

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

2015 NOV -2 PM 4: 58

TRANSAMERICA BUILDING COMPANY,
INC.,

Plaintiff,

v.

OHIO SCHOOL FACILITIES
COMMISSION,
nka Ohio Facilities Construction Commission,

Defendant.

:
:
: Case No. 2013-00349
:
: Judge McGrath
:
: Referee Wampler
:
:
:

**PLAINTIFF TRANSAMERICA'S OBJECTIONS
TO THE DECISION OF THE REFEREE**

Pursuant to Ohio Civ. Rule 53, Plaintiff TransAmerica Building Company, Inc. ("TA") respectfully sets forth the following objections to the Decision of the Referee issued in this case on September 17, 2014. Pursuant the Court's Entry on October 1, 2014, the deadline for filing these objections was extended on joint motion of the parties to November 2, 2015.

I. INTRODUCTION:

The Referee, using his vast construction experience, did an outstanding job of weighing the credibility of the witnesses, digesting a mountain of evidence, and ultimately coming to the correct conclusion that the following actions and inactions of the Defendant OSFC doomed the Project:

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;
6. slow and sometimes confusing or inadequate responses to RFI's;

7. the architect putting an unlicensed person in charge of contract administration;
8. inability to coordinate construction phases; and
9. heavy-handed and sometimes misleading conduct of the construction manager and the architect.¹

The Referee correctly ruled that the OSFC, through its agents, materially breached its contract by : 1) not furnishing approved plans to TA with which to build the dorms; 2) repeatedly misrepresenting to TA without good faith that a full and complete set of drawings would be furnished while it knew or should have known such representations were false, that TA was relying on such representations, and that TA was being negatively impacted by those misrepresentations; 3) wrongfully withholding liquidated damages and deducting change order amounts; 4) preventing TA from scheduling and attending inspections; 5) failing to furnish timely responses to RFIs necessary for TA to complete its work; 6) regularly ignoring contractual requirements under Article 8; 7) failing to properly coordinate the work of contractors so as to not causing damages to TA's work; and 8) preventing TA from protecting its work from damage by other contractors.²

But just as lawyers are not always faultless in explaining complex information, this fact finder was not perfect in understanding everything on the damages front in this case. These errors can be easily corrected. Only once these adjustments are made will TA have a comprehensive damages award, consistent with the Referee's findings as to liability.

¹ Decision, pg. 4

² Decision, pgs. 58-60

OBJECTIONS:

Objection No. 1: **The Referee erred in reducing TA's damages award for "discrete costs."**

The Referee acknowledged TA's rough carpentry activities were "severely disrupted by actions and inactions of OSFC and its agents"³ and went to award \$507,426.07 attributable to loss of productivity for rough carpentry.⁴ TA agrees that it was "highly impractical if not impossible for TA to prove actual losses directly using specific segregated costs assigned to each activity upon which TA bases its claim." TA also does not question that the modified total cost method was a suitable method to determine TA's loss of productivity for rough carpentry. TA objects only to the Referee's erroneous subtraction of \$464,148.24 from TransAmerica's damages for "Discrete Change Orders Not Allowed."⁵

"The purpose of compensatory damages is to make a plaintiff whole." *Myer v. Preferred Credit*, 177 Ohio Misc. 2d 8, 2001-Ohio-4190, 766 N.E.2d 612 (C.P. 2001)(citing 30 Ohio Jurisprudence 3d (1999) 15, Damages, Sections 8-10.). TA conservatively estimated its damages when it sought only \$2.8 million (excluding contract balance) from the OSFC, even though its losses on the Project were in excess of \$3.2 million.⁶ The Referee acknowledged that TA lost in excess of \$2.5 million even with the Referee's damages award.⁷ The adjustment to the award that TA seeks still does not make it whole, but is fully supported by the liability findings of the Referee, which include:

- OSFC, through its agents SHP and LL, did not act in good faith⁸; and

³ Decision, pg. 79.

⁴ Decision, pg. 91.

⁵ Decision, pg. 91.

⁶ \$7,585,899.47 from Sept. 2012 JCR - \$4,186,163.93 Adjusted Contract = \$3,295,207.02 Loss (excluding overhead and profit).

⁷ Decision, pg. 5.

⁸ Decision, pg. 59.

- OSFC, through its agents LL and SHP, made material misrepresentations.⁹

The Referee’s reduction appears to result from confusion over a TA prepared trial exhibit -- TA-0734 (inserted below), which identified discrete changes not incorporated in a change order that led, at least partially, to TA’s loss of labor productivity.

TA Has Already Identified \$603,392.71 In Discrete Changes Not Included In A Change Order

AVERAGE BUILDING ANALYSIS

<i>Partial List of Inefficient Activities/Remobilization</i>	<i>Average Crew Size</i>	<i>Average Hours</i>	<i>Average Inefficiency Factor</i>	<i>Average Revised Hours</i>
Corner Blocking	2	16	30%	21
Fire Blocking	2	32	30%	42
Baffle Blocking	2	32	30%	42
General Blocking	2	40	30%	52
Rated Ceiling Framing	3	90	30%	117
Rated Wall Framing	3	90	30%	117
Shower Stall Reconstruction	2	32	30%	42
Medicine Cabinet Relocations	2	32	30%	42
Draft Walls	2	32	30%	42
Bulkhead Diffusers/Fire Dampers	2	40	30%	52
Gable End Wall Framing	3	90	30%	117
Unsupported Gable Ends	3	72	30%	94
Wall Plumbness Issues	4	120	30%	156
Entertainment Walls	2	32	30%	42
Kitchen Walls	2	32	30%	42
Closet Walls	2	32	30%	42
Exterior Wall Panel Caulking	2	32	30%	42
Miscellaneous Damage/Repairs	4	80	30%	104
Totals		926		1,204

These discrete changes helped illustrate TA’s loss of productivity claim by showing how relatively minor items would “add up” on this Project where multiple buildings were being constructed.¹⁰ The changes noted in TA-0734 were only identified after TA received its public records response and were simply referenced to illustrate how relatively small issues – experienced on a massive scale – could add up to high dollar amounts of labor inefficiencies and cost overruns.¹¹

A number of the items that comprise TA-0734 arise from specific issues discussed at trial, which the Referee ultimately determined caused the Project to become “chaotic with incomplete

⁹ Decision, pg. 139.

¹⁰ One of the OSFC’s primary defenses to TA’s claim was “lack of causation” and TA-0734 was simply a series of identifiable changes that helped explain TA’s loss of productivity claim. The Referee ultimately agreed that TA incurred significant loss of productivity and quantified such losses on page 91 of his decision, but incorrectly reduced such amount by \$464,148.24 (excluding overhead and profit) in his Modified Total Cost Calculation.

¹¹ See the Trial Transcript of Joshua Wilhelm attached as Exhibit A, hereafter “Wilhelm,” 253:19-24, and 254:1-4.

and confusing drawings.”¹² For example, the rated ceiling framing, rated wall framing, draft walls, and bulkhead diffusers/fire damages all result from the architect’s change in the building’s fire rating that took place during construction. When it came to corner blocking, Wilhelm testified this blocking was necessitated because of the changed fire ratings.¹³ These are the same changes that Referee was critical of the OSFC and its agents for concealing. The wall plumbness change related to SHP and LL’s expectation (including LL’s heavy-handed management) that TA should install the walls to a more stringent standard than what was specified in the documents. The shower stall reconstruction change was discussed in detail to explain why such a relatively small item multiplied to significant loss of productivity costs when spread over the twelve (12) buildings. None of these changes were identified in a pricing request, because it wasn’t until **after** TA reviewed the public records response that it fully appreciated the significance of these changes and the adverse impact it had on its carpentry activities.

The Referee mistakenly treated the items in TA-0734 to be “additional work not captured in a change order”¹⁴ and a separate component of TA’s overall claim. But the changes associated with TA-0734 were never a separate claim, but were always part of TA’s \$1,320,299.99 Loss of Productivity Claim. This is demonstrated by TA’s November 7, 2012 Supplemental Claim (TA-0659), which does not identify these changes as a separate portion of TA’s claim. As shown by TA-0659, TA asserted its loss of productivity was \$1,320,299.99, calculated using the “measured mile” method, and that amount stayed constant through trial.¹⁵

¹² Decision, pg. 138.

¹³ Wilhelm, 284:20-24, and 285:1-3.

¹⁴ Decision, pg. 90.

¹⁵ See McCarthy October 24, 2014 Supplemental Report (TA-1201).

TA's November 2012 Supplemental Claim (TA-0659)

Description	Amount	Calculation Method	See Exhibit for Further Detail
Extended General Condition Costs	\$160,501.45	TA's Time Based Costs	1
Additional and Extended Trade Supervision Costs	\$171,481.80	TA's Time Based Costs	2
Extended Project Management Costs	\$183,557.40	TA's Time Based Costs	3
Extended Equipment Rental Costs	\$38,331.52	TA's Time Based Costs	4
Unprocessed Change Order & Scope Adjustments	\$22,029.67	Direct Costs	5
Loss of Productivity for Rough Carpentry	\$1,320,299.99	Measured Mile	6
Additional Drywall Costs For Out-of-Sequence Work, Excessive Construction Damage, and Extended Punchlist.	\$498,003.90	TA's Time Based Costs	7
Additional Painting Costs For Out-of-Sequence Work, Excessive Construction Damage, and Extended Punchlist.	\$486,742.67	TA's Time Based Costs	8
Extended Home Office Overhead	\$167,345.73	ODOT HOOP Calculation	9
TOTAL CLAIM AMOUNT	\$3,048,294.13		

McCarthy's October 24, 2014 Supplemental Report (TA-1201)

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

The Referee separately analyzed and denied those costs as examples of "Unprocessed Change Order and Scope of Adjustments"¹⁶ even though TA never included these costs as examples of unprocessed change orders, nor did TA seek them at trial. As can be seen above, TA was only seeking \$22,029.67 for unprocessed change orders. The Referee went on to be critical that these costs were not identified in TA's earlier claim documents:

¹⁶ Decision, pg. 72.

These costs, according to TA, were discrete and yet they were not included in TA's certified claim filed on March 8, 2012 or in the supplemental certified claim filed on November 7, 2012 (TA-0659-005). These changes and their related costs were never certified by TA. Moreover, when McCarthy filed his supplemental expert report in this action dated October, 23, 2014, these costs were not included. (See Decision pages 72-73).

However when it comes to the costs associated with TA-0734, TA **never** made a separate claim for these costs. Accordingly, TA had no reason to separately state them in the claim documents because these changes were only provided to help explain TA's carpentry loss of productivity claim at trial.

To the extent that the changes identified in TA-0734 should have been included in a change order,¹⁷ such a position is contrary to the Referee's earlier findings that OSFC:

- "regularly ignored contractual requirements for Article 8 claims,"¹⁸
- "**insisted that TA perform additional scope work without a signed change order**,"¹⁹ and
- "prevented TA from complying with the conditions precedent under Article 8 of the General Conditions" when it failed to issue revised drawings to TA in a timely manner.²⁰

TA had no way of fully identifying these costs until after receiving OSFC's public records and could see the full picture purposely hidden from TA's view during the course of the Project. The Referee acknowledged this fact when he found that "TA's ability to submit a claim was controlled entirely by OSFC so long as revised drawings were withheld"²¹ and that "TA could not reasonably assess its losses and certify a claim until its work was near completion. As such, TA's performance of the Article 8 time requirements for claim initiation, certification, and submission were excused."²²

¹⁷ Decision, pg. 72.

¹⁸ Decision, pg. 59.

¹⁹ Decision, pg. 59.

²⁰ Decision, pg. 40.

²¹ Decision, pg. 37.

²² Decision, pgs. 40-41.

Up until receiving responses to its public records requests, TA could not fully identify all the changes that had taken place due to the OSFC's (and its agents') decision not to provide the previously promised updated set of plans. Additionally, the OSFC never presented evidence, nor is there evidence to even suggest, that the changes in TA-0734 were ever part of an RFI response or pricing request. Instead, these undocumented changes are the product of the "incomplete and confusing drawings" and the scheme to conceal cost increases due to the Project's lack of proper funding.

Any argument that TA should have proceeded with these changes through the change order process is also inconsistent with the Referee's ultimate finding that TA substantially complied with GC Article 8²³ and the "OSFC waived strict compliance with GC Article 8 and is estopped to assert the waiver provision of Article 8 as a defense to TA's claim."²⁴ Accordingly, no reduction of TA's loss of productivity claim should be made for the changes identified in TA-0734, which results in a TA loss of productivity of \$1,041,196.54, instead of the current \$507,426.07 (an increase of \$533,770.47).²⁵

Objection No. 2: The Referee erred in reducing TA's damages award by the amount of its additional supervisory costs.

TA sought to recover additional and extended supervision costs incurred because of the compression and acceleration of its work prior to February 14, 2012, and because of the extension of its work past February 14, 2012.

The Referee is correct that TA's claim for additional supervision costs incurred prior to February 14, 2012 is effectively a claim for "constructive acceleration," addressed by the Tenth District in *Sherman R. Smoot Co. v. State*, 136 Ohio App.3d 166, 179, 736 N.E.2d 60 (10th Dist.

²³ Decision, pg. 34.

²⁴ Decision, pg. 138.

²⁵ \$1,041,196.54 = \$507,426.07 + [\$464,148.24 + \$69,622.23 (overhead and profit)].

