

TRANSAMERICA BUILDING  
CO., INC.

Plaintiff,

v.

OHIO SCHOOL FACILITIES  
COMMISSION

Defendant.

Case No. 2013-00349

Judge McGrath

Referee Samuel Wampler

**STATE OF OHIO'S POST-TRIAL BRIEF**

**I. INTRODUCTION.**

This Post-Trial Brief is supported by the attached Findings of Facts at Tab A and Conclusions of Law at Tab B and is intended to be read in conjunction with the State of Ohio's Closing Argument which is also attached to this brief at Tab C.

Plaintiff was the general trades contractor for the construction of twelve new dormitories on the State of Ohio's campus for the Deaf and Blind Schools.

Plaintiff, through their claims seek to nearly double their bid amount for which they agreed to build these dorms.

Plaintiff's claim should be denied for the following reasons:

1. Plaintiff breached its contractual duties with the State;
2. Plaintiff has failed to prove any casual connection between what it alleges to be breaches of contract on the State's part and its damages; and
3. Plaintiff's damages are not fair, reasonable and necessary.

## **II. PLAINTIFF UNDERBID THIS PROJECT.**

Plaintiff intended to subcontract this project. Initially, it planned to self-employ the following positions:

1. Project manager;
2. Superintendent;
3. One general laborer to clean-up and "fetch things".

Unfortunately for Plaintiff, they failed to lock down their subcontractors. When Plaintiff was awarded the bid, their subcontractors took a walk on them. Plaintiff then found itself in a position where it was to self-perform work that it never intended to.

Shortly after being awarded the bid, Plaintiff's chief financial officer, Alan Starr, testified that he increased Transamerica's bid amount for rough carpentry, a major component of its scope of work, from \$606,390 to \$1,010,243.

When a contractor underbids a project, as Plaintiff did in this case, it means that much of Plaintiff's losses are their own doing. It also means that their damages will be overstated as we will see in subsequent sections.

## **III. PLAINTIFF POORLY SUPERVISED THIS PROJECT.**

Plaintiff went through six superintendents on this project. The following is the relevant chronology with regard to Plaintiff's supervision of this project:

6/28/11 – Plaintiff's first superintendent (Don Ball) was fired for poor performance;

December/January of 2012 – T/A's second superintendent (Brad Miller) was fired for poor performance;

Transamerica brings in four people, several without any supervisory experience themselves or with Transamerica, to fill the superintendent role.

The biggest part of Transamerica's claim is over \$1 million dollars for lost productivity with regard to the rough carpentry work, a major part of Transamerica's scope of work. Supervision is key to productivity. Transamerica's lack of productivity was self-inflicted.

#### **IV. TRANSAMERICA'S SUBCONTRACTORS FAIL TO PERFORM.**

##### **A. Transamerica fired and sued its roofing subcontractor.**

The following chronology highlights just some of the problems Transamerica had with its roofing subcontractor:

8/11/11	Roofer behind schedule.
9/8/11	Lack of roofers major issue.
10/6/11	Roofers maintaining schedule major issue.
10/11/11	96 hour Notice – 9 roofs incomplete.
11/3/11	T/A looking to replace roofer.
12/1/11	Can't get roof warranty.
12/6/11	LDs assessed.
12/8/11	Roofer removed.
12/8/11	T/A self-performing roof (not certified) and drywall.
12/12/11	T/A sues sub roofer.
12/19/12	T/A gets J/E against its roofing sub.

It is unprecedented to have a case where a prime contractor not only terminates their subcontractor, but files suit and obtains a judgment before the prime contractor completes its project. But that is exactly what we have here with Transamerica and its subcontractor roofer.

It is particularly telling what problems Transamerica admits that they were having with their roofing subcontractor in terms of the following facts which they alleged in their lawsuit (numbers referring to the paragraphs of Transamerica's complaint):

9. Eventually, Hanna quit, stopped, vacated, or otherwise abandoned the Project without completing its Scope of Work.
10. Hanna failed to perform its Scope of Work on the Project in a timely and workmanlike manner, resulting in numerous deficiencies and delays.
11. After receiving numerous notices of deficiencies, Hanna failed to remedy the defects or complete its Scope of Work in a timely fashion.

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14. As a result of Hanna's stoppage, vacating, or otherwise abandoning the Project without completing its Scope of Work, **Transamerica has incurred** and will continue to incur significant additional expenses and damages, including **liquidated damages** assessed by Owner proximately **resulting from Hanna's breach of contract**, repudiation of its obligations thereunder and abandonment of the Project.

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38. During the course of the Project, a certain portion of the roofing was changed and a white PVC roofing product manufactured by Johns Mansville was specified by the Owner. On or about July 18, 2011, Transamerica's project manager, Josh Wilhelm, asked Hanna whether he could provide a warranty for the Johns Mansville product. On July 20, 2011, Hanna affirmatively represented that he could provide such warranty. Obtaining a warranty was and its material to the Scope of Work under the Contract.
39. Mr. Wilhelm discovered, on or about October 27, 2011, that **Hanna could not provide the warranty as he represented.**
40. Hanna also made a material omission when he represented he could provide the warranty for the Johns Mansville product. Specifically, it was subsequently discovered by Transamerica that Hanna is not a certified or authorized installer of the Johns

Mansville product and, accordingly, the manufacturer will never warrant the system.

41. Also during the course of the Project, Transamerica issued a joint check payable to AAA Roofing and a supplier, Northcoast.
42. On or about September 27, 2011, **Hanna forged** Northcoast's **signature endorsement on the check** and deposited same.

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44. During the course of the Project, **Hanna also instructed or permitted his employees or subcontractors** or agents to wear **hardhats with certain designations** on them that were not issued to those persons **with intent of deceiving Transamerica and the construction manager**; the importance of the **hardhat certifications relate to safety** qualifications and issues for the Project. He was removed from the Project by the CM for repeatedly ignoring safety requirements while on the roof.

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46. **Hanna's actions were committed with malice.** Transamerica is entitled to punitive damages in connection with the same in an amount in excess of \$25,000.00 to be proven at trial.

*Transamerica v. Hanna, dba AAA Roofing, Franklin County Common Pleas Court, Case Number 11 CV 15424 (Defendant Ex. G) (emphasis added)*

Transamerica's damages are based on a delay claim. This Court well appreciates how important a roof is to the enclosure of a building and timely completion of the project. Transamerica didn't face an impossibility of performance (Conclusion of Law § Q) but its roofing sub surely did- an impossibility it was completely responsible for. It is Transamerica's roofing subcontractor which let it down in this case, not the State of Ohio.

**B. Transamerica loaned its painting/drywall subcontractor \$400,000.**

In another unprecedented move, Transamerica loaned its painting/drywall subcontractor \$400,000. This, not coincidentally, is close to the amount which Transamerica is claiming in additional drywall/painting cost which they want the State to pay. Again, it is Transamerica's subcontractor, not the State of Ohio which has breached its contract and let Transamerica down.

**V. TRANSAMERICA FAILED TO PROSECUTE AND PRESERVE ITS CLAIM.**

Transamerica's contract with the State is clear. If it believed that it was owed additional days or dollars, it had to submit a proposed change order and claim for such an amount. It must give notice of an adverse impact within ten days. It must provide a certified claim thirty days later:

8.1.1 Except as provided under GC subparagraph 2.14, the Contractor shall initiate every claim by giving written notice of the Claim to the Architect, through the Construction Manager, within ten (ten) days after the occurrence of the event giving rise to the Claim.

\* \* \*

8.1.2 The Contractor's written notice of a Claim shall provide the following information to permit timely and appropriate evaluation of the Claim, determination of responsibility, and opportunity for mitigation:

8.1.2.1 Nature and anticipated amount of the impact, including all costs for any interference, disruption, hindrance, or delay, which shall be calculated in accordance with GC paragraph 7.6 and be a fair and reasonably accurate assessment of the damages suffered or anticipated by the Contractor;

8.1.2.2 Identification of the circumstances responsible for causing the impact, including but not limited to, the date or anticipated date, of the commencement of any interference, disruption, hindrance, or delay;

8.1.2.3 Identification of activities on the Construction Schedule that will be affected by the impact or new activities that may be created and the relationship with existing activities;

8.1.2.4 Anticipated impacts and anticipated duration of any delay, impact, interference, hindrance or disruption, and any remobilization period; and

8.1.2.5 Recommended action to avoid or minimize any delay, interference hindrance, impact, or disruption.

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8.1.4 The Contractor's failure to provide written notice of a Claim as and when required under this GC paragraph 8.1 shall constitute the Contractor's irrevocable waiver of the Claim.

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8.3.1 Within thirty (30) days after providing written notice of a Claim, the Contractor shall submit in writing five (5) copies of all information and statements required to substantiate a Claim as provided in this GC Article 8 and all other information which the Contractor believes substantiates the Claim.

