

IN THE COURT OF CLAIMS OF OHIO

TRANSAMERICA BUILDING COMPANY,
INC.

Plaintiff/Counter Defendant

v.

OHIO SCHOOL FACILITIES
COMMISSION, etc.

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

v.

LEND LEASE (US) CONSTRUCTION,
INC.

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

and

STEED HAMMOND PAUL INC., etc.

Third-Party
Defendant/Fourth-Party Plaintiff

v.

BERARDI PARTNERS, INC., et al.

Fourth-Party Defendants

Case No. 2013-00349

Referee Samuel Wampler

DECISION OF THE REFEREE

FILED
COURT OF CLAIMS
OF OHIO
2015 SEP 17 PM 4:41

2015 SEP 17 PM 4:41

I. SUMMARY OF THE PROCEEDINGS

This action arises from a publicly bid contract (Contract)¹ entered into on December 20, 2010 between TransAmerica Building Company, Inc. (TA) and the Ohio School Facilities Commission (OSFC). Under the Contract TA was the general trades contractor for partial construction of twelve dormitories (the "Dorm Project") at the Ohio State School for the Blind (OSSB) and the Ohio School for the Deaf (OSD), collectively referred to as the OSBD.² The public improvements consisted of six dormitories for OSD and six dormitories for OSSB. The building types were wood frame, residential style buildings and consisted of two basic models. One model was for high school students (HS) and was approximately 3900 square feet. The other model was for elementary and middle school students (ES/MS) and ranged in size from approximately 2200 to 2500 square feet, depending on the configuration. The Dorm Project was one phase of the public improvements collectively referred to as the "OSBD Project," and which included site preparation and utilities, the Dorm Project, academic buildings and what were called Campus-wide Bid Packages.³

On June 14, 2013, TA commenced this action against defendant OSFC to recover damages for breach of contract, equitable adjustment and, breach of express and implied warranties.⁴ OSFC answered and counterclaimed for damages for breach

¹Joint Exhibit (JX) JX-A.

²The phrase "partial construction" is based on facts explained more fully below, in that the scope of TA's work under the Contract would result in living space that could not be occupied without additional work to be furnished by OSFC through separate prime contracts, i.e. casework, controls and technology/security/fire alarm system known as the Campus-wide Bid Packages. This additional work was common to the dorms and academic buildings, and in some instances could not operate except as a single system.

³The "Campus-Wide Bid Packages" consisted of casework, controls, technology/security/fire alarm, and food service equipment. (Plaintiff Exhibit (TA) TA-0162/2).

⁴Plaintiff amended its complaint on August 1, 2013 and included seven counts sounding in contract and tort. Plaintiff voluntarily dismissed its claim for negligence as reflected in the court's entry dated June 18, 2015. Plaintiff's claims for fraud, fraud in the inducement and negligent misrepresentation

FILED
COURT OF CLAIMS
OF OHIO

2015 SEP 17 PM 4:42

Case No. 2013-00349

-3-

DECISION

of contract. TA seeks what it alleges are wrongfully withheld liquidated damages, unpaid contract balance, unpaid change orders and other damages arising from delay and impacts to TA's work under the Contract caused by OSFC, its agents and other prime contractors. By its counterclaim, OSFC seeks damages for correcting defective roof work, increased operating costs, increased architect (A/E) and construction manager (C/M) fees and costs, and paying claims of other prime contractors due to delay allegedly caused by TA during construction.

Trial commenced May 18, 2015 and concluded on June 4, 2015.⁵ Eighteen witnesses gave sworn testimony, including six expert witnesses and three former Executive Directors of the OSFC.⁶ The court admitted over 200 exhibits offered jointly by TA and OSFC, the authenticity of which was stipulated to at commencement of trial and the majority of which were contemporaneous project records. The court also admitted over 300 exhibits offered by TA, the majority of which were contemporaneous project records, construction documents and written communications. And, the court admitted over 30 exhibits offered by OSFC. All expert reports offered into evidence were admitted except the report of Lee Martin, whose testimony was, however, considered by the court.

The court also admitted several exhibits that, while not substantive proof of any facts, were viewed by the court during the trial to better understand the evidence. These exhibits were described as demonstrative or illustrative and some of them

were dismissed as reflected in the entry dated October 1, 2014 and such dismissal was confirmed by entry dated April 9, 2015. The court does not distinguish between the remaining counts for breach of contract, equitable adjustment and breach of express and implied warranties, but instead treats them all as arising out of the Contract and thus as a claim for breach of contract.

⁵By entry dated March 24, 2015, the trial of TA's claim and OSFC's counterclaim was separated from a trial of the claims by OSFC against its architect and construction manager by way of a third-party complaint as well as a counterclaim and fourth-party claims by the architect against its consultants and a counterclaim by the construction manager.

⁶Because he was unavailable as a witness, deposition testimony of Madison Dowlen, a project administrator for OSFC during construction was read into the record by the attorneys for TA.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-4-

DECISION

consisted of animations. Although the court did not review these exhibits in preparing this report, it did admit them solely for a reviewing court to consider, if it decided to, how the court might have considered testimony of witnesses as well as other evidence in light of such demonstrative evidence.

II. SUMMARY OF THE PROBLEMS

Many of the issues presented by TA's claim resulted from one or a combination of the following: 1) an inadequate budget; 2) political forces; 3) OSFC's lack of experience with residential type projects; 4) a poorly developed, unrealistic and manipulated schedule; 5) confusing, incomplete, and unapproved design documents;⁷ 6) slow and sometimes confusing or inadequate responses to TA's requests for clarification or information about the drawings and specifications;⁸ 7) the architect putting an unlicensed person in charge of contract administration;⁹ 8) inability to coordinate construction phases effectively; and 9) heavy-handed and sometimes misleading conduct of the construction manager and the architect.

TA did have issues of its own, but when compared to the problems caused by OSFC and its agents, those issues did not have a significant impact on the Dorm Project or TA's work that was not captured in Don McCarthy's (McCarthy) analysis of delay or otherwise carefully considered by the court in determining liability and

⁷As will be explained more fully below, "unapproved" means not approved by the Ohio Department of Commerce, Division of Industrial Compliance (DIC), the agency responsible for issuing plan approval for the Dorm Project.

⁸Often the slow response could be attributed to Berardi, but as the architect SHP was responsible for the conduct of its consultants.

⁹Josh Predovich (Predovich) was substituted early on as the project manager for the architect (TA-0014/1). Predovich reported to Andrew Maletz, who was designated as the lead person for SHP (JX-N-03/4, ¶ 1.1.5) and presumably a licensed architect, but who, from the evidence presented, rarely showed up at any of the construction meetings or otherwise actively participated in the ongoing problems with the Dorm Project during contract administration. Its contract with OSFC required SHP to furnish a licensed architect to oversee contract administration and close-out phases during construction of the dorms (JX-N-03/40, ¶ 6). From the evidence presented, this responsibility fell to Predovich who was, admittedly, unlicensed during bidding and construction of the Dorm Project.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-5-

DECISION

damages.¹⁰ At the end of the day, it is clear that OSFC tried to build a project that OSD and OSSB could not afford within the funding provided through the Capital Bill, and it forced its contractors to achieve this task, at least with respect to the Dorm Project, without approved or adequate construction documents.

Against the pressures of the budget and the schedule, the design and construction of the dorms became more complex than it should have been, resulting in poor decisions by the architect and construction manager. As it turned out, the Dorm Project became very expensive for TA and others. Even with the damages awarded to TA in this action, it will still have lost almost \$2.5 million on the Dorm Project according to its job cost report (JCR).¹¹ OSD and OSSB ended up with a compromised design and reduced capacity for their new facilities and they were delayed in putting them into service for their students. This was not the fault of TA. It was the fault of OSFC in its efforts to build facilities that OSD and OSSB could not afford, and in trusting its agents to carry out the task, agents who often acted in their own interest and not in the interest of the OSFC, or fairly and honestly in their dealings with TA.

III. SUMMARY OF THE FACTS¹²

A. Project History, Funding, Team Building and Planning

Because of its experience in the development of K-12 schools throughout Ohio, OSFC was selected to lead the effort to plan, design and construct the OSBD Project,

¹⁰McCarthy was TA's expert witness at trial on scheduling and damages. He also helped prepare TA's supplemental certified claim submitted on November 7, 2012 (TA-0659).

¹¹There were two job cost reports (JCRs) admitted at trial: a March 8, 2012 JCR submitted in support of TA's first certified claim submitted on March 8, 2012 (TA-0592/TRANS000014-TRANS000087) and a September 30, 2012 JCR submitted in support of TA's supplemental claim submitted on November 7, 2012 (TA-0659-44 Tab C2 and TA-0659-57 Table C3, Job Cost Transaction Report). Unless indicated otherwise, reference to the "JCR" herein means the September 30, 2012 JCR and corresponding Job Cost Transaction Report).

¹²Additional facts relevant to specific issues are set forth in more detail in the discussion of the parties' claims, defenses and counterclaim.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-6-

DECISION

including the Dorm Project, adhering to the extent possible, to the requirements and guidelines of the Ohio School Design Manual (TA-1300).¹³ This was not a typical project for OSFC in that no school district was involved and it had never built or administered the building of residential wood frame buildings. Several witnesses described it as "unique" because of its wood frame residential character and limited funding. The manner of funding differed from previous school building projects administered by OSFC, because the funding for the OSBD Project came through the state Capital Bill for OSD and OSSB and not through local funding by a school district in combination with OSFC funds (TA-0022). In the event of a budget shortage, there was no additional funding to pay for any additional costs, including contractor claims such as TA's.¹⁴

In 2006, according to the testimony of Richard Hickman (Director Hickman), then Executive Director of OSFC, funds for the planning, design and construction of new school facilities for the OSSB and OSD were provided through the state Capital Bill.¹⁵ Construction of the OSBD Project was initially planned for a single campus combining both schools on a common site and the budget was established accordingly.¹⁶ This single campus concept was advocated by Governor Taft's administration based on other states that had done the same. When Governor Strickland took office in 2007,

¹³Very little of the School Design Manual was applicable to the dorms because it did not cover residential construction. However, what was applicable was the objective of the construction documents phase. The manual clearly states that "These documents are submitted for agency approval for the issuance of a building permit." (TA-1300/000061).

¹⁴During early planning, OSFC explained that funding of the Project would not be typical of an OSFC project and that a "second safety net" consisting of investment income accumulated during the planning, design and construction of the project would not be available in the event of cost overruns (TA-0014). See also, TA-0165.

¹⁵Director Hickman was Executive Director of OSFC in 2005-07 when the planning and design of the Project began and again in 2011-14 during construction. He testified that when he returned to OSFC as its Executive Director in 2011 he was surprised that the Project was not completed.

¹⁶At the time, OSSB and OSD were operated on separate campuses divided by an impassable ravine and had operated like this for years.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-7-

DECISION

officials of OSD and OSSB convinced his administration to keep the campuses separate. However, the budget was never adjusted to accommodate a separate campus for each school, which would, all other things being equal, be more costly and the schools and OSFC realized this (TA-0026). During the planning, design and construction of the OSBD Project, the budget was approximately \$43-44 million, of which approximately \$8.4 million was ultimately spent on architectural and construction management services, so-called "soft costs." (JX-H-63/21).¹⁷

OSFC hired Bovis Lend Lease (LL) to serve as the construction manager and Steed Hammond Paul (SHP) to serve as the architect.¹⁸ LL and SHP were authorized agents of OSFC during planning, design and construction of the Dorm Project. LL and SHP had considerable experience working with OSFC on K-12 school facilities throughout Ohio, but had no experience working with OSFC on a project with a fixed budget. Neither SHP nor LL had ever designed or administered the construction of any wood frame dormitories for OSFC. Both LL and SHP were authorized to and did engage consultants to assist them in providing their respective services to OSFC. Because SHP did not design wood frame residential type projects it hired Berardi + Partners, Inc. (Berardi) to prepare the housing design/architectural drawings.¹⁹

After the fact, OSFC, and LL in particular, are critical of TA as not being experienced in OSFC projects and public improvements generally. However, LL presumably satisfied itself that TA was qualified to build the dorms through the post-bid interview process and recommended that OSFC award it the general trades contract.

¹⁷By June 20, 2013, only \$32.3 million had been spent for construction costs of the original bid/estimate of \$37 million. On the other hand, almost \$8.4 million had been spent on architectural and construction management services when the original estimate for such services was \$6.5 million. Remaining funds amounted to \$2.8 million, of which a substantial portion consisted of funds wrongfully withheld from TA. (JX-H-63/21)

¹⁸Both LL and SHP are third-party defendants in this action.

¹⁹SHP hired other design consultants for civil, structural, electrical, mechanical, etc., but their services are not particularly relevant to the issues.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-8-

DECISION

TA's references included a broad range of successfully completed wood frame type projects, including commercial projects, a dormitory for Ohio Dominican University, a condominium complex, 12 story hi-rise apartments, and custom homes (TA-0145/6). TA also furnished references to OSFC, confirmed by LL, which demonstrated that TA had a good reputation as a contractor (TA-0146 and TA-0147). TA's president, William Koniewich, had 30 years experience in construction starting as an estimator, then vice president and ultimately as president of TA. He was on site regularly during construction and was knowledgeable and forthright in his testimony. Among LL, SHP and OSFC, TA was probably the most experienced entity with this type of wood frame residential construction.²⁰

Robert Grinch (Grinch) was designated as the project administrator for OSFC to oversee the OSBD Project. In Spring 2007, to facilitate the planning, design and construction of the OSBD Project, a Core Team was formed consisting of representatives from OSD, OSSB, OSFC, the Ohio Department of Education, Office of Budget & Management, LL and SHP. The Core Team held its Meeting No. 1 on May 2, 2007 (JX-H-01). At this first meeting, according to witness Clay Keith ("Keith"), Michael Shoemaker, then Executive Director of OSFC announced: *"We do not want to do the Ready, Fire, Aim. We want to be Ready, Aim, Fire"* (TA-0584). *Ready, Aim, Fire* in construction parlance means: *Plan, Design, Build*, a traditional, logical and efficient method of construction. *Ready, Fire, Aim*, on the other hand, means *Plan, Build, Design*, every public (and private) owner's fear. *Ready, Fire, Aim* probably best describes the way the OSSB and OSD dorms were planned and built. In other words, the Dorm Project design was completed "on the fly" after award of the contract and

²⁰Josh Wilhelm, TA's project manager was hired by TA to manage the construction of the dorms. He did have experience on OSFC projects and he was well educated, trained and experienced in project management. In addition, he worked as a carpenter during college at Bowling Green where, in 2001, he earned a B.S. in construction management. He also was a knowledgeable and forthright witness. Smith also had some experience with wood frame construction, but not design.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-9-

DECISION

during construction rather than being sufficiently complete and approved at the time bids were solicited.²¹

Core Team Meeting No. 1 was the first of 33 consecutive and documented meetings of the Core Team at various intervals through July 15, 2010. Curiously, no meeting minutes of Core Team meetings were offered by the parties as joint exhibits reflecting meetings from July 15, 2010 until May 11, 2011.²² Thereafter, the Core Team met at least another 20 times at various intervals through June 20, 2013. TA did submit the minutes from an executive partnering session held on March 10, 2011, which reflected serious problems with the budget. This meeting appears to have been attended by the some of the members of the Core Team.