2000). There, the Tenth District provided **five** “elements” of a prima facie claim for constructive acceleration:

(1) that the contractor experience 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.**

Id. at 178.

After identifying the proper legal standard, the Referee correctly determined that TA proved by the greater weight of the evidence elements one through four listed in the *Sherman R. Smoot* case.²⁶ Turning to the fifth element, however, the Referee incorrectly construed the proof required under that fifth element, and thus determined (incorrectly) that TA had not meet its burden of proof on its claim of constructive acceleration.

The Referee’s error lies in his legal interpretation of the words “the contractor actually accelerated the work in order to complete the project by the original completion date and incurred added costs as a result.” From these words, the Referee concluded, incorrectly, that on-time completion is a “necessary element of a claim for constructive acceleration.”²⁷

To be clear, Ohio courts require contractors to prove that they “actually accelerated” to recover under a claim of constructive acceleration. *See, e.g., Conti Corp. v. Ohio Dep’t of Admin. Servs.*, Ohio Ct. Cl. No. 88-14568, 1992 Ohio Misc. LEXIS 77 (Nov. 30, 1992)(explaining that “[p]roof of actual acceleration must also be set before the court by plaintiff). However, no Ohio court has required separate proof that the contractor both “actually accelerated” **and** “complete[d] the project by the original completion date.” Indeed, this second (additional) requirement is

²⁶ Decision, pg. 68.

²⁷ Decision, pg. 68.

conspicuously absent from the Ohio cases addressing contractor claims for constructive acceleration.

A proper interpretation of the Tenth District's decision in *Sherman R. Smoot* places emphasis on the phrases "actually accelerated" and "incurred added costs as a result." That is, TA was required to show that it "**actually accelerated** the work in order to complete the project by the original completion date **and incurred added costs as a result.**" The phrase "in order to complete the project by the original completion date" describes only the goal or aim of the contractor's acceleration. The sentence is not, however, meant to imply that the contractor should be precluded from recovery if it fails to meet that goal (particularly if that failure was not due to the contractor's own shortcomings).

To see why this must be the case, consider the logical conclusion of the Referee's interpretation. A contractor would lose its recourse against the owner, no matter its efforts to accelerate and no matter the costs spent, if the contractor was to miss the original completion date by just one day. A hypothetical owner could delay a six-month-long-project until the end of the fifth month, and then (unjustifiably) refuse to grant a time extension, requiring the contractor to accelerate. If the contractor miraculously (or through enormous expense) completed the project on the originally scheduled completion date **plus just one day**, the owner would not be legally liable to the contractor for any of the contractor's costs of acceleration under the Referee's interpretation. The contractor may have "actually accelerated," and may have "incurred additional costs as a result," but it failed to complete the project by the original completion date, and thus, under the Referee's reading, the contractor has no claim for constructive acceleration.

This is far from what the Tenth District envisioned in *Sherman R. Smoot*, when it explained that "[a] contractor who accelerates its work as the result of the denial of a justified time extension

is entitled to recover its increased costs for labor, equipment, overhead and efficiency, as well as any lost profits.” *Sherman R. Smoot Co.*, at 178 (citation omitted). It cannot be the law in Ohio.

What matters for the purposes of a constructive acceleration claim are the **contractor’s additional efforts** at the owner’s demand to try to meet the original completion date after an owner-caused delay, not the contractor’s ability to fulfill the original completion date. The contractor’s shortfall in this regard is dealt with separately, through the owner’s ability in some cases to offset the contractor’s claim with a liquidated damages assessment,²⁸ or in other cases to bring a claim for consequential damages. But missing the original completion date (by one day or otherwise) is not by itself fatal to the contractor’s entire constructive acceleration claim.

Under established Ohio law, an owner cannot cause a delay on a project and then avoid the natural consequences of that delay through a technicality. *Cleveland Constr., Inc. v. Ohio Pub. Emples. Ret. Sys.*, 10th Dist. No. 07AP-574, 2008-Ohio-1630. The Tenth District has explained that an owner-caused “delay” should be thought of broadly, and “can encompass different types of damages, including inefficiency costs, acceleration costs, loss of productivity, and unabsorbed home office overhead costs.” *Id.* at ¶19. When an owner delays a project, and then demands that a contractor accelerate to make up for that owner-caused delay, Ohio law prevents that owner from relying solely on the original completion date (agreed on before the owner-caused delay occurred), to avoid paying those acceleration costs. To say otherwise would be to allow the owner to avoid the natural consequences of its own delay simply by insisting that the contractor meet an often unreasonable completion date, hoping that the contractor misses it by one day.

²⁸ The Referee correctly determined that the OSFC was not entitled to liquidated damages in this case because the liquidated damages provision in the Contract was “manifestly unreasonable” and was a penalty (Decision, pg. 114); because TA actually met the milestones for which the OSFC assessed liquidated damages (Decision, pg. 114); and because the OSFC materially breached the Contract (Decision, pg. 116).

TA's acceleration damages were caused directly by the OSFC's own delay and breach of contract, and the OSFC's insistence through its agent, LL, that TA accelerate to complete the Project as originally scheduled. Because TA proved all elements of a claim of constructive acceleration by the greater weight of the evidence, TA is entitled to recover all of its costs incurred as a result of the OSFC's acceleration of its work. As such, the Referee incorrectly found that additional supervision costs for Jason Kuhn from 11/5/11 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 compensable. The Court should correct this error by adjusting the damages award to TA upward by \$60,492.59.²⁹

Objection No. 3: The Referee erred in reducing TA's damages award by the amount of \$400,000 for a "loan" to Sammie Walker.

The Referee correctly determined that TA is entitled to damages for additional drywall and additional painting costs it incurred due to extensive damage to its finished work throughout the Project by other prime contractors.³⁰ As the Referee properly found, the OSFC through LL, not TA, was responsible for coordinating the work and for overseeing the various contractors on the Project.³¹ Thus, the OSFC is liable for these additional costs.

Yet, in awarding TA's damages, the Referee substantially reduced TA's damages for additional drywall and additional painting costs³² without citation to legal authority, and based solely on a \$400,000 "loan" issued from TA to its drywall subcontractor, Sammie Walker. The Referee's recommendation in this regard lacks reasoning, and concludes only (without support) that "the note amount is not recoverable from OSFC because it was an independent obligation of

²⁹ \$125,620.46 (total supervisory costs) – \$65,127.87 (amounts already awarded by Referee) = \$60,492.59 (proper adjustment).

³⁰ Decision, pg. 91.

³¹ Decision, pg. 93.

³² For simplicity, the Referee divided the \$400,000 loan into two halves, and subtracted \$200,000 from TA's additional drywall costs and the other \$200,000 from TA's additional painting costs to arrive at the Referee's final damages award. (Decision, pg. 95, f.n. 120)

Sammie Walker to TA.”³³ The Referee incorrectly reduced TA’s damage award for additional drywall and painting costs from \$752,883.74 total³⁴ to \$292,883.74 total.³⁵ When accounting for overhead and profit, this was a mistaken reduction of approximately \$460,000 that should be corrected.

First and foremost, TA knows of no legal authority, and can find none through its research, that supports the Referee’s conclusion that these amounts – advanced by TA for its subcontractor -- cannot be recovered from the OSFC. This is legal error.

Second, rather than a “liquidated” promissory note, issued with the expectation that the funds would be repaid by Sammie Walker under any circumstance, TA’s transfer of monies to Sammie Walker is more properly thought of as financing a subcontractor’s cost overruns with the expectation that those funds would be ultimately recovered from the party or parties at fault for those overruns. Only if that claim failed (which did not occur) would Sammie Walker remain on the hook for the note.

While TA may have financed Sammie Walker’s additional costs, rather than Sammie Walker (who did not have those financial resources), that fact should not change the Court’s analysis. TA’s damages should be considered in the same manner as would any other pass-through claim (or a claim for additional costs incurred by a subcontractor, asserted through the proxy of the general contractor against the owner for payment). This interpretation is supported in the offset language of the note itself ³⁶:

³³ Decision, pg. 94.

³⁴ This number accounts for the \$90,068.44 (drywall costs) and \$79,576.50 (painting costs) the Referee concluded were part of TA’s original scope and are thus not compensable damages. Subtracting those amounts from the \$411,167.41 (total drywall cost) and \$413,159.04 (total painting costs) used the Referee, and accounting for 10% overhead and 5% profit, yields a balance of \$752,833.74 owed to TA.

³⁵ This is the total damages award for additional drywall (\$139,263.82) and painting (\$153,619.92) awarded by the Referee, as seen in Table 6 and Table 7 to the Referee’s Decision.

³⁶ See OSFC’s Trial Exhibit F.

Shall TransAmerica recover from the Owner (OSFC) any costs associated with damages and delay's, that are in which associated with the painting and drywall scope, the amount rightfully owed to Anginette and James Blake shall be applied directly to the principle amount of the Note.

The \$400,000 "loan" to Sammie Walker was made necessary by a "stacking" of the work and resulting inefficiencies caused by the many failures of the OSFC and its agents. TA's Project Manager, Josh Wilhelm (expressly found by the Referee to be "well educated, trained and experienced," knowledgeable, forthright, and credible³⁷), testified that delays on the Project lead to a "stack situation" where "[i]nstead of doing one or two buildings at a time, you're doing four or five or six or you're getting all the buildings turned over to you within days or weeks instead of a stagger."³⁸ This was contrary to the Project's original schedule, which envisioned an organized progression in the work where subcontractors would "complete one piece [of the work] before you start the next piece" in a "phased" "logical" and "stepped progress."³⁹ Mr. Wilhelm explained that this stepped or phased progression allowed TA to ensure that it had enough laborers to perform specific tasks, with "the same group of people . . . expected to do that [same] work in multiple buildings."⁴⁰

However, this planned phased or logical progression of construction was a nonstarter. Instead, through the actions and inactions of the OSFC and its agents, "[t]he sequence of work in the schedule changed constantly . . . driven more by design problems than contractor problems."⁴¹ "LL was essentially fitting more work into less time, at a time when many of the design issues

³⁷ Decision, pg. 8, f.n. 20. The Referee explained that he "was impressed with the testimony of Wilhelm" who was able to provide "direct evidence of disruption and delays during construction caused by OSFC and its authorized agents." Decision, pg. 82.

³⁸ Wilhelm, 333:4-11, 12-22.

³⁹ Wilhelm at 335:9-12.

⁴⁰ Wilhelm, 334:24-335:16.

⁴¹ Decision, pg. 55.

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.”⁴²

This delay and acceleration of the work lead to spreading laborers out over many buildings, all performing a variety of out-of-sequence activities, and requiring a larger labor force than originally anticipated when Sammie Walker submitted its bid to TA. Mr. Wilhelm reported using Sammie Walker laborers in multiple places across the Project site “trying to get the amount of work done that was available or that had stacked up to that point in time.”⁴³ When asked if “[t]he job was just more than [Sammie Walker] could handle,” Mr. Wilhelm responded,

I wouldn't say it like that . . . they were waiting for the project to progress and by the time that the work got to them, it was a stack situation . . . just like the carpenters, bring on more and more carpenters, like we had to do, [Sammie Walker's] resource, you know – any company has a certain amount of resources, and they were taxed.⁴⁴

This taxing of resources was also described at trial by Jim Deering, TA's lead carpentry foreman.⁴⁵ Mr. Deering testified that similar problems stemming from the faulty drawings required him to move his crews from building to building where he could progress with the information he had at the time.⁴⁶ “This persistent disruption and constant relocation typically took about 45 minutes or more per worker, especially if he had to have his crews move from the OSD campus to the OSSB campus or vice versa.”⁴⁷

TA was left with two choices. First, TA could supplement Sammie Walker's work through different or additional contractors. Yet when TA made inquiries to contractors for replacing

⁴² Decision, pg. 55.

⁴³ Wilhelm, 342:21-343:4.

⁴⁴ Decision at 33:4-11.

⁴⁵ The Referee found Jim Deering to be an “impressive and credible witness who was helpful in understanding the many challenges faced by TA in the field, particularly with the rough carpentry.” Decision, pg. 18.

⁴⁶ Decision, pg. 18.

⁴⁷ Decision, pg. 18.

Sammie Walker or adding an additional contractor, TA could not find contractors willing to commit to the already troubled Project:

[B]y a certain point in the project the work was out with the subcontractor world that this was probably a project you didn't want to have a whole lot of involvement with . . . I can tell you on several occasions when we talked to . . . drywall contractors and the finish carpenter contractor, that they . . . reported to me that they were hesitant to get involved.⁴⁸

TA's only other choice was to supplement Sammie Walker by funding the costs of additional laborers, to keep Sammie Walker working on the Project. Mr. Wilhelm explained that this was the basis of the \$400,000 "loan" to Sammie Walker:

Q – You did need their people.

A – That's right. And we made the calculation – as I said earlier, his needing more people wasn't as much a fault of Sammie Walker as it was a reality of where the job was at that point in time for a lot of different reasons, most of which I would say weren't TransAmerica's fault, either. But so, you know, removing him from the site for not having enough people wasn't going to solve any problems. It was only going to have fewer people available to do the work.⁴⁹

The Referee was correct to note that monies transferred to Sammie Walker from TA were simply a means to finance Sammie Walker and to pay for the unanticipated supplementation of its work force.⁵⁰ However, the Referee's deduction of these monies from TA's damages award is based on the mistaken premise that "[s]upplementation and correction of defective work are both costs for which TA and Sammie Walker are responsible, not OSFC."⁵¹

This is not the case, and is not supported by the evidence. As the Referee correctly recognized with respect to TA's lost productivity in carpentry, supplementation of Sammie Walker's work force was a direct result of the OSFC and its agents' many failures to issue a

⁴⁸ Wilhelm, 337:11-338:4.