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8.3.3 The Contractor shall substantiate all of its Claims by providing the following minimum information:

8.3.3.1 A narrative of the circumstances, which gave rise to the Claim, including, without limitation, the start and finish date of the event or events and the actual, or anticipated, finish date;

8.3.3.2 Detailed identification of the Work (e.g. activity codes from the Construction Schedule) affected by the event giving rise to the Claim;

8.3.3.3 Copies of relevant correspondence and other information regarding or supporting Contractor entitlement;

8.3.3.4 Copies of the Contractor's most recent job cost reports itemized by activity codes, including segregated general and administrative expenses for the most recent reporting period, and for the period of the Contract, if available, and similar information for any Subcontractor claim included; and

8.3.3.5 The notarized certification described under GC subparagraph 8.2.1.1.

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8.3.5 The Contractor's failure to comply with the requirements of this GC paragraph 8.3 shall constitute an irrevocable waiver of any related Claim.

(Gen. Conditions Art. 8; Jt. Ex. B)

The following chronology is particularly telling:

3/8/12 – Transamerica files its first claim for \$2.1 million dollars;

11/7/12 – Transamerica files its second claim for \$3 million dollars;

There is no run-up to either of these multi-million dollar claims. There were no proposed change orders, notice, and certified claim in the months preceding the first \$2.1 million dollar claim. Likewise, in the eight months between the first and second claim when the claim amount grew another million dollars, there were no proposed change orders, notices and certified claim.

The contract and case law are clear. (See Conclusions of Law §B) The failure of a contractor to give proper notice and certification of its claim results in a waiver of that claim and that is what we have in this case.

#### **VI. TRANSAMERICA'S FIRST ARTICLE 8 CLAIM IS BEYOND THE STATUTE OF LIMITATIONS.**

The statute of limitations for a money damages claim against the State of Ohio is two years.

Subject to the division (B) of this section, civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties.

*R.C. 2743.16 (A)*

Transamerica filed its first Article 8 notice on February 17, 2011 complaining about poor plans for this project. However, Transamerica didn't file suit until June 14, 2013. Thus, any claims prior to June 14, 2011 are beyond the statute of limitations. Both the schedule which included milestone dates upon which the liquidated damages were based as well as recovery schedule number one occurred more than two years before Transamerica filed suit. (See Transamerica time table attached at Tab D). Thus, any challenge by Transamerica to the milestones upon which liquidated damages were based is also beyond the statute of limitations.

#### **VII. TRANSAMERICA'S RELEASE OF DAMAGES CLAIMS.**

Each of the executed change orders in this case have the following release language:

The compensation or time extension provide 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.

(See, e.g. Def. Ex. B)

Transamerica spent a good bit of its trial time introducing testimony of design changes to the fire rating of the walls in these dormitories. And yet, there are two change orders, twenty-five and twenty-six that specifically dealt with and compensated Transamerica for this issue. Whereas one of these change orders left the amount of time open, Transamerica was only seeking ten days which doesn't come close to their six month delay claim.

#### **VIII. TRANSAMERICA'S RELEASE OF TIME CLAIMS.**

Like the change orders, each schedule sign-off had the following release language:

##### **Prime Contractor Acknowledgments**

Each Prime Contractor acknowledges and certifies that they have satisfied their contractual requirements regarding the submission, coordination, and

development of the construction schedule with the Construction Manager per General Conditions 4.3.1 Further, each Prime Contractor acknowledges that they have reviewed the construction schedule and agree with its logic, activities, durations, milestones, and established completion date per General Conditions 4.3.2. Each Prime Contractor with their endorsement certifies that they shall deliver the project consistent with the schedule and any associated update or revision to the schedule, consistent with their contract requirements.

(See, e.g. Def. Ex. YY)

The following chronology reflects the approved schedules by Transamerica:

3/31/11	C/O 1 – Approved schedule.
5/20/11	Recovery Sched. 1.
8/10/11	C/O 13 – Recovery Schedule 2 approved.
12/10/11	Recovery Sched. 3.

Thus, up to December 10, 2011 (less than four months before Transamerica's multi-million dollar claim), it had been agreeing to and approving the schedules in this case. Thus, any schedule criticism prior to this date on behalf of Transamerica has been waived and cannot be used as a basis for their claim.

#### **IX. TRANSAMERICA SEEKS TO GAME THE SYSTEM.**

The State of Ohio introduced an email from George Hadler, the son of the Hadler Companies founder. The Hadler Companies owns Transamerica. In this email, Mr. Hadler talks about "scoring points" with a claim and staging a fight between himself and the president of Transamerica in an effort to motivate their subs and employees:

I have to know exactly what we agreed to before **I can try to construct arguments** for unfair and unrealistic treatment that will get us reimbursement for costs and a time extension. It seems to me that every state and federal project has cost overruns. I don't want lend lease to collect and we don't.

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And ask him [Transamerica's Project Manager] for anything else he knows of **that can help us build a case** as being unfairly and unreasonably victimized. **That's going to be where we score any points** and justify getting some relief both in terms of recapturing our excessive costs and getting the schedule adjusted to avoid penalties or at least us having to incur severe overtime costs to meet the schedule.

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I too am getting involved, and you should let people know that Transamerica is owned by the family, and that the family is not pleased with how this job is going. Explain that you too have people you have to answer to. The family has been patient so far, but patience is wearing thin. I say that with no disrespect, and only for you to use if that helps you light a fire under everybody's butt. **I would even agree to stage a heated argument between us in close proximity to get the message across to others. Only you and I and Brad would know it was just for show and to send a message employees and subs need to kick ass. Phil Russo always told employees shit runs downhill. If it begins with me eating shit, I guarantee you're going to eat it with me.**

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In closing everybody needs to pay more attention to the dollars and not the pennies. If a \$200 tool saves five man-hours, the tool is paid for, and the five hours is saved. **The words on the job site should be delegate, delegate, delegate, and efficiency, efficiency, efficiency** – not a minute to lose to anything. Top management is making sacrifices and going beyond and above so they need to also. And someone needs to watch them with a stop watch to make sure breaks are not a minute longer, or they work the extra minutes staying later on the job with pay for time wasted. I'll do what I can from my end and willing to do more as needed. **I join you in wanting to get this job finished and then decide if state jobs are even worth it. I suspect they are since there is so little private work in the pipeline.** But everybody needs to know what happens from now on depends on how well everybody performs between now and when we pull off the job. **I hate financing our subs, but so long as we are doing it, we want their souls just as committed as we are.**

(emphasis added) (See Def. Ex. 000)

Delegation may have been the watch word for how Transamerica planned to construct this project with subcontractors. However, once they were stuck self-performing, they needed direct action, not delegation.

**X. TRANSAMERICA'S POOR WORKMANSHIP.**

There is no better evidence of Transamerica's poor workmanship than the punch list which were generating between five hundred and seven hundred corrective items per building.

For a project of this size, we would anticipate a punch list of less than 100 items, with required staff time averaging between 4-6 hours. To date, we have punched 5 of the 12 buildings, with the average interior punch totaling more than 700 items and the exterior punches averaging an additional 60 items. Staff time is averaging 16-20 hours.

(Def. Ex. X)

**XI. TRANSAMERICA FAILS TO PROVE PROXIMATE CAUSE.**

Transamerica's claim to recover their losses from their six month delay in completing this project is based on allegations of bad plans and poor scheduling. However, if the plans and scheduling were as bad as Transamerica tries to make them out to be, then where are the multitude of pre- and post-bid questions you would expect to see from bad plans and scheduling? Likewise, where is all of the tear-out and re-bid that you would expect to see from bad plans?

A good example of Transamerica's failure to prove proximate cause arises with a number of dimensional issues about which they offered testimony. For each dimensional issue raised, there was corresponding testimony offered by the State of Ohio from both the architect and construction manager that these dimensional issues were dealt with in the field in a matter of 24 to 48 hours. If there was a dimensional bust on this project that impacted Transamerica, they were entitled to recover any days or dollars that they suffered as a consequence. However, they offered no proof of that because they weren't so adversely impacted.

## **XII. THE STATE OF OHIO IS ENTITLED TO APPORTIONMENT.**

Whether you call it proximate cause or apportionment, for each criticism of the plans and schedule advanced by Transamerica – alleged breaches of contract – Transamerica had to prove what damages flowed from that breach. (See Conclusions of Law §E and N). Thus, for the previous example, for each dimensional issue that Transamerica raised, they had to prove that such an issue proximately caused them damages. Otherwise, the alleged dimensional issue or bust is not relevant.

The same is true for Transamerica's criticism of the schedule. Their expert, Don McCarthy, gave a "Scheduling 101" class on the problems with the schedule for this particular project. However, Mr. McCarthy also admitted that he did not connect any of his scheduling criticisms with damages suffered by Transamerica. Once again, without such a causal connection, then his testimony is merely academic.

As this Court well knows, the State of Ohio has brought a lawsuit against both the architect and construction manager in this case in the event that Transamerica prevails on their criticism of the plans and scheduling. Both the State of Ohio and these parties are entitled to know what damages flow separately from Transamerica's allegations that the State of Ohio breached its contract when it came to the plans and scheduling.