Budget constraints shaped the OSBD Project almost immediately and heavily influenced decision making by OSFC, LL and SHP during the planning, design, bidding and construction processes of both the dorms and academic facilities, as well as the Campus-wide Bid Packages. The OSBD Project was fragmented and constructed in several phases, due in part to budget constraints, design issues and poor scheduling. Many of these issues were brought about by competing interests between the OSD and OSSB as to what each school wanted from their new facilities and led to the scheduling problems.

B. Dorm Project Bidding.

In or about Spring 2010, site work was underway by separate prime contractor(s) to assure that building pads and underground utilities would be available for construction of the dorms and academic buildings. In June 2010, SHP submitted plans for sixteen dorms (eight on each campus) for review and approval by the Ohio

²¹Approved means an unconditional certificate of plan approval in hand from DIC.

²²While it is not clear why the minutes between July 15, 2010 and May 11, 2011 were not available, these minutes would have shed more light on why OSFC went out to bid in October with plans that had not been approved by DIC. They also would have been helpful in better understanding the schedule pressures that OSFC was dealing with at the time.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-10-

DECISION

Department of Commerce, Division of Industrial Compliance (DIC).²³ On these plans the "Construction Type" was shown as V-A (also sometimes shown as 5A on related documents) and the design included one-hour fire rated exterior and interior walls (TA-0900, Sheet LS101). Knowing that it did not yet have plan approval for the dorms or academic buildings, OSFC nevertheless solicited bids by issuing the unapproved plans for construction of the dorms and academic buildings for bid opening on July 22, 2010 (Bid #1) based on assurances from SHP that plan approval was forthcoming and that SHP would take steps to promptly address any issues presented by DIC in the approval process (TA-0084). However, because the bids came in at almost 40% over the advertised estimate they could not be accepted as a matter of law and OSFC did not have such funds in its Budget to award contracts that were 40% over the advertised estimate (TA-0129/3).

On July 29, 2010, DIC issued its first partial plan approval for the dorms that was contingent on a complete and adequate response to 13 items outlined in Correction Letter No. 1 accompanying the approval (TA-0091/7). Correction Letter No. 1 listed a compliance date of August 28, 2010. SHP never responded to Correction Letter No. 1 prior to the re-bid of the Dorm Project on October 28, 2010 (Dorm Bid #2).²⁴ Notably, each sheet on the approved plans had the red DIC partial approval stamp and limitation language on it (TA-0900). OSFC/LL did not issue these partially approved plans when bids were solicited for Dorm Bid #2, nor were they disclosed to the bidders. Instead, bidders were issued altered plans that had not been approved by DIC as explained below.

²³The plans were dated 12/15/09 for "Permit and Review" and 4/16/2010 for "Permit and Bid" and yet from the evidence, it appears they were not submitted to DIC until June 1, 2010 for "Permit and Review." There was no explanation of why there was a 6 month delay in submitting the plans.

²⁴SHP did respond later in December 2010, and additional drawings for the dorms were submitted to DIC during 2011 and 2012 for approval.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-11-

DECISION

After Bid #1, the academic buildings required considerable redesign and refinement before they could go out for bid again, and given the budget pressure at the time, OSFC decided to proceed with Dorm Bid #2 separately in order to more accurately evaluate its impact on the budget for the academic buildings. As with bids for the academic buildings, the Campus-wide Bid Packages common to both the dorms and the academic buildings were not solicited until long after construction began on the dorms, and were delayed several times due to design/budget issues. It was generally understood by SHP and LL that any delay in the award of contracts for the Campus-wide Bid Packages would adversely impact the contractors' ability to complete the dorms on schedule (TA-0162/2).

In order to better manage the budget, OSFC/SHP/LL took at least three steps before soliciting bids for Dorm Bid #2:

1) They decided to bid the dorms only and see how much money would remain in the budget for the two remaining phases, the academic buildings and the Campus-wide Bid Packages;

2) They reconfigured the base bid to provide for six dorms on each campus for a total of twelve dorms rather than sixteen as with Bid #1.²⁵ This eliminated a total of four dorms (and their attendant costs) from the base bid, potentially reducing the pressure on the budget. The four deleted dorms (OSSB4, OSSB8, OSD4 and OSD8) were instead bid as alternates so the OSFC could see what they would cost separately, and if the cost was within the budget OSFC could accept them, but if not it could at least proceed with construction of the twelve

²⁵Each campus consisted of three elementary/middle school dorms and three high school dorms.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-12-

DECISION

dorms without further delay. Ultimately, the bid alternates for the four dorms were not accepted;²⁶

3) They "value engineered" the design of the dorms.²⁷ While SHP may have implemented other opportunities during this process, the one identifiable action it took was to substantially alter the plans for which it had obtained approval from DIC on July 29, 2010. This alteration changed the fire-resistance construction type from V-A to V-B. (The building type V-A was noted on the original Certificate of Partial Plan Approval as 5A, [TA-0091], and as V-A on the plans (TA-0900, Sheet LS100), but when the plans were altered the building type was noted as V-B on the bid set (TA-0901, Sheet LS101). This was a significant and material deviation from the partial plan approval issued by DIC on July 29, 2010. Not only was the fire-resistance construction type changed, but this change permitted SHP/Berardi to delete the one-hour fire rated exterior and interior walls approved by DIC in July.²⁸ These changes become apparent when sheets LS101, LS101a and A002 of the plans for Dorm Bid #2 are compared with the July 29, 2010 partially approved plans (TA-0901 and TA-0900, respectively).²⁹ The alteration is represented in TA-1421, TA-1422 and TA-1423. Such alteration

²⁶The four deleted dorms, OSD4, OSD8, OSSB4 and OSSB8 remained on the bid schedule and all recovery schedules during construction, which, according to TA's expert, Don McCarthy was confusing and not a good practice from a scheduling standpoint.

²⁷According to the U.S. General Services Administration "[v]alue engineering can be defined as an organized effort directed at analyzing designed building features, systems, equipment, and material selections for the purpose of achieving essential functions at the lowest life cycle cost consistent with required performance, quality, reliability, and safety." <http://www.gsa.gov/portal/category/21589>. In other words, acceptably less expensive.

²⁸Although it was not mentioned at trial, this seemed particularly disconcerting considering these dorms were being constructed as living quarters for deaf and blind children who, in the case of a fire, would be at a disadvantage that in some instances only time could protect them from. To the court, this is an example of how unrealistic budget pressures led to poor decision making on this project by OSFC, SHP and LL.

²⁹It is apparent to the court, but would not have been apparent to TA at the time it submitted its bid or during construction, because TA did not know about the partial approval by DIC in July 2010.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-13-

DECISION

was not disclosed to TA at or before Dorm Bid #2 or when TA entered into the Contract with OSFC and the alteration was not submitted or disclosed to DIC for approval prior to Dorm Bid #2. The fact that SHP did not include DIC's stamped plan sheets in the bid set that were not changed is evidence of an intent to conceal the fact that there was only partial approval for the plans or that the plans had been altered.

Consequently, when it solicited bids for Dorm Bid #2, OSFC issued plans to the bidders that had not been approved by DIC. The fire-resistance changes were more akin to "bid engineering" than "value engineering" because ultimately DIC caught SHP in this scheme and required one-hour fire rated walls between the dorm rooms as well as other fire protection components.³⁰ These altered plans also resulted in a protracted, confusing and expensive series of events for OSFC and TA and it led to dimensional framing issues, extensive reworking and unnecessary confusion for TA during construction, much of which could not be fully realized in the scope of any change orders.³¹

Not knowing about the altered plans for Dorm Bid #2 and that OSFC did not have plan approval at bid time, TA submitted its bid for the general trades contract for the Dorm Project.³² TA was the apparent second low bidder and its bid was within 2% of the published estimate. TA's overall bid was reasonable according to Keith and other

³⁰By "bid engineering" it is meant that SHP and its consultant, Berardi, made a change to the drawings that would help to reduce the bid estimate and therefore the bids, but in the end it was nothing more than a ruse because it led to almost \$100,000 in change orders (JX-F-25 and JX-F-26) as well as other costly life-safety requirements.

³¹It is hard to appreciate just how confusing the plans were, but a good example is revealed in an email from LL/Keith to SHP/Predovich on July 27, 2011, over three months after TA had mobilized to the job site (TA-0410), referring to a recent inspection, "[h]e is not going to sign off or approve any further inspection requests until revised/updated/stamped drawings are available for review." This was in reference to the DIC inspector's confusion over the drawings.

³²The partial plan approval by DIC was useless to OSFC at the time of the second bid opening because of unapproved changes made to the plans by SHP. There was no evidence that DIC was made aware of these material changes or approved of them at the time bids were solicited for Dorm Bid #2.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-14-

DECISION

witnesses. The apparent low bidder was allowed to withdraw its bid based on a mistake it claimed it made when preparing its bid. TA was then selected as the next low bidder and after completing post-bid interviews with LL, and receiving the recommendation of LL, OSFC awarded TA the Contract for the general trades work, which was executed on December 20, 2010 (JX-A).

C. Dorm Project Construction Drawings.³³

Weeks before TA signed the Contract it requested revised and complete drawings and SHP/Berardi promised to issue such drawings including all changes to date (TA-0164). These changes were extensive and consisted of well over 100 specific changes to the drawings, substantial changes to the technical specifications and over 150 pre-bid RFIs, many of which affected the drawings.³⁴ While the bid set of plans may have been sufficient upon which to submit a bid, they were not full and accurate nor were the details easily understood so as to be sufficient for construction.³⁵ To the contrary, the drawings were described by various witnesses, including representatives of OSFC, SHP and LL, as flawed, useless, worthless, trash, confusing and any number of other adjectives, none of which are synonymous with unambiguous, full, accurate or easily understood.

³³A more detailed explanation is set forth below in "Problems with the Drawings."

³⁴RFI (Request For Information) is a process to obtain clarification or interpretation of the Contract Documents (JX-B/14, General Conditions (GC) 2.2.2). The inquirer (usually a bidder, contractor or the construction manager) submits a specific form (RFI) setting forth the question, the date a response is needed and any suggested solution. On this project, RFIs were submitted through LL's construction management software, Prolog Manager. Once the contract is awarded and executed, the architect then is required to answer an RFI within three business days of receipt as provided in GC 2.2.2.2 (JX-B/15). As can be seen from a review of the RFI Log (JX-L), SHP rarely responded to RFIs within three business days. Sometimes RFIs went for weeks or even months without a response. Early in the project, if the RFI related to the drawings, sometimes rather than answer the RFI specifically, SHP simply stated "Construction set to be issued." This became a major issue during construction because a construction set of drawings was never issued to TA or the other contractors.

³⁵The referee acknowledges that construction drawings and specifications are never perfect and the RFI process is one of several processes designed specifically in recognition of this inevitable imperfection. However, the state of the bid drawings was, by accounts of all of the witnesses who testified credibly, unacceptable, incomplete and not ideal.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-15-

DECISION

By February 17, 2011, after several attempts to get updated construction drawings, TA sent LL a letter pursuant to General Conditions (GC) 8.1 (JX-B/60), stating as its reason a lack of revised drawings (TA-0245/5-6). This letter notified OSFC, LL and SHP that the lack of revised drawings had impacted and would continue to negatively impact TA's work. LL, SHP and OSFC were well aware of the impact that the confusing and inadequate bid drawings were having and would continue to have on TA's and other prime contractor's ability to perform their work. TA also notified OSFC/LL that until it received the revised drawings it could not determine the impact to its costs or schedule.

On March 1, 2011, LL/Keith responded to TA's Article 8 notice letter and advised TA that the architect was not contractually obligated to issue updated drawings as previously promised, but that it had agreed to do so (TA-0256/1). Keith also acknowledged that TA could not anticipate its costs at that time.³⁶ While SHP may not have been contractually obligated to TA to issue updated drawings, it was contractually obligated (to OSFC) to prepare construction documents that were "complete and unambiguous" (JX-N-03/8, Paragraph 2.5.1).³⁷ LL also represented to TA that updated drawings would be available that same day and advised TA that TA's "notification" was considered "closed." The updated drawings were not made available to TA on March 1, 2011 or any other date, despite LL's continuing representations that revised drawings would be issued. LL's representations were based on promises by SHP that it would issue the revised drawings. And, SHP's promises were in turn based on promises made to it by Berardi, its consultant responsible for preparing the plans. However, Berardi and SHP had been failing in these promises for months and LL knew it. And worse yet, not only did LL conceal this problem from TA, it also had been concealing it

³⁶So long as TA was not able to anticipate its costs it could not certify its claim under GC 8.2.1.1, which was essential to submission of a claim.

³⁷This exhibit was also marked as TA-0037.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-16-

DECISION

from OSFC for months as well as evidenced by a March 28, 2011 email (TA-0280/2) wherein LL/Keith wrote to SHP/Predovich/Maletz as follows:

"We are on the brink of turning this project over to a new PA [Dowlen] and will have to give him an update on the status of the project and it will not look good if we have to present all of this information we have been asking for from SHP for months with no response. We have not copied the Owner on all of this information in hopes that SHP would get caught up, but will be forced to get them involved if we do not have information in our hand by the end of the week."³⁸

RFIs continued to pour in after Dorm Bid #2 and by the time TA mobilized on site to commence construction SHP had received over 100 more RFIs most of which arose from the confusing and incomplete drawings.³⁹ Starting in March 2011 and for months thereafter, LL repeatedly promised revised construction drawings to TA and the other prime contractors, while insisting in the meantime that they continue to work with the bid set of drawings and hand-drawn sketches, which were not approved by DIC and did not include the hundreds of changes captured in addenda 10-13 and post-bid RFIs.

Each time SHP issued revised construction drawings to LL which supposedly captured the hundreds of changes and RFIs, they were reviewed by LL only to discover that they were not correct and were confusing. This happened at least four times over the course of six months, starting in December 2010. In other words, SHP and its consultants, who developed the plans and specifications, and whose design generated

³⁸This email was sent at about the same time TA mobilized and commenced construction, and five months after TA submitted its bid.

³⁹It should be noted here that the dorms were not complex construction buildings. The models were similar and they were relatively simple wood frame buildings with basic plumbing, electrical, HVAC and fire protection systems. The number of RFIs generated on the Dorm Project might be expected on a complex project such as a large academic building or health care facility, but not on a project such as the Dorm Project. By June 2012, over 300 RFIs had been issued to SHP and its consultants by prime contractors and LL, in addition to the hundreds of RFIs and changes included in Addenda 10-13. This is extraordinary because the Dorm Project only consisted of two relatively simple residential building types ranging in size from 2200 to 3900 square feet, respectively. This fact alone supports TA's contention that the dorm buildings were designed "on the fly."

2015 SEP 17 PM 4:42

Case No. 2013-00349

-17-

DECISION

the hundreds of changes over the previous year, were unable to consolidate these hundreds of changes and clarifications into a set of drawings that was complete and accurate enough for LL to issue to the contractors, including TA. Yet, LL and OSFC insisted that TA continue with construction of the dorms utilizing a cumbersome, confusing, cobbled-together "posted set" of drawings. The posted set was so confusing that Wilhelm put together individual working notebooks to hold all the changes, sketches, drawings, and other documentation to help his workers and subcontractors build the dorms (e.g. TA-0800, TA-0801 and TA-801A, TA-0802 and TA-0803).