⁴⁹ Wilhelm, 336:24-337:10.

⁵⁰ Decision, pg. 95.

⁵¹ Decision, pg. 95.

buildable design, their poor scheduling, and their poor project management, which inevitably lead to the “stacking situation” referred to by Mr. Wilhelm.⁵² That is, the OSFC’s delay created the need for supplementation of Sammie Walker, and thus lead directly to these substantial costs.

While the Referee suggested that “Sammie Walker had substantial corrective work to perform,⁵³ he also found that “OSFC, through its agent LL, prevented TA from protecting its work from damage caused by other contractor or documenting that damage.”⁵⁴ Much of that corrective work might have been avoided, if the OSFC had (1) properly coordinated the work among the various trades but also (2) allowed Sammie Walker to protect its work from damage by other contractors. There was no evidence to suggest that any self-inflicted corrective work by Sammie Walker amounted to anything approaching \$400,000.

If Sammie Walker had obtained outside financing to supplement its labor force, after being delayed, after having its scope dramatically altered, and after being forced to proceed in a dramatically different sequence of construction than originally anticipated when it submitted its bid to TA, without question, the OSFC would be liable for those additional costs. [Even if Sammie Walker could recover those costs only from TA (and not directly from the OSFC), TA could recover those costs as a pass-through claim against the OSFC.] The fact that the financing of Sammie Walker’s additional labor force came from TA, rather than some third-party institution, should not change the result. Regardless of who contributed the additional financing, the damages incurred are compensable, and should be awarded.

⁵² The Referee correctly described stacking of trades, its causes (poor scheduling and coordination), and the problems it creates for contractors (inefficiencies and additional costs) in his Decision on page 55, f.n. 79.

⁵³ Decision, pg. 94.

⁵⁴ Decision, pg. 60.

As such, TA respectfully requests that the Court adjust the damages award upward by \$460,000.00 (\$400,000 plus \$60,000 overhead and profit per contract) to a revised total of \$752,883.74.

Objection No. 4: A continuing objection as to the Court's dismissal of TA's claims for fraud, fraud in the inducement, and negligent misrepresentation.

While not seeking to reargue the Court's judgment entry dated April 9, 2015, TA asserts a continuing objection as to the Court's early dismissal of its claims for fraud, fraud in the inducement, and negligent misrepresentation. In addressing TA's breach of contract claim, after reviewing all of the evidence offered at trial, the Referee all-but made the factual findings needed to support a claim of fraud, or at a very minimum, a claim of negligent misrepresentation:

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.⁵⁵

The Referee's decision refers repeatedly to the numerous and repeated promises made by the OSFC and its agents throughout construction, all of which were broken and only for self-interested reasons. Among the many instances of fraud, misrepresentation, deceit, manipulation, and cover-up which characterize the actions of the OSFC, LL, and SHP in this case, the Referee found all of the following:

- The Referee noted SHP and the OSFC's "bid engineering" and how the "DIC caught SHP in this scheme" and ultimately required corrections to the plans which directly impacted TA through confusion, dimensional issues during framing, and extensive rework; the Referee also described how TA did not know about the "scheme" at the time it relied on the plans, bid its work, and agreed to perform work on the Project.⁵⁶

⁵⁵ Decision, pg. 58.

⁵⁶ Decision, pg. 13.

- The Referee recounted the string of promises running from LL to SHP to Berardi, and finding that “Berardi and SHP had been failing in [their] promises for months and LL knew it.”⁵⁷
- The Referee held that “not only did LL conceal [problems with updating the bid documents] from TA, it also had been concealing it from OSFC for months.”⁵⁸
- The Referee explained that “[t]he court found it a little more than curious that a signed off posted set was never produced, although [James Smith, LL’s Superintendent] testified at trial and in his deposition that it did exist.”⁵⁹
- The Referee described how “TA’s workers and workers for the subcontractors were not allowed in the [LL] trailer to view [the “posted set”].”⁶⁰
- The Referee found that key personnel for the OSFC and its agents failed to include significant problems encountered by TA in their daily reports in a “deliberate attempt to conceal the fact that the contractors were not working off approved plans.”⁶¹
- The Referee recounted Jim Deering’s testimony, after labeling Deering as “an impressive and credible witness,” wherein Deering testified that he was not invited to framing inspection performed by DIC and that this was “very unusual.”⁶²
- The Referee noted that “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.”⁶³
- The Referee described how “[u]nbeknownst 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.”⁶⁴
- The Referee described LL’s rejection of TA’s certified claim as “not timely and not substantiated,” “but such rejection itself was not timely.” Indeed, LL denied the claim only after learning there were no funds to pay the claim. “[A]lthough OSFC denied that this played a role in its decision, the court believe[d] otherwise.”⁶⁵

⁵⁷ Decision, pg. 15.

⁵⁸ Decision, pg. 16.

⁵⁹ Decision, pg. 16.

⁶⁰ Decision, pg. 18.

⁶¹ Decision, pg. 57.

⁶² Decision, pg. 19; see also Decision, pg. 19, f.n. 40.

⁶³ Decision, pg. 22.

⁶⁴ Decision, pg. 25.

⁶⁵ Decision, pg. 27.

Moreover, abundant evidence at trial established that the OSFC's fraud persisted many months into the Project, well after the statute of limitations cut-off date for TA's fraud and fraud-related claims. Indeed, as the Referee properly concluded:

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 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.⁶⁶

Indeed, "[o]nly when TA was fully committed to the Dorm Project and it was too late to turn back, did LL reveal that the much needed plans would not be furnished."⁶⁷ This occurred no earlier than July 18, 2011, when the OSFC's agent, LL, first admitted the long-promised updated drawings would not be provided⁶⁸:

Project Drawings

003-002 7/25/11
 - Lisa to copy electronic drawings onto discs and put in Contractor's mailboxes.

7/18/11
 - Everything that is in the project drawings has been issued via PR, therefore Construction set of drawings will not be issued. Current set of post drawings will be available for those contractors that needed. Clay asked if there is anything specific that any of the contractors

Item	Meeting Item Description	R
	<p>was waiting to get answered thru construction set? Everybody seems to be OK.</p> <p>- Madison suggested posting these sets in Prolog, Clay agreed. Madison is concern about several versions going around; this is the reason LL offered contractors to copy LL's posted sets. All contractors requested hard copies of posted set.</p> <p>- Josh W. noted they were hoping for a construction set, however there are 6 buildings being built as we speak.</p>	

⁶⁶ Decision, pg. 22.

⁶⁷ Decision, pg. 139.

⁶⁸ See July 18, 2011 Progress Meeting Minutes wherein the OSFC (through LL) finally revealed to TA and other contractors that it would not be releasing the promised "Construction Set," at JX-I-23/12-13.

These new findings stand in stark contrast to the Court's original findings on summary judgment, where the Court held that TA's fraud and fraud-related claims "accrued at the latest on January 10, 2011," and thus were barred by R.C. 2743.16(A).⁶⁹ TA therefore wishes to preserve its rights to its fraud, fraud in the inducement, and negligent misrepresentation claims, including but not limited to, TA's right to recover from the OSFC its attorney's fees and costs as punitive damages.

II. THE COURT SHOULD CERTIFY ITS JUDGMENT FOR AN IMMEDIATE APPEAL PURSUANT TO CIV.R. 54(B).

The Court should certify its judgment pursuant to Civ.R. 54(B), such that its final judgment is immediately appealable.⁷⁰ This would save TA the additional burden of having to wait the many months (or years) it will take to conclude the trial between the OSFC and its agents. An immediate appeal would hasten TA's ability to recover the damages it incurred years ago, without an additional, unnecessary, delay.

Civ.R. 54(B) gives the Court the discretion to make its judgment immediately appealable, even where its judgment is entered as to fewer than all of the parties to the case. Civ.R. 54(B) provides,

When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, **the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay.**

The Court's judgment as to TA and the OSFC will be a "final order" as defined by R.C. 2505.02 because it will dispose and finally decide **all** of the issues in controversy between TA and

⁶⁹ TA hereby incorporates by reference all of its arguments raised in its Objections to the Decision of the Referee filed with the Court on October 15, 2014.

⁷⁰ Referee Wampler has indicated that the issue of recovery of costs shall be reserved for the Court to decide. Accordingly, TA reserves its right to recover its costs as the prevailing party in a subsequent hearing before Judge McGrath.

OSFC. “For an order to determine the action and prevent a judgment for the party appealing, it **must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court.”** *Whipps v. Ryan*, 10th Dist. No. 07AP-232, 2008-Ohio-1216, ¶19. *See also Noble v. Colwell*, 44 Ohio St.3d 92, 95 (Ohio 1989) (explaining that “an order fully adjudicating a claim and accompanied by a Rule 54(b) determination and direction **is** final and appealable despite the fact that a counterclaim, either compulsory or permissive, remains pending.”). For all of the reasons that follow below, the Court should exercise its discretion here and include certification language in its Judgment Entry that “there is no just reason for delay” of an appeal in this case.

First, an immediate appeal would further the important interest of judicial economy. Because the OSFC’s recovery from its agents is conditioned on TA’s recovery against the OSFC, if TA cannot recover from the OSFC (or if that recovery is to be limited significantly), a second trial may not be necessary at all. That is, if the Court’s judgment is to be modified or reversed on appeal, this should be known **before** a lengthy trial is held between the OSFC and its third-party agents. By certifying its final judgment pursuant to Civ.R. 54(B), the Court can reduce the risk that a second trial is heard unnecessarily.

Certification under Civ.R. 54(B) would be consistent with controlling law from the Tenth District, set forth in *Dywidag Sys. Internatl., USA, Inc. v. Ohio Dept. of Transp.*, 10th Dist. No. 10AP-270, 2010-Ohio, 3211. In *Dywidag Sys.*, before trial, the Court of Claims granted a motion for summary judgment brought by a material supplier, which released the material supplier as a party to the case. The subcontractor (Dywidag), who had impleaded the material supplier as a third-party defendant to the case, brought an appeal in the Tenth District seeking to have the supplier reinstated as a third-party defendant. The supplier brought a motion to dismiss, arguing

that the Tenth District lacked jurisdiction. The Tenth District disagreed, however, and held that the Court of Claims properly certified the case under Civ.R. 54(B), reasoning that “if the trial court did in fact err in granting summary judgment with respect to the third-party complaint, [hearing the appeal before the trial] would allow one trial with all of the parties present.” *Id.* at ¶31 (emphasis added).⁷¹ Because an immediate appeal was in the best interests of judicial economy, the Tenth District upheld the certification.

The Tenth District held, “[w]here the record indicates that the interests of sound judicial administration could be served by a finding of ‘no just reason for delay,’ the trial court’s certification determination must stand.” *Id.* at ¶27. Here, as in *Dywidag Sys*, it would further the interests of sound judicial administration to identify and correct any error in the Court’s judgment **before** a second trial is heard between the OSFC and its agents. Certification under Civ.R. 54(B) is therefore appropriate in this case.

Next, requiring TA to wait for a second trial to be heard and decided would conflict with Civ.R. 14(A), the Rule which permitted TA’s claims against the OSFC to be separated from the OSFC’s claims against its third-party agents. Civ.R. 14(A) makes certain that plaintiffs like TA are not prejudiced when a defendant impleads its employee(s), servant(s), or agent(s) into a case as third-party defendants. If TA cannot bring an immediate appeal, but instead must wait until the second trial is heard between the OSFC and its agents, the benefit of holding separate trials is diminished considerably, and TA would be (unnecessarily) prejudiced.

Finally, certification would serve the important purpose underlying this language in Civ.R. 54(B), to prevent unnecessary delays in litigation and the appellate process. While the second trial will be hotly contested between the OSFC and its agents, TA has no stake in its outcome. TA will

⁷¹ Judge McGrath, serving on the Tenth District Court of Appeals panel, concurred with this decision.

not prosecute or defend claims in the litigation, and its rights are not implicated—all issues in controversy between the OSFC and TA have been resolved. The separate dispute between the OSFC and its agents could take months or years to resolve, as the litigation is only in its beginning stages. Civ.R. 54(B) was designed to prevent this type of unnecessary delay or burden to a party’s recovery. *See, e.g., Noble v. Colwell*, 44 Ohio St.3d 92, 97 (Ohio 1989) (explaining that Civ.R. 54(B)’s purpose is to avoid unnecessarily delayed appeals and to avoid “undue prejudice, hardship or injustice”).

The Referee heard and described in detail abundant evidence about the hardships the OSFC’s actions and inactions have caused TA to endure, and the effect of those hardships will only continue to increase the longer TA is deprived of its recovery. This being the case, TA requests that the Court certify its final judgment under Civ.R. 54(B).