## **XIII. DEFICIENCIES IN TRANSAMERICA'S DELAY ANALYSIS.**

Initially, Transamerica did not ask their expert do a schedule analysis when their expert reports were otherwise due. Transamerica's scheduling expert, Don McCarthy, admitted that he issued a second report with a scheduling analysis because the State's expert, Andy Englehart, criticized Transamerica for not producing a scheduling analysis in the first instance. Indeed,

Transamerica provided no scheduling analysis with its Article 8 claim and the argument can and is made that they should be precluded from doing so now.

Article 8 is more than a contractual requirement for the contractor to submit its claim pre-suit. It is actually a statutory mandate:

**If a dispute arises between the state and a contractor concerning the terms of a public improvement contract let by the state or concerning a breach of the contract, and after administrative remedies provided for in such contract and any alternative dispute resolution procedures provided in accordance with guidelines established by the executive director of the Ohio facilities construction commission are exhausted, the contractor may bring an action to the court of claims in accordance with Chapter 2743. of the Revised Code.**

*R.C. 153.12 (B)* (emphasis added)

The contract is also clear that the failure of a contractor to follow Article 8 results in a waiver of its claim. (See previous § V.)

When Transamerica's scheduling expert issued his first report, he had delays at 197 days. In his second report, that delay went down by 49 days to 148 days. Despite the reduction in days, the dollars for drywall and painting damages (totaling over \$1 million dollars) did not go down despite these damages being time sensitive as will be seen in subsequent sections.

What is also telling and not credible from Transamerica's schedule analysis is that only fourteen days of this delay was attributed to Transamerica. This despite the fact that Transamerica had to fire their roofing subcontractor and supplement their roofing, drywall and painting subcontractors with not only cash but also manpower.

#### **XIV. THE PROBLEMS WITH TRANSAMERICA'S LOSS OF PRODUCTIVITY CLAIM.**

Transamerica uses a measured mile approach to attempt to justify over \$1.3 million additional dollars for rough carpentry.

Loss of productivity claims are suspect because of all the variables that go into the productivity of a particular crew such as:

1. Supervision;
2. The qualifications of the crew;
3. The type of work that is being performed;
4. Whether the work is being performed during regular, overtime or weekend hours; and
5. Environmental conditions such as weather, etc.

Any measured mile approach by Transamerica would be suspect given the fact that they used six different supervisors/superintendents on this project. Transamerica's scheduling expert, who did this loss of productivity calculation, admitted that he didn't consider the above variables when putting together this measured mile claim.

Further, as with all of Transamerica's damage calculations, it assumed that they had a good bid; that they didn't under-bid the project. An impacted v. un-impacted portion of the work is going to be off if the contractor failed to bid enough money to do the work in the first instance. And that was the case here. Plaintiff's chief financial officer testified that after Transamerica was awarded the contract in this case and their subcontractors bailed out on them, he adjusted the bid amounts within Transamerica's job cost reports. He moved the bid amount for rough carpentry from a little over \$600,000 (rounded) to over \$2 million dollars (rounded).

**XV. DEFICIENCIES WITH TRANSAMERICA'S DRYWALL AND PAINTING CLAIMS.**

These two claims amount to nearly another \$1 million dollars. There are multiple problems with these damages.

The amount sought by Transamerica for additional drywall nearly approximates the amount which they had loaned their drywall subcontractor. In fact, Transamerica's chief financial officer admitted that that loan would be within their job cost reports for this project. Certainly an owner cannot be responsible for a prime contractor having to finance its subcontractor.

Both of these categories of damages include "out of sequence work". Transamerica's scheduling expert who assembled these damages admitted that this would include "scope work"<sup>1</sup> Certainly a contractor cannot make a claim for additional money when they are performing scope work; work that they were being paid for under the contract.

Both of these items include work under an "extended punch list". However, the punch lists were extensive in this case - nearly six to eight hundred items per building - much of which was work that Transamerica failed to originally perform or perform adequately.

Both of these items were underbid, just like rough carpentry was. Transamerica only bid about \$272,000 to perform the drywall but then adjusted this amount to \$1.2 million dollars after they were awarded the contract. With regard to painting, Transamerica bid \$150,000 and then increased that to \$421,000 after being awarded the contract. That was very close to their claimed amount for painting. You cannot submit a claim for damages when that approximates what you had planned to spend to perform the work in the first place.

#### **XVI. TRANSAMERICA IS NOT ENTITLED TO HOME OFFICE OVERHEAD.**

The Supreme Court has made it clear that for a contractor to be entitled to home office overhead, they would actually have to be suspended from doing any work on the project and unable to pick up that work on other projects. (See Conclusions of Law §O). That never

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<sup>1</sup> The same expert admitted that he applied none of his expertise to these calculations which simply took all of the job cost codes for painting and drywall over the delay period and assigned them as damages - a total cost claim.

happened in this case. Additionally, Transamerica burdened every category of damages with overhead. The contract is clear. Overhead is to include all items of home office cost and expenses:

Overhead includes but is not limited to, telephone, telephone charges, facsimile, telegrams, postage, photos, photocopying, hand tools, simple scaffolds (one level high), tool breakage, tool repairs, tool replacement, tool blades, tool bits, **home office estimating and expediting, home office clerical and accounting support, home office labor (management, supervision, engineering), all other home office expense**, legal services, travel, and parking expenses.

Gen. Condition § 7.6.5.6; Jt Ex B 57 (emphasis added)

**XVII. TRANSAMERICA IS NOT ENTITLED TO ADDITIONAL BOND COSTS.**

Transamerica has burdened every category of their damages with increased bond costs despite the fact that they never incurred such costs and despite the fact that the bonding company never made any demand for additional premium all these years later.

**XVIII. PLAINTIFF IS NOT ENTITLED TO ADDITIONAL PROJECT MANAGEMENT COSTS.**

Plaintiff is seeking additional project management costs for the time of its President and its CFO. These individuals would fall in the category of home office overhead which, for the reasons previously stated, is not recoverable.

**XIX. PLAINTIFF IS NOT ENTITLED TO ADDITIONAL TRADE SUPERVISION COSTS.**

Plaintiff should not recover for additional supervision costs where it did such a poor job supervising the project to begin with. It had no less than six superintendents on this project, having to fire its first two for performance issues. Additionally, the time for these supervisors is merely estimated – a rounded off percentage.

**XX. PLAINTIFF IS NOT ENTITLED TO EXTENDED GENERAL CONDITION COSTS.**

These damages are time sensitive – based on Transamerica’s six month delay in completing this project. For all the reasons previously stated as to why Transamerica is responsible for this delay, they likewise are not entitled to recover these costs. Further, as is the case with Transamerica’s other damages, they could have contemporaneously tracked any additional time or money that they were incurring through time and material tickets. They didn’t and shouldn’t now be able to recover all costs incurred for various scope work during the delay period.

**XXI. PLAINTIFF IS NOT ENTITLED TO RECOVER EXTENDED EQUIPMENT RENTAL COSTS.**

As with their other categories of damages, Plaintiff should not be able to recover extended equipment rental costs simply because they incurred these costs at a later period of time. Further, Plaintiff cannot recover these costs when they initially bid nothing for them.

**XXII. STATUTORY DELAY DAMAGES.**

The General Assembly has mandated that all state construction contracts contain a statutory delay provision:

**All contracts** under sections 153.01 to 153.60, inclusive, of the Revised Code, **shall contain provision in regard to the time when the whole or any specified portion of work contemplated therein shall be completed and that for each day it shall be delayed** beyond the time so named **the contractor shall forfeit to the state a sum to be fixed in the contract**, which shall be deducted from any payment due or to become due to the contractor.

*R.C. §153.19 (emphasis added)*

Pursuant to this statutory direction, Section 8.7.1 of the General Conditions of Contract, provides:

If the Contractor fails to achieve one or more of the Completion Milestones set forth in the Contract Documents, the Contractor shall pay or credit to the Commission the associated liquidated damages per-diem sum(s) set forth in the Contract Documents for each day that the Contractor fails to achieve one or more of the Completion Milestones.

(Jt. Ex C)

Additionally, Section 3.3 of the Contract Form provides:

**The Contractor's failure** to complete all Work within the period of time specified, or failure to **have the applicable portion of the Work completed upon any Milestone date, shall entitle the Commission** to retain or **recover** from the Contractor, as **Liquidated Damages**, and not as a penalty, the applicable amount set forth in the following table for each and every day thereafter until Contract Completion or the date of completion of the applicable portion of the Work, unless the Contractor requests, and the Commission grants an extension of time in accordance with the Contract Documents.

(Jt. Ex. A)

Transamerica argued that liquidated damages should be returned because they were based on a milestone that included roof and window enclosure with window enclosure being outside their scope of work.

Transamerica did not and could not dispute that they didn't meet the roof enclosure deadline. They fired their subcontractor roofer, sued it, and blamed it for the assessment of liquidated damages. (See § IV) Thus, Transamerica judicially admitted that the failures of its roofing subcontractor caused the assessment of liquidated damages. Just because the milestone date included the work of another prime contractor does not excuse Transamerica's late compliance with its milestone.