To add to the confusion, from the testimony of James Smith (Smith), LL's Senior Superintendent for the Dorm Project, he "posted" all of the changes from Addenda 10-13 and subsequent RFIs and other changes to his set of bid drawings by taping the changes on the back of the sheets to which they corresponded. Smith described this as the "Posted Set" of drawings and testified that anyone was able to come to LL's construction trailer and look at the "Posted Set" anytime they wanted. He claimed that all the contractors, including TA signed off on the Posted Set, but it was not produced at trial, nor was it produced during discovery. The court found it a little more than curious that a signed off posted set was never produced, although Smith testified at trial and in his deposition that it did exist.

Smith also testified that SHP updated the bid drawings with all of the changes that he had put on his bid drawings and that the contractors were given a disk with the updated drawings and told they could buy a set from the printer if they wanted to. While a disk was distributed to the contractors with electronic copies of drawings on it, it was months after construction began and the electronic copies were not of the updated drawings. TA was never furnished an updated set of construction drawings during its work on the Dorm Project, electronic or otherwise, and that was made clear by the testimony of LL/Keith, Predovich and Wilhelm.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-18-

DECISION

Wilhelm, TA's project manager, testified that while there was a "Posted Set" maintained at the trailer, TA's workers and workers for the subcontractors were not allowed in the trailer to view them. The only time carpentry foremen were allowed in LL's trailer was to attend coordination meetings. The court finds Wilhelm's testimony more credible than Smith's on this issue. The impact of a lack of full and complete drawings on TA's work was pervasive and continuous throughout construction causing substantial inefficiencies and disruption to TA's work. Moreover, TA was not only directed to work from the unapproved bid set of plans, LL and SHP were both directing work to be performed that was not as described on the plans (TA-0294/1).

Jim Deering (Deering) was TA's lead carpentry foreman. Deering was an experienced carpenter and particularly experienced in residential wood frame structures. Deering, was an impressive and credible witness who was helpful in understanding the many challenges faced by TA in the field, particularly with the rough carpentry. He testified that he had planned to have a set of plans in every building he was working in, but instead had to go with one master set in conjunction with the binders put together by Wilhelm.

Deering testified that a lack of information and details in the plans coupled with slow responses to questions about the design were his biggest problems during construction in trying to stay up with the schedule. He testified that because of a lack of details and complete information he would have to move his crews from building to building where he could progress the work with the information he had. This happened many times. Once he had enough information about the work at the dorm he left behind, he would then relocate from where he was at a later time and resume his work there. This persistent disruption and constant relocation typically took about 45 minutes or more per worker, especially he if had to have his crews move from the OSD campus to the OSSB campus or vice versa.

2015 SEP 17 PM 4:42

Deering testified that he did not attend framing inspections by DIC because he was not invited, that he could not remember a job where the carpenter was not asked to attend framing inspections and that he found this to be very unusual.⁴⁰ The court finds that OSFC/LL prevented TA from performing its duties and deriving the benefits under the Contract with respect to the inspection process.

In addition to testimony, the contemporaneous project records also substantiate the problems encountered in trying to work with SHP's confusing and incomplete drawings. Examples are:

- SHP/Predovich acknowledging many outstanding items with the drawings in January 2011 (TA-0217/1);
- email from Predovich to his structural engineer consultant expressing concerns about confusing dimensional problems in late January 2011 (TA-219/1-2);
- email from Predovich to Berardi regarding dimensions issues in late January 2011 (TA-0220);
- internal LL email in January 2011 regarding dimension problems in the drawings (TA-226);
- email chain in February 2011 between SHP/Predovich and LL/Keith regarding finish submittals and dimension issues with the drawings - Predovich complaining

⁴⁰The court also found this to be unusual. On any construction project if there are issues with framing it is important to have the framing subcontractor or foreman present at the inspection so he or she can learn firsthand what, if anything, needs correction and to ask questions for clarity. The ability to interact with the inspector provides the best opportunity to correct an issue observed by the inspector. The court found it suspicious that LL assumed control of the inspection process when the Contract gave that control to TA (JX-B/22, GC 2.9.1.2). The only logical explanation for restricting TA from attending inspections is that LL and SHP did not want Deering or anyone from TA present when the inspector was comparing the work completed with the stamped and approved plans for the Dorm Project. TA was not working from such plans. If differences surfaced between the plans TA was using and the plans approved by DIC, SHP's and LL's scheme to keep this from the inspector would be exposed. In the pre-construction meeting (TA-0186/12) it was noted that the contractor would schedule the inspections and notify the CM and architect, but after the Contract was fully executed LL took control of the inspection process and excluded TA from DIC inspections (JX-J-02/5 and testimony of Deering and Koniewich).

2015 SEP 17 PM 4:42

Case No. 2013-00349

-20-

DECISION

he will have to delete more email from Keith because of communications issues (TA-0236);

- angry email in February 2011 from LL/Keith to SHP/Predovich demanding updated drawings for the contractors to build the Dorm Project (TA-0237);
- email on February 15, 2011 from LL/Keith to SHP/Predovich expressing frustration with getting revised drawings "GET US DRAWINGS WE CAN USE TO BUILD THE BUILDINGS . . . OH YEAH A PERMIT APPROVED TOO" (TA-0237);
- email on February 24, 2011 from OSFC/Grinch acknowledging receipt of TA's formal written notices on February 17 & 23, 2011 regarding the need for updated drawings, and LL's acknowledgment that TA is entitled to have updated drawings issued (TA-0245);
- internal SHP email in March 2011 acknowledging the deficiencies with the drawings and the importance of resolving them (TA-0280);
- email on April 4, 2011 from LL/Keith to SHP/Predovich regarding resolution of a wide range of issues with the construction documents (TA-0292);
- email on April 15, 2011 from LL/Keith to SHP/Predovich in reference to the new OSFC Project Administrator (Dowlen) asking for a set of the construction drawings, LL/Keith jokingly asks SHP/Predovich "shouldn't you ask which set of drawings first?" (TA-0304);
- email on May 8, 2011 from LL/Keith to SHP/Predovich regarding confusion in the construction drawings and continuing dimension issues (TA-0325);
- email on May 23, 2011 from LL/Keith to OSFC/Dowlen regarding urgent situation with the casework portion of the OSBD Project and the delay it will cause completing the dorms (TA-0354);
- email on May 25, 2011 from LL/Smith to SHP/Predovich regarding problems with the drawings, RFI responses and the bid set of drawings not being correct, also

2015 SEP 17 PM 4:42

Case No. 2013-00349

-21-

DECISION

email from LL/Keith to SHP/Predovich voicing his loss of confidence in the drawings, specs and drawing notes (TA-0352);

- email on June 2, 2011 from SHP/Predovich to Rolando Matias (Matias) with Berardi describing a lack of a construction set of drawings as critical (TA-0358);
- email on June 6, 2011 from SHP/Predovich to Berardi/Matias "Lend Lease is getting fed up. The contractors have been complaining and sending letters that the lack of the construction set is delaying the job." (TA-0359);
- email on June 10, 2011 from TA/Wilhelm to LL/Keith about confusion over the life safety design changes (TA-0361);
- email on July 7, 2011 from LL/Keith to SHP/Predovich regarding deficiencies and multitude of problems with drawings (TA-0380);
- email on July 18, 2011 from OSFC/Dowlen to SHP/Predovich and Maletz expressing concerns about delay in design of the Campus-wide Bid Packages and the impact it will have on the completing the Dorm Project and potential delay claims by contractors (TA-0394);
- email on July 22, 2011 from LL/Keith to SHP/Predovich making sure fire rating design questions get cleared up before the inspector arrives (the inference is so TA won't try to interact with the inspector) (TA-0403);
- email on July 27, 2011 from LL/Keith to SHP/Predovich advising that the structural inspector (DIC) refused to sign off or approve any further inspections until revised/updated/stamped drawings are available for review (TA-0410);
- email chain in October 2011 regarding door hardware and doors that were not specified properly by Berardi (TA-0496);
- email on October 21, 2011 from SHP/Predovich to DIC/Jindal confirming major change to drawings/design made necessary by inadequate design of sprinkler system (TA-0497);

2015 SEP 17 PM 4:42

Case No. 2013-00349

-22-

DECISION

- email chain in November 2011 (over a year after Dorm Bid #2) where design team is still struggling with the problems created by the unapproved alteration (all 1-hour fire rated walls deleted) of the plans between Bid #1 and Dorm Bid #2 (TA-0514);

For more than seven months after TA signed the Contract, OSFC/LL/SHP repeatedly promised to issue revised and updated drawings to TA. For more than five months after TA gave formal written notice under Article 8 about the need for the revised and updated drawings, OSFC/LL/SHP continually promised, but failed to issue them. For almost four months after construction actually began, the drawings were routinely promised, but never issued. Remarkably, SHP issued a "Construction Set" of drawings to DIC and obtained partial approval in August 2011, but these approved plans were never issued to TA.⁴¹

D. Dorm Project Construction Phase

Despite the confusion caused by SHP's construction documents, TA proceeded with construction in March 2011 rather than risk being accused of delaying performance. Almost immediately, TA encountered problems with the foundation design which did not account for penetration of the water and sanitary lines through the foundations and which led to a substantial change order. TA also encountered errors in the coordination between the dimensions reflected in the architectural drawings and the structural drawings. LL and SHP became aware of the dimension issues almost two months before TA began construction and yet never brought them to TA's attention.⁴² Various other dimensional issues plagued TA's ability to perform its work throughout construction of the Dorm Project, and while many were ultimately resolved by RFIs, field

⁴¹As explained in more detail below in Section **V.C.2 Problems with the drawings and their impact on TA's work**, these drawings differed from the set of drawings upon which TA submitted its bid and used to build the dorms.

⁴²TA-0219, TA-0220, TA-0226 and TA-0236.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-23-

DECISION

decisions, change orders or simply by TA's own initiative, they nevertheless took their toll on TA's ability to perform the contract efficiently.⁴³

TA was compensated for some discrete changes from time to time as evidenced by change orders, but the full impact of the confusing construction documents could not be fully realized until near the end of construction, nor could they have reasonably been expected to be included in discrete change orders. For this reason it was not until late in the project that TA was able to submit a certified claim under GC Article 8.

During construction TA did have problems of its own, separate and apart from having to construct the dorms from the poor drawings and under the pressure of an unrealistic schedule. Its framing subcontractor failed to honor its quote for the framing work and TA was forced to hire framing personnel to self-perform the rough framing. TA hired experienced and well-qualified framers to self-perform the framing work, including Jim Deering and his brother Gerald. As pressure from LL and the schedule intensified, TA ramped up its carpentry crews and did its best to keep up.

TA also experienced difficulties with its roofing subcontractor, AAA Roofing (AAA). There is no question that AAA did not perform well on the Dorm Project and it was not certified to issue a roof warranty. In November 2011, when it became apparent that AAA was not and could not perform its obligations, TA terminated its subcontract with AAA. TA immediately furnished additional labor and materials to correct defective work that had been installed by AAA and to complete the roofs on all twelve dorms. TA issued all roof warranties required by the Contract. The court took issues caused by AAA roofing into account when calculating TA's damages and adjustments were made as supported by the evidence.

⁴³LL/Smith testified that the dimension issues only lasted about one day. This was an oversimplification of the problems with the drawings. Dimensional issues were pervasive throughout installation of the rough framing and continued to be a problem into 2012 (TA-0545).

2015 SEP 17 PM 4:42

Case No. 2013-00349

-24-

DECISION

TA also experienced problems with its drywall/painting subcontractor, Sammie Walker Construction (Sammie Walker).⁴⁴ The details of the problems and the associated damages are reported below in Section **V.D.7. Additional Drywall Costs** and **8. Additional Painting Costs**. These issues with Sammie Walker were considered when determining OSFC's liability and calculating TA's damages as supported by the evidence.

From time to time during construction TA hired and fired some of its supervisory personnel, and while such changes were not that unusual for a project of this type, the court did consider these issues when determining OSFC's liability and calculating TA's damages as supported by the evidence. Turnover is likely to occur on a project that experienced the types of problems TA encountered trying to perform its work under pressure from LL to meet what started out as a tight schedule, but what soon became an unrealistic schedule, especially while being forced to work with such confusing construction documents.⁴⁵

There were also incidents of TA workers who reported to work with false security credentials, although there was not very much detail about this issue, nor was there any evidence that this significantly impacted TA's work. Each time this was brought to TA's attention, TA promptly and adequately addressed such conduct. While these incidents are interesting, OSFC failed to prove that they had a significant impact on TA's productivity or on the schedule, but they were considered when determining OSFC's liability and calculating TA's damages as supported by the evidence.

⁴⁴Actually it was Smith Evans and Associates LLC dba Sammie Walker Construction, but the court refers to the drywall/painting subcontractor as "Sammie Walker."

⁴⁵It is also noted that LL changed one of its superintendents early in the project between bids for the dorm construction. Another of LL's superintendents, Joe Rice, retired after TA was awarded its Contract but before construction began. Such changes do not typically affect construction in any measurable way. OSFC also experienced turnover in project administrators (Grinch asked to be replaced just as construction was getting under way). And, OSFC had three different Executive Directors during the planning, design and construction of the Project.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-25-

DECISION

E. Project Completion and Subsequent Events.

On February 14, 2012, the Dorm Project was to be complete, at least according to Recovery Schedule 2, which was made part of the Contract by Change Order No. 13 (JX-F-13).⁴⁶ The OSD dorms were to be completed by February 7, 2012 and the OSSB dorms were to be completed by February 14, 2012. However, DIC did not issue final plan approval for the dorms until July 18, 2012 so TA could not get a final inspection until the plans were fully and finally approved.⁴⁷ Unbeknownst to TA, it had constructed the entire project with unapproved and unpermitted plans because each time OSFC/SHP obtained plan approval from DIC the approved plans were withheld/concealed from TA. TA remained on site and continued to perform its work at the job site after February 14, 2012, through and including August 2, 2012.⁴⁸

The reports (TA-1200 and TA-1201) and testimony of McCarthy were persuasive in addressing the impacts experienced by TA during construction and in showing how OSFC, through its agents SHP and to a lesser extent LL, delayed TA's work. Throughout construction TA continually provided LL/OSFC with written notice of delays caused by the confusing and incomplete drawings, among other causes, but because many of those delays related to a lack of revised/updated drawings that had been promised repeatedly, it could not certify and submit its claim as required by GC Article 8 until the impacts could be fully realized. Until such costs had been fully or at least

⁴⁶Recovery Schedule 2 was the only schedule upon which completion dates were based as set by Change Order 13. While Recovery Schedule 3 was generated it was never signed by all prime contractors nor was it incorporated into a Change Order and therefore did not modify the Contract.

⁴⁷There was another partial plan approval issued on August 23, 2011, which included all of the general trades work, but such approval was contingent on complete and adequate response to all of the items outlined in Correction Letters (TA-0440/3). There is no evidence that SHP provided a complete and adequate response to all of the items outlined in the Correction Letters until July 18, 2012 when Final Plan Approval was given (Plaintiff Exhibit TA-0619).

