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COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

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**TRANSAMERICA BUILDING
COMPANY, INC.**

Plaintiff,

v.

**OHIO SCHOOL FACILITIES
COMMISSION,**

Defendant.

CASE NO. 2013-00349

JUDGE PATRICK M. MCGRATH

REFEREE SAMUEL WAMPLER

**STATE OF OHIO'S OBJECTIONS TO THE
REFEREE'S REPORT AND RECOMMENDATION**

I. INTRODUCTION.

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

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

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

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

Only in construction claims against the State of Ohio do you find the unique situation where they can be heard, in the first instance, by a non-judge. This can lead, as it has in this case, to some non-judicious findings.

Seldom do you find a Court referring to politics and yet that is what the Referee did in this case:

Politics and budgeting problems brought forth all of the regrets that such forces can bestow on people who are otherwise well intentioned. (Rec. p.138)

Courts stay away from politics as there is seldom any evidence of it, as was the case in this case, and it is also irrelevant what has motivated a party to do or not do something in a breach of contract case.

What is also non-judicious about this decision is that the Referee found that the Plaintiff had failed to prove the majority of their claim (loss of productivity) through the method that they had employed (measured mile) and then proceeded to re-do the contractor's claim (through a modified, total-cost approach).

For these and other reasons, the State of Ohio's objections should be sustained.

II. PLAINTIFF'S LOSS OF PRODUCTIVITY CLAIM.

The largest component of the Plaintiff's damages (over \$1.3 million) is a loss of productivity claim. These claims should always be viewed with suspicion and skepticism as they are not based upon a contemporaneous record of the actual losses which the contractor has suffered. While the Referee reduced the contractor's loss of productivity claim, the contractor should have recovered nothing.

The Plaintiff used a measured mile approach to these damages. In its simplest form, a measured mile analysis is where a contractor will take a part of the project that they did well on and argue that they should have done just as well on the rest of the project.

The Referee did get right what was wrong with such an approach and outright rejected this measured mile approach as to loss of productivity – the only method that the contractor

employed to arrive at such damages. TA has not proven its damages for loss of productivity to a reasonable degree of certainty utilizing the measured mile analysis prepared by McCarthy. That should have been the end of it. The contractor failed in its burden of proof.

What the Referee did instead is assume the non-judicious role of an advocate by actually putting together an alternative loss of productivity claim for the contractor. He did this by adjusting their bid, adjusting impacts, adjusting change orders and creating a Modified Total Cost calculation. (Referee's Report and Recommendation, pages 84 -91)(hereinafter R.R.&R.). This the Referee cannot do. For the foregoing reasons, the State of Ohio's objection should be affirmed and the Referee's recommendation for loss of productivity should be reduced to \$0.00.

III. THE STATE OF OHIO DID NOT WAIVE THE ARTICLE 8 PROVISIONS OF THE CONTRACT.

Another unique aspect of contracting with the State is the statutorily-enforced contract claim resolution process.

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

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

As the Tenth District Court of Appeals has repeatedly held, contractors are required to exhaust the claim resolution process within their contracts before they can proceed to file suit. If they don't, their claim is waived. *Stanley Miller Constr. Co v. Ohio School Facilities Comm.*, 2010-Ohio-6397; *Cleveland Construction v. Kent State Univ.*, 2010-Ohio-2906.

In an attempt to get around the contractor's failure to follow Article 8 in this case (by providing the State of Ohio with notice of any alleged impacts within ten days and then substantiate their claim within 30 days), the Referee found that the State of Ohio, through its agents, had waived the Article 8 process.

There is a provision within public construction contracts with the State to waive or change a provision of the contract. It is called a Change Order. These Change Orders are in writing. They describe the change and require all parties to sign off on it. There was no such change order in this case waiving Article 8 and that is the only way it could have been waived.

The Supreme Court has affirmed this proposition of law:

It is universally recognized that where a building or construction contract, public or private, stipulates that additional, altered, or extra work must be ordered in writing, the stipulation is valid and binding upon the parties, and no recovery can be had for such work without a written directive therefore in compliance with the terms of the contract, unless waived by the owner or employer. *Foster Wheeler Enviresponse v. Franklin Cnty. Convention Facilities Auth.*, (1997) 78 Ohio St.3d 353, 360.

Thus, the Referee erred as a matter of law in concluding the State waived Article 8.

The Referee also adopts an impossibility of performance test to overlook and overcome the contractor's failure to follow the statutorily-enforced dispute resolution process within the contract. The Referee found that until the contractor got the promised plan revisions, it couldn't know the nature and extent of its damages. (R.R.&R. pg. 35)

If a contractor wants to base its claim upon not having adequate plans, then it must prove how the inadequate plans have impacted and damaged it. If the contractor is truly impacted, it will know that on the first day of impact. It then has to give the State notice of that impact and substantiate it thirty days later. At the early stages of a claim, the Article 8 provisions require an "estimate," not pinpoint precision.

This is true because public owners are entitled to notice of any impact to their projects at the earliest occasion so they can work to mitigate such impacts.