Transamerica also does not dispute the amount of liquidated damages (once corrected) and there is no dispute that Transamerica failed to file an Article 8 claim

requesting the return of liquidated damages. On the first day that the State of Ohio withheld liquidated damages which Transamerica didn't believe was justified, it had a statutorily created, contractual duty to make a claim for such damages. The failure of Transamerica to make that claim is waiver of their damages. (See §V)

### **XXIII. CONCLUSION.**

Construction claims are no different than any other lawsuits. In order for a Plaintiff to prevail, it must show duty, breach, proximate cause, and damages.

In this case, Plaintiff-Contractor alleges that the State breached its duty by failing to provide buildable plans and a workable schedule. What Plaintiff has failed to prove is any causal connection between its criticisms of the plans and schedule and the first dollar of its damages.

The Plaintiff should not be permitted to recover nearly twice what they bid and contracted to build the twelve new dormitories on the State of Ohio's campus for the Deaf and Blind given:

1. Plaintiff underbid this project as evidenced by their CFO's manipulation and substantial increases to their budget/bid in their job cost report;
2. Plaintiff never intended to self-performed this project but was forced to when they failed to lock down their subcontractors' bids.
3. Plaintiff had six different superintendents on this project.
4. Plaintiff terminated their roofing contractor accusing it of fraud
5. Plaintiff loaned their painting and drywall sub \$400,000; nearly the amount they are claiming as damages for this work.
6. Plaintiff never proved what days or dollars were the proximate cause by its complaints about the plans and schedule in this case.
7. Plaintiff never requested an extension of time for the delay claim they now present.

8. Plaintiff never provided timely notice and substantiation of the multi-million dollar claim which they now present.
9. Plaintiff released the delay claim they now seek through the schedules which they had approved.
10. Plaintiff released many of the plan issues they complained about through the change orders which they signed.
11. Plaintiff did nothing to mitigate their six month delay.
12. Plaintiff did nothing to mitigate their multi-million dollar claim.
13. Plaintiff sought recovery by way of damages for scope work.
14. Plaintiff's claim is a total cost claim as they seek to recover all costs for certain scope work during the delay period.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *State of Ohio's Post-Trial Brief, Proposed Findings of Fact/Conclusions of Law and Closing Argument* was sent by regular U.S. mail, postage prepaid, this 20<sup>th</sup> day of July, 2015 to:

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12. Transamerica submitted a bid on the State of Ohio's new dorm project for the School for the Deaf and Blind.
13. Transamerica was not the low bidder for this project.
14. The low bidder for this project withdrew its bid due to a clerical error.
15. Transamerica ended up bidding on this project due to a down-turn in the economy.
16. At the time that Transamerica bid on the project, it intended to sub-contract out all of the construction.
17. Transamerica's plan at the time of their bid was to staff this construction project with one project manager, one superintendent, and one laborer who would do clean-up and "fetch things" as necessary.
18. Transamerica did not lock down the bids from their subcontractors at the time of its bid.
19. After Transamerica was awarded the bid, their subcontractors increased their prices.
20. Transamerica's rough carpentry subcontractors at the time of its bid.
21. Transamerica hired the Deering Brothers as carpenters to perform the rough carpentry.
22. The Deering Brothers Company consisted of about seven carpenters.
23. Transamerica made the Deering Bros. their employees.
24. Transamerica planned to have the Sammy Walker Construction Company perform the drywall and painting.
25. The low bid general trades contractor, Summit Contracting, was not able to qualify Sammy Walker as a subcontractor.
26. The construction manager warned Transamerica that Sammy Walker only had some limited residential experience.
27. Transamerica told the construction manager that they would "set money aside" to cover Sammy Walker's performance.
28. Transamerica ended up loaning Sammy Walker \$400,000.00.

29. That \$400,000.00 loan is in Transamerica's job cost reports.
30. After the low bidder withdrew, Transamerica was awarded the bid to construct the new dormitories at the State of Ohio School for the Deaf and Blind.
31. Transamerica entered into a contract with the State of Ohio to perform the general trades construction of the new dormitories at the State of Ohio School for the Deaf and Blind for a total of \$3,975,000.
32. Shortly after Transamerica bid on this project and after they learned that they were going to have to self-perform more of the construction than they planned, their chief financial officer began creating new bid or budget numbers in their job cost report.

## **II. CHRONOLOGY OF KEY EVENTS.**

1. Transamerica was issued a notice to proceed on December 10, 2010.
2. The first day of construction was March 17, 2011. All contractors accepted the milestone schedule on March 31, 2011 through the execution of Change Order #1.
3. All change orders signed by Transamerica had release language of any prior/present claims.
4. Recovery Schedule 1 was signed by Transamerica and all other prime contractors on May 20, 2011.
5. All schedules signed off by Transamerica included an affirmation that they could and would meet that schedule.
6. The two year anniversary of Transamerica's complaint is June 14, 2011.
7. Any claim filed by Transamerica prior to June 14, 2011, the two year anniversary of their complaint, is waived.
8. Transamerica first superintendent, Don Ball was fired on June 28, 2011 for his failure to perform.
9. All contractors, including Transamerica, signed off on Recovery Schedule 2 on August 10, 2011 through Change Order 13.
10. Transamerica was issued a 96 hour notice on October 11, 2011, as nine of the twelve roofs were incomplete.

11. On November 4, 2011 and November 29, 2011, Change Order 25 and 26 are respectively issued covering changes to the fire rating of the walls in the dormitories.
12. Transamerica only requested ten additional days due to the change in the fire rating of the walls through Change Order 25.
13. By December, 2011, Transamerica reports that it cannot get a warranty for its roof because its subcontractor is not certified.
14. Liquidated damages are assessed on December 6, 2011, due to Transamerica missing the roof completion milestone.
15. Transamerica fires their roofing subcontractor on December 8, 2011.
16. Recovery Schedule 3 is signed by Transamerica and all other prime contractors on December 10, 2011.
17. Transamerica files suit against its subcontractor roofer on December 12, 2011, alleging:
  - a./9. Eventually, Hanna quit, stopped, vacated, or otherwise abandoned the Project without completing its Scope of Work.
  - b./10. Hanna failed to perform its Scope of Work on the Project in a timely and workmanlike manner, resulting in numerous deficiencies and delays.
  - c./11. After receiving numerous notices of deficiencies, Hanna failed to remedy the defects or complete its Scope of Work in a timely fashion.
  - d./14. As a result of Hanna's stoppage, vacating, or otherwise abandoning the Project without completing its Scope of Work, **Transamerica has incurred** and will continue to incur significant additional expenses and damages, including **liquidated damages** assessed by Owner proximately **resulting from Hanna's breach of contract**, repudiation of its obligations thereunder and abandonment of the Project.
  - e./38. During the course of the Project, a certain portion of the roofing was changed and a white PVC roofing product manufactured by Johns Mansville was specified by the Owner. On or about July 18, 2011, Transamerica's project manager, Josh Wilhelm, asked Hanna whether he could provide a warranty for the Johns Mansville product. On July 20, 2011, Hanna affirmatively represented that he could provide such warranty. Obtaining a warranty was and its material to the Scope of Work under the Contract.

f./39. Mr. Wilhelm discovered, on or about October 27, 2011, that **Hanna could not provide the warranty as he represented.**

g./40. Hanna also made a material omission when he represented he could provide the warranty for the Johns Mansville product. Specifically, it was subsequently discovered by Transamerica that Hanna is not a certified or authorized installer of the Johns Mansville product and, accordingly, the manufacturer will never warrant the system.

h./41. Also during the course of the Project, Transamerica issued a joint check payable to AAA Roofing and a supplier, Northcoast.

i./42. On or about September 27, 2011, **Hanna forged Northcoast's signature endorsement on the check** and deposited same.

(Numbers refer to the paragraphs in the complaint)  
(emphasis added)

18. George Hadler, son of the founder of Hadler Companies (which owns Transamerica) issues an email to the president of Transamerica stating the following:

a. I have to know exactly what we agreed to before **I can try to construct arguments** for unfair and unrealistic treatment that will get us reimbursement for costs and a time extension. It seems to me that every state and federal project has cost overruns. I don't want lend lease to collect and we don't.

b. And ask him [Transamerica's Project Manager] for anything else he knows of **that can help us build a case** as being unfairly and unreasonably victimized. **That's going to be where we score any points** and justify getting some relief both in terms of recapturing our excessive costs and getting the schedule adjusted to avoid penalties or at least us having to incur severe overtime costs to meet the schedule.

c. I too am getting involved, and you should let people know that Transamerica is owned by the family, and that the family is not pleased with how this job is going. Explain that you too have people you have to answer to. The family has been patient so far, but patience is wearing thin. I say that with no disrespect, and only for you to use if that helps you light a fire under everybody's butt. **I would even agree to stage a heated argument between us in close proximity to get the message across to others. Only you and I and brad would know it was just for show and to send a message employees and subs need to kick ass. Phil Russo always told employees shit runs downhill. If it begins with me eating shit, I guarantee you're going to eat it with me.**

d. In closing everybody needs to pay more attention to the dollars and not the pennies. If a \$200 tool saves five man-hours, the tool is paid for, and the five hours is saved. **The words on the job site should be delegate, delegate, delegate,** and efficiency, efficiency, efficiency – not a minute to lose to anything. Top management is making sacrifices and going beyond and above so they need to also. And someone needs to watch them with a stop watch to make sure breaks are not a minute longer, or they work the extra minutes staying later on the job with pay for time wasted.