⁴⁸Actually, TA remained on site after August 2, 2012 into October 2012, but August 2, 2012 is the date that McCarthy used in calculating damages resulting from delays. Accordingly, this is the date used by the court to calculate damages as well.

reasonably realized, TA was prevented from submitting its claim. LL/Keith understood this dilemma. He commented on the same issue when he presented LL's own claim for additional compensation based on a lack of full and final drawings for the academic buildings.⁴⁹

TA submitted its first certified claim on March 8, 2012, over a year after it first gave written notice of its claim followed by many other written notices, including as late as March 1, 2012 based on a need for buildable construction drawings and various impacts caused by LL and SHP (TA-0555). By contract, LL, with the assistance of SHP, had until April 9, 2012 (30 days from submission of the claim) to schedule a meeting with TA in order to implement the job site dispute resolution procedures, all as mandated by GC 8.3.1. As explained more fully below, OSFC/LL disregarded the GC Article 8 requirements to schedule the meeting in a timely manner and disregarded GC Article 8 by failing to respond to TA's certified claim in a timely manner. In fact, there was no evidence submitted at trial that a job site dispute resolution process was ever agreed to by the parties as required by the Contract.

In the months that followed submission of the initial certified claim, TA discovered more about LL's and SHP's behind the scenes activities, and on November 7, 2012 TA submitted another certified claim (TA-0659 - Supplemental Certified Claim). The structure of this Supplemental Certified Claim forms the basis for TA's claim on in this action, as refined by McCarthy's expert report (TA-1200) and supplemental expert report (TA-1201). LL did not respond to the Supplemental Certified Claim as required by GC Article 8, or at all. It did not schedule a meeting under Article 8. It did not respond in writing with an explanation denying the claim; in fact it did

⁴⁹Keith faced a similar problem with the drawings for the academic building and notified OSFC that it (LL) was being delayed by not receiving corrected drawings (TA-0453). Referring to the need for full and final drawings for the academic buildings he told OSFC "[p]lease be aware that this impact cannot be truly measured until we receive full and final drawings for the Blind and Deaf Academic Buildings." In TA's case, full and final drawings were never prepared and approved for the Dorm Project until July 18, 2012.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-27-

DECISION

not deny the claim. It did not assert any waiver rights as to TA's Supplemental Certified Claim. The initial March 8, 2012 certified claim was rejected by LL and OSFC in all respects as not timely and not substantiated, but such rejection itself was not timely. It was not sent by LL for weeks after it was required by Article 8, and it was sent only after learning the day before that there were no funds to pay the claim (TA-0637). Lack of funds is not a legitimate reason to deny a claim, and although OSFC denies that this played a role in its decision, the court believes otherwise.

The analysis of TA's Supplemental Certified Claim by McCarthy was revised (downward) during the pendency of this action (TA-1201/15). In this action TA seeks \$2,897,325.92 on its claim for an increase in the Contract Sum, and payment of its contract balance in the amount of \$824,605.42, together with pre-judgment interest and costs of suit.⁵⁰

IV. THE PARTIES' CONTENTIONS

The parties raised a multitude of factual and legal issues in their pleadings, pretrial, during trial and in their post-trial briefs. The following issues are considered outcome determinative and are each addressed separately. Any issue not addressed is considered not relevant and/or was, by the greater weight of the evidence after careful consideration, decided adverse to the party against whom judgment is recommended.

A. Amended Complaint and Counterclaim

TA's claim is for breach of contract.⁵¹ To prevail on a claim for breach of contract TA must allege and prove: 1) the existence of a contract; 2) performance by TA; 3) breach by OSFC; and 4) damages or loss to TA.

⁵⁰TA's claim for payment of its contract balance includes \$686,000 of liquidated damages that TA alleges were wrongfully withheld.

⁵¹The court does not recognize an implied warranty that OSFC would provide accurate, detailed, buildable and easily understood plans and specifications or that it would provide plans and specifications suitable for their intended purpose as it relates to jobsite conditions as alleged in the Amended Complaint,

2015 SEP 17 PM 4:42

Case No. 2013-00349

-28-

DECISION

In determining liability and damages for breach of contract the court considered the following:

A plaintiff in a breach of contract action is entitled to those damages which might have been expected by the parties as a natural result of a breach; those damages which might have been in the contemplation of the parties at the time of the breach, having in mind all the circumstances known to them when they dealt with one another.

R & H Trucking, Inc. v. Occidental Fire & Cas. Co., 2 Ohio App.3d 269, 272, 441 N.E.2d 816 (10th Dist. 1981);

Where a right to damages has been established, such right will not be denied merely because a party cannot demonstrate with mathematical certainty the amount of damages due. *Geygan v. Queen City Grain Co.* (1991), 71 Ohio App.3d 185, 195, 593 N.E.2d 328. See, also, Restatement of the Law 2d, Contracts (1981) 145, Section 352, Comment a. Rather, 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.

Tri-State Asphalt Corp. v. Ohio Dep't of Transp., 1995 Ohio App. LEXIS 1554, *13-14, 1995 WL 222160 (Ohio Ct. App., Franklin County Apr. 11, 1995); and

The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights.

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265-66, 66 S.Ct. 574 (1946).

2015 SEP 17 PM 4:42

Case No. 2013-00349

-29-

DECISION

In its answer, OSFC denied that:

- 1) TA performed its obligations under the contract;
- 2) it (OSFC) breached the contract; and
- 3) TA was damaged.

OSFC also affirmatively alleged that:

- 1) TA failed to state a claim upon which relief can be granted;
- 2) TA's claim is barred by the statute of limitations;
- 3) TA's damages were not caused by OSFC; and,
- 4) TA failed to provide the statutorily and contractually mandated notice and presentation of its claim.

In addition to affirmative defenses pled by OSFC, it has also asserted various contentions in defense of TA's claims, including waiver, release, mitigation and failure to file an Article 8 claim for return of liquidated damages, none of which were affirmatively pled in its answer.⁵²

This report addresses OSFC's defenses first and unpled contentions, then TA's claims and finally OSFC's counterclaim.

B. OSFC's Defenses and Contentions

1. Failure to State a Claim (Second Defense)

TA's amended complaint sets forth the essential elements for breach of contract. TA alleges the existence of a contract (¶ 14); that it performed its obligations under the contract (¶ 61);⁵³ breach by OSFC (¶ 62); and that it was damaged (¶ 64). If proven,

⁵²Release, waiver and mitigation are affirmative defenses and must be pled or they are waived. "Mitigation is an affirmative defense in Ohio." *Young v. Frank's Nursery & Crafts, Inc.*, 58 Ohio St.3d 242, 244, 569 N.E.2d 1034 (1991).

⁵³Substantial performance is all that is required. When calculating damages, a court can account for minor omissions and defects which will reduce the Contract Sum and therefore the balance due. *Mel Gornall Co. v. Tonti*, 1983 Ohio App. LEXIS 14990, 1983 WL 3703 (Ohio Ct. App., Franklin County Sept. 29, 1983).

2015 SEP 17 PM 4:42

Case No. 2013-00349

-30-

DECISION

these allegations are sufficient to state a claim against OSFC upon which relief may be granted. OSFC's second defense is without merit.

2. Statute of Limitations (Third Defense)

OSFC is correct that the limitation of action applicable to a claim for damages against the State is set forth in R.C. 2743.16(A). OSFC relies on the key language of the statute, specifically "shall be commenced no later than two years after the date of accrual of the cause of action" ⁵⁴ OSFC equates accrual of TA's "claim" under the contract with accrual of its cause of action. In order to determine whether TA's *causes of action* are barred by the provisions of R.C. 2743.16(A), it must first be determined when TA's causes of action accrued, not when TA's claims under the contract accrued. Counts One, Two and Three each arise from the contract between the parties, and although stated separately, they are all a claim for breach of contract.

Pursuant to R.C. 153.12(B), TA had to exhaust its administrative remedies before filing this action. ⁵⁵ This included any remedies provided for in the Contract and any alternative dispute resolution procedures established by the Department of Administrative Services (DAS). There were no such DAS procedures established by the evidence. Some remedies and alternative dispute resolution procedures are referred to in GC Article 8, but some procedures such as job site dispute resolution were to be created after execution of the Contract. ⁵⁶ In fact from the evidence

⁵⁴OSFC's PROPOSED CONCLUSIONS OF LAW, p. 1 filed on July 20, 2015.

⁵⁵R.C. 153.12(B) presents a rare instance where a statute requires a plaintiff to exhaust its administrative remedies before bringing suit. Unlike the judicially-created exhaustion of administrative remedies doctrine, R.C. 153.12(B) does not include any exceptions." *Cleveland Constr., Inc. v. Kent State Univ.*, 2010-Ohio-2906, ¶ 37 (Ohio Ct. App., Franklin County June 24, 2010). See also, *Painting Co. v. Ohio State Univ.*, 2009-Ohio-5710, ¶¶ 10, 13 (Ohio Ct. App., Franklin County Oct. 29, 2009).

⁵⁶Neither party submitted a copy of the job site dispute resolution procedure that was to be included in a partnering agreement pursuant to GC 4.4.3 (JX-B/42). The partnering agreement was to be reached after execution of the Contract pursuant to GC 8.8.2 (JX-B/64). Witnesses did refer to partnering sessions or meetings and there was reference in some project records to a partnering agreement (TA-

2015 SEP 17 PM 4:42

Case No. 2013-00349

-31-

DECISION

presented there was no job site dispute resolution procedure and as such the Article 8 process reached a dead end at such time as TA submitted its first claim in March 2012, because the next step was for LL to implement job site dispute resolution procedures upon which, from the evidence presented, the parties never reached an agreement.

GC 8.3.2 provides that the statute of limitations begins on the date the contractor is required to file its substantiated and certified Claim with the Commission. However, such a provision has no application to the extent it is inconsistent with the provisions of R.C. 153.16(B), which provides:

"[n]otwithstanding 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 purposes of division (B) of section 153.12 of the Revised Code." [emphasis added]

TA gave notice on February 17, 2011 that it intended to file a claim based on what it perceived would be potential cost and schedule impacts resulting from a lack of completed construction drawings. TA explained that it could not estimate the costs or schedule impacts at that time because it had not received the completed drawings. The contract required TA to submit its claim by certifying and substantiating it within 30 days of the date it was initiated by notice. However, prior to expiration of this 30-day period, LL advised TA by its March 1, 2011 letter that it considered TA's notification of February 17, 2011 "closed at this time." If TA had submitted the claim it would have had to have been resolved in no more than 120 days from the day submitted, or TA's

0543), but there was no testimony or other evidence of any partnering agreement that established the job site dispute resolution procedures formulated through the partnering process.

2015 SEP 17 PM 4:42

Case No. 2013-00349

-32-

DECISION

administrative remedies would have been deemed exhausted as a matter of law and it could then have filed suit in the Court of Claims.⁵⁷

The earliest certified claim before the court was submitted on March 8, 2012. TA's cause of action would have accrued no sooner than TA's exhaustion of its administrative remedies under Article 8 and no later than July 10, 2012, or 120 days after it submitted its certified claim. TA brought this action on June 14, 2013, well within the two years required by R.C. 2743.16(A).⁵⁸ The applications of these statutes working together was explained in more detail in *R. E. Schweitzer Constr. Co. v. Univ. of Cincinnati*:

We concluded that R.C. 153.12(B) and 153.16(B), construed together, provide that "[consistent with [that] principle" any claim submitted under a public works contract with the state necessarily will accrue, at the latest, by the end of the 120-day statutory period when, by operation of law, all administrative remedies are deemed exhausted under R.C. 153.16(B), the claim is deemed rejected, and money the state allegedly owed is deemed withheld.

R. E. Schweitzer Constr. Co. v. Univ. of Cincinnati, 2011-Ohio-3703, ¶ 28 (Ohio Ct. App., Franklin County July 28, 2011).

Counts One, Two and Three of the Amended Complaint are not barred by the statute of limitations. OSFC's Third Defense is without merit.

⁵⁷The term "submitted" has particular relevance here. Although the claim was initiated on February 17, 2011, initiation of a claim is different from submission of a claim. Even the language of the contract, GC 8.3.1, provides that the "contractor shall submit" substantiation of its claim, while GC 8.1.1 makes no mention of submitting a claim, rather only initiating it by written notice. Moreover, without substantiation (submission) of the claim, defendant was in no position to participate in the dispute resolution processes provided for in the contract, even if there were any. TA submitted its first certified claim on March 8, 2012. 120 days from March 8, 2012 was July 10, 2012. By this analysis, TA had until July 10, 2014 to bring an action against OSFC based on its certified claim of March 8, 2012, well beyond the filing of this action.

⁵⁸Even if the 120 days started to run on February 17, 2011 when TA first initiated its claim, this action still would have been brought within the two year statute of limitations because the 120 day period would not have run until June 17, 2011, giving TA until June 17, 2013 to file this action.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-33-

DECISION

3. Failure to Provide Notice and Presentation of its Claim (Fourth Defense)

OSFC alleges that TA "failed to provide the statutorily and contractually mandated notice and presentation of its claim."⁵⁹ OSFC did not identify which provision(s) of the Contract TA failed to comply with, nor did it identify a statute or statutes referred to in this defense. Assuming OSFC is alleging that TA failed to comply with the GC Article 8 initiation, certification and submission requirements for claims, then what OSFC is alleging is a failure to perform conditions precedent to TA's right assert a claim. *Boone Coleman Constr., Inc. v. Vill. of Piketon*, 2014-Ohio-2377, 13 N.E.3d 1190, ¶ 21 (4th Dist.).

The Contract provided that if TA failed to perform specific conditions precedent to asserting a claim, such claim was irrevocably waived (JX-B/61-63; GC 8.2.2, GC 8.3.5, GC 8.4.2 and GC 8.5.3). Even though it did not plead waiver as an affirmative defense in its answer, OSFC has focused its arguments on some of these express waiver provisions, each of which is triggered by noncompliance with corresponding conditions to be performed by TA.⁶⁰ Waiver is an affirmative defense that must be pled under Civ.R. 8(C) or it is waived.

⁵⁹OSFC Answer and Counterclaim filed August 20, 2013, ¶ 112.

⁶⁰OSFC also alleges that this obligation is mandated by statute, but in this case it is not (Answer filed August 20, 2013, paragraph 112). R.C. 153.12(B), upon which OSFC relies in its post trial brief, only requires compliance with the dispute resolution procedures in the contract and as established by the Department of Administrative Services (DAS). OSFC did not submit any evidence of any dispute resolution procedures established by DAS, nor did it submit any evidence of job site dispute resolution procedures agreed to by the parties as the result of partnering. From the evidence submitted, other than the provisions of Article 8 for initiating, certifying and submitting a claim, there was no job site dispute resolution procedures with which TA could address its claim. Given the omission of job site dispute resolution procedures, the Article 8 process appears to be nothing more than a roadblock to TA's claim, full of boilerplate time requirements and waiver provisions, and offering TA nothing more than a road to nowhere when it came to a real process for actually resolving the claim. The court recognizes that the parties engaged in some type of job site dispute resolution process, but there is no evidence that they followed the Contract in doing so.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-34-

DECISION

Affirmative defenses other than those listed in Civ.R. 12(B) are waived if not raised in the pleadings or in an amendment to the pleadings. Civ.R. 8; Civ.R. 15.

