestone involves two separate Prime Contractors, which is not a proper way to administer milestones. (Don McCarthy and Andy Englehart)

427. Don McCarthy testified that "because TransAmerica installed the ice, water shield and roofing felt, all of the buildings were dry and follow-on work was progressing." (Don McCarthy)

428. In February 2012 all of the activities used as the basis of assessing liquidated damages to TransAmerica were retroactively adjusted back and given completion dates that preceded the notice letter sent on December 6, 2011.

429. The fact that the Project Schedule was manipulated to adjust backwards the official record is proof that this issue was manufactured by LL. (Don McCarthy)

430. TransAmerica was under no obligation to pursue an Article 8 claim for the OSFC's wrongful assessment of liquidated damages.

431. The OSFC cannot enforce liquidated damages for the Roof and

Window Enclosure Milestone because:

- (a) The milestone dates included in the bid documents failed to include a milestone for Roof and Window Enclosure. (Don McCarthy)
- (b) The Roof and Window Enclosure “milestone” is vague and open to multiple meanings, especially when two prime contractors are responsible for achieving this single activity. (Don McCarthy)
- (c) The day before assessing liquidated damages, TransAmerica received a pricing proposal for Recovery Schedule 3 proposing a time extension. (TA-0519).
- (d) TransAmerica never agreed to Recovery Schedule 3, which is the schedule LL referenced in its December 6, 2011 letter as the basis for assessing liquidated damages. (TA-0520).

432. The OSFC, through LL and SHP, wrongfully applied liquidated

damages against TransAmerica when it:

- (a) Initially assessed liquidated damages in the amount of \$3,000, which is in conflict with the terms of the Contract. (Bill Koniewich)
- (b) Failed to properly evaluate or grant TransAmerica extensions of time. (Josh Wilhelm)
- (c) Manipulated the schedule to retroactively assess liquidated damages. (Don McCarthy)
- (d) Assessed liquidated damages for the sole purpose to “get TransAmerica’s attention” for not providing its roof warranty from a certified roofer for pvc roof sections. (Clay Keith)
- (e) Any delays on TransAmerica’s part with providing roof warranty documents should be addressed through the retainage and the Project’s closeout process and not through an assessment of liquidated damages. (JX-B)
- (f) LL’s December 6 2011 letter assessing liquidated damages makes no mention of the requirement to submit its warranty letter from a certified roofer for pvc roof sections. (TA-0520)
- (g) OSFC own core meeting minutes and pictures show work progressing in September 2011 and that Blind 5 and Deaf 7 were fully enclosed. (JX-40/4 and JX-40/12)

(h) OSFC began assessing liquidated damages in December of 2011 but retroactively commenced the assessment in July 2011. (Don McCarthy)

(i) OSFC failed to release the liquidated damages after TransAmerica provided its roof warranty paperwork. (Clay Keith)

(j) LL proposed using TransAmerica's liquidated damages as a way to offset the Project's budget overruns. (TA-0641)

M. OSFC Failed to Prove Its Roof Defect Claim

433. Certain dormitories roofs, notably those facing northern exposures, experience significant amounts of ice buildup, which could be the cause of any complaints regarding bulk moisture intrusion. (Josh Wilhelm and Jim Luckino)

434. The compression of insulation results in a loss of R insulation value and results in additional ice buildup. (Jim Luckino)

435. SHP's detail regarding the placement of the ice and water shield does not comply with code. (Jim Luckino)

436. On August 12, 2011, DIC plan examiner informed SHP that the ice and water shield detail did not comply with the building code, but SHP never changed the plans or detail, nor is there any proof that they warned anyone or did anything about it in the field. (Jim Smith and TA-0428)

437. In its August 12, 2011 email to DIC's plan examiner, SHP acknowledged its roof design did not meet code and represented LL would direct the necessary change out in the field. (TA-0428)

438. There was no evidence to support that SHP directed LL to alter the installation of the ice shield to extend further beyond the exterior wall line despite SHP's contrary representations to DIC's plan examiner. (Jim Smith)

439. The ice and water shield were installed in plain view of SHP and LL and neither voiced objections during construction.

440. With the exception of one cut in the felt, Gary Mays could not identify the location or source of water infiltration. He never reviewed the site after big rainstorms or during winter conditions. (Gary Mays)

441. Nobody associated with TransAmerica, or either expert for that matter, was informed of the Blind No. 1 re-roof so nobody will ever know what the evidence would have shown with respect to water marks (or lack thereof) on the plywood or anything else. (Jim Luckino)

442. The OSFC unilaterally self-performed repair work on one of the roofs on the Project without TransAmerica being present despite several notices and letters sent by TransAmerica to the OSFC, requesting that TransAmerica be present during the repair work so that it could observe the work and avoid spoliation of relevant evidence. (Josh Wilhelm)

443. TransAmerica established that evidence relevant to its defense to the OSFC's defective workmanship claims was destroyed or permanently altered when the OSFC unilaterally self-performed the roofing repair work without TransAmerica being given an opportunity to be present.

444. The OSFC had the opportunity to observe and document the underlayment of the roof during the repair but failed to, while TransAmerica did not have such an opportunity.

445. OSFC self-performed the roofing repair work without notice to TransAmerica, and thereby destroyed relevant evidence, even though this litigation was on-going at the time the OSFC self-performed the repair work.

446. Criticisms that portions of the roof were not installed by a certified roofer overlooks the fact that these sections represents a very minor portion of the roofs (located at the valleys – see detail A106 on TA-901) and TransAmerica replaced those sections at no cost to the OSFC.

447. In addition to the ice shield design not meeting code, the EPDM roof Specification 075323 is not project specific and is written for a typical school structure using a metal deck roof structure and cannot be enforced against TransAmerica. (JX-E/103)

448. While TransAmerica complied with the submission requirements described in Specification Section 075323 for EPDM roofs, a pvc system was installed and as a result the OSFC cannot enforce the requirements of the EPDM roof system against TransAmerica. (JX-E/103)

449. Mr. Luckino testified that criticism regarding TransAmerica's failure to use barb nails overlooks the fact that barb nails became obsolete with the use of air guns when installing shingles. (Jim Luckino)

450. Mr. Mays conceded that nails used in an air gun now have "shanks" instead of barbs and can also be referred to as ring shank nails. (Gary Mays)

451. OSFC failed to satisfy its burden to prove damages that flowed from any forthcoming roof replacement when it failed to use the actual costs to re-roof Blind 1 and precluded its own expert from observing or quantifying the actual costs.

452. The damages the OSFC presented regarding its roof claim are speculative because:

- (a) The OSFC made no attempt to segregate any betterment that would be necessary to resolve the design errors of SHP.