I'll do what I can from my end and willing to do more as needed. **I join you in wanting to get this job finished and then decide if state jobs are even worth it. I suspect they are since there is so little private work in the pipeline.** But everybody needs to know what happens from now on depends on how well everybody performs between now and when we pull off the job. **I hate financing our subs, but so long as we are doing it, we want their souls just as committed as we are.**

(emphasis added)

19. During the December, 2011 – January 2012 time frame, Transamerica fires its second superintendent, Brad Miller, for poor performance.
20. On February of 2012, the rough carpentry of the dormitories is finished.
21. Transamerica loans its drywall/painting subcontractor, Sammy Walker, \$400,000.00 on February 10, 2012.
22. Less than one month later, Transamerica files its first Article 8 claim seeking \$2.1 million dollars.
23. Substantial completion is achieved on June 1, 2012.
24. Six to Eight Hundred items per building are noted as needing correction on the punch lists developed as of July 25, 2012.
25. Transamerica declares substantial completion as of August 31, 2012.
26. On November 7, 2012, Transamerica files its second supplemental, certified claim, eight months after its first claim, seeking nearly another \$1 million.
27. On June 14, 2013, Transamerica files the lawsuit which became the basis for this trial.

### III. TRANSAMERICA'S DELAY CLAIM PUT IN CONTEXT.

1. Transamerica employed Don McCarthy to put together their delay claim.
2. In Mr. McCarthy's first report, he claimed that Transamerica suffered a 197 day delay
3. Mr. McCarthy did not perform a schedule analysis in coming up with these 197 days of delay.
4. The State of Ohio retained an expert to review Mr. McCarthy's work.
5. The State's expert issued a report criticizing Transamerica's expert for failing to perform a scheduled analysis.
6. Following this criticism, Transamerica's expert performed a scheduling analysis.
7. After his first report, Transamerica's expert was assisted by a third party scheduling expert.
8. As a result of Transamerica's expert performing a schedule analysis, the days of delay went from 197 to 148.
9. Transamerica's scheduling expert failed, in his first report, to account for:
  - a. An agreed and granted 27 day time extension;
  - b. Eight days of weather delay;
  - c. Fourteen days of self-inflicted delay that Transamerica caused itself.
10. Roofing and building enclosure is critical to keeping a project on schedule.
11. Transamerica's scheduling expert attributed their fourteen days of self-inflicted delay to both roofing and framing.
12. Transamerica's scheduling expert didn't apportion between roofing and framing with regard to these fourteen days of self-inflicted delay.
13. Despite Transamerica's scheduling expert reducing the days of delay from 197 in his first report to a 148 in his second, the time sensitive dollars for drywall and painting were not reduced.
14. Transamerica's claim far exceeds any amount they requested through proposed change orders.

15. Transamerica's six month delay claim far exceeds any days of extension they requested through change orders.
16. Transamerica alleged that the State of Ohio breached its contract by providing poor plans.
17. Transamerica did not prove what damages were a direct and proximate cause of their allegations of poor plans.
18. Transamerica alleged that the State breached its contract by poorly scheduling this project.
19. Transamerica did not prove what damages were a direct and proximate cause of poor scheduling.
20. Transamerica had few pre-bid RFIs about the plans.
21. Transamerica did not have an inordinate number of RFIs during the course of the project with regard to the plans.
22. Transamerica did not have to redo work due to poor plans.
23. Transamerica did not have to redo work due to poor scheduling.
24. The agreed to Change Orders were not excessive as they did not exceed 5% of Transamerica's contract amount.
25. Transamerica had few, if any, RFIs with regard to the schedule.
26. Although Transamerica's expert criticized the project schedules, he used them in his schedule analysis.
27. If Transamerica was damaged for six consecutive months, then they failed to mitigate their damages.
28. If Transamerica was unproductive to the tune of over \$1 million dollars then they failed to mitigate their damages.
29. Transamerica failed to request a six month time extension to accompany their six month delay claim.

#### **IV. DAMAGES**

##### **A. \$1.3 million loss of productivity for rough carpentry.<sup>1</sup>**

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<sup>1</sup> Transamerica's alleged dollar amount for damages will be rounded off through these findings.

1. Transamerica, through its expert, used a measured mile approach to loss of productivity for rough carpentry.
2. Transamerica had initially used a measured mile approach to loss of productivity for drywall and carpentry in their first claim and then abandoned that approach.
3. A measured mile approach assumes an un-impacted scope of work against which all other work can be compared.
4. Transamerica alleges that it had no scope of work for rough carpentry that wasn't impacted.
5. A measured mile approach to loss of productivity is sensitive to supervision.
6. Transamerica fired its first two superintendents on this project and ended up with a total of six different superintendents.
7. A measured mile approach to loss of productivity is sensitive to the crews that are doing the work.
8. Transamerica had as many as forty different carpenters working on this project at one time.
9. Transamerica only had familiarity with the Deering Brothers carpentry crew which was no more than seven people total.
10. A measured mile approach to loss of productivity is sensitive to the type of work being performed.
11. In this case Transamerica's expert underestimated the amount of time that the measured mile work took to accomplish rough carpentry.
12. A measured mile approach to loss of productivity is sensitive to when the work is being performed; i.e. overtime or weekend work.
13. Transamerica's expert did not quantify any negative impact to his measured mile approach to loss of productivity that may have been caused by overtime or weekend work.
14. The measured mile approach to loss of productivity is sensitive to environmental conditions such as weather.
15. Transamerica's expert did not attempt to quantify any negative impact to

his measured mile approach to loss of productivity that would have been caused by weather.

16. Transamerica only bid slightly over \$600,000 for the rough carpentry for all twelve dorm buildings.
17. Following the post-bid manipulation of Transamerica's bid/budget performed by its CFO shortly after its bid (see prior Findings of Fact), Transamerica budgeted \$2.1 million for the rough carpentry of the dorms.
18. Moving its bid/budget number from slightly over \$600,000 to over \$2 million shows that Transamerica grossly underbid rough carpentry.
19. A measured mile approach to loss of productivity assumes that the contractor had a good bid to begin with.

**B. Painting.**

1. Transamerica's claim for additional painting costs includes out of sequence work.
2. By its very nature, out of sequence work is scope work.
3. The contractor is not permitted to claim scope work as damages.
4. Transamerica's expert admitted that he sought to charge the State of Ohio for all paint costs incurred by Transamerica during this claimed six month delay period.
5. Transamerica's expert admitted that his analysis included scope work as damages.
6. Transamerica's expert admitted that excessive construction damages (caused by other prime contractors) or extended punch list work could easily and more credibly have been recorded through time and material tickets.
7. Transamerica only bid \$150,000 to perform all the painting work on these twelve dorms.
8. Transamerica's job cost report shows a bid/budget number of \$421,000 for this work.
9. Transamerica's bid/budget number nearly matches their claim number of \$487,000.

**C. Drywall Costs.**

1. The underlying approach to drywall damages is the same as it was for painting.
2. Transamerica's expert (scheduler) admitted that you didn't need his expertise to figure out damages.
3. The damages for drywall, like paint, simply involve taking all of the charges for drywall during the six month delay period.
4. Like painting, the approach to drywall damages does not take into consideration that there are between six to eight hundred items on the punch list that Transamerica was responsible for.
5. Transamerica only bid \$272,000 for the drywall work in all twelve dorms.
6. Transamerica's revised bid/budget number was \$1.2 million for the drywall work.
7. Transamerica's claimed amount for drywall damages, \$498,000, approximate the amount of money they loaned to their drywall subcontractor, Sammy Walker.

**D. Extended Home Office Overhead.**

1. Transamerica never had to stop and walk away from this project which has been required by the Ohio Supreme Court to make a home office overhead claim.
2. Transamerica's expert applied the Ohio Department of Transportation approach to calculating home office overhead.
3. The contract between Transamerica and the State of Ohio does not allow for the Ohio Department of Transportation approach to calculating home office overhead.
4. Transamerica burdened every category of its damages with overhead.
5. Overhead is defined by the contract to include every element of home office overhead.

**E. PROJECT MANAGEMENT COSTS.**

1. Transamerica has listed the time of their President and the time of their Chief Financial Officer, as project management damages.

2. The time of a president and chief financial officer of a company is part of the home office overhead of that company.
3. Transamerica already has a category of home office overhead damages. (See previous section).
4. Transamerica's project management costs are speculative in that it's based on an estimated percentage of time.