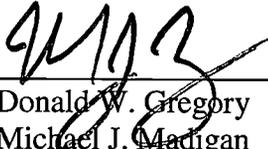
III. CONCLUSION:

While the Referee properly found in favor of TA on its claim, adjustments in the damages award are necessary to conform the evidence and applicable law, and to reconcile the award with the Referee’s findings as to liability. When those adjustments (consistent with the Referee’s factual findings) are made, the damages (at a minimum) should be upwardly adjusted in the following respects:

Objection No. 1	Incorrect Reduction in TA’s Loss of Productivity	\$533,770.47
Objection No. 2	Incorrect Reduction for TA’s Supervision Costs Due To Project Acceleration	\$60,492.59
Objection No 3	Incorrect Promissory Note Reduction for Drywall and Painting Costs	\$460,000.00
TOTAL	Total Increase to Referee’s \$1,837,404.35 Award	\$1,054,263.06

When these additions are made, the net award to TA should be increased by \$1,054,263.06, consistent with the evidence and the rationale of the Referee. The Court should then enter Judgment under Civ.R. 54(B) with an express determination that there is “no just reason for delay” of an appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true copy of the foregoing was served via U.S. Mail, postage prepaid, this 2nd day of November, 2015 upon:

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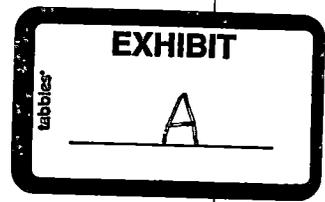
Michael J. Madigan

(0079377)

IN THE OHIO COURT OF CLAIMS

- - - - -

TransAmerica Building :
 Company, Inc., :
 :
 Plaintiff, :
 : Case No. 2013-00349
 vs. : Referee Samuel Wampler
 :
 Ohio School Facilities :
 Commission NKA OFCC, :
 :
 Defendant. :



- - - - -

EXCERPT OF TRIAL

VOLUME 4

TESTIMONY OF JOSHUA WILHELM

- - - - -

Before Referee Samuel Wampler
 Taken at Court of Claims of Ohio
 65 South Front Street, 3rd Fl.
 Columbus, OH 43215-4131
 May 21, 2015

- - - - -

Spectrum Reporting LLC
 333 Stewart Avenue, Columbus, Ohio 43206
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Page 2

A P P E A R A N C E S

1

2

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9 Court of Claims Defense
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11 Columbus, OH 43215-3130
12 By William C. Becker, Jr., Esq. and
13 Craig D. Barclay, Esq. and
14 Jerry K. Kasai, Esq.

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Page 3

I N D E X

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2 Examination By Page

3 Mr. Madigan - Direct V1 - 4

4 Mr. Becker - Cross V3 - 316

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Page 4

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2 EXCERPT OF PROCEEDINGS

3 -----

4 *****

5 JOSHUA WILHELM

6 being first duly sworn, testifies and says as

7 follows:

8 DIRECT EXAMINATION

9 BY MR. MADIGAN:

10 Q. Good afternoon, Josh. Can you give the

11 reporter your full name.

12 A. Joshua Wilhelm.

13 Q. And why are you here today?

14 A. I was the project manager for

15 TransAmerica on the Ohio School for the Deaf and

16 Blind project.

17 Q. If you could speak up a little bit --

18 A. Sure.

19 Q. -- so that she can pick it up and

20 everybody in the back.

21 I want to talk about your background.

22 Where did you graduate from?

23 A. I went to Bowling Green State

24 University and I graduated with a Bachelor's of

Page 5

1 Science in construction management.

2 Q. What year did you graduate?

3 A. 2001.

4 Q. Describe your work history after you

5 graduated from Bowling Green.

6 A. I started at a company called Miles

7 McClellan Construction, and they did a lot of

8 public works, schools, OSFC projects, quite a few

9 of those, Franklin, and then also some projects

10 down at Ohio State, a lot of large bid projects.

11 And then I went to a company called

12 Contract Construction where it was more private

13 work, but also some larger work.

14 And then the economy -- that was about

15 2008 or '09, and then I spent a year at Hanlin

16 Rainaldi Construction.

17 And then I spent a year approximately

18 at -- as a consultant for Owens-Corning.

19 Q. Have you ever worked out in the field?

20 A. I have. Actually in college I worked

21 as a carpenter. I worked my way through school,

22 and that's what I did to support myself and pay

23 for -- pay the bills.

24 Q. Could you briefly describe some of the

<p style="text-align: right;">Page 6</p> <p>1 public school projects that you worked on? 2 A. Sure. Like I said, a lot of schools. 3 We did the Trotwood High School, Bexley High 4 School. That was an addition and renovation. 5 That was on the CM side. We did New Albany, K-1, 6 Reynoldsburg Elementary and Middle. There's quite 7 a few more. 8 Q. Did you feel you were comfortable with 9 the State's process for construction of its -- of 10 its vertical projects? 11 A. Yes, I did. 12 Q. Now, when did you get hired on at 13 TransAmerica? 14 A. I was hired at TransAmerica, and I 15 started in approximately November 2010. 16 Q. And who hired you? 17 A. Bill Koniewich and Brad Koniewich. 18 Q. Now, when you started in late 2010, 19 what project were you assigned to? 20 A. I started directly on this project, 21 which was the Ohio School for the Deaf and Blind 22 dorm project. 23 Q. And what was one of the first things 24 that you did when you got involved with this</p>	<p style="text-align: right;">Page 8</p> <p>1 to give some schedule input to the schedule that 2 was in the bid packet. 3 Q. And why was this directed to 4 Mr. Pattillo? 5 A. He was the scheduler, and I believe 6 that's who they identified as who should receive 7 it. 8 Q. So if we go to page 2, explain to us 9 what you're conveying on page 2. 10 A. I'm conveying things that are on the 11 schedule that might need adjusted, things that 12 aren't on the schedule that should be added. I'm 13 indicating overall duration of some of these 14 activities. Primarily -- 15 Q. So under -- so under, "Misc. Additional 16 Links," explain your reference to the casework. 17 A. My reference to the casework is that it 18 was a future package, but it, you 19 know -- experience tells me that those things are 20 going to impact completing the work. And so I 21 made a couple of notes for casework and indicated 22 it was future contract. I said, "Shop Drawings, 23 Notes: Needed prior to completion of framing for 24 blocking, final dimensions, et cetera."</p>
<p style="text-align: right;">Page 7</p> <p>1 project? 2 A. The first thing I did was start the 3 buyout process, you know, go through the bid, 4 start calling apparent low contractors and start, 5 you know, getting people under contract to do the 6 work. 7 Q. Did you look at any schedule 8 information for the project? 9 A. Sure. Yeah. We obviously reviewed the 10 bid documents, what's required. Those are the 11 conversations you're having with these people as 12 you're buying the project. You're making sure 13 that everybody understands the schedule, what the 14 plan is, you know. The plan's not final, but you 15 have a rough idea of, you know, duration, overall 16 duration and approximate sequence, and you start 17 putting your own thoughts to filling in those 18 blanks, especially as you talk to the contractors. 19 MR. MADIGAN: If we could pull up 20 TA-0195. 21 Q. And this is a transmittal that you were 22 providing back in -- back in late December by 23 Mr. Pattillo. 24 A. Yeah. Part of the requirement here was</p>	<p style="text-align: right;">Page 9</p> <p>1 "Casework" I indicated again, future 2 package, "Field Measure, Notes," it should be 3 done, "After drywall is complete, verify actual 4 dimensions prior to fabrication." Same activity 5 only under, "Install, Needed prior to inspections 6 and MEP completion," and I questioned flooring, 7 depending on how that was going to be scheduled. 8 And I also noted about the "Technology" 9 was again another future contract, and I indicated 10 that rough-in should occur "prior to enclosing 11 walls, blocking," and "final dimensions." 12 Q. And what about for technology? 13 A. That it would also be needed prior to 14 enclosing walls, blocking, and final dimensions. 15 Q. Now, were these items ever incorporated 16 into the project to reflect what was going on out 17 in the field? 18 A. They were put into the schedule, but 19 they were changed. 20 Q. Explain how they were changed. 21 A. Late in the project, the -- these 22 packages, same packages, we referred to them as 23 the late packages, came into the picture and moved 24 things back. They weren't -- they weren't done</p>

<p style="text-align: right;">Page 10</p> <p>1 per what they were originally scheduled. 2 Q. If we can go to page 3, you make a 3 reference there, "Provide footer and foundation 4 penetration layout." 5 A. Correct. 6 Q. What did you mean by that? 7 A. What -- you know, what's happened, and 8 again, in my experience, is that you'll go to do 9 the footers and foundations only to need the 10 location of where any sleeves or underground 11 mechanical electrical plumbing items might be. 12 And so I was putting a schedule item in for that 13 so that people knew to give that to us. 14 Q. And did this later become an issue in 15 the project? 16 A. It did. 17 Q. Explain how it became an issue. 18 A. What happened was we didn't get that in 19 time and then it became a last-minute change, and 20 then there was coordination issues with where 21 those things were even going to go. And it was a 22 source of a couple RFIs, I believe. 23 MR. MADIGAN: I'll give you some blind 24 documents here, and for the Court's convenience I</p>	<p style="text-align: right;">Page 12</p> <p>1 changes in the strings of dimensions, you know, 2 you're going to need to know the relationships of 3 all these detailed things to each other, and 4 that's what happened here. 5 Q. Could you go through the mirror image 6 of these plans? Because we've got different 7 buildings. Can you explain how that configuration 8 worked? 9 A. Every other building, so this one would 10 reflect 5, I believe. The next building would 11 actually be a mirror image of it, which I don't 12 think you have a floor plan for. Some sheets 13 would show pieces of it, but it -- the floor plan 14 would flip and the entryway would be on the other 15 side. The two dorms at the other end would be at 16 the other -- at the other end of the building; 17 just a mirror image. 18 Q. Did that create additional confusion? 19 A. Sure. It would cause, you know -- 20 without having a direct layout, it would cause -- 21 we had guys holding drawings up to windows to 22 figure out what they were doing. 23 MR. MADIGAN: If we could go to 24 TA-1102.</p>
<p style="text-align: right;">Page 11</p> <p>1 will -- this is for the blind high school. 2 THE COURT: All right. 3 Q. Josh, I'd like for you to turn to 4 TA-913, which should be the bid set for the 5 blind -- for the blind high school. 6 A. Okay. 7 Q. And I'd like to have you turn to A104. 8 A. Okay. 9 Q. And could you just describe the 10 different components of this floor plan? 11 A. Sure. This is the exterior dimension 12 plan, but it shows spatially a blind high school 13 and it -- you can see the -- it's not a -- the 14 first thing you see is it's not a big open 15 building. It's a building that's -- that has a 16 lot of partitions and a lot of detail. It shows 17 that there's going to be some casework. The notes 18 indicate that; so casework, closets. We've got a 19 lot of bathrooms, a lot of small spaces. 20 Q. So if there's a dimension change, what 21 type of impact will it have on a project like 22 this? 23 A. On a project -- it's a big deal. It 24 changes -- you know, one change or even a couple</p>	<p style="text-align: right;">Page 13</p> <p>1 Q. And I'll have you to turn page 25. And 2 based on -- well, let me ask you this: What's the 3 designation of this schedule in the upper 4 left-hand corner? 5 THE COURT: Mr. Madigan, if this is 6 going to have any meaning for me, we're going to 7 have to lay a little foundation as to what this 8 is, because I can't see it. If you want me 9 thinking about it when you're asking questions, it 10 would help to do that first so I know what we're 11 looking at. 12 MR. MADIGAN: Sure. 13 THE COURT: This is very preliminary. 14 MR. MADIGAN: Sure. 15 Q. Josh, I'm going to pull up -- well, in 16 front of you is TA-1102. Do you recognize this as 17 the approved baseline schedule? 18 A. Yes. That's what it is. 19 Q. And do you see that designation on the 20 upper left-hand side? 21 A. Yeah. It's also in the title block as 22 well. 23 Q. So if we go to blind dorm 5 on page 25, 24 what's the first activity for TransAmerica in this</p>

Page 14

1 baseline schedule for blind dorm 5?
2 A. "Prepare building pad."
3 Q. And what's the date of that activity?
4 A. The start date would be March 22nd,
5 2011.
6 Q. And if we wanted to see when blind dorm
7 5 was complete, we could go to the schedule and
8 find that out. Does it show that on page 23?
9 A. On -- I'm sorry. On what page?
10 Q. If you go to page 23 --
11 A. Yes.
12 Q. -- what's the completion date for blind
13 dorm 5?
14 A. The 21st of October, 2011.
15 Q. And are blind dorms 4 and 8 in this
16 schedule?
17 A. They are.
18 Q. Did those dorms end up getting
19 constructed?
20 A. No, they didn't.
21 Q. Now, was blind dorm 5 the first
22 building that was to be started on the blind site?
23 A. Yes. It was also the first in the
24 sequence of all the buildings.

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1 MR. BECKER: I'm sorry. You're going
2 to have keep your voice up.
3 A. Okay. Yes, it was the first building
4 on the blind side as well as it was the first
5 building in the sequence of all the buildings.
6 Q. And what was the last building that was
7 going to be completed on the blind site?
8 A. On the blind site it would be blind 3,
9 which would be an elementary building.
10 Q. And if we go back to page 23, when was
11 blind 3 to be completed?
12 A. Blind 3 would be complete on the 10th
13 of January, 2012.
14 MR. MADIGAN: I'd like to pull up
15 TA-1415.
16 Q. And, Josh, this is a demonstrative of
17 the baseline schedule for the blind site. Does
18 this demonstrative reflect the baseline schedule
19 that we just looked at?
20 A. Yes.
21 Q. And you can see, for dorm 5, the
22 completion is what?
23 A. Dorm 5 the completion is October 21st,
24 2011.