Jim's Steak House v. City of Cleveland, 81 Ohio St.3d 18, 20, 1998-Ohio-440, 688 N.E.2d 506 (1998).

See also, *George Byers Sons, Inc. v. Smith*, 1999 Ohio App. LEXIS 3648, 1999 WL 595105 (Ohio Ct. App., Franklin County Aug. 10, 1999).

Having failed to plead waiver in its answer or an amended answer OSFC has waived its right to assert waiver as a defense to TA's claim. However, even if the defense had been affirmatively pled, it would nevertheless be ineffective against TA's claims for the following reasons:

a. TA Substantially Complied with GC Article 8.

TA notified OSFC through LL on February 17, 2011 that it intended to submit a claim once it received revised drawings. Its notice was predominately based on a lack of complete drawings for construction of the dorms (TA-0245).⁶¹ At that point TA was experiencing difficulties during the submittal process and was within weeks of mobilizing on site to begin construction. TA advised OSFC/LL that it could not estimate the impact to its costs or to the schedule associated with the new drawings until they were received. LL acknowledged that fact on March 1, 2011 (TA-0256/1). TA advised LL/OSFC that issuing the drawings that had been promised for months would help to minimize impacts to its costs and to the schedule. LL understood the importance of getting the revised drawings to TA (TA-0236,

⁶¹It is worth noting here that GC 8.1.1 did not require TA to give notice within 10 days after the "first" occurrence of the event giving rise to the claim, but merely required notice within 10 days after occurrence of the event. Here, the primary event (incomplete, and as it turns out, unapproved plans) occurred daily and continuously throughout construction.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-35-

DECISION

TA-0237). It was or should have been clear to OSFC and LL that TA could not submit a certified claim until it received the revised drawings. In other words, TA's ability to submit a certified claim on the basis of its notice of claim was within the exclusive control of OSFC/LL/SHP. So long as the revised drawings were withheld, TA could not be reasonably expected to comply with the requirements of Article 8.

Disregarding the procedure set forth in Article 8, LL/Keith responded to TA's notice on March 1, 2011 setting forth a list of reasons why TA did not have a claim at that time and advised TA that the completed drawings were being provided that day.⁶² Keith also told TA that he considered the notice/claim "closed." TA continued to notify OSFC/LL by email during construction that it was being impacted by a lack of revised drawings (TA-0294, TA-0305, TA-0325). In addition, issuance of revised drawings was a regular subject of discussion in progress meetings for months starting on February 7, 2011 (JX-I-21/10-12, Item 003-002) wherein TA and other contractors were repeatedly promised the updated drawings, until on July 18, 2011 LL finally told the contractors that it would not be issuing an updated "construction set" of drawings (JX-I-22/12). By this time, construction was well underway on six of the twelve buildings and many, but not all of the issues with the drawings had been resolved through the RFI process.⁶³

⁶²While LL/Keith may contend it had a good faith belief that the updated drawings would be issued that day, he had no reason to believe this to be true for two reasons: 1) SHP/Berardi had made similar promises for months and failed to deliver; and 2) Keith knew that even if the drawings were issued, LL would review them before releasing them to the contractors and that would take time. Previous attempts to issue updated drawings were not successful (TA-0194).

⁶³The impact of the drawings will become more clear in the discussion of TA's loss of productivity damages where the evidence demonstrates that the costs for rough carpentry labor declined during construction of the later starting dorms.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-36-

DECISION

None of TA's work was performed with plans approved by DIC.⁶⁴ Instead, TA continued to work with a cobbled set of plans that attempted to incorporate the hundreds of RFI's and other informal sketches and design band-aids that had been applied by SHP and LL to the design. Wilhelm put together binders for the workers to use to build the dorms instead of the complete set of construction drawings that were never issued (e.g. TA-0800, TA-0801). Looking at these binders it is hard to imagine how TA managed to complete its tasks. TA's work was impacted throughout construction not only because of the confusing drawings, but also because of a lack of timely answers to questions about the drawings and the specifications.

On March 1, 2012, TA again sent written notice to LL that it was initiating a claim. This time, however, TA was far enough along in construction of the dorms that it could actually quantify, certify and submit its claim, even though the costs would continue to grow. On March 8, 2012, TA submitted its first certified claim to OSFC/LL for consideration. Again, LL disregarded the Article 8 process. In response to TA's certified claim OSFC/LL with the assistance of SHP was required to schedule a job site dispute resolution meeting in accordance with the partnering agreement within 30 days from receipt of TA's certified claim (JX-B/64, GC 8.8.2). However, without a partnering agreement setting forth the job site dispute resolution process, the Article 8 process was on the road to nowhere.

OSFC knew throughout construction that TA would be making a claim and that it could not make a claim until it could capture its costs. The court finds

⁶⁴The risk of error and disruption to the work was high considering the fact that various crews for multiple prime contractors on twelve different buildings all in various stages of construction were expected to incorporate hundreds of changes into their bid set of drawings and hope that their set was exactly like the other contractors' sets. The whole point of getting a complete and updated set of drawings was so the contractors would all know that they were building from the same set of plans and that they were building the dorms with a complete design.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-37-

DECISION

that TA substantially complied with the notice and claim requirements of the Contract insofar as they were enforceable, that any delay in certifying and submitting a claim was OSFC's fault, not TA's and that OSFC was not prejudiced.

b. By its Conduct OSFC Waived its Right to Enforce GC Article 8.

Through its conduct and that of its agent, LL, OSFC waived the notice, certification and submission requirements of Article 8 and prevented TA from complying with such requirements. (Amended Complaint, ¶ 57.)

OSFC/LL knew that TA could not submit a certified claim until it had the revised drawings in hand and could review them to determine the impacts, if any, to its costs and the schedule. OSFC/LL knew this because TA advised LL of its need for the drawings in order to submit its claim when it initiated the claim on February 17, 2011 and again on February 23, 2011 (TA-0245).

TA also advised LL that OSFC could mitigate potential cost and schedule impacts by promptly issuing revised and updated drawings. On March 1, 2011, LL/Keith acknowledged that TA could not anticipate its costs at that time (TA-0256/1) stating, "[p]er specification section 8.1.2.1 it is noted that you are unable to anticipate costs at this time." Keith went on to advise TA that the revised drawings would be available that same day and that he (Wilhelm) should consider the "notification issue closed at this time." The drawings were not made available that day and for months afterwards they were routinely promised, but not issued to TA. TA's ability to submit a claim was controlled entirely by OSFC so long as revised drawings were withheld.

Even after TA submitted its first certified claim, LL disregarded the dispute resolution process and did not schedule a job site meeting within 30 days as required by Article 8, GC 8.8.2. Instead, LL scheduled a meeting over 130 days after TA submitted its certified claim. Following the meeting (albeit late)

2015 SEP 17 PM 4:43

Case No. 2013-00349

-38-

DECISION

LL was required to issue its written analysis prepared by LL and SHP to TA within 14 days (Article 8, GC 8.8.4). Here again, LL ignored the Article 8 process and did not submit a written analysis of TA's certified claim for another 45 days.

TA submitted its second certified claim on November 7, 2012 (supplemental claim, TA-0659). There is no evidence that LL responded at all to the second certified claim. OSFC's disregard for the Article 8 process was further evidenced by its issuance of change orders to TA Mechanical and Vaughn Industries for claims allegedly resulting from delays caused by TA. Keith and Smith admitted that LL did not follow the Article 8 process for these claims either. They just paid them.⁶⁵

[W]aiver of a contract provision may be express or implied. *Lewis & Michael Moving & Storage, Inc. v. Stofcheck Ambulance Serv., Inc.*, 10th Dist. No. 05AP-662, 2006-Ohio-3810, ¶ 29, quoting *Natl. City Bank v. Rini*, 162 Ohio App.3d 662, 2005-Ohio-4041, ¶ 24, 834 N.E.2d 836, citing *Griffith v. Linton* (1998), 130 Ohio App.3d 746, 751, 721 N.E.2d 146. [W]aiver by estoppel exists when the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon it. (Emphasis omitted.) *Id.*, quoting *Natl. City Bank* at ¶ 24, quoting *Mark-It Place Foods* at ¶ 57. Waiver by estoppel allows a party's inconsistent conduct, rather than a party's intent, to establish a waiver of rights. *Id.*, quoting *Natl. City Bank* at ¶ 24. Whether a party's inconsistent conduct amounts to waiver involves a factual determination within the province of the trier of fact.

⁶⁵Vaughn and TP Mechanical were paid over \$140,000 for additional work. Vaughn gave notice but never submitted a certified claim and TP Mechanical simply sent a letter asking for more money months after it was supposedly delayed. In neither instance did OSFC follow the Article 8 process.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-39-

DECISION

EAC Props., LLC v. Brightwell, 2011-Ohio-2373, ¶ 22 (10th Dist.).

Upon careful consideration of the evidence, the court is clearly convinced that by withholding the revised drawings from TA, disregarding its obligations under Article 8 and waiving the Article 8 procedures for other contractors on the Dorm Project, OSFC, through the authorized acts of its agent LL, knowingly and impliedly waived strict compliance with the initiation, certification and submission requirements of GC 8.1, GC 8.2, GC 8.3, GC 8.4 and GC 8.5. Accordingly, the provisions of GC 8.1.4, GC 8.2.2, GC 8.3.5, GC 8.4.2 and GC 8.5.3 were likewise waived and as such OSFC is estopped to assert them in defense of TA's claim.

c. OSFC Prevented TA's Strict Compliance with Article 8.

The initiation, certification and submission requirements of Article 8 are also conditions precedent that ordinarily TA would have to perform in order to assert a claim.

Notice provisions in contracts operate as conditions precedent to a party's recovery of damages for a breach when the parties expressly indicate such an intent. See *Moraine Materials Co. v. Cardinal Operating Co.*, 2d Dist. Montgomery No. CA 16782, 1998 Ohio App. LEXIS 5387, 1998 WL 785363, *6 (Nov. 13, 1998). Consequently, "[i]t is well established under Ohio Contract Law that a party must comply with all express conditions to be performed in case of breach before it can claim damages by reason of the breach." *Au Rustproofing Ctr., Inc. v. Gulf Oil Corp.*, 755 F.2d 1231, 1237 (6th Cir. 1985). And a "right of action requiring notice as a condition precedent cannot be enforced unless the notice provided for has been given." *Id.*

Boone Coleman Constr., Inc. v. Vill. of Piketon, 2014-Ohio-2377, 13 N.E.3d 1190, ¶ 21 (4th Dist.).

2015-SEP 17 PM 4:43

Case No. 2013-00349

-40-

DECISION

A party who prevents performance of another cannot take advantage of such noncompliance or nonperformance.

Suter v. Farmers Fertilizer Co., 100 Ohio St. 403 (1919), Syllabus 4.

If a party prevents the occurrence of a condition, the condition is excused.

Crawford v. By Lamb Builders, 1993 Ohio App. LEXIS 3949, *13, 1993 WL 303684 (Ohio Ct. App., Franklin County Aug. 10, 1993).

Ohio courts have held that something more than actual notice of a claim on the part of the state is required to excuse a contractor from complying with the claims requirements of a contract.

Therefore, under *Dugan & Meyers* 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.

Stanley Miller Constr. Co. v. Ohio Sch. Facilities Comm'n, 2010-Ohio-6397, ¶ 17 (10th Dist.)

Here there was more than actual notice of the basis for TA's intent to make a claim. In addition to actual notice, OSFC, through its agent, LL, continually led TA to believe that it would be furnished updated/revised drawings, and not just once, but regularly for over five months after TA first gave written notice that it intended to file a claim.

By not issuing revised drawings to TA in a timely manner, OSFC, by and through its agents LL and SHP, prevented TA from complying with the conditions precedent under Article 8 of the General Conditions. TA could not reasonably assess its losses and certify a claim until its work was near

2015-SEP 17 PM 4:43

Case No. 2013-00349

-41-

DECISION

completion. As such, TA's performance of the Article 8 time requirements for claim initiation, certification and submission was excused.

For all of the foregoing reasons, OSFC's Fourth Defense is without merit.

d. Failure to file an Article 8 claim for release of liquidated damages (not pled as an affirmative defense).

OSFC contends that TA's failure to submit an Article 8 claim for return of the liquidated damages constitutes a waiver of that claim. OSFC cites no authority for such a position, nor has it directed the court to any evidence or reference to any contractual provisions to support such a contention.

Under GC Article 8 of the General Conditions of the Contract a contractor is only furnished with two reasons to file a certified claim: 1) an increase in the Contract Sum, GC 8.4; 2); an increase in the Contract Time, GC 8.5; or both. Just because Article 8 is entitled "Dispute Resolution" does not mean a contractor has to file a certified claim for payment due or which has been wrongfully withheld. A certified claim under Article 8 serves to modify the contract, not enforce payments that are due and unpaid. R.C. 153.12(B) only requires a contractor to follow administrative remedies provided for in the contract and dispute resolution procedures in accordance with guidelines established by DAS. The contract does not provide the contractor with any administrative remedy to recover wrongfully withheld liquidated damages and there was no evidence that DAS established a dispute resolution process for the Dorm Project, or construction projects generally.

Moreover, TA did seek the return of liquidated damages through the Article 8 process in a timely manner. In its March 8, 2012 certified claim, TA stated on page two, "[i]n addition to the delay and inefficiency damages noted above, TA is also demanding the present amount of liquidated damages

2015 SEP 17 PM 4:43

noted below to be released immediately. In addition, TA intends to seek interest on these payments that have been wrongfully withheld." (TA-0563/2).

Wrongful withholding of liquidated damages occurs every day the money is withheld. Because it is a liquidated sum, as a matter of law interest accrues everyday in recognition of that fact. The claim initiation requirement of GC 8.1.1 only requires written notice of a claim within 10 days of the occurrence of the event giving rise to the claim, not the initial occurrence, first occurrence, or when the event first occurs. In the case of wrongful withholding of liquidated damages, the wrongful withholding occurs daily. Here, after the initial withholding of \$296,000, OSFC withheld an additional \$90,000 every month thereafter through and including the pay application for July 10, 2012 (TA-0732). According to OSFC, TA would have to file a claim every month for return of liquidated damages. The Contract has no such requirement.

This contention is without merit.

4. Release (not pled as an affirmative defense)

Although OSFC did not plead release as an affirmative defense, it does contend that change orders signed by TA released OSFC from any prior/present claims. (STATE OF OHIO'S PROPOSED FINDINGS OF FACT, Page 3, CHRONOLOGY OF KEY EVENTS, Proposed Finding No. 3, filed July 20, 2015). Each of the 26 change orders (JX-F-01 through JX-F-26) signed by TA included the following release language:

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.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-43-

DECISION

In its Proposed Finding No. 3, OSFC contends, that such language amounts to a release. Under Civ.R. 8(C), certain affirmative defenses of which "release" is one must be pled in an answer.⁶⁶ OSFC has not pled the release language as an affirmative defense and as such the defense is waived. *Jim's Steak House v. City of Cleveland*, 81 Ohio St.3d 18, 20, 1998-Ohio-440, 688 N.E.2d 506 (1998); see also, *George Byers Sons, Inc. v. Smith*, 1999 Ohio App. LEXIS 3648, 1999 WL 595105 (Ohio Ct. App., Franklin County Aug. 10, 1999).