**F. EXTENDED TRADE SUPERVISION COSTS.**

1. Transamerica had a total of six trade superintendents on this project.
2. Transamerica fired its first two supervisors for failure to perform. (See previous section).
3. Transamerica's extended supervision costs includes the time of three superintendents before the six month delay period.
4. Transamerica's extended trade supervision costs are speculative in that they are based on estimated amounts of time.
5. Transamerica's extended trade supervision costs do not take into consideration their own poor supervision.
6. Transamerica blew through their bid for supervision by ground breaking.
7. Transamerica did not intend to self-perform the majority of construction at the time of its bid.
8. Transamerica underbid the amount of supervision that this project would take.

**G. EXTENDED GENERAL CONDITIONS COST.**

1. This category of damages, like all of the other time sensitive damages, assumes that Transamerica had zero responsibility for the six month delay of this project.
2. Transamerica, by their own judicial admission, admitted that it was assessed liquidated damages due to the delay of their roofing subcontractor to timely complete the roofs. (See previous section).
3. Roofing enclosure is critical to the project schedule and timely completion of the project. (See previous section)

4. Like all other categories of Transamerica's damages, general conditions includes scope work.
5. Like the other categories of damages, Transamerica could have excluded scope work by keeping time and material tickets for the actual extra work caused by the six month delay.
6. Like the other categories of damages, Transamerica's general condition damages includes the markup for additional bond costs which Transamerica did not incur.
7. Transamerica's surety has not made a claim for any additional bond premiums.

**H. EXTENDED EQUIPMENT COST.**

1. The deficiencies of this claim are essentially the same as the other categories of Transamerica's damages.
2. Like Transamerica's other categories of damages, this is a total cost claim seeking all cost for equipment during the six month delay period, whether or not that equipment was being used on scope work.
3. Transamerica bid nothing for equipment.
4. Transamerica's Chief Financial Officer testified that he believed that Transamerica had a good bid for all categories of damages.

**I. LIQUIDATED DAMAGES.**

1. Liquidated damages were assessed against Transamerica for its failure to meet the roof and window milestone date.
2. Transamerica filed suit against its roofing subcontractor blaming it for the assessment of liquidated damages. (See previous section)
3. Transamerica did not file an Article 8 claim seeking the return of its liquidated damages.

**J. CONTRACT BALANCE**

1. Transamerica argued in its closing argument for a return of its contract balance.
2. Transamerica offered no evidence as to its present contract balance.

3. Transamerica did not file an Article 8 claim for return of its contract balance.

Respectfully submitted,

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**C. R.C. 153.16(B) – REMEDIES DEEMED EXHAUSTED**

1. “Notwithstanding any contract provision to the contrary, any claim submitted under a public works contract that the state or any institution supported in whole or in part by the state enters into for any project subject to sections 153.01 to 153.11 of the Revised Code shall be resolved within one hundred twenty days. *After the end of this one hundred twenty-day period, the contractor shall be deemed to have exhausted all administrative remedies for purpose of division (B) of section 153.12 of the Revised Code.*” (Emphasis added).

**D. EXHAUSTION OF STATUTORILY MANDATED CLAIM RESOLUTION PROCESS – “VAIN ACT” EXCEPTION OVERRULED**

1. “In the context of the exhaustion of administrative remedies doctrine:  
  
[A] “vain act” occurs when an administrative body lacks the authority to grant the relief sought; a vain act does not entail the petition’s probability of receiving the remedy. The focus is on the *power* of the administrative body to afford the requested relief, and not on the happenstance of the relief being granted.” (Citing *Nemazee v. Mt. Sinai Med. Ctr.* (199), 56 Ohio St.3d 109, 115.)
2. “Instead of conducting the above analysis, the trial court relied upon our decision in *Conti Corp. v. Ohio Dept. of Adm. Serv.* (1993), 90 Ohio App.3d 462, to conclude that CCI did not have to exhaust its administrative remedies under R.C. 153.12(B).”
3. “Essentially, the *Conti* court dispensed with R.C. 153.12(B)’s requirement that a contractor exhaust the Article 8 procedures because the trial court had found those procedures were unlikely to end in a result favorable to the contractor. Importantly, *Conti* neglected to set forth any legal reasoning to support its holding...Moreover, we cannot conceive of any legal rationale to support the proposition that a court can ignore a clear statutory mandate because it believes that the mandate results in inequity. As we stated above, courts must apply unambiguous statutes according to their terms.”
4. “Because our holding in *Conti* lacks any legal support, we conclude that it was wrongly decided...Effectively, *Conti* allows a contractor to ignore Article 8 with impunity, thus undermining public improvement contracts.”

5. “Consequently, we overrule *Conti* to the extent that it held that a contractor can eschew the Article 8 process if it demonstrates that the Article 8 adjudicators were unlikely to provide it the relief it sought.”

*Cleveland Construction, Inc. v. Kent State University*, 10<sup>th</sup> Dist. No. 09AP-822, 2010-Ohio-2906, paras. 40, 41, 42, 43, 44.

6. {¶12} “[W]hen a contract has an express provision governing a dispute, that provision will be applied; the court will not rewrite the contract to achieve a more equitable result.” *Dugan & Meyers Const. Co., Inc. v. Ohio Dept. of Adm. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, ¶39, citing *Ebenisterie Beaubois Ltee v. Marous Bros. Const., Inc.* (Oct. 17, 2002), N.D. Ohio E.D. No. 02CV985, 2002 WL 32818011. This sentiment was echoed in *Cleveland Construction*, when our court had the opportunity to analyze a near identical section to Section 8.1.1. In *Cleveland Construction*, we held:

[C]ourts cannot decide cases of contractual interpretation on the basis of what is just or equitable. *N. Buckeye Edn. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886, ¶ 20. See Also *Dugan & Meyers Constr. Co. v. Ohio Dept. of Adm. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, ¶ 29 (holding that a contract “does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties thereto” and that “it is not the province of courts to relieve parties of improvident contracts”). When a contract is unambiguous, a court must simply apply the language as written. *St. Marys [v. Auglaize Cty. Bd. of Commrs.]*, 115 Ohio St.3d 387, 2007-Ohio-5026, ¶ 18]. Here, the language of Section 8.1.1 is plain and unambiguous. Consequently, we conclude that the trial court erred when it, in effect, deleted the second sentence of Section 8.1.1 from the parties’ contract.

*Stanley Miller Construction Co., v. OSFC, et. al.*, 10<sup>th</sup> Dist. Ct. of Appeals No. 10AP-298; *Stanley Miller Construction Co., v. State of Ohio, et. al.*, 10<sup>th</sup> Dist. Ct. of Appeals No. 10AP-299; *Stanley Miller Construction Co., v. State of Ohio et. al.*, 10<sup>th</sup> Dist. Ct. of Appeals No. 10AP-432; *Stanley Miller Construction Co., v. OSFC, et. al.*, 10<sup>th</sup> Dist. Ct. of Appeals No. 10AP-433.

**E. BREACH OF CONTRACT/BURDEN OF PROOF/PROXIMATE CAUSE.**

“In summary, for the State of Ohio to be liable it must be shown that the state owed a duty, that the state breached the duty and that the breach was the immediate cause of Plaintiff’s damages...This means that if the breach – the hindrance or delay, if any – is not directly the fault of the state there is no liability. In a more positive statement this

means that if there is no contractual provision to the contrary, the contractor has a right to recover damages from the contractee, the State of Ohio, for a delay caused by the State of Ohio. Finally, it must be noted that the burden of proof is upon the contractor.”

*Backus Assoc., Inc. v. Ohio Dept. of Natural Resources* (Ct. of Claims 1976), 47 Ohio Misc. 11.

To prevail on a claim for breach of contract, the claimant must demonstrate the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff, *Jarupan v. Hanna*, 173 Ohio App.3d 284, 878 N.E.2d 66, 2007-Ohio-5081, ¶18. It is axiomatic that damages must be the natural and proximate result of the defendant’s breach. *Ziss Bros. Constr. Co., Inc. v. TransOhio Sav. Bank* (June 20, 1991), 8<sup>th</sup> Dist. No. 58787. A contracting party is at liberty to breach his contract, being liable only for damages proximately resulting from the breach. *Sorensen v. Wise Mgt. Servs., Inc.* 8<sup>th</sup> Dist. NO. 81627, 2003-Ohio-767, ¶39. See Also *DeMuesy v. Haimbaugh* (Dec. 31, 1991), 10<sup>th</sup> Dist. No. 91 AP-212 (damages for breach of contract must be proximate and foreseeable.)