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1 Q. And the -- the completion of dorm 3?
2 A. January 10th, 2012.
3 MR. MADIGAN: If we could -- well, if
4 we could -- let's -- can we pull up TA 1402.
5 Q. And, Josh, does this animation reflect
6 the sequence of construction for the dorms? We'll
7 let it play through.
8 Now, the sequence that we just looked
9 through in this animation, is that reflected in
10 what's in the baseline schedule?
11 A. Yes.
12 MR. MADIGAN: Your Honor, we're right
13 at 5:00.
14 THE COURT: Is this a good time to
15 break?
16 MR. MADIGAN: Yes.
17 THE COURT: Okay. Very good. We'll be
18 in recess till tomorrow morning at 9:00.
19 Mr. Wilhelm, you're under oath. You're
20 not to discuss your testimony with anyone till
21 you're released, but you're done for the night.
22 THE WITNESS: All right. Thank you.
23
24 Thereupon, the trial of this cause was
adjourned at 5:01 until May 22, 2015, 9:00 a.m.

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1 State of Ohio : C E R T I F I C A T E
County of Franklin: SS
2
3 I, Reva Chafin Mundy, a Notary Public in and
4 for the State of Ohio, do hereby certify that I
5 reported the aforementioned proceedings and that
6 the within-named witnesses were first duly sworn;
7 that the foregoing is a true record of the
8 proceedings.
9 I do further certify I am not a relative,
10 employee or attorney of any of the parties hereto,
11 and further I am not a relative or employee of any
12 attorney or counsel employed by the parties
13 hereto, or financially interested in the action.
14
15 IN WITNESS WHEREOF, I have hereunto set my
16 hand and affixed my seal of office at Columbus,
17 Ohio, on October 20, 2015.
18
19
20
21
22
23
24

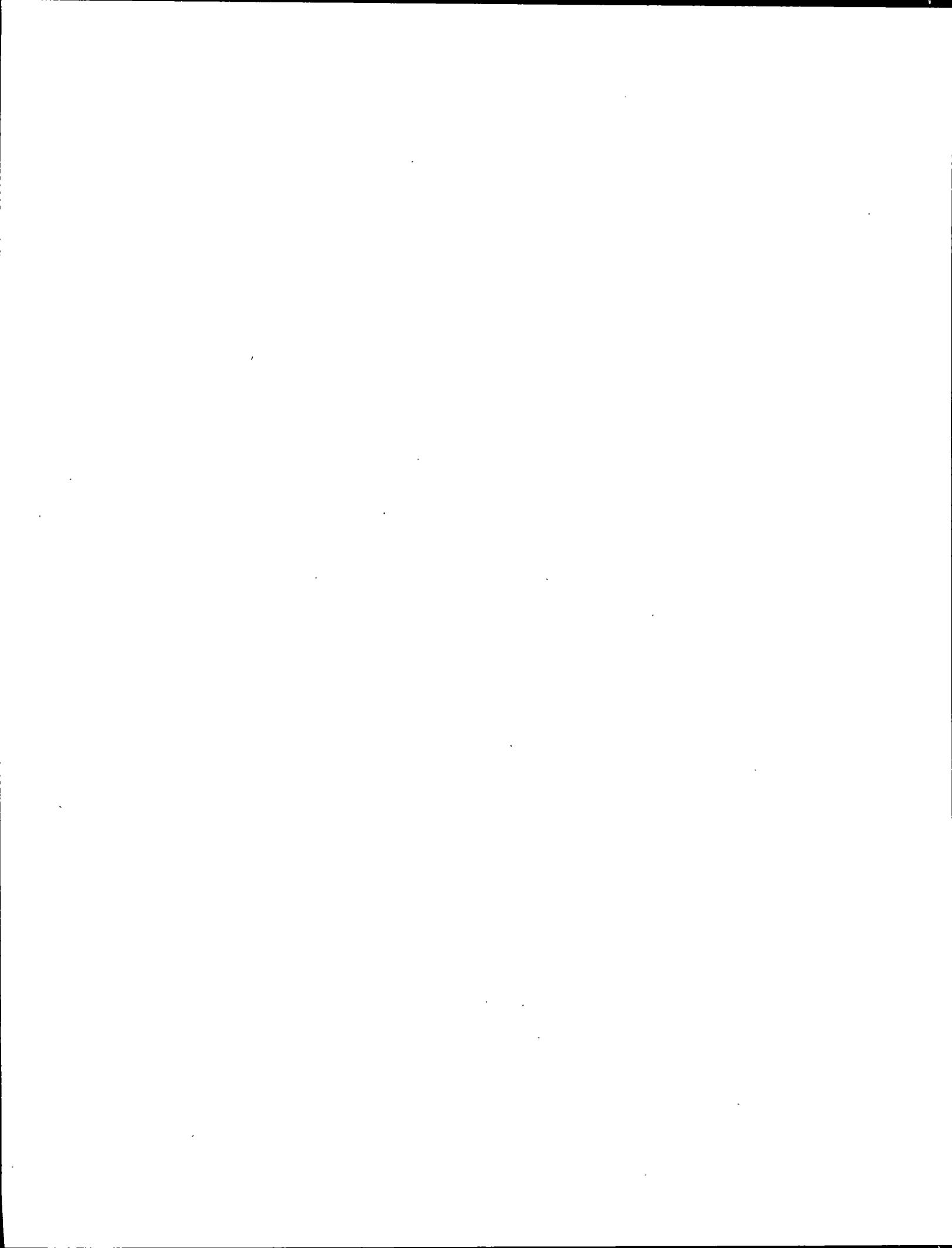
Reva Chafin Mundy

Reva Chafin Mundy, Notary Public - State of Ohio
My commission expires June 23, 2017.

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IN THE OHIO COURT OF CLAIMS

- - - - -

TransAmerica Building :
Company, Inc., :
 :
Plaintiff, :
 : Case No. 2013-00349
vs. Referee Samuel Wampler
 :
Ohio School Facilities :
Commission NKA OFCC, :
 :
Defendant. :

- - - - -

EXCERPT OF TRIAL

VOLUME 5

TESTIMONY OF JOSHUA WILHELM

- - - - -

Before Referee Samuel Wampler
Taken at Court of Claims of Ohio
65 South Front Street, 3rd Fl.
Columbus, OH 43215-4131
May 22, 2015, 9:05 a.m.

- - - - -

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I N D E X (C O N T ' D)

1

2 Witnesses Page

3 Joshua Wilhelm 21

4 Mr. Madigan - Direct

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1 -----

2 EXCERPT OF PROCEEDINGS

3 -----

4 THE COURT: Okay. Back on the record

5 in TransAmerica Building Company, Inc. versus Ohio

6 School Facilities Commission, Case No.

7 2013-00349.

8 Mr. Madigan, if you want to continue

9 your examination.

10 -----

11 JOSHUA WILHELM

12 being previously duly sworn, testifies and says as

13 follows:

14 -----

15 THE COURT: You're still under oath,

16 Mr. Wilhelm.

17 THE WITNESS: Yes.

18 -----

19 CONTINUED DIRECT EXAMINATION

20 BY MR. MADIGAN:

21 Q. Yes. Josh, before we concluded

22 yesterday, we were looking at an animation, it's

23 TA 1402. And Tamara will pull it up, but does

24 this animation accurately show how TransAmerica

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1 was going to construct these dorms?

2 A. Yes, it does.

3 Q. And as the animation's playing, could

4 you just talk about the different steps that

5 TransAmerica had planned to build these dorms?

6 A. So we're coming in on what is -- what

7 we knew as blind dorm one. And here's the

8 foundation. Now, what would have occurred at this

9 point is you would have the footings and the

10 foundations and you're seeing the slab on grade.

11 And the underground mechanical would be in at that

12 point. And then the wall panels would have been

13 delivered and are beginning to be erected.

14 And then there's some interior framing

15 going in. And then the trusses are able to be

16 set, as you can see by both the picture and the

17 animation. And then the dry-in of the roof would

18 occur shortly thereafter -- after the roof is

19 sheeted. And then windows and siding. Sometimes

20 the windows actually went in prior. Now, you can

21 see the windows are in in the picture. And then

22 siding would be trimmed, and then the work --

23 beginning to show the work going on inside.

24 Q. And over to the left we can see the

1 framing of the bulkheads?
 2 A. Uh-huh. Framing of the bulkheads
 3 above, that's that secondary structure in the
 4 common areas. And then you see the kitchen in the
 5 photo area. And then in the animation you see the
 6 painting and the finishes are then going on.
 7 Q. With respect to the framing and getting
 8 the wall panels out and having them set in the
 9 30-day time period, what's key to that?
 10 A. Everything fitting. The key to be able
 11 to put it all together is -- is everything
 12 fitting. Because the wall panels are coming out
 13 panelized. That was the point.
 14 Q. So if we would go to another animation,
 15 it's TA 1403, and this is going to be taking a
 16 look at the overall blind site. Is -- does this
 17 animation accurately show how the dorms and the
 18 blind site were going to be constructed in terms
 19 of the sequence in time?
 20 THE COURT: Mr. Madigan, you're still
 21 tying this animation to the baseline schedule?
 22 MR. MADIGAN: Correct.
 23 THE COURT: Thank you.
 24 A. Yes, this shows the sequence and the

1 timing of the project as planned.
 2 Q. (By Mr. Madigan) So in terms of
 3 sequence, it goes from five to one to six to two
 4 to seven to three?
 5 A. That's correct.
 6 Q. And if we could pull up demonstrative
 7 Exhibit TA 1418, and we'll take a look at the deaf
 8 site. And yesterday we looked at the baseline
 9 schedule. And does this demonstrative for the
 10 deaf site accurately reflect the sequence and the
 11 dates for the construction of the deaf dorms?
 12 A. Yes.
 13 Q. So what's the first dorm in the deaf
 14 site that's going to start?
 15 A. Five.
 16 Q. And what's the last dorm?
 17 A. Three.
 18 Q. And when's the -- when's the deaf site
 19 to be -- when's the last dorm on the deaf site to
 20 be finished?
 21 A. The completion would be January 18th,
 22 2012.
 23 Q. And if we -- if we pull up another
 24 animation, it's TA 1403 -- oh, 1404?

1 THE COURT: Thank you.
 2 MR. MADIGAN: Thank you.
 3 Q. (By Mr. Madigan) It's -- that's the
 4 blind?
 5 A. Yeah, this is an as-built.
 6 Q. Do you have 1404?
 7 A. This is labeled as 1404.
 8 MR. MADIGAN: What about 1403? The
 9 deaf?
 10 MR. BECKER: Your Honor, while they're
 11 looking for the next animation, I probably need to
 12 do this to preserve the record. There's been some
 13 discussion before we went on the record, and then
 14 there was some reference to these animations being
 15 demonstrative. As I understand, demonstrative
 16 evidence is admissible, illustrative evidence is
 17 not.
 18 I just want to say when it comes time
 19 to admit, I'm going to object to the admission of
 20 these animations. They are illustrative. I think
 21 you can look at them if to the extent that they
 22 help you understand the testimony, you may
 23 consider them, but we will object to their
 24 admission. I don't intend to argue that right

1 now, but to the extent that I have to make a
 2 record at the soonest possible time since there's
 3 been a reference to this as demonstrative. We
 4 object to the animations being referred as
 5 demonstrative or these schedules that you're
 6 seeing being referred to as demonstrative.
 7 THE COURT: Okay. Noted.
 8 Mr. Gregory?
 9 MR. GREGORY: Just to clarify, the
 10 animations themselves we intend to move to admit
 11 into evidence. We have a bench brief ready for
 12 you at any time talking about the evidentiary
 13 issues with respect to animations generally in
 14 this one -- these series of animations in
 15 particular.
 16 Now, some of the references to
 17 demonstrative by Mr. Madigan related to the charts
 18 and so forth that you see as-planned versus
 19 as-built, all of which the underlying records are
 20 going to be in evidence and we'll move to admit
 21 those as well of course. But I just wanted to
 22 clarify this is Mr. Becker clarifying where he's
 23 going, clarify where we're going. And at the
 24 appropriate time, we're happy to have the

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1 discussion about admissibility.
2 THE COURT: Right. And I think -- I
3 appreciate Mr. Becker raising this now, and it
4 doesn't come as a surprise to me. And I think
5 we'll just have to -- you know, we're going to
6 address all these exhibits at the end of each
7 case. I mean, when plaintiff's done with its
8 case, we're going to have to address exhibits at
9 that point, admissibility, and I suspect we'll
10 spend a considerable amount of time on that.
11 If Mr. Becker in anticipation of his
12 brief you want to pull something together over the
13 next week or so, and the sooner I can get those
14 briefs and have the opportunity to read them, the
15 easier it will be for me to make a ruling more
16 efficiently, more quickly for you so we're not
17 spending a half a day debating the issues.
18 But I -- and I do assume and I can, you
19 know, say that I think as with most trials, any
20 demonstrative, illustrative exhibits would have to
21 be supported by admissible evidence, so, I mean,
22 it's -- that's pretty elementary. And so we'll
23 cross that bridge when we get to it, but your
24 objection is noted.