The contract in this case is also clear. The failure of the contractor to follow Article 8 results in a waiver of its claim.

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

* * *

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

* * *

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

* * *

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

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

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

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

8.3.3.4 Copies of the Contractor's most recent job cost reports itemized by activity codes, including segregated general and administrative expenses for the most recent reporting period, and

for the period of the Contract, if available, and similar information for any Subcontractor claim included; and

8.3.3.5 The notarized certification described under GC subparagraph 8.2.1.1.

* * *

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

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

The following chronology is particularly telling:

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

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

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

TA's failure to follow Article' 8 is an absolute waiver of its claim.

For the foregoing reasons, the State of Ohio's objection should be affirmed and the contractor's total damage claim reduced to \$0.00.

IV. THE STATE OF OHIO'S LIQUIDATED DAMAGES ASSESSMENT SHOULD NOT BE RETURNED TO THE CONTRACTOR.

Another unique aspect of contracting with the State for public construction is statutorily-mandated liquidated damages. The General Assembly has mandated that all state construction contracts contain a statutory delay provision:

All contracts under sections 153.01 to 153.60, inclusive, of the Revised Code, shall contain provision in regard to the time when the whole or any specified portion of work contemplated therein shall be completed

and that for each day it shall be delayed beyond the time so named **the contractor shall forfeit to the state a sum to be fixed in the contract**, which shall be deducted from any payment due or to become due to the contractor.

R.C. §153.19 (emphasis added)

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

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

(Jt. Ex C)

Additionally, Section 3.3 of the Contract Form provides:

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

(Jt. Ex. A)

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

Transamerica did not and could not dispute that they didn't meet the roof enclosure deadline. They fired their subcontractor roofer, sued it, and blamed it for the

assessment of liquidated damages. In the lawsuit Plaintiff brought against its sub-roofer, it alleged:

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

Thus, Transamerica judicially admitted that the failures of its roofing subcontractor caused the assessment of liquidated damages. Just because the milestone date included work of another prime contractor does not excuse Transamerica's late compliance with its milestone.

Transamerica also did not dispute the amount of liquidated damages (once corrected) and there is no dispute that Transamerica failed to file an Article 8 claim requesting the return of liquidated damages. On the first day that the State of Ohio withheld liquidated damages which Transamerica didn't believe was justified, it had a statutorily-created, contractual duty to make a claim for such damages. The failure of Transamerica to make that claim is waiver of this portion of their damages.

In this case, the Referee excused the contractor's late performance by creating hypothetical applications of the liquidated damages in order to claim that they were in the nature of a penalty which should not be enforced. For example, the Referee created a Liquidated Damage calculation of \$1.26 million for a 45-day delay. The problem is that such an application of LDs never occurred in this case. The Referee simply made them up. Another example of his non-judicious approach.

Courts can't create evidence to support their findings. Rather, their findings must be based on the evidence actually presented.

Accordingly, this Court should not accept the Referee's findings that the liquidated damages in this case were in the nature of a penalty. Liquidated damages should not be returned to the contractor.

V. THE CONTRACTOR WAS REQUIRED TO FILE AN ARTICLE 8 CLAIM FOR THE RETURN OF ITS LIQUIDATED DAMAGES.

The Referee also erred in finding that Transamerica did not need to file an Article 8 Claim for the return of its liquidated damages. (R.R.&R. pg. 41). The statutorily enforced Article 8 contract states in pertinent part:

Except as provided under GC subparagraph 2.14, the Contractor shall initiate every Claim by giving written notice of the Claim to the Architect, through the Construction Manager, within ten (10) days after the occurrence of the event giving rise to the Claim.

Indeed, Article 8 of the contract contains the provision for the owner to withhold LDs:

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

Thus, if a contractor believes that liquidated damages have been improperly withheld, it must file a claim for those damages. The claim provision portion of the contract is found at Article 8. As previously stated, failure to follow Article 8 results in a waiver of the claim.

The only contractual way that an owner would know that a contractor is disputing the assessment of liquidated damages is if the contractor files a claim for their return. There may be a situation where a contractor does not dispute the assessment of all or part of liquidated damages. In those situations, the contractor must file a claim for the return of the LDs. It is undisputed that the contractor did not do that in this case. It is also undisputed that the failure to do so in the past is a waiver of any claim in the present.

Thus, this Court should overrule the Referee's recommendation that liquidated damages be returned to the contractor.

VI. THE CONTRACTOR IS NOT ENTITLED TO A RETURN OF ITS CONTRACT BALANCE.

The Plaintiff never put on any evidence of what its current contract balance was. The Referee acknowledged this:

“TA did present evidence of its present contract balance (TA-0732 and testimony of Koniewich). But the present balance does not establish the damages that TA is entitled to recover for OSFC's breach of contract. In order to recover damages for the unpaid balance of the Contract, TA must prove what it would have received under the contract if it had been performed, less the value to TA of relief from full performance.”