#### F. RIGHT OF APPORTIONMENT.

The general rule is that “[w]here both parties contribute to the delay neither can recover damage[s], unless there is in the proof of a clear apportionment of the delay and expense attributable to each party.” *Klingensmith v. United States*, 731 F. 2d 805, 809 (1984), quoting *Blinderman Construction Co. v. United States*, 695 F.2d 552 (Fed.Cir. 1982). See also, *Commerce Int’l Co. v. United States*, 167 Ct. Cl. 529, 338 F.2d 80, 90 (1964); *Gladwynne Const. Co. v. Mayor & City Counsel of Baltimore*, 807 A2d 1141, 1167 (Md. Spec. App. 2002); *P.R. Burke Corp. v. United States*, 277 F.3d 1346 (Fed. Cir. 2002); *Fru-Con Corp. v. State*, 50 Ill. Ct. Cl. 50, 1996 WL 1566061 (1996); *Sea Crest Const. Corp. v. United States*, 59 Fed. Cl. 615 (Fed. Cl. 2004). As the Federal Circuit stated elsewhere, “Where both parties contribute to the delay neither can recover damages, unless there is in the proof a clear apportionment of the delay and the expense attributable to each party.” *Blinderman*, supra.; see also *Amertex Enters, Ltd. v. United States*, 1995 WL 925961 (Fed. Cl. 1995); *Tyger Const. Co. v. United States*, 31 Fed. Cl. 177 (1994).

A contractor must establish that a delay caused by the owner was separate from one caused by it. *Manual Bros., Inc. v. United States*, 55 Fed. Cl. 8 (Fed. Cl. 2002); *W.M. Schlosser, Inc. v. United States*, 50 Fed. Cl. 147, 152 (Fed. Cl. 2001); *Coastal Indus., Inc. v. United States*, 32 Fed. Cl. 368, 372 (Fed. Cl. 1994). A contractor must also prove that any owner caused delays were not concurrent with a delay caused by the contractor. *P.J. Dick Inc. v. Principi*, 324 F.3d 1364 (Fed. Cir. 2003), citing *Sauer v. Danzig*, 224 F.2d 1340, 47-48 (Fed. Cir. 2000). “Only if the delay was caused solely by the government will the contractor be entitled to both an extension of time within which to perform, and recovery of excess costs associated with the delay.” *Weaver-Bailey Contractors, Inc. v. United States*, 19 C. Ct. 474, 476 (1990). See also *Manuel Bros.*, supra.

## G. SANCTITY OF CONTRACT.

“The sanctity of contract is long established and the sanctity must be respected and protected. In the instant case the contract proper is a compact and somewhat simple document. The plans and specifications are voluminous. However forbidding and overwhelming; the plans and specifications are a part of the contract:

“Where the plans and specifications are by express terms made a part of the contract, the terms of the plans and specifications will control the same force as though physically incorporated in the very contract itself.” 13 Ohio Jurisprudence 2d 15, Building and Construction Contracts, Section 12.

*Backus Assoc., Inc. v. Ohio Dept. of Natural Resources* (Ct. of Claims 1976), 47 Ohio Misc. 11.

## H. COURT SHOULD NOT REWRITE PUBLIC CONTRACTS

1. “In refusing to enforce the liquidated-damages provision, the trial court in effect rewrote the contract to require the city to prove actual damages. Both as a matter of contract law and as a matter of the policy favoring the timely performance of public contracts, the trial court’s holding was untenable.”

*Security Fence Group, Inc. v. City of Cincinnati* (October 3, 2003), Hamilton App. No. C-020827, 2003-Ohio-5263.

2. “...contract law, which holds that parties to a commercial transaction should remain free to govern their own affairs. *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, at 42.”

*Corporex Dev. & Const. Mgt., Inc., v. Shook, Inc.* (2005), 106 Ohio St.3d 412,

3. “This court has long recognized that ‘where a contract is plain and unambiguous, it does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties thereto and a corresponding advantage to the order, [and] that it is not the province of courts to relieve parties of improvident contract.’ *Ohio Crane Co. v. Hicks* (1924), 110 Ohio St. 168...In addition, ‘unless there is fraud or other unlawfulness involved, courts are powerless to save a competent person from the effects of his own voluntary agreement.’”

*Dugan & Meyers Const. Co. v. Ohio Dept. of Adm. Servs.* (2007), 113 Ohio St.3d 226, at 231.

4. “Here, because R.C. 153.12(B) does not contain any ambiguity, we must apply it as written. The rules of statutory interpretation prohibit courts from adding

language to statutes, and thus, we cannot engraft any exceptions onto R.C. 153.12(B).”

“Essentially, the *Conti* court dispensed with R.C. 153.12(B)’s requirement that a contractor exhaust the Article 8 procedures because the trial court had found those procedures were unlikely to end in a result favorable to the contractor. Importantly, *Conti* neglected to set forth any legal reasoning to support its holding....Moreover, we cannot conceive of any legal rationale to support the proposition that a court can ignore a clear statutory mandate because it believes that the mandate results in inequity. As we stated above, courts must apply unambiguous statutes according to their terms.”

*Cleveland Construction, Inc. v. Kent State University*, 10<sup>th</sup> Dist. No. 09AP-822, 2010-Ohio-2906, paras 39, 42...

## I. CONTRACT INTERPRETATION

1. “When construing the terms of a contract, a court’s principal objective is to determine the intent of the parties. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270,..., 1999-Ohio-162. A court must presume that the intent of the parties resides in the language that they used in the contract. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. If a court is able to determine the intent of the parties from the plain language of the contract, then the court must apply the language as written and refrain from further contract interpretation. *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d, 2007-Ohio-5026,; *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24. When the ‘the terms in a contract are unambiguous, courts will not in effect create a new contract by finding an intent not expressed in the clear language employed by the parties.’ *Holdeman v. Epperson*, 111 Ohio St.3d 551, 2006-Ohio-6209, quoting *Shifrin v. Forest City Ents., Inc.* (1992), 64 Ohio St.3d 635, 638).

*Cleveland Construction Inc. v. Kent State University*, 10<sup>th</sup> Dist. No. 09AP-822, 2010-Ohio-2906, par. 29.

2. “In general, when interpreting contracts, ‘[t]he meaning of a contract is to be determined by considering all of its parts, and no provision is to be wholly disregarded as inconsistent with other provisions unless no other reasonable construction is possible.’ *State Auto. Ins. Co. v. Childress* (Jan. 15, 1997), Hamilton App. No. C-960376, unreported. Further, ‘[c]onstruction of the contract should attempt to harmonize all of the provisions rather than create conflicts in them and a court must determine whether the contract can be interpreted giving reasonable, lawful, effective meaning to all terms.” *Id.*

*Masterclean, Inc. v. Ohio Dept. of Admin. Servs.* (May 13, 1999), Franklin App. No. 98-AP-727, unreported.

3. We observed that the *Spearin* Doctrine does not invalidate an express contractual provision: “Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered (Citations omitted).”

*Dugan & Meyers Const. Co. v. Ohio Dept. of Adm. Servs.* (2007), 113 Ohio St.3d 226, at 231.

## J. WAIVER BY OWNER OF CONTRACT PROVISIONS

1. “It is universally recognized that where a building or construction contract, public or private, stipulates that additional, altered, or extra work must be ordered in writing, the stipulation is valid and binding upon the parties, and no recovery can be had for such work without a written directive therefore in compliance with the terms of the contract, unless waived by the owner or employer.”

*Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilitis Auth.* (1997), 78 Ohio St.3d 353, 1997-Ohio-202.

2. “Waiver is a voluntary relinquishment of a known right and is generally applicable to all personal rights and privileges, whether contractual, statutory, or constitutional.” *Glidden Co v. Lumbermens Mut. Cas. Co.*, (2006), 112 Ohio St.3d 470,...A party asserting waiver must prove it by establishing a clear, unequivocal, decisive act by the other party, demonstrating the intent to waive.” *Maghie & Savage, Inc. v. P.J. Dick Inc.*, Franklin No. 08AP-487...”

*Central Allied Enterprises, Inc. v. The Adjutant General’s Dept.* (June 18, 2010), Ct. of Claims No. 2007-07841, at page 12 of the slip opinion.

3. Section 8.1.1 [of the State’s public construction contract] provides that any request for equitable adjustment of the contract must be preceded by written notice to the construction manager “no more than ten (10) days after the initial occurrence of the facts which are the basis of the claim.” As noted above, it is undisputed that J&H [the contractor] did not provide timely written notice of the facts upon which it based its soil-stabilization delay claim.

{¶ 78} J&H contends, however, that, because OSFC had actual knowledge of the soil-stabilization problems and the resulting delay, it was not prejudiced by the lack of timely written notice. J&H’s argument is unavailing, however, in light of this court’s decision in *Stanley Miller*. As noted above, that case held that “something more than actual notice on the part of the state is required to excuse a contractor from complying with its obligations regarding change-order procedures in public works contracts.” *J&H Reinforcing & Structural Erectors, Inc. v. Ohio School Facilities Commission*, 10<sup>th</sup> Dist. Ct. of Appeals No. 12AP-588, citing *Dugan & Myers*. Pursuant to *Stanley Miller*, even assuming OSFC had actual notice

of the unstable soil conditions, such fact does not excuse J&H from complying with its contractual obligations. *Id.*

#### K. STATE NOT INSURER

1. "In sum, it should be said that the State of Ohio as the owner, or contractee, and party to a construction contract is not an insurer of the contractor. Specifically, the State of Ohio is not an insurer against delays in construction due to causes over which the state has no control. If the State of Ohio breaches a contractually created duty with resultant delay it is liable in damages.