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1 MR. BECKER: I would just say if
2 TransAmerica has a brief on this issue, sounds
3 like they do, they should share it with us now.
4 We'll take a look at it over the coming week and
5 we'll be ready to argue the issue upon admission.
6 THE COURT: I think that's a good idea.
7 I mean, I -- I'm not going to tell them how to
8 proceed with their case, but I think that would be
9 efficient.
10 Anyway, Mr. Madigan, you may proceed.
11 MR. MADIGAN: Okay.
12 Q. (By Mr. Madigan) If we could pull --
13 if we could go with the animation of the deaf
14 as-planned, if we could play that.
15 THE COURT: That's the 1404 -- TA 1404?
16 MR. MADIGAN: Yeah, I need the deaf
17 as-planned.
18 MR. KASAI: 1404 is blind.
19 THE WITNESS: Mike, we were talking
20 about the blind side.
21 THE COURT: I want to have my exhibit
22 numbers right.
23 Q. (By Mr. Madigan) Let's go to Joint
24 Exhibit F-01. And, Josh, could you describe what

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1 Joint Exhibit F-01 is?
2 A. This is a change order, and it's
3 specifically for the milestone dates and the
4 attached signed-off schedule.
5 MR. BECKER: I'm sorry, you're going to
6 have to keep your voice up. We can't hear you
7 back here.
8 A. Sorry. Okay. This is a change order,
9 and it's specifically for the milestone dates and
10 the signed-off -- signed-off schedule.
11 Q. (By Mr. Madigan) And is that
12 signed-off schedule the baseline schedule?
13 A. It is.
14 Q. And that's the baseline schedule that
15 we were just discussing earlier?
16 A. Yes.
17 Q. Is there any reference in here about
18 liquidated damages for milestone dates?
19 A. No, there's not.
20 THE COURT: Well, Mr. Madigan, if you
21 could do me the favor of providing me a change
22 order when you have a change order exhibit, a
23 change order number?
24 MR. MADIGAN: Sure.

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1 THE COURT: It's just -- that's the way
2 we think, and it will be helpful in going back
3 through what I am certain is going to be a lot of
4 documents.
5 MR. MADIGAN: Understood.
6 Q. (By Mr. Madigan) And, you know, this
7 was change order No. 1?
8 A. Yes.
9 Q. Could we go to TA 245. And will you --
10 going to page 5. And, Josh, we've discussed this
11 letter, but could you briefly describe what you're
12 doing with this February 17th, 2011 letter?
13 A. Okay. I'm filing a formal notice
14 regarding the -- as noted, the revised drawings.
15 I tell them that per your conversation yesterday
16 with Bill Koniewich, and as we've previously
17 discussed in some project meetings, and that would
18 be the last on February 7th, we've not yet
19 received revised corrected updated drawings for
20 use at the OSDB project. Do you want me to -- I
21 can go through the whole thing here.
22 Q. No. Did you -- did you mirror this off
23 the article 8 provisions of the contract?
24 A. I did. I tried to follow it exactly.

1 Q. And were you familiar with those
2 provisions from your prior work on state -- on
3 state projects?
4 A. Yes.
5 Q. And if we could go to TA 256. What was
6 the response of Lend Lease to your February 17th
7 letter?
8 A. They -- they committed to provide us
9 the drawings. In fact, that day and -- and
10 considered the matter closed upon the issuance of
11 those drawings. So the closed was saying provided
12 that they are available as noted March 1st, 2011,
13 that the matter would be resolved.
14 Q. If we could blow back out about halfway
15 down this page, there's a reference to RFIs.
16 A. Yes.
17 Q. What's going on with RFIs and responses
18 that SHP is giving?
19 A. They're -- for a period of time, they
20 were responding with RFIs saying the answer was
21 simply additional drawings or construction sets or
22 whatever to be issued. They were answering
23 questions of -- of, you know, what's the specific
24 question with drawings to be issued?

1 Q. Now, anywhere in this letter does it
2 tell TransAmerica to stop construction?
3 A. It does not.
4 Q. Anywhere in this letter does it tell
5 TransAmerica that the architectural dimensions are
6 wrong?
7 A. No.
8 Q. Anywhere in this letter does it tell
9 TransAmerica that the architectural drawings are
10 useless?
11 A. No.
12 Q. If we could go to TA 255. What did you
13 do in response to Lend Lease's March 1st letter?
14 A. Well, when I got the letter, I
15 immediately called Key to order a set of drawings
16 as the -- as the letter instructed us to do, and
17 was not able to get drawings. Key did not have
18 updated drawings. And I let Clay at Bovis know
19 that, and I indicated this to -- in my e-mail here
20 that the situation is ongoing.
21 Q. What was your direction with your subs?
22 A. Well, our only choice was to proceed
23 with the drawings that we had. And I noted that,
24 you know, we're going to proceed with the bid set

1 and expect to handle this through the change order
2 process.
3 Q. If we could go to TA 259. Describe the
4 issue that you're having with Mr. Sheck here.
5 A. Well, he's the surveyor from Sands
6 Decker, and I had given him -- earlier given him
7 sets of the bid documents to look at and start
8 doing his layouts. You know, surveyors have some
9 software stuff that they use to, you know, lay out
10 buildings before they show up in the field. And
11 what he's doing is he's asking me, because I had
12 indicated to him that construction sets would be
13 coming, he's asking me -- he's telling me this CD
14 that you sent over is labeled bid set, and he's
15 asking is there not a for-construction set? Which
16 is kind of normal. And I'm telling him, yeah, the
17 bid set is what we're supposed to use.
18 Q. So that was -- that is what was used to
19 lay out these buildings?
20 A. That's correct. Initially, yes.
21 Q. And this is in early March?
22 A. That's correct.
23 Q. If we could go to Exhibit TA 265.
24 Is this a submittal for the truss shop

1 drawings?
2 A. It is.
3 Q. And is this the submittal coming back
4 from Lend Lease and SHP?
5 A. That's correct. It's the as-noted shop
6 drawings.
7 Q. If we could go to page 3. And if we
8 could first blow up the Bovis stamp.
9 So based on this stamp, did Lend Lease
10 review this submittal?
11 A. Yes.
12 Q. And did they -- did they have any
13 problems with forwarding it to SHP for approval?
14 A. No.
15 Q. And if we could go to the next stamp on
16 the screen.
17 Is this a stamp from SHP?
18 A. It is.
19 Q. And does it say: Reviewed as noted?
20 A. Yes, it does.
21 Q. And does it also say: Fabrication
22 slash installation may be undertaken?
23 A. It does.
24 Q. If we go to page 23. Were the truss

1 drawings significantly marked up by SHP?
 2 A. Yes. What happened was we submitted
 3 these initially and the information that we had in
 4 the architectural structural drawings, the bid
 5 set, we weren't able to complete the dimensioning
 6 of the trusses. So we gave these to SHP.

7 After not being able to resolve these
 8 things, we had a list of questions. And that's
 9 the meeting I was referring to earlier. I think
 10 that was around the 7th of February, that same
 11 meeting that I referred to in the notice letter
 12 where what was decided is they would take these
 13 drawings and they would dimension them for us.

14 And so what this really is is it's --
 15 it solves the immediate problem of here's the
 16 dimensioning that you need to order your trusses
 17 from. And that gets us that step, which is what
 18 this is used for. This is the truss shop
 19 drawings. But the problem that causes is it's
 20 really kind of a none of the above kind of answer
 21 to the question of what's the dimensions? Because
 22 I don't have an architectural answer -- you know,
 23 the dimensions aren't what they are in the
 24 architectural drawings. They aren't what they are

1 in the structural drawings.

2 We know that the site -- the civil
 3 drawings, the corners of the buildings didn't
 4 match the structural. And we already knew at this
 5 point that the mechanical guy was having some
 6 trouble laying out the undergrounds.

7 So we're -- again, it's a none of the
 8 above, but it solves the immediate issue of the
 9 truss shop drawings. He dimensioned those and so
 10 those are the dimensions we're supposed to use.

11 Q. Did SHP direct you -- direct you not to
 12 rely on the architectural dimensions at this
 13 point?

14 A. For some of them, yes.

15 Q. Did they ever issue a revised plan?

16 A. No. I would like to add to that. The
 17 intent of what was going on is that they would
 18 take this information and update the drawings with
 19 it that they were going to put this into the CAD
 20 system or their design system and come back with
 21 revised drawings.

22 Q. So you proceeded with these marked-up
 23 truss drawings with the expectation that you were
 24 going to get an updated set of architectural plans

1 that was coordinated with this?

2 A. That's correct. And -- and one more
 3 point, that's an -- it's important to me because
 4 we looked at earlier these are very detailed
 5 buildings, they're not just big open spaces. And
 6 you can see on here that there's -- there's
 7 three -- the trusses span three pieces of the
 8 building. There's a bearing wall on the outside,
 9 a bearing wall to the corridor, a bearing wall
 10 across the corridor, and then the other perimeter
 11 bearing wall, so these trusses, there's three
 12 dimensions.

13 And I won't do the math on all these
 14 right now, but so let's say you have a string of
 15 dimensions that you know the outside dimension is
 16 -- let's just -- again, I'm not speaking in
 17 specifics, this is round numbers here. Let's say
 18 it's 60 feet -- well, you're going from outside
 19 bearing to outside bearing, and let's call that
 20 30 feet, and then across the corridor let's call
 21 it 10, so we're at 40 feet. And the last chunk
 22 let's call it maybe 20 feet.

23 What you're doing here is telling me
 24 that some of those spans are now different than

1 what I know on my drawings, but you're not telling
 2 me what the breakdown is. So when I -- when you
 3 give me this, that's great, I can order trusses, I
 4 can proceed with that step, but I don't know what
 5 those smaller pieces are now and I don't know what
 6 you want to do about that.

7 So if, for instance, I have a
 8 difference from -- on this first bigger piece, the
 9 part that goes across the dorm rooms, let's say I
 10 have a difference in some of them, again, speaking
 11 in generalities, were significant, you know, we're
 12 talking a foot, six inches.

13 THE COURT: Excuse me, Mr. Wilhelm. I
 14 would like you to walk up to the monitor so we can
 15 see.

16 A. Sure.

17 So if you look at like a truss bay
 18 here.

19 MR. GREGORY: Would you like it turned
 20 so you can see it?

21 THE WITNESS: Who's the audience here?
 22 THE COURT: Well, I think they need to
 23 see it, too. If you can stand -- yeah, will the
 24 camera pick this up?

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1 THE BAILIFF: No.
2 THE WITNESS: I can describe it.
3 THE COURT: Well, I understand that.
4 I'm wanting to have a record of this -- I mean,
5 you're referring to Exhibit 265, page -- TA 265,
6 page 23, which is a pretty elaborate, marked-up
7 document.
8 THE WITNESS: Yes. The red indicates
9 changes.
10 THE COURT: I understand that.
11 THE WITNESS: So, yeah.
12 THE COURT: I understand that. So if
13 you would take us through that last explanation
14 you gave using an example --
15 THE WITNESS: Okay.
16 THE COURT: -- of a truss.
17 A. So if these T5-A, T5 series of trusses
18 here, if these are changed by several inches, it
19 would stand to reason that my architectural
20 drawings that show that same distance from this
21 outside wall to this corridor wall, there's going
22 to be some difference in what occurs within that
23 space from the corridor wall to the outside wall.
24 And, you know, as the -- the contractor, I don't

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1 know -- you know, I don't know which is the most
2 important. Do you want to preserve the width of
3 the corridor? Do you want to preserve the width
4 of the openings? You know, I don't know what you
5 want to do with those differences. But I can
6 order the trusses at this point.
7 THE COURT: Okay. I understand.
8 Q. (By Mr. Madigan) If we could go to
9 Exhibit 267.
10 Josh, you referenced earlier that there
11 was problems with laying out the buildings as
12 well?
13 A. That's correct.
14 Q. Is that what's -- is that what's being
15 addressed here in this RFI -- RFI 109?
16 A. Yes. We're -- we're -- I'm indicating
17 as briefly discussed in the preconstruction
18 meeting Friday 3/11, we had the following
19 questions from our surveyor. And what we found in
20 summary here is that the civil drawings locate the
21 corners of buildings, typically two corners of
22 each building locate so that you could locate both
23 where they were in relationship to, you know, the
24 world, using north, east and then how they relate

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1 to each other. And then ultimately, though,
2 pinning the corners, you know, that should
3 coincide with the structurals of the overall
4 dimension of the outside to outside of that
5 building.
6 And what we found is those were off by
7 half a foot, which is six inches, the surveyor
8 uses tenths, but -- so there's a six-inch
9 difference between the civil and the structural at
10 this point.
11 And then we also were coming up with
12 areas that we just couldn't define, we didn't know
13 what the dimensions should be.
14 Q. And in this response, was a -- a sketch
15 was provided. If we could go to page 12. And if
16 you could explain what this sketch is?
17 A. Okay. This sketch is trying to explain
18 the -- the dimensional difference with what you
19 see on the structural to the architectural, at
20 least some of it, for how you lay a wall out to
21 align with the foundation. And what the biggest
22 thing he's trying to indicate here I believe is
23 the four-inch dimension from the face of the
24 foundation to the face of stud.