Moreover, the language of the release does not apply to extensions of time or delays caused by OSFC that were not related to the change. The language of the release is purely economic in that the compensation provided by every change order was in full 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**" (emphasis added). There is no mention of waiving claims for extensions of time, inefficiencies, disruptions or delay impacts to work not related to the change. See also, *J&H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Facilities Comm'n*, 2013-Ohio-3827, ¶ 61 (10th Dist.).

TA's claim is associated with work it had to perform within its original scope, but under circumstances that made its work more difficult and inefficient and for costs incurred correcting work damaged by others. It also seeks damages for delays caused by OSFC that extended completion of the Dorm Project. The release language of the change orders would only bar TA's claim to the extent its damages relate to work performed pursuant to the change order. OSFC presented no evidence to connect any of TA's claim to the scope of any change order work. Accordingly, even if OSFC had

⁶⁶Ohio Civ. R. 8 (C) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively * * * release, * * *, waiver, * * * and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-44-

DECISION

pled the release as an affirmative defense, there is no evidence to support the defense other than the language of the release itself.

OSFC's contention that the release language of the change orders executed by the parties bars TA's claims is without merit.

Any other contentions by OSFC in defense of TA's claims are either without merit as a matter of law, have not been pled or are not supported by the evidence.

V. TA'S CLAIMS AGAINST OSFC

TA's claim against OSFC is for breach of contract and to prevail TA must allege and prove: A) the existence of a contract; B) performance by the plaintiff; C) breach by the defendant; and D) damages or loss to the plaintiff. *Traveny v. University of Akron*, 1999 Ohio App. LEXIS 6528 (Ohio Ct. App., Franklin County Aug. 12, 1999).

A. Existence of a contract.

There is no dispute over the existence of the Contract. Both parties referred to the Contract during trial and it was admitted by stipulation as exhibit JX-A. Although JX-A it is only the CONTRACT FORM, it bears the signatures of the parties and forms a part of the Contract Documents, which, when taken together are the Contract.

B. Performance by TA.

Except to the extent its performance was excused by the conduct of OSFC, TA otherwise substantially performed its obligations under the Contract and completed construction of the dorms for occupancy in August 2012 (TA-0630). TA contends that R.C. 4113.62 invalidates the provisions of Article 8 (JX-B/60) to the extent it seeks damages for delay caused by OSFC and that therefore its performance of the conditions of Article 8 precedent to making a claim are excused. The court has found that TA substantially performed its obligations under Article 8; that OSFC prevented TA from strictly complying with such provisions; and that by its conduct OSFC waived strict compliance with such provisions. In light of these findings, application of R.C.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-45-

DECISION

4113.62(C)(1) to invalidate provisions limiting its remedies for delays caused by OSFC as urged by TA would not provide a different result.

C. Breach by OSFC.

In addition to the discussion below under various items of TA's damages, several issues related to breach are: 1) the budget and its influence on the Dorm Project and TA's claim; 2) problems with the drawings and their impact on TA's work; 3) the schedule and its impact on TA's claim; and 4) LL's and SHP's concealment of material facts from TA.

1. The budget and its influence on the Dorm Project and TA's claim.

Managing the budget was difficult from the outset for several reasons. Funding for the OSBD Project came from appropriations through the Capital Bill to OSD and OSSB. The funds were appropriated based on a planned development of a single campus combining residential and academic facilities for both OSD and OSSB. While OSFC was the owner of the OSBD Project for purposes of planning, design and construction, the true owners were OSD and OSSB, and their needs drove the design, budget and construction schedule. OSD and OSSB necessarily competed for allocation of the funding during the planning, design and construction of their facilities. Almost immediately, when there was a change of administration (Gov. Taft to Gov. Strickland in 2007) OSD and OSSB successfully lobbied the new administration to keep their campuses separate, which in turn made the OSBD Project more expensive. However, as Director Hickman explained at trial, while the separate campus concept was accepted, the budget never increased to accommodate the additional costs associated with the change.

At the first Core Team Meeting on May 2, 2007, then OSFC Executive Director Michael Shoemaker announced that the budget was off by \$20 million and the facilities were off by 70-80,000 square feet. In other words, at the outset

2015 SEP 17 PM 4:43

there was not enough money and the facilities were too large. This problem never went away. The Core Team struggled to keep the facilities as accommodating as possible for OSD and OSSB, and at the same time try to find a way to pay for it. Construction was delayed for almost two and a half years while the architect developed a design for the OSBD Project (TA-0731/4). As of March 10, 2011, the OSBD Project was still potentially \$7.8 million over budget (TA-0260/16). This is about the time TA mobilized on site to begin construction of the dorms. Except for a small contingency allowance, there was no money to address issues that might arise during construction, such as TA's claim in this action.

Moreover, the "soft costs" for the architect (SHP) and the construction manager (LL) increased dramatically during the life of the OSBD Project. By June 2013 these costs had increased by almost 28% (JX-H-63/21). By the time LL finally responded to TA's first certified claim in September 2012, the budget did not have enough money to pay for the claim (TA-0637). Although Director Hickman testified that his statement in an email that there was no more money did not relate to the merits of TA's claim, the court did not find that position to be credible in light of the evidence and other testimony. At around that same timeframe, LL suggested to OSFC/Dowlen that OSFC could use \$500,000 of the liquidated damages withheld from TA's progress payments to help offset the budget shortage (TA-0641/4). It is clear to the court that TA not only had become a scapegoat for LL's mismanagement of the Dorm Project and SHP's poor design performance, but its unpaid contract balance served to address budget issues.

2. Problems with the drawings and their impact on TA's work.

Furnishing full and accurate construction drawings for construction of the dorms was not only mandated by R.C. 153.01(A), but it was essential to TA's

2015 SEP 17 PM 4:43

Case No. 2013-00349

-47-

DECISION

timely and efficient performance of the Contract. LL knew this and SHP knew this. TA even told OSFC as much when it initiated its claim in February 2011 almost a month before it mobilized on site. There are countless emails and other evidence acknowledging this fact. Yet, SHP/Berardi continually failed to issue drawings that were considered acceptable enough for LL to issue to TA.

Problems with the drawings began long before TA submitted its bid to build the dorms. By the time TA mobilized to the job site, several different sets of drawings had been generated by SHP during the construction documents phase of the design and, depending on the party, each set was being relied on in different ways. DIC thought TA was building the dorms from the plans approved in July 2010. TA was actually working from a modified set of plans upon which it based its bid. And, from the testimony of LL/Smith, it appears he was working from a construction set prepared by SHP after TA submitted its bid, but before construction began.⁶⁷ LL's chief superintendent, Smith, testified that some of the walls had two hour fire ratings when the job was bid and that the fire ratings never changed. In fact, none of the walls ever had a two-hour fire rating and in fact the fire ratings did change at least twice. By the time the dorms were almost complete at least two additional sets of drawings had been generated by SHP and submitted to DIC each with different fire rated walls than what TA was issued at the time its bid was submitted. Even when these sets were approved, LL did not issue them to TA.

Although from the testimony there were many other sets of drawings issued by SHP throughout the design and construction of the dorms, there were

⁶⁷It was telling to hear Smith testify that the fire ratings never changed from what was bid except for some smoke walls in the trusses. He also testified that the walls between dorms were 2-hour walls. If that is true, his set of plans had to have been different from the bid set being used by TA because the only fire-rated walls in the bid set was a 1/2 hour rated wall between the sleeping rooms and the living area. This helps to explain the email from LL/Keith to SHP/Predovich on July 27, 2011 following an attempted inspection by a confused DIC inspector (TA-0410).

2015 SEP 17 PM 4:43

Case No. 2013-00349

-48-

DECISION

four different and specific sets of drawings that are relevant to the issues and which were admitted as evidence at trial: a) **JULY2010 SET** -partial DIC approval (TA-0900); **OCT2010 BID SET**, not approved by DIC (TA-0901); **AUG2011 SET**, labeled partial DIC approval (TA-0902); and **FINAL SET**, full approval July 18, 2012 (TA-0903). They are summarized as follows:⁶⁸

- a. **JULY2010 SET (first partial approval by DIC):** This set of drawings was issued by SHP on April 16, 2010 and filed with DIC on June 1, 2010. [see TA-0900 for an example of these drawings for OSD1 and OSD2]. They were labeled "Permit and Review." The JULY2010 SET was issued to bidders for the first bid opening on July 22, 2010, which bids came in almost 40% over the estimated amount.⁶⁹ On July 29, 2010, a week after the first bid opening and almost three months before TA submitted its bid, DIC issued its first Certificate of Plan Approval (partial) along with Correction Letter No. 1 and Addendum No. 1 (Plaintiff Exhibit TA-0091/2-5], which included a list of thirteen (13) items that needed correction. Item No. 1 was entitled "Incomplete Plans" and included the following comment:

"Because the construction documents do not have enough information for a complete plan review, this correction letter is a request for missing information and contains a review only of the items submitted."

Each sheet on the JULY2010 SET had been stamped by DIC and marked "29 July 2010 Partial Plan Approval for Footer/Foundation,

⁶⁸The drawings are representative of various stages of issuance and approvals. This series of drawings is for Elementary and Middle School Dorms for OSD, but similar drawings for the other buildings were issued at the same time and approvals were also obtained at the same time.

⁶⁹The estimate was prepared by LL in consultation with SHP. The court understands that the July 2010 bids were high in part because of a PLA (project labor agreement) that was included in the bid specifications. A PLA can cause bids to be higher because it often forces non-union bidders out of the process. The PLA was deleted from Dorm Bid #2 in October 2010.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-49-

DECISION

Slab and Shell only Correction and Addendum lettes (sic) are attached" (TA-0900).

The "Type of Construction" listed on the JULY2010 SET was designated V-A, and showed 1-hour fire rated exterior walls, one hour fire rated walls between the dorm rooms and bathrooms and, one-half hour fire rated and smoke walls between the dorm rooms and the living/water/mechanical areas. The JULY2010 SET was the first set of drawings for what would become a very confusing series of drawings for the Dorm Project. First of all, the JULY2010 SET was not issued for the solicitation of TA's bid and nor was it disclosed to TA at or before the bid opening.⁷⁰ Correction Letter No. 1 established a compliance date of August 28, 2010. So far as the evidence shows, this date was not met. Moreover, the approval was contingent. Addendum No. 1 to the partial approval stated:

"This partial Plan Approval is contingent upon a complete and adequate response to all of the items outlined in Correction Letter No. 1, dated July 29, 2010."

As of the date of Dorm Bid #2, October 28, 2010, SHP/Berardi had not responded to DIC's correction letter or addendum.

- b. OCT2010 BID SET (TA's bid):** Sometime between the July 29, 2010 Partial Plan Approval of JULY2010 SET by DIC and the re-bid of the dorms in October 2010, a revised set of drawings was issued by SHP, dated October 10, 2010, the OCT2010 BID SET. They were labeled "Bid-Oct.2010" on four of the first five sheets, including the cover sheet (A000), life-safety (LS-101 and LS-101a) and construction type (A002).

⁷⁰To the contrary, SHP removed the DIC stamp from every sheet on the OCT 2010 BID SET that TA used to prepare its bid.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-50-

DECISION

The remaining sheets are either labeled Permit and Review or not labeled at all and although they appear to be consistent with the JULY2010 SET, DIC's approval language is missing on all of the sheets and there was no evidence that they were the same as the corresponding sheets on the JULY2010 SET, nor did the court conduct a comparison of the two sets.⁷¹ There was no evidence that DIC approved the changes to sheets A000, LS-101, LS-101a or A002 in time for Dorm Bid #2. To the contrary, the court finds that it did not. Yet OSFC pushed forward soliciting bids using the OCT2010 BID SET, and these are the drawings upon which TA submitted its bid. These drawings were never approved by DIC and these are the drawings that LL insisted that TA use to construct the dorms. As it turns out, apart from not being reviewed and approved by DIC, they were incomplete, not coordinated, full of mistakes or omissions and did not incorporate hundreds of previous RFIs and other addenda items generated during Bid #1.

- c. **AUG2011 SET (second partial approval by DIC):** Before signing the Contract with OSFC, TA asked LL a number of questions about the drawings and specifications on November 12, 2010, one of which was whether a set of drawings incorporating Addenda 10-13 would be issued to the contractors (TA-152/5, Question #33).⁷² LL responded to all of TA's questions, except Question #33. On November 22, 2010, however, Matias, from Berardi, promised the contractors that he would

⁷¹Such a task would have been monumental and would not have revealed, in the opinion of the court, any outcome determinative information.

⁷²Addenda 10-13 included hundreds of revisions to the drawings and specifications in the form of pre-bid changes and pre-bid RFIs (JX-P-01, JX-P-02, JX-P-03 and JX-P-04). It is not unusual to have pre-bid changes to drawings and specifications and RFIs. However, the extent of these changes was unusual considering that the dorms were not complex facilities.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-51-

DECISION

furnish them an updated set of construction drawings incorporating all of the addenda and post-bid RFIs to date (TA-0164). Over the next seven months that promise (by Matias, Predovich and Keith) was made and broken time and time again.

SHP had ongoing problems with Berardi trying to respond to the project's needs. For example, SHP/Predovich and Berardi/Matias exchanged a series of emails starting on December 6, 2010 (TA-0176/1-3) where Matias from Berardi promised to have the OCT2010 BID SET updated by mid December. Berardi attempted to produce an updated set of drawings in mid December, but they were not acceptable to LL. LL's then superintendent, Joe Rice described them as useless drawings, garbage and useless trash (TA-0194). Vaughn Industries ("Vaughn"), the HVAC contractor also questioned LL about when the updated drawings would be issued. Unlike the other contractors such as Vaughn, TA had not worked on an OSFC project before. To this extent, TA was an outsider on the construction team and OSFC knew it (TA-0245). When Vaughn inquired about when the updated drawings were going to be issued it was given a full and truthful explanation by LL (TA-0198). Keith told Vaughn that while it had received the updated drawings they were not ready to be issued to the contractors because they were not correct.⁷³ From the evidence presented, TA was never afforded the courtesy of such an explanation. Instead, LL continued to lead TA on by telling them that updated

⁷³In his response to Vaughn's inquiry Keith erroneously stated that the architect was not obligated to furnish updated drawings, but that was not true. Because the drawings did not meet the minimum standard of R.C. 153.01, they had to be updated and because they were not correct and confusing by LL's own admission, they were necessarily not unambiguous. SHP was paid millions of dollars to produce drawings and specifications that were complete and unambiguous and in accordance with applicable codes and statutes (JX-N-03/15, paragraph 2.5.1). OCT 2010 BID SET was not such a set of drawings.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-52-

DECISION

drawings were coming. For months the updated drawings were just around the corner.

SHP's consultant, Mr. Koehler, a registered architect, testified that Berardi fell below the standard of care for architects in terms of timeliness in completing the construction drawings, obtaining a permit and the quality of the documents. When asked to apportion the responsibility for the design problems as between SHP and Berardi, Koehler testified that in his opinion if Berardi "had not been involved in this project, none of us would be sitting in this room." Koehler was also critical of the timeliness of Berardi's performance as it related to responding to DIC's comments, producing updated construction drawings and the inaccuracies in the details of the construction drawings produced by Berardi.