*Backus Assoc., Inc. v. Ohio Dept. of Natural Resources* (Ct. of Claims 1976), 47 Ohio Misc. 11.

#### L. CONTRACTOR'S DUTY TO ANALYZE CONTRACT DOCUMENTS

"[The] contractor should at least be under a duty of carefully analyzing...documents provided him by the state."

*Foley Const. Co. v. State* (September 29, 1977), Franklin App. No. 77Ap-23, unreported.

1. "Ohio courts have recognized that the 'Spearin doctrine holds that, in cases involving government contracts, the government impliedly warrants the accuracy of its affirmative indications regarding job site conditions.' (Emphasis theirs).
2. "Despite the interest in the Spearin Doctrine...we decline the opportunity to extend the Spearin Doctrine from job-site-conditions cases to cases involving delay due to plan changes.
3. "Moreover, the court of appeals correctly observed that 'the record fails to demonstrate that [the problems with the plans] rendered the owner furnished plans unbuildable or otherwise wholly inadequate to accomplish the purpose of the contract.'"
4. "We have previously affirmed these principles in a case involving a competitively bid public construction contract. In *S & M Constructors, Inc. v. Columbus* (1982), 70 Ohio St.2d 69,...[w]e held that the 'no claim' provision was unambiguous and was enforceable in the absence of a showing of fraud or bad faith on the part of the city. We observed that the Spearin Doctrine does not invalidate an express contractual provision:

“Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered (Citations omitted).”

5. “In order to hold in favor of *Dugan & Meyers*, we would need, first, to find that the state had implicitly warranted that its plans were buildable, accurate, and complete, and, second, to hold that the implied warranty prevails over express contractual provisions. To do so would contravene established precedent, which we will not do.”

*Dugan & Meyers Const. Co. v. Ohio Dept. of Adm. Servs.* (2007), 113 Ohio St.3d 226, 230, 231, 233, 234.

#### **M. NO CONSTRUCTIVE CHANGE ORDER**

1. “It is universally recognized that where a building or construction contract, public or private, stipulates that additional, altered, or extra work must be ordered in writing, the stipulation is valid and binding upon the parties, and no recovery can be had for such work without a written directive therefore in compliance with the terms of the contract, unless waived by the owner or employer.”

*Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 1997-Ohio-202.

2. “Next, we reject *Dugan & Meyers’s* argument that it was excused from complying with the specific change-order procedure for requesting extensions because the state had actual notice of the need for changes to the deadline, and therefore any failure to comply with procedure was harmless error.”

*Dugan & Meyers Const. Co., Inc. v. Ohio Dept. of Adm. Servs.* (2007), 113 Ohio St.3d 226, at 234.

3. “In addition, the court finds that the contract required Allied to give prompt, written notice prior to incurring any increased costs that it intended to charge Miami. Indeed, Allied was prohibited by contract from proceeding with a change in the scope of the work to be performed without first obtaining written approval from Miami.”

*Allied Environmental Servs. v. Miami Univ.* (September 15, 2006), Ct. of Claims No. 2004-06887, at paeg 12 of the slip opinion.

**N. CONCURRENT FAULT FOR DELAY – NO RECOVERY**

1. “In general, ‘[w]here both parties contribute to the delay neither can recover damages, unless there is in the proof a **clear apportionment** of the delay and the expense attributable to each party.’ *Blinderman Const. Co., Inc. v. United States* (Fed.Cir. 1983), 695 F.2d 552, 559. Thus, ‘courts will deny recovery where the delays are concurrent or intertwined and the contractor has not met its burden of separating its delays from those chargeable to the Government.’”

*Masterclean, Inc. v. Ohio Dept. of Admin. Servs.* (May 13, 1999), Franklin App. No. 98-AP-727, unreported.

**O. PROOF OF DAMAGES – WHAT’S PROBABLE – NO TOTAL COST RECOVERY**

1. “[T]he law of Ohio has always required that damages be proven with at least the degree of sufficiency of more likely than not. *Gahanna v. Eastgate Properties, Inc.* (1988), 36 Ohio St.3d 65, 521 N.E.2d 814. Any less standard of proof would be mere speculation. Consequently, the court refuses to apply the total cost recovery method, and further concludes that such standard results in damage awards that are speculative.”
2. {¶ 94} “[A] party seeking damages for breach of contract must present sufficient evidence to show entitlement to damages in an amount which can be ascertained with reasonable certainty.” [*J&H Reinforcing & Structural Erectors, Inc. v. Ohio School Facilities Commission*, 10<sup>th</sup> Dist. Ct. of Appeals No. 12AP-588], *Tri-State Asphalt Corp. v. Ohio Dept. of Transpo.*, 10<sup>th</sup> Dist. No. 94API07-986 (Apr. 11, 1995). “Contract damages must be shown with certainty and not be left to speculation.” *Id.*, citing, *Sampson Sales, Inc. v. Honeywell, Inc.* 8<sup>th</sup> Dist. No. 51139 (Dec. 18, 1986).

**P. TEST FOR RECOVERY OF HOME OFFICE OVERHEAD**

1. Home office overhead costs “typically include salaries of executive or administrative personnel, general insurance, rent, utilities, telephone, depreciation, professional fees, legal and accounting expenses, advertising, and interest on loans. See *Interstate Gen. Govt. Contrs., Inc. v. West* (Fed.Cir. 1993), 12 F.3d 1053, 1058.”

*Complete General Const. Co., v. Ohio Dept. of Transportation* (2001), 94 Ohio St. 3d 54, 57, 2002-Ohio-59.

2. “The *Eichleay* formula, modified for use in Ohio courts, is one way of determining unabsorbed home office overhead damages in public construction cases. Courts applying the formula must allow owners the opportunity to dispute particular items a contractor submits in an overhead cost presentation.”

*Complete General Const. Co., v. Ohio Dept. of Transportation* (2001), 94 Ohio St. 3d 54, 57, 2002-Ohio-59, syllabus of the court.

3. “The *Eichleay* formula “seeks to equitably determine allocation of unabsorbed [home office] overhead to allow fair compensation of a contractor for government delay.’ *Satellite Elec. Co. v. Dalton* (Fed. Cir. 1997), 105 F.3d 1418, 1421, quoting *Wickham Contracting Co., Inc. v. Fischer* (Fed. Cir. 1994), 12 F.3d 1574, 1578. The formula was developed in the federal court system, beginning in 1960 with *Eichleay Corp., supra*, ASBCA No. 5183, 60-2 CBA 2688, and has been adopted by the Federal Circuit Court of Appeals as the prevailing method for calculating home office overhead expenses attributable to owner-caused delay on federal contracts. *Wickham*, 12 F3d at 1579-1581.”
4. “Before the *Eichleay* formula may be applied, the contractor must demonstrate two important elements in order to establish a prima facie case for the award of damages. First, the contractor must demonstrate that it was on “standby.” *Interstate Gen. Govt. Contractors*, 12 F.3d at 1056. A contractor is on standby “when work on a project is suspended for a period of uncertain duration and the contractor can at any time be required to return to work immediately.” *West v. All State Boiler*, 146 F.3d at 1373. In effect, the contractor is not working on the project, yet remains bound to the project. The contractor must be ready to immediately resume performance at any time.”
5. “The second element in a prima facie case is that the contractor must prove that it was unable to take on other work while on standby. *Id.* That is, the contractor must show that the uncertainty of the duration of the delay made it unable to commit to replacement work on another project. Impracticability, rather than impossibility, of other work is the standard, and the contractor is entitled to damages ‘only if its inability to take on additional work results from its standby status, *i.e.*, is attributable to the government.’ (Emphasis *sic*) *Id.*, 146 F.3d at 1375, quoting *Satellite Elec. Co.*, 105 F.3d at 1421.”
6. It is important to note that a contractor may recover under *Eichleay* only if

the suspension of the project results in the extension of the completion date. If the suspension does not affect the completion date, the contractor cannot claim damages because he has not suffered any injury, i.e., he spent the time he had originally allocated on the project. *All State Boiler*, 146 F.3d at 1379. Thus, as the court holds in *All State Boiler*, damages are measured based on the number of days the contractor continues to expend home office overhead on the project beyond what was allocated...”

#### Q. IMPOSSIBILITY OF PERFORMANCE

“**Impossibility of performance** occurs when, after the contract is entered into, an unforeseen event arises rendering **impossible** the **performance** of one of the contracting parties.” *J.J.O Constr., Inc. v. Balijak*, 10<sup>th</sup> Dist. No. 06AP-1300, 2007-Ohio-4126. ¶ 13. Application of this doctrine can allow any party to void the contract when government activity renders **performance impossible** or illegal. *London & Lancashire Indemn. Co. of Am. v. Bd. Of Commissioner of Columbiana Cty.*, 107 Ohio St. 51, 64, 140 N.E. 672 (1923). (“[L]egal **impossibility of performance** is a defense to the **performance** of a contract[.]”)

*Arlington Housing Partners, Inc., v. Ohio Housing Finance Agency*, 10<sup>th</sup> Dist. No. 10AP-764, 2012 WL1078835 {¶ 39}

Respectfully submitted,

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