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1 Q. And is that four-inch dimension, is
2 that important in terms of trying to coordinate
3 between the architectural plans and the structural
4 plans?
5 A. Yes. Because you're give -- you're
6 locking in a precise point for those perimeter
7 walls.
8 Q. Did this sketch include any other
9 dimensions?
10 A. It did not.
11 Q. If we could go to Exhibit 219. In this
12 e-mail, Mr. Predovich talks about a sketch. And
13 he says: My concern is in the relationship of
14 face of stud to face of foundation, and this is
15 January 25th, 2011. Was anybody from TransAmerica
16 -- and we can zoom out of this -- but was anybody
17 from TransAmerica copied in on this -- on this
18 e-mail chain?
19 A. No.
20 Q. And if we could go to the next page and
21 we blow that -- yeah, blow that up. Keep going
22 down a little further.
23 He says: With the four and a half --
24 four and a quarter inch dimension, I'm unable to

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1 compare overall architectural dimensions to
2 foundation dimensions.
3 As you were going through these
4 problems in early March, did Mr. Predovich make
5 you aware of any of this?
6 A. No. We were never aware of this. In
7 fact, at the time when I was bringing these
8 problems to their attention, I was surprised to
9 learn this later, I would get a lot of resistance.
10 I mean, I -- it -- I was treated like I was the
11 one creating the problem. So it surprised me to
12 find out that -- that they were aware of this.
13 Q. If we could go to TA 713. Did you ever
14 receive this sketch in March when you were having
15 problems with the layout of the building?
16 A. No, I did not.
17 Q. And if we could -- if we could blow up
18 this right there. If you could blow out that --
19 right where I ran my finger. Yeah. The -- right
20 where I have it marked.
21 And what's the differential given
22 there?
23 A. Four and a quarter inches.
24 Q. Is that different than what was

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1 provided to you in the RFI response?
2 A. Yes, it is by a quarter inch.
3 Q. If we could -- if we could back out of
4 that.
5 THE COURT: When you say, "RFI
6 response," you're referring to RFI 109?
7 MR. MADIGAN: That's correct. And
8 that's Exhibit TA 267.
9 THE COURT: Thank you.
10 Q. (By Mr. Madigan) If we could go to TA
11 269.
12 Is this a progress meeting minute that
13 you were in attendance?
14 A. It is.
15 Q. What's the date of this meeting minute?
16 A. The 21st of March 2011.
17 Q. And if I can reference you to page 8.
18 THE COURT: Does this have a meeting
19 number?
20 MR. MADIGAN: Yes, it does.
21 THE COURT: I think it's six or eight.
22 I can't read it.
23 MR. MADIGAN: It's weekly progress
24 meeting six.

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1 THE COURT: Thank you.
2 Q. (By Mr. Madigan) If we could blow
3 up --
4 On March 7th, 2011, what's going on at
5 that meeting with respect to the project drawings?
6 A. The contractor's requested updated
7 drawings that's in CAD files agreed in previous
8 meetings. Bovis direction was to provide post bid
9 set of drawings since changes, addendums, RFIs.
10 Contractors were directed that architectural
11 dimensions are correct and should be used for
12 coordination. And Rob -- referring to Rob
13 Grinch -- I believe asked why this was an issue
14 and requested that updated construction sets are
15 complete to be able to release them to
16 contractors. They asked that they are to be
17 completed and released to contractors.
18 Contractors agreed to proceed with posted sets
19 until construction sets are completed.
20 Q. Did the contractors have any choice in
21 terms of what to proceed with at that point in
22 time?
23 A. No.
24 Q. Were the contractors told to stop work?

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1 A. No.
2 Q. Were the contractors told that there
3 were problems with the fire ratings of the
4 buildings at that point in time?
5 A. No.
6 Q. On February 7th, 2011, there's a
7 discussion about the -- about the drawings and
8 that last note there final drawings, what's --
9 what's being discussed as of February 7th, 2011?
10 A. That final drawings per SHP, we should
11 be receiving new drawings by the end of the --
12 this week available at Key Blueprints in PDF
13 format.
14 Q. And if we could go to that next page,
15 and if we could blow up the top.
16 Did you make this reference about truss
17 drawings?
18 A. Yes.
19 Q. And --
20 A. Truss drawings are under review,
21 TransAmerica will submit shop drawings and SHP
22 will review slash mark up. TransAmerica is
23 concerned about lead times with trusses, six to
24 eight weeks and rebar.

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1 Q. And this was discussed in what meeting?
2 A. The February 7th meeting.
3 Q. And what did you do 10 days after that?
4 A. I filed the notice regarding drawings.
5 Q. If we could go to Exhibit 270, TA 270.
6 And this is an e-mail that you wrote?
7 A. Yes, I wrote this e-mail.
8 Q. And what's -- who wrote the -- the red?
9 A. Jim Smith would have -- he overwrote my
10 e-mail, I guess is what you would say. I was
11 letting him know that the -- that there were
12 differences in the truss shop drawings, which we
13 were told to lay out the buildings with, and the
14 architectural or structurals, and making sure that
15 they understood that they're telling -- you know,
16 I'm letting them know that there's differences.
17 Q. If we could go to page 3. Is this
18 direction that Mr. Smith is providing regarding
19 the quarter-inch difference not enough to stop
20 layout of the buildings?
21 A. It is.
22 Q. What was Mr. Smith's position with
23 respect to when these issues should have been
24 brought up?

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1 A. Well, this was frustrating. He brings
2 up that, you know, these should have been
3 discussed weeks ago. And then he also -- you
4 know, again, this was the general tone of most
5 things out there, effectively blames us for the
6 problems. And what I'm doing in this e-mail is
7 saying to them, you've told us to use the
8 architectural drawings, they're okay. You've also
9 told us to use the truss shop drawings, which you
10 re-dimensioned.
11 Now I sit down with both those things
12 in front of me and they don't match. So I'm
13 telling you what the differences are. I'm doing
14 this extra bit of work so you understand that
15 there are problems. And I -- I get this response,
16 which is basically shut up and go out and do it.
17 And -- and that's --
18 MR. BECKER: I don't think -- I would
19 object. Mischaracterizes the evidence.
20 THE COURT: Yeah, I'll sustain that and
21 I'll strike that last comment. But the document
22 is understandable.
23 A. Okay.
24 Q. (By Mr. Madigan) Did -- anywhere in

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1 here, did Mr. Smith talk about the discussions
2 between SHP and Lend Lease in January regarding
3 these -- regarding dimensional issues?
4 A. No. And, again, I was surprised to
5 learn that they were aware of them.
6 Q. Okay. Now, at this point in time when
7 you're trying to get the foundations in and you're
8 trying to get the truss drawings in to
9 fabrication, is it your -- is it your expectation
10 that you're still going to get an updated set of
11 drawings?
12 A. It is.
13 Q. If you had known that you weren't going
14 to get an updated set of drawings, would you have
15 gone about building the buildings like this?
16 A. No.
17 Q. If we can go to TA 277.
18 Is this an RFI from the plumbing
19 contractor?
20 A. Yes. And here they're asking for the
21 piping penetration and foundation profiles at the
22 center corridors.
23 THE COURT: Sorry, what's the exhibit
24 number?

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1 MR. MADIGAN: It's TA 277.
2 THE COURT: Thank you.
3 A. And it would be RFI 112.
4 Q. So this issue of piping penetrations
5 and foundation elevations, is this something that
6 you mentioned in the schedule comments back in
7 December that we looked at yesterday?
8 A. It is. It's something that I requested
9 or asked to be on the schedule.
10 Q. If we can go to TA 282.
11 And this is proposal request No. 1,
12 it's dated March 29th, 2011. What's going on with
13 PR No. 1?
14 A. They are asking for an itemized
15 proposal for the modifications to the foundations
16 per RFI 112, which are the additional information
17 on plumbing line elevations and locations.
18 Q. And in terms of attachments, what did
19 they attach to this PR?
20 A. Additional structural drawings.
21 Q. Did they attach any updated
22 architectural plans?
23 A. They did not.
24 Q. If we could go to TA 282-A, that first

1 page, we have it highlighted here.
 2 Could you explain what this change is?
 3 A. Here this would be at the center wall
 4 as indicated in the write-up. The -- I believe
 5 the plumbing lines were coming through that area
 6 and would have gone right through the original
 7 footer, and so they decided to drop the footer and
 8 introduce a center foundation wall for the
 9 plumbing to go through. And that's how that issue
 10 would be resolved.
 11 Q. If we could go to the next page,
 12 page 2.
 13 A. Right.
 14 Q. And this is -- this is the structural
 15 plan here?
 16 A. Correct.
 17 Q. And they're changing dimensions on the
 18 structural plan?
 19 A. Correct. They're changing these
 20 dimensions to what -- some of the questions we had
 21 asked earlier in some of the meetings that we had
 22 had that we referred to as the dimension meetings
 23 when we would meet in the mornings sometimes and
 24 go over things. They're putting some of this

1 information on these drawings.
 2 Now, usually, though, when they did
 3 this, see there's clouded information? Not all of
 4 the information on this sheet would be correct,
 5 and we'll see that as it -- we documented what we
 6 come to find out is a lot of times you could rely
 7 on only the very specific part of the drawing that
 8 is being shown.
 9 Q. So if there was another dimension on
 10 this drawing, it may be not right?
 11 A. That's correct.
 12 Q. And you were asked to price this
 13 structural drawing, were you asked to price any
 14 changes to the architectural drawings?
 15 A. No.
 16 Q. And is the architectural drawings what
 17 you used to fabricate your wall panels?
 18 A. Yes.
 19 Q. If we could go to TA 294.
 20 What's going on with the surveyor?
 21 This is April 1st, 2011?
 22 A. Okay. Our earlier correspondence where
 23 he was asking for the construction drawings and we
 24 documented or told him to use the bid set. We had

1 then been issued the revised truss shop drawings
 2 as marked up by the architect. Those were then --
 3 we were told to use those for the foundation
 4 layout because those were the corrected
 5 dimensions.
 6 And the surveyor is telling me, quote,
 7 I've never had to deal with truss drawings for
 8 foundation layout. And then he indicates, I
 9 thought I understood them by checking the numbers
 10 across, but I am confused on this one. So he's
 11 still having trouble. Essentially this is a list
 12 of questions, he's having trouble resolving the
 13 dimensions of the building from the information
 14 that we have at that point.
 15 Q. If we could go to page 6. Is this a
 16 list of comments that the surveyor had after RFI
 17 109 had been issued?
 18 A. It is, yes. He's indicating he's
 19 looking at RFI 109 and that they -- the plans
 20 expand after offset of four inches to create the
 21 foundation points. He's cautioning us that he'll
 22 do that, but he can't warrant that there will not
 23 be future issues with the structural foundations.
 24 And because I don't think he has the ability to be

1 able to check it by anything.
 2 Q. And what's going on with the deaf high
 3 school item No. 7?
 4 A. He's indicating that that building
 5 doesn't close by a half inch and he's indicating
 6 that it would -- it would be somewhere along the
 7 north entry of the building.
 8 Q. And if we could go back to page 1 of TA
 9 294.
 10 THE COURT: Mr. Madigan, I have a
 11 question. Are these exhibits highlighted like
 12 they are on the screen?
 13 MR. MADIGAN: In the --
 14 THE COURT: The ones you're going to
 15 give -- offer into evidence?
 16 MR. MADIGAN: No.
 17 THE COURT: Okay. I would ask that
 18 when you're questioning him, that you refer him --
 19 have him reference the paragraph numbers he's
 20 reading from. It will be much easier for my job.
 21 MR. MADIGAN: Sure.
 22 THE COURT: Thank you.
 23 MR. GREGORY: Your Honor, to follow up
 24 on that, and certainly a way to keep the record

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1 clear, does the Court have any preference as to
2 whether the exhibits you accept be highlighted as
3 they're highlighted on the screen and in front of
4 the witness?

5 THE COURT: Well, depends upon whether
6 the -- whether both counsel agree. And I suspect
7 they won't, so I would say just stick with the
8 describing what it is you're reading and where it
9 is in the document.

10 Q. (By Mr. Madigan) If we could go to the
11 first page of 294. This is an e-mail you wrote to
12 Mr. Keith and others at Lend Lease?

13 A. Yes. I copied everybody at Lend Lease
14 I think. I let them know that we have not seen
15 the revised drawings as promised Wednesday after
16 our dimensioning meeting. Further, we are having
17 more difficulties laying out the successive
18 buildings as I feared and stated in last week's
19 meeting. And then I, you know, summarize -- went
20 down, said that we are relying on memory, multiple
21 different documents, truss shop drawings,
22 surveying layouts, everything but the bid set of
23 documents.

24 The more of this occurs the greater of

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1 the likelihood of the major costly error. From
2 what I've seen, the construction set of drawings
3 is being used by the design team. Can this set be
4 finally issued for the field use once the
5 dimensions are corrected from Wednesday's meeting?

6 Q. Explain what you mean by "construction
7 set."

8 A. What I mean is I'm referring to the set
9 that my surveyor was asking for. What typically
10 happens is there's a bid set and then a
11 construction set or a set that's issued for
12 construction that, you know, are final, I guess.

13 Q. Over to your left there's a set of
14 plans. If you go to -- at this point in time,
15 were you working off a set of plans that said bid?

16 A. Yes.

17 Q. And when you made that reference to
18 construction set, had you seen a set where it was
19 labeled construction set?

20 A. No. But there was indications that
21 there was a set floating around on the design
22 side.

23 Q. You hadn't seen it?

24 A. No.

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1 Q. Had you been -- and you hadn't been
2 provided it?

3 A. No. That's what I'm asking for. I'm
4 asking them to give it to us.

5 Q. If we could go to TA 297.
6 And I'm going to reference your e-mail
7 dated April 7th, 2011 to Clay Keith on the lower
8 portion of the page. And describe what's going on
9 in here.