SHP/Berardi continued trying to update the OCT2010 BID SET. However, according to testimony from C. Keith, each time SHP issued an updated set of drawings LL discovered problems with the drawings and would not issue them because they were not correct.⁷⁴ By July 2011, SHP/Berardi gave up trying to update the drawings, but they did not give up on getting approval for the drawings from DIC. After all, until OSFC obtained fully approved plans for final inspection it could not obtain a certificate of occupancy (TA-0440/3) and TA could not get a final inspection.

⁷⁴An email on July 7, 2011 from LL/Keith to SHP/Predovich sums up the problems that the confusing and incomplete plans were causing. (TA-0410).

2015 SEP 17 PM 4:43

Case No. 2013-00349

-53-

DECISION

On August 23, 2011, DIC issued a partial approval of a Construction Set (AUG2011 SET) for the dorms (TA-0902). This set of plans was labeled "Construction Set."⁷⁵ This partial approval included the general trades work, but again was issued with another correction letter and the approval was contingent on complete and adequate responses to all previous correction letters (TA-0440/3). There is no evidence that SHP furnished a complete and adequate response to the correction letters issued by DIC as required by the certificate of partial approval for AUG2011 SET until over nine months later when, on June 1, 2012, it submitted fire alarm shop drawings (TA-0599). Moreover, the AUG2011 SET was never issued to TA and the court finds this perplexing. OSFC finally had an approved (partially) set of plans (labeled "Construction Set") and yet they were not issued to the contractors, at least not to TA. Instead, TA continued to construct the dorms from the unapproved, confusing and incomplete OCT2010 BID SET.⁷⁶

- d. FINAL SET (Final Approval):** During the later stages of construction SHP sought final approval from DIC for the plans for the dorms by submitting the FINAL SET to DIC labeled "Construction Set" (TA-0903).⁷⁷ Without final approval, OSD and OSSB could not occupy the dorms (TA-0440/3, ¶ 5). On July 18, 2012, DIC issued its Certificate of Final Plan Approval (TA-0619). By this time, according to OSFC, TA's

⁷⁵This was misleading to DIC because this set of plans was never used for construction.

⁷⁶Exhibits TA-800, TA-801, TA-802 and TA-803 are examples of binders that Wilhelm had to put together for his workers. Rather than using a set of drawings, the workers had to work from a hodge-podge of RFI responses, sketches and other documents to figure out how to build the dorms.

⁷⁷Like the AUG2011 SET the FINAL SET was not used for construction although it was labeled as such.

2015 SEP 17 PM 4:43

work had been substantially complete for over six weeks.⁷⁸ A certificate of occupancy was issued on August 16, 2012 (TA-0632). The same day it was congratulations all around, except to the contractors who actually built the dorms (TA-0629).

It is telling that the AUG2011 SET was the only "Construction Set" of plans approved by DIC (conditionally) for all of the general trades work prior to substantial completion and yet this set was never issued to TA. Of the four sets, three were DIC approved either partially or fully, yet only the unapproved OCT2010 BID SET was ever issued to TA. Yet, it is from the unapproved OCT2010 BID SET and the hundreds of piecemeal changes, sketches and corrections that TA was expected to build the dorms in an efficient and timely manner and pursuant to a poorly developed, accelerated and manipulated schedule. The design was in such a state of confusion and disarray that the architect itself was never able to issue a comprehensible set of construction drawings to LL's satisfaction so that they could be issued to the contractors.

3. The schedule and its impact on TA's claim.

Problems with the schedule had been hovering over the Project for months before TA submitted its bid (TA-0065). LL had been struggling with the schedule for years. As McCarthy pointed out in his testimony and reports, the Bid Schedule was not developed in accordance with accepted industry standards to the extent it was to reflect a true critical path with logically connected activities. Moreover, according to McCarthy, to meet the schedule TA and the other contractors would have had to perform their work with military precision; and that was before problems with the drawings began to manifest themselves.

⁷⁸OSFC proposed finding of fact #53.

2015 SEP 17 PM 4:43

As construction began LL compressed the schedule through schedule updates and recovery schedules. The sequence of work in the schedule changed constantly and was driven more by design problems than contractor problems. The Bid Schedule provided 302 days from commencement of OSSB1 to completion of OSD7. As construction progressed, LL manipulated the schedule by accelerating some activities which resulted in stacking of trades which in turn led to inefficiencies.⁷⁹ As of the June 2011 Update Schedule, the project duration had been reduced by 16 days to 286 days. LL was essentially fitting more work into less time, at a time when many of the design issues were still being worked out between TA and SHP, and at a time when DIC still had not approved plans for the general trades work. McCarthy's forensic schedule analysis provides a month by month view of how LL manipulated the schedule and a narrative of the effects of this manipulation (TA-1201/151-161).

McCarthy also pointed out the problem of not including additional work at the dorms in the schedule such as the Campus-wide Bid Packages, and particularly the casework (TA-1200/60-65). This may not have been a problem initially because all of the Campus-wide Bid Package work was not going to be installed until after TA was finished with its work according to testimony from Smith. That soon changed, though, when construction began. Design issues plagued construction almost immediately beginning with the foundations and conflicting dimensions. Everyone in the design/construction management teams were well aware that these issues and others would have a significant, negative

⁷⁹Stacking of trades occurs when two or more contractors occupy the same space at the same time and are forced to compete for time and space to complete the activity on the schedule. This is usually the result of poor scheduling or scheduling that attempts to accelerate the work without consideration of the impact on the contractors. Contractors typically work these types of issues out on the job site or through coordination meetings, but more often than not it results in inefficiency for one or the other or both.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-56-

DECISION

impact on completion of the dorms (TA-0146, TA-0162, TA-0260/11, TA-0345 and TA-0393).

4. Concealment of material facts by LL and SHP

- a. Roofing issue known to Predovich but concealed from TA.** As will be discussed below under OSFC's counterclaim for defective work, SHP/Predovich knew that the perimeter underlayment for the asphalt shingle roof was not properly designed. The way the underlayment was drawn on the plans was not code compliant. Rather than correct the drawings, Predovich represented to the DIC plans examiner that the materials specifications provided a code compliant instruction and that he (Predovich) would work with the construction manager to ensure that the perimeter underlayment was properly installed at all of the dorms (TA-0428) despite the mistake on the drawings. This conversation/email took place at a critical time when SHP was trying to get the AUG2011 SET approved. In fact, it was less than two weeks away from approval.

Resubmitting the plans would have risked delaying approval. As of the time Predovich made this representation to DIC, five of the dorms had been completed and the roofs would have had to be removed and replaced, partially or entirely. Predovich did not follow through on his representation to DIC that he would work with LL to make sure the underlayment was installed correctly on all dorms. OSFC's counterclaim for defective work includes exactly the same issue that would have been avoided if Predovich had followed through. Predovich's dilemma was that SHP would have likely been liable for the design error and removing and replacing the shingle roofs on five

2015 SEP 17 PM 4:43

Case No. 2013-00349

-57-

DECISION

dorms would have not only been expensive for SHP or OSFC, it is likely that it would have led to a significant time extension.

b. Concealing inspection issues with the drawings. On July 27, 2010, a structural inspection was conducted by DIC. The inspector was so confused by the drawings that he indicated he would not sign off on any further inspection requests until the revised drawings were available for his review. TA was not made aware of this and being excluded from inspections could not have known of this. This event is reflected in an email from LL/Keith to SHP/Predovich that same day (TA-410).⁸⁰ Yet, Smith did not record this significant problem in his daily report for that day (TA-K-01/114). This information, if properly entered in the daily log, would have been available to TA and the other contractors through the Prolog management system. This is a good example of a deliberate attempt to conceal the fact that the contractors were not working off of approved plans.⁸¹ It also renders Smith's daily log entries suspect when considering what else he may have omitted on important issues relevant to TA's claim. In other words, how honest and accurate are his entries?

⁸⁰Is should be noted that neither TA nor any of the contractors were copied with this email.

⁸¹In support of this conclusion the court notes that the email (TA-0410) was not copied to any of the contractors and especially not to TA who was responsible for installing the structural work. The court can only imagine how confused the inspector would have been if TA had been present at the inspection and shown him the OCT2010 BID SET of plans.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-58-

DECISION

To summarize, OSFC materially breached the Contract as follows:

- OSFC was required to obtain plan approval from DIC through SHP, its agent, and it failed to do so in a timely manner (JX-B/22, GC 2.9.1.1). TA was never furnished approved plans with which to build the dorms;⁸²
- OSFC, through its agents LL and SHP, repeatedly misrepresented to TA that it would be furnished with a full and complete set of construction drawings. Both SHP and LL either knew or should have known that such representations were false. SHP and LL also knew that TA was relying on such representations and that should such drawings not be issued, TA's work would be negatively impacted. The court finds that LL did not act in good faith in this respect by failing to disclose to TA the problems it was having with SHP/Berardi and the drawings.
- Under the Contract and R.C. 153.01, OSFC, through its architect, was required by law to furnish TA with full and accurate plans with details to scale and so drawn as to be easily understood for construction of the dorms, and yet OSFC awarded TA the Contract to build the dorms knowing its plans had been altered, were not approved by DIC and that they were incomplete;⁸³
- OSFC wrongfully withheld \$686,000 as liquidated damages from TA on December 20, 2011 starting with pay application No. 10 (JX-G-10/1; TA-0732) (see discussion under liquidated damages below), thereby failing to pay progress payments when due;

⁸²Even though OSFC obtained full approval for plans for the construction of the dorms on July 18, 2012, it never issued a copy of those plans to TA and by that time TA had substantially performed its obligations under the Contract.

⁸³The court does not find that OSFC impliedly warranted that the plans issued were full, accurate and complete so as to furnish a buildable design. Instead, the court finds that the plans issued to TA with which it was instructed to build the dorms did not meet the minimum requirements of R.C. 153.01(A) and were not approved by DIC for construction. The second provision of the General Conditions (JX-B/5) provided:

1.1.2 The parties to the Contract shall comply with Applicable Law.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-59-

DECISION

- OSFC wrongfully withheld deduct change order amounts from payments due TA under the Contract based on unsigned change orders (discussed in more detail below);
- OSFC, through its agent LL, prevented TA from scheduling and attending DIC inspections when the Contract not only obligated TA to schedule and attend such inspections, but also gave it the right to do so;
- OSFC, through its agent SHP, more often than not failed to furnish timely responses to RFIs, which responses were necessary for TA to timely and efficiently perform its work;
- OSFC, through its agents SHP and LL, did not act in good faith in the performance of its obligations to TA under the Contract. It regularly ignored contractual requirements for Article 8 claims for other contractors when it suited its purpose, ignored its obligation to furnish approved plans, insisted that TA perform its work with plans that it knew had not been approved by DIC, insisted that TA perform additional scope work without a signed change order and failed to follow or completely ignored its obligations under the Article 8 dispute resolution process when processing TA's claims.
- OSFC, through its agent LL, failed to properly coordinate the work of other contractors so as not to cause damage to TA's completed work and unfairly managed the punchlist process;⁸⁴

⁸⁴LL and OSFC knew that the casework was going to interfere with TA's work shortly after TA began construction and considered having TA install the casework pursuant to a change order (TA-0345). This would have probably minimized any delay but, more importantly, as it turns out it would have prevented the significant damage to TA's drywall and painting work caused by installation of the casework, or at least it would have made correcting such damage the responsibility of TA.

2015 SEP 17 PM 4:43

- OSFC, through its agent LL, prevented TA from protecting its work from damage caused by other contractors or documenting that damage by providing the casework and other Campus-wide Bid Package contractors exclusive access to the dorms.

D. DAMAGES

TA is seeking \$3,721,931.33 in damages from OSFC, consisting of \$2,897,325.91 for delay, costs to correct work for which TA was not responsible, loss of productivity caused by OSFC and its agents,⁸⁵ LL and SHP, and \$824,605.42 for wrongfully withheld liquidated damages and contract balance.⁸⁶ TA's claim for damages falls into four separate and distinct categories: 1) delay; 2) loss of productivity; 3) corrective work for which TA was not responsible; and 4) payments due under the Contract. The law applicable to each category is different and the method of calculating damages for each category is different. Each item is analyzed in the order in which they appear.

⁸⁵It is important to distinguish between the loss of productivity claim which is not necessarily tied to delay, but rather conditions under which TA was forced to work, i.e. confusing drawings, unrealistic schedule, slow responses to RFIs, etc. and the damages tied to delay caused by OSFC which extended TA's work under the contract for several months. Loss of productivity is not a delay claim as such even though time plays a part in the analysis.

⁸⁶TA-1201/5 reflects the latest revision to the amounts TA seeks in damages. In addition, the amount of liquidated damages of \$686,000 was taken from the summary set forth in TA-0732, testified to by W. Koniewich at trial and confirmed by the minutes of Core Team Meeting held on June, 21, 2013 (JX-H-63/22). Although it does not determine any facts in this case, McCarthy testified that he had spent approximately 1000 hours analyzing and assisting with TA's claim. This testimony is relevant only to show just how complex the issues are in this case.

2015 SEP 17 PM 4:43

Case No. 2013-00349

-61-

DECISION

The damages sought by TA are as follows:

No.	Description	Amount of Damages Sought
1.	Extended General Conditions (Delay)	\$119,367.78
2.	Additional and Extended Trade Supervision Costs (Delay)	\$125,620.46
3.	Extended Project Management Costs (Delay)	\$166,451.39
4.	Extended Equipment Rental Costs (Delay)	\$34,351.92
5.	Unprocessed Change Order & Scope Adjustments (Delay)	\$22,029.67
6.	Impacts to Rough Carpentry Labor (Loss of Productivity)	\$1,320,299.99
7.	Additional Drywall Costs For Out-of-Sequence Work, Excessive Construction Damage, and Extended Punchlist (Damage Caused by Others)	\$498,003.90
8.	Additional Painting Costs for Out-of-Sequence Work, Excessive Construction Damage, and Extended Punchlist (Damage Caused by Others)	\$486,742.67
9.	Extended Home Office Overhead (Delay)	\$124,458.13
(A)	TOTAL CLAIM FOR INCREASE TO CONTRACT SUM	\$2,897,325.91
10.	Liquidated Damages Withheld by OSFC (Due Under the Contract)	\$686,000.00
11.	Payment of Contract Balance Withheld by OSFC (Due Under the Contract)	\$138,605.42
(B)	TOTAL CONTRACT SUM WITHHELD BY OSFC	\$824,605.42
	TOTAL AMOUNT (A) + (B)	\$3,721,931.33
	Prejudgment Interest	According to Proof

(Table 1)

2015 SEP 17 PM 4:43

Case No. 2013-00349

-62-

DECISION

In determining liability and calculating damages, the court was guided by the following propositions of law:

Where a right to damages has been established, such right will not be denied merely because a party cannot demonstrate with mathematical certainty the amount of damages due. *Geygan v. Queen City Grain Co.* (1991), 71 Ohio App.3d 185, 195, 593 N.E.2d 328. See, also, Restatement of the Law 2d, Contracts (1981) 145, Section 352, Comment a. Rather, 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. *Kinetico, Inc. v. Independent Ohio Nail Co.* (1984), 19 Ohio App.3d 26, 30, 482 N.E.2d 1345.

Tri-State Asphalt Corp. v. Ohio Dept. of Transp., 10th Dist. No. 94API07-986, 1995 Ohio App. LEXIS 1554 (Apr. 11, 1995).