(R.R.&R. pg. 117)

Despite recognizing that the contractor had failed, once again, in its burden of proof, the Referee nonetheless un-judiciously assumed the role of advocate and created a calculation which he believed supported a current contract balance. (R.R.&R. pgs. 118 – 123)

Once again, it is not the role of the Courts to create evidence. Rather, when a party, such as the Plaintiff in this case fails to prove that they are entitled to damages, that's the end of it. They don't recover.

For the foregoing reasons, the State's objections to the Referee's recommendation that the contractor recover its contract balance should be sustained.

VII. THE CONTRACTOR WAS REQUIRED TO FILE AN ARTICLE 8 CLAIM FOR THE RETURN OF ITS CONTRACT BALANCE.

It is undisputed that the contractor did not present an Article 8 claim for the return of its contract balance. As with liquidated damages, the only way that an owner is contractually put on

notice that the contractor is claiming a return of dollars is by following the statutorily mandated Article 8 claims process of the contract. The failure to do so is a waiver of any such claim.

Thus, this is further support for the Court sustaining the State's objection to the Referee's recommendation that the contract balance be returned to the contractor.

VIII. TRANSAMERICA FAILS TO PROVE PROXIMATE CAUSE.

As to all Plaintiff's claims for damages, it failed to show causation.

Transamerica's claim to recover their losses from their six-month delay in completing this project is based on allegations of bad plans and poor scheduling. However, if the plans and scheduling were as bad as Transamerica tries to make them out to be, then where are the multitude of pre- and post-bid questions you would expect to see from bad plans and scheduling? Likewise, where is all of the tear-out and re-bid that you would expect to see from bad plans? They don't exist.

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

This Court should sustain the State's objections to the Referee granting Plaintiff damages when Plaintiff failed to prove proximate case.

IX. THE REFEREE ERRED IN FAILING TO APPORTION DAMAGES.

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

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

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

X. CONCLUSION.

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

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

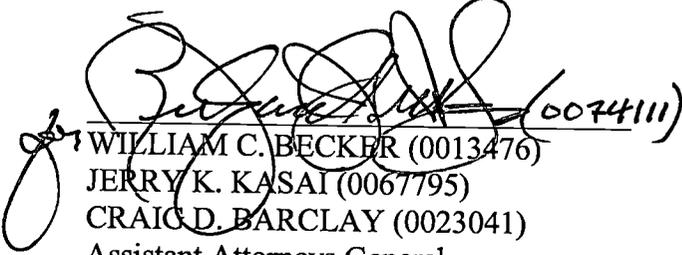
The Plaintiff should not be permitted to recover nearly \$2 million given:

1. Plaintiff underbid this project as evidenced by their CFO's manipulation and substantial increases to their budget/bid in their job cost report;
2. Plaintiff never intended to self-perform this project, but was forced to when they failed to lock down their subcontractors' bids;
3. Plaintiff had six different superintendents on this project;
4. Plaintiff terminated their roofing contractor accusing it of fraud;
5. Plaintiff loaned their painting and drywall sub \$400,000; nearly the amount they are claiming as damages for this work;
6. Plaintiff never proved what days or dollars were the proximate cause by its complaints about the plans and schedule in this case;
7. Plaintiff never requested an extension of time for the delay claim they now present;
8. Plaintiff never provided timely notice and substantiation of the multi-million dollar claim which they now present;
9. Plaintiff released the delay claim they now seek through the schedules which they had approved;
10. Plaintiff released many of the plan issues they complained about through the change orders which they signed;
11. Plaintiff did nothing to mitigate their six-month delay;
12. Plaintiff did nothing to mitigate their multi-million dollar claim;
13. Plaintiff sought recovery by way of damages for their own scope work (e.g., punch list items); and
14. Plaintiff's claim is actually a total cost claim as they seek to recover all costs for certain scope work during the delay period, but Plaintiff failed to establish the proof required for a total cost claim (see, e.g., *Cleveland Const. Inc. v. Ohio Pub. Emps. Retirement Sys.*, 10th Dist. App. No. 07AP-574, 2008-Ohio-1630, ¶39).

Given the non-judicious comments and approach of the Referee in this case, this Court should sustain the State of Ohio's objections to the Referee's recommendations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *State of Ohio's Objections to the Referee's Report and Recommendation* was served upon via electronic and regular U.S. Mail, postage pre-paid, this 2nd day of November, 2015 upon the following:

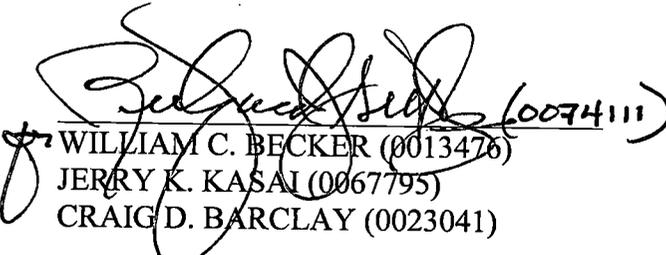
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