Mathematical precision is not required in calculating damages. When presented with complex and continuing damages as demonstrated by the expert reports of McCarthy and as contested by Englehart, the court carefully considered both experts' testimony and their reports. However, the referee also drew upon his own knowledge and experience in determining liability and calculating damages. As one Ohio court opined:

Ordinarily, a witness may not testify as an expert unless his testimony relates to matters beyond the knowledge or experience possessed by lay [sic] persons; unless he is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter; and unless his testimony is based on reliable scientific, technical or other specialized information. Evid.R. 702. [citations omitted]. In the present case, the issue as to the cause, the fault, and the effect of the delays in the construction project, whether attributable in whole or in part to the owner, the architect, or the contractor, was not a matter which was highly technical, scientific in nature, or beyond the experience or knowledge of the average jury.

Jurgens Real Estate Co. v. R.E.D. Constr. Corp., 103 Ohio App.3d 292, 298, 659 N.E.2d 353 (12th Dist.1995).

2015 SEP 17 PM 4: 44

Case No. 2013-00349

-63-

DECISION

While the issues in *Jurgens* were by no means as complex as the issues here, the court here did not feel compelled to accept one expert's opinion or the other in determining liability or damages, but instead treated both experts' opinions and analyses as helpful. McCarthy and Englehart were both well-qualified and experienced in the matters before the court. Both were credible witnesses, but as expected, both witnesses and their reports favored their respective clients and the court took all of these observations into consideration in weighing the evidence, their testimony and reports.

And finally, an opinion from the Supreme Court of the United States provided further guidance, particularly because the court is convinced to a reasonable certainty by the greater weight of the evidence that OSFC breached the Contract and that TA was damaged by such breach of contract. Accordingly, justice requires an award of damages in some amount:

Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate." This, we think, was a correct statement of the applicable rules of law. Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible.

Eastman Kodak Co. v. S. Photo Materials Co., 273 U.S. 359, 379, 47 S.Ct. 400 (1927).

The only schedule analysis submitted at trial was performed by McCarthy.⁸⁷ McCarthy testified that TA was required to remain on the Dorm Project for an additional 197 days beyond the bid schedule duration (TA-1201/4). The court finds this to be

⁸⁷Englehart, was critical of McCarthy's schedule analysis, but Englehart did not perform a schedule analysis of his own.

2015 SEP 17 PM 4:44

Case No. 2013-00349

-64-

DECISION

established by the greater weight of the evidence. In his analysis McCarthy attributed 27 days to time extensions allowed by OSFC, 8 days to normal weather delays and 14 days to rework performed by TA that he described as self-inflicted, for a total of 49 days. He identified the days that were impacted by the rework and weather (TA-0736 and TA-0737).⁸⁸

The 27 days attributable to time extensions were accepted by TA through execution of a no cost change order and are therefore not compensable (Recovery Schedule 2 adopted by Change Order No. 13, JX-F-13, extending the time for completion of the Dorm Project to February 14, 2012). There was no evidence that weather days identified by McCarthy experienced anything other than normal weather conditions and as such are a risk allocated by contract to TA and not compensable (JX-B/63, GC 8.6.1.1). The 14 days spent by TA reworking its own defective/nonconforming work is also not compensable, as correction of defective/nonconforming work is within TA's scope of work (JX-B/26, GC 2.16). In his analysis McCarthy correctly deducted these 49 days from the 197 additional days that TA's work was extended and arrived at an adjusted total of 148 days (Extended Period) that TA was required to remain on the Dorm Project beyond the original completion date. McCarthy further opined that the Extended Period was caused by OSFC and not TA, explaining his opinions in both his initial report (TA-1200), his supplemental report (TA-1201) and testimony at trial. Much of the work performed during the extended period was for damage caused by other contractors to drywall and painting for which TA was not responsible and which TA was prevented from protecting.

After careful consideration of the evidence introduced at trial, the court finds that McCarthy's analysis of the compensable Extended Period was reasonable and

⁸⁸Together, the weather and rework days may have actually been more than 22 days. However, there were likely days with adverse weather or when reworking was occurring but neither had an impact on planned and executed work on that day. In such a case, that day would not impact the analysis because it did not delay TA's work.

2015 SEP 17 PM 4:44

Case No. 2013-00349

-65-

DECISION

supported by the greater weight of the evidence.⁸⁹ It is recommended that TA be compensated for damages it incurred as a result of the 148 day delay. These are delay damages as distinguished from damages for loss of productivity, corrective work for which TA was not responsible or for non-payment under the Contract.

1. Extended General Conditions.

TA seeks damages of \$119,367.78 it claims it incurred during the Extended Period for direct costs to the project including cleanup, temporary construction and security, safety, temporary electric, office & sheds, toilets, trash removal, loading and hauling, and temporary water. Whereas McCarthy initially calculated the total of these costs before overhead and profit at \$136,237.54 (TA-1200/81), Englehart calculated the same costs at \$145,436.36, also before overhead and profit. The costs were taken from specific segregated and cost coded activities set forth in TA's JCR. When McCarthy submitted his supplemental report (TA-1201/6), he reduced his calculation to \$101,322.28, but did not report the costs for each segregated activity. His explanation for the reduction was that in the initial report he used August 31, 2012 (TA-1200/81, Section VI.a.) as the last day of delay to calculate the costs whereas in his supplemental report he used August 2, 2012 (TA-1201/6, See spreadsheet), a difference of 29 days.⁹⁰ Englehart filed a supplemental report also, but he did not analyze or address McCarthy's supplemental calculation. Because McCarthy's total is

⁸⁹The court notes that in his original report, TA-1200, McCarthy gave a detailed description of the impacts to TA's work and the supporting documentation of those impacts and their causes. In addition, there were testimony and additional contemporaneous project records and correspondence to support McCarthy's analysis. In reaching this conclusion, the court took the criticisms, opinions and contentions of Englehart and other witnesses into account.

⁹⁰McCarthy used a per diem rate of \$684.61 per day in his supplemental report, which is not entirely accurate because it was obviously arrived at by dividing the original gross delay period of 199 days as set forth in his original report (TA-1200/81) into the sub-total for general conditions in the amount of \$136,237.54, yielding a quotient of exactly \$684.61 per day. However, because this is more likely to be less than recalculating this figure for the revised extended general conditions in the supplemental report the court accepts this per diem as a reasonable approximation of the costs incurred during the Extended Period, and it is substantially less than Englehart's calculation.

2015 SEP 17 PM 4:44

Case No. 2013-00349

-66-

DECISION

significantly less than Englehart's, the court accepts McCarthy's revised total to be a reasonable calculation of TA's gross costs for extended general conditions resulting from delay caused by OSFC, LL and SHP during the Extended Period.

However, as Englehart noted, McCarthy did not adjust the gross costs to account for any remaining original scope work that was performed during the Extended Period.⁹¹ This work was the responsibility of TA under the Contract. Because February 14, 2012 was the completion date for the Dorm Project under Recovery Schedule 2, the value of this remaining scope work is best reflected in the February 2012 pay application (JX-G-12/3), i.e. unbilled costs for Clean Up work under the Contract in the total amount of \$12,720.00 (JX-G-12/3).⁹² Deducting these unbilled costs from McCarthy's gross amount yields net adjusted costs for general conditions incurred during the Extended Period of \$88,602.28. TA is allowed 10% for overhead and 5% for profit on the Adjusted Extended General Conditions in the amount of \$8,860.23. The allowances for overhead and profit are consistent with and allowable under the General Conditions for change orders (JX-B/57, GC 7.6.5.6 and 7.6.5.8).

McCarthy also included 2% for additional surety bond premium. However, from the JCR it appears that TA only paid 0.88% to the surety as a premium for the contract and payment bond (TA-0659-044).⁹³ Moreover, there was testimony that the additional bond premium only becomes payable in the event of an audit by the surety and TA's CFO, Alan Starr (Starr), testified that an audit had not yet occurred. There was no

⁹¹Actually, TA's actual costs were much higher, which is not uncommon. From a review of the activities designated by cost code in McCarthy's supplemental report (TA-1201/6) the total costs for those activities actually exceeded the original estimate by \$176,360.98 before any markup for overhead and profit (see, JCR, TA-0659-044). During the course of construction the various activities typically vary from the estimates. The amount allowed here for extended general conditions when added to the amount of the original estimates is substantially less than what TA actually incurred on the Dorm Project overall.

⁹²Clean up was the only segregated cost included in the schedule of values accompanying the pay application and it had not been billed 100%.

⁹³According to TA's JCR it paid \$34,925.00 for the bond. Based on its contract sum of \$3,975,000 this results in a bond premium of approximately .88%.

2015 SEP 17 PM 4:44

Case No. 2013-00349

-67-

DECISION

evidence that the surety intended to audit the contract. Because TA has not incurred this cost and because payment of an additional premium is a mere possibility such costs cannot be reasonably certain to occur nor can they be calculated with reasonable certainty. The claim for a 2% additional bond premium is not compensable.

Including the allowance for overhead and profit, TA's total costs for extended general conditions are as follows:

EXTENDED GENERAL CONDITIONS	
Gross Amount for Extended General Conditions	\$101,322.28
Less Remaining Original Scope of Work	-\$12,720.00
Adjusted Extended General Conditions	\$88,602.28
10% Overhead	\$8,860.23
5% Profit	\$4,430.11
Damages for Extended General Conditions	\$101,892.62

(Table 2)

It is recommended that TA be awarded \$101,892.62 as damages for extended general conditions.

2. Additional and Extended Trade Supervision Costs.

TA seeks \$125,620.46 as damages for "additional" trade supervision costs because of the compression and acceleration of various work activities prior to February 14, 2012 and "extended" trade supervision costs incurred subsequent to February 14, 2012 during the 148 day Extended Period. Additional and extended costs are two different and distinct categories of costs often encountered in delayed construction

FILED
COURT OF CLAIMS
OF OHIO

2015 SEP 17 PM 4:44

Case No. 2013-00349

-68-

DECISION

projects and as such require separate analysis, although McCarthy lumped them together in his reports (See charts, TA-1200/82 and TA-1201/6).

TA's claim for "additional" supervision costs incurred prior to February 14, 2012 is actually a claim for "constructive acceleration." In other words, additional forces employed to meet the schedule when a time extension properly requested had been denied. The elements of a constructive acceleration claim are as follows:

(1) that the contractor experienced an excusable delay entitling it to a time extension; (2) that the contractor properly requested the extension; (3) that the project owner failed or refused to grant the requested extension; (4) that the project owner demanded that the project be completed by the original completion date despite the excusable delay; and **(5) that the contractor actually accelerated the work in order to complete the project by the original completion date** and incurred added costs as a result. [emphasis added]

Sherman R. Smoot Co. v. State, 136 Ohio App.3d 166, 178, 736 N.E.2d 69 (10th Dist. 2000).

The court finds that TA experienced excusable delays entitling it to time extensions; it properly requested the extensions;⁹⁴ OSFC refused to grant the requested extensions; and OSFC demanded that TA complete the Dorm Project on schedule. However, TA did not complete the Dorm Project on schedule, a necessary element of a claim for constructive acceleration. Without completing the work on schedule, OSFC derives no benefit from acceleration, and in fact there is no acceleration. As such, costs incurred for additional supervision by TA for Jason Kuhn from 11/15/11 to 2/14/12, Jack Fowler from 12/20/11 to 2/14/12 and K.C. Saint from 12/20/11 to 2/14/12 are not

⁹⁴TA requested 10 days per building on 11/9/11 (JX-F-26/2); TA requested 10 days extension on 10/19/11 (JX-F-25/2); TA requested 2 days on 8/3/11 (JX-F-22/2); TA requested 2 days on 8/3/11 (JX-F-21/2); TA requested 2 days per building on 10/6/11 (JX-F-02/2); TA requested 2 days on 7/20/11 (JX-F-16/2); TA requested 1 day on 8/15/11 (JX-F-14/2); TA requested 3 days on 7/26/11 (JX-F-12/2); TA requested 2 days on 6/9/11 (JX-F-06/2); and TA requested 2 days on 8/3/11 (JX-F-03/3), for a total of 36 days.

compensable (see, TA-0659/73-74, cost code 01-420). They are neither costs incurred during acceleration nor were they incurred during the Extended Period.

Costs for their time spent on the Dorm Project after February 14, 2012 are compensable as part of TA's delay damages. Unlike the general conditions, the February pay application did not reveal any discernible original scope work remaining for this category and therefore no such deduction is made. Based on the JCR (TA-0659-073 and 074, Cost Code 01-420) the costs for supervision incurred by TA for Jason Kuhn (\$45,508.45) and Jack Fowler (\$11,124.48) from 02/15/12 to 08/02/12 total \$56,632.93.⁹⁵ For the same reasons set forth in the analysis of the extended general conditions any additional bond premium is not compensable.

Including the allowance for overhead and profit, TA's total costs for extended trade supervision are as follows:

EXTENDED TRADE SUPERVISION COSTS	
Extended Trade Supervision Costs	\$56,632.93
10% Overhead	\$5,663.29
5% Profit	\$2,831.65
Damages for Extended Trade Supervision Costs	\$65,127.87

(Table 3)

For the same reasons set forth in the analysis of the extended general conditions any additional bond premium is not compensable. Accordingly, it is recommended that

⁹⁵This determination was made from the JCR cost code 01-420 entitled Supervision, see TA-659-074.

2015 SEP 17 PM 4:44

Case No. 2013-00349

-70-

DECISION

TA be awarded \$65,127.87 as damages for "extended" trade supervision costs and that it not be awarded damages for "additional" trade supervision costs.

3. Extended Project Management Costs.

TA seeks damages of \$166,451.39 it claims it incurred for project management costs during the Extended Period. McCarthy included in his analysis costs associated with TA's President, Koniewich (described as the Project Executive) and TA's CFO, Starr (described as the Project Accountant) for time spent on the Dorm Project during the Extended Period (see chart, TA-1201/7). Employment costs of home office personnel including executive compensation are not a direct cost to the project, but are instead part of the contractor's home office overhead, an indirect cost.⁹⁶ Such costs are captured in the 10% overhead allowance provided for in the Contract (JX-B/57, GC 7.6.5.6.1) for change orders. Because an award of damages including 10% overhead for delayed and disrupted work has the same effect as a change order, i.e. it increases the Contract Sum, including costs for Koniewich and Starr would result in overlapping recovery, and are therefore not allowed.

However, the costs for Wilhelm, the project manager, are recoverable as direct costs. According to the JCR and McCarthy's supplemental report (TA-1201/7), the unadjusted gross cost for Wilhelm during the delay period was \$49,000.00, which included 107 days full-time at the rate of \$400/day and 62 days part-time (25%) at the same rate. The court accepts this figure, but again, not without adjustment for original scope work not performed.

Original activities that would have been performed by Wilhelm and remained unbilled as of the February 2012 pay application were project meetings (\$720.00) and scheduling (\$2,709.00) for a total of \$3,429.00 (JX-G-12/3). From a review of the project records these were tasks routinely performed by Wilhelm during construction.

⁹⁶This is confirmed by the fact that no direct costs are recorded in any of the JCRs for Koniewich or Starr under the supervision cost code 01-420, or any other cost code associated with project management. (e.g. TA-659-073-74)