10 A. Okay. Which page are --

11 Q. It's 297. It's Exhibit 297.

12 A. Okay. Oh, okay. What we're doing --
13 what I'm doing is I am documenting the meeting
14 that we had that morning and making sure that, you
15 know, I'm putting into writing what the decisions
16 are. And specifically I'm -- I indicate we can
17 proceed to use the construction set drawings for
18 all elementary, high school buildings with the
19 following exceptions. And these I'm specifically
20 referring to foundation plans, just the foundation
21 plans.

22 And so the exceptions are like I
23 indicated earlier were given in those -- that --
24 those RFIs and things, these few sheets of the

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1 construction set structurals. And not everything
2 is correct. So you've got -- at the blind
3 elementary, middle school we have a 1 foot 7/8th
4 inch step in lieu of the six-inch step at the deaf
5 site. So the -- you know, depending on which site
6 you're on, that drawing is not going to be
7 accurate.

8 There's an inch and a half bust at the
9 columns that -- so the dimensioning on that
10 construction set as of that point wasn't correct
11 on that. As far as PR one, which would be the
12 lowering of the footers, those drawings accurately
13 show that. But then they're not showing the
14 lowering of the foundation piers. So there's --
15 that's three aspects of the construction set
16 foundation plans that have been issued as of that
17 date that aren't correct.

18 Q. So when you're referring to the
19 foundation plans, those are the structural plans
20 that we looked at earlier that was attached to one
21 of the PRs?

22 A. I think it was the RFI 109, I think.

23 Q. But you -- you hadn't received a
24 construction set for the architectural plans?

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1 A. That's correct. Yeah, I indicate here
2 it's foundation plans.
3 Q. And even these structural plans, the
4 dimensions on those, they're not all entirely
5 correct?
6 A. That's correct.
7 Q. If we could go to TA 300.
8 It's light and a little hard to read,
9 but what's going on here between yourself and it
10 looks like Mr. Wagner?
11 A. This is the truss manufacturer and the
12 wall panel manufacturer ABC and Automated. And
13 I'm telling them to proceed with the fabrication
14 of the trusses with the approved as-noted shop
15 drawings. There was another round of questions
16 that had occurred after the dimensioning of them
17 that we had to get resolved.
18 And I indicated here that Russell was a
19 great help in giving me the information to argue
20 slash eliminate the incorrect items that we're
21 asking for, which I indicate is most of the list,
22 only four items survived and were to be
23 incorporated into the final set. And I think most
24 of those revolve around dimensioning.

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1 Q. So at this point in time, the truss
2 fabrication is proceeding?
3 A. Yes.
4 Q. Based at least in part on that
5 marked-up set of shop drawings we looked at
6 earlier?
7 A. That's correct.
8 Q. If we could go to TA 307.
9 And is TA 307 RFI 132?
10 A. Yes, it is, RFI 132.
11 Q. And when was RFI 132 created?
12 A. This was created on the 7th of
13 April 2011.
14 Q. And how long did it take to get RFI 132
15 resolved?
16 A. Months. It ultimately goes on for
17 several revisions. I'm not sure exactly what
18 month. I think we have it in the record, but
19 yeah, it goes through -- it's initially answered,
20 it's reopened again and then it's reopened a
21 second time.
22 Q. So if we go down, the date it was
23 responded to was when?
24 A. 4/15/2011.

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1 Q. What about -- what does it say for is
2 cost impact?
3 A. No.
4 Q. What about is drawing update required?
5 A. No.
6 Q. Now, you indicated that there were
7 multiple revisions to this -- this RFI. Was the
8 second revision, did that occur on 5/11/2011?
9 A. No. I think that was just the first
10 revision. I -- no, I'm sorry, that would be the
11 second, yeah, per site meeting 5/11. No changes
12 from original RFI -- no, I think that's just the
13 revision one.
14 Q. If we can go to, let's see, page 3 of
15 this exhibit. And it's hard to -- it's hard to
16 read, but can you see how they're crossing out
17 dimensions from a previous response? Is that
18 what's going on here?
19 A. Yes. And this is indicated as response
20 one, so this is the first revision.
21 Q. If we go to TA 308. Is this the first
22 response that was given for RFI 132?
23 A. Yes, it is.
24 Q. Is a complete architectural set

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1 provided with this -- with this response?
2 A. It is not.
3 Q. And then this response was later
4 changed?
5 A. That's correct. And, again, it -- just
6 like before, it's just the clouded information.
7 And, in fact, as you're noting, the clouded
8 information will make other information on this
9 page not correct. So, again, it's only to be used
10 for that very narrow purpose.
11 Q. So the first response to RFI 132 was
12 when?
13 A. I believe R -- what we referred to was
14 R one or revision one, I believe that 5/11 as
15 noted in the clouded information attached here.
16 Q. Well, what does it say for the --
17 responded in the RFI?
18 A. It says 4/15/2011.
19 Q. If we can go to TA 304. If we could go
20 to page 3.
21 THE COURT: What is -- what is TA 304?
22 Just an e-mail?
23 MR. MADIGAN: It's an e-mail from
24 Mr. Wilhelm dated April 15th, 2011.

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1 THE COURT: Thank you.

2 Q. (By Mr. Madigan) What do you do on

3 April 15th, 2011, the same day you receive at

4 least the first response to RFI 132?

5 A. I'm indicating again that I haven't

6 seen the construction set of drawings produced

7 yet. We're incorporating changes made in the

8 addendums, RFIs, et cetera. Most recently the

9 dimension problems we worked through on RFI 109,

10 112 and 125.

11 At this point we are proceeding with

12 the dimensions as we have received in our meetings

13 with Lend Lease, SHP, surveyor and TransAmerica.

14 This should get us through the footings and

15 foundations. We are concerned, however, that the

16 drawings should be updated so future coordination

17 with the primes and subsequent trades is correct.

18 And we'll all be working from the same dimensions.

19 Q. What was your concern with future

20 coordination with other primes and your subsequent

21 trades?

22 A. Well, we -- we had been proceeding in

23 a -- in the fashion -- like I said, when you

24 answer one dimensional question, you're leaving

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1 essentially the rest of the page as unknown. It

2 could be correct or it might -- it might be wrong.

3 And the other, you know, the plumber,

4 the electrician, the HVAC contractor, you know,

5 they're looking at drawings that -- that just like

6 we are for architectural drawings that are -- that

7 are unchanged at this point in time to all of the

8 things that we've been doing. So, you know,

9 you're bound to run into some problems when you're

10 making those changes and it's not being, you know,

11 updated and modified.

12 Q. Mr. Keith takes your e-mail and

13 provides it to Mr. Predovich. During

14 construction, did you -- did you ever see this

15 e-mail?

16 A. No, I did not.

17 Q. During construction, did Mr. Keith ever

18 indicate to you that TransAmerica had submitted

19 correspondence to cover themselves if there's a

20 field issue or error?

21 A. No.

22 Q. And this is the same day that you

23 received the first response to RFI 132?

24 A. That's correct.

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1 Q. If we could go to TA 1019.

2 Now, you indicated earlier about

3 coordination with the other primes. Could you

4 identify this picture and its significance?

5 A. Yeah. This is a layout of a mechanical

6 room. And what's shown here is the layout as we

7 have it at that point in time isn't allowing --

8 you know, the electrical undergrounds are turned

9 up and we can't build the wall where the wall is

10 shown per our layout because they interfere.

11 Q. If you were to build the wall as it's

12 laid out right now, the conduit would be sticking

13 through the wall?

14 A. Yeah. Yeah. The -- you wouldn't have

15 much of a masonry unit left.

16 Q. If we could go to TA 311. Is this

17 another RFI?

18 A. It is. It's RFI 125. And I'm asking

19 for updated dimension drawings, construction set

20 for all buildings incorporating the dimension

21 issues highlighted in 109 and per the dimension

22 meeting on 3/30/11.

23 Q. And if we could go further down, this

24 was an RFI that you wrote?

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1 A. It is.

2 Q. And what was your suggestion?

3 A. My suggestion was to update and issue

4 the construction set in its entirety to be used

5 for construction and coordination.

6 Q. And what was the response?

7 A. The response was that they issued the

8 foundation plans and that's it.

9 THE COURT: Mr. Madigan, would you back

10 up to the photo? I have a couple questions. That

11 was --

12 MR. MADIGAN: 1019.

13 THE COURT: -- TA 1019.

14 Mr. Wilhelm, do you know what date this

15 picture was taken?

16 THE WITNESS: The exact date I don't.

17 Not sitting here, it's not --

18 THE COURT: It's -- was it dated when

19 it was taken? Was there a date record made of

20 this photograph?

21 THE WITNESS: Yeah. I believe it's one

22 of my photographs, and it would be stored by month

23 and the date downloaded. And the data date in the

24 photo, you know, whatever they call that, would

1 tell you what date it is.
 2 THE COURT: Do you know which building
 3 this is in?
 4 THE WITNESS: I don't.
 5 THE COURT: Okay.
 6 THE WITNESS: I remember the instance,
 7 what it was is a -- we had received the dimensions
 8 for the layout. And I actually believe this was a
 9 Saturday. And I went out, was there and went out
 10 with the mason having an issue laying out the wall
 11 to determine what we should do. And we had -- we
 12 had -- you can see some chalk lines and some
 13 string lines there and we were laying out the
 14 information as we had it, and that was the problem
 15 that arrived with.
 16 THE COURT: And this is -- what I'm
 17 looking at is just sealed concrete here?
 18 THE WITNESS: Yes. Yeah. It's a
 19 little wet that day.
 20 THE COURT: Okay.
 21 Q. (By Mr. Madigan) Did you take this
 22 picture, Josh?
 23 A. I believe I did.
 24 Q. Is it a picture of the project?

1 A. Yes.
 2 Q. And -- and you indicated -- what room
 3 is this a picture of?
 4 A. It would -- it would be a high school
 5 and it would be a mechanical room in the high
 6 school. And it would most likely be the deaf site
 7 if memory serves.
 8 Q. And it was taken sometime after the pad
 9 was poured?
 10 A. Yes.
 11 Q. But before the walls were installed?
 12 A. Yeah. We're building, it would be --
 13 we were building the mechanical rooms. We
 14 received some -- there was some questions about
 15 the dimensions, the layout of the -- the
 16 dimensional layout of those buildings, we had
 17 gotten that answer and then we were attempting to
 18 put it into practice.
 19 Q. And does this picture illustrate your
 20 concern with coordination between the other
 21 primes?
 22 A. Yes. Actually it illustrates very
 23 good -- I would like to go a little farther on
 24 that. When -- when a lot of these dimensional

1 questions are re-answered or the truss drawings
 2 come out, the thing you have to keep in mind in
 3 that RFI where they show the -- I think it's 109
 4 again, the back of it where they pin that detail
 5 to the edge of the foundation, you've got, you
 6 know, the drawings aren't just theoretical
 7 anymore, you've got some construction in place
 8 that is actual.
 9 And so now when you're messing with the
 10 dimensions on the trusses or the truss shop
 11 drawings or these things that occur afterwards,
 12 it's against the background of -- there's actual
 13 foundations and pads poured out in the site that
 14 aren't moving, in theory, like your dimensions
 15 are.
 16 THE COURT: Do you know if there was
 17 any field measuring done to address that concern?
 18 THE WITNESS: Yes, we did, and at one
 19 of these dimensions meetings provided field
 20 measurements of the -- the -- what was existing to
 21 that point in time. And that's why we expected
 22 these things were getting put together back at the
 23 architect's office, because, you know, we were
 24 giving them that kind of information, that's what

1 we were -- that's why we were doing it.
 2 THE COURT: Okay.
 3 Q. (By Mr. Madigan) And when you say, we
 4 were giving them that information, an example of
 5 that would be the e-mail between yourself and
 6 Mr. Smith where you were giving them --
 7 A. Yes, exactly. Yeah. And I always felt
 8 we were going above and beyond to make sure that
 9 everyone understood what was going on.
 10 Q. If we could go to TA 314, which is a
 11 progress meeting minute. It's weekly progress
 12 meeting 11 dated April 25th, 2011. You were in
 13 attendance at this meeting?
 14 A. Yes, I was.
 15 Q. And was -- who was the attendance for
 16 the OSFC?
 17 A. Just for the record, this is meeting
 18 minute 11. Sorry.
 19 THE COURT: Yeah. He mentioned that.
 20 THE WITNESS: Okay.
 21 THE COURT: You were focused.
 22 A. All right. I'm sorry, Mike.
 23 Q. (By Mr. Madigan) Who attended for the
 24 OSFC?

1 A. OSFC? Madison Dowlen.
 2 Q. If we could go to page 8.
 3 Was the casework package being
 4 discussed in this April 11th, 2011 meeting?
 5 A. Yes. Yes, it is.
 6 Q. And about -- underneath the heading
 7 4/11/11, it references the casework. And could
 8 you describe what was being discussed at that
 9 meeting?
 10 A. What they indicate -- well, what they
 11 say is: Casework could have been impact at least
 12 one in the first dorm since it didn't go out to
 13 bid yet.
 14 They're indicating that the casework
 15 might be late. Lend Lease is to work with the
 16 owner to get this package out as soon as possible.
 17 They indicate a contractor is to notify Lend Lease
 18 and SHP if any conflicts with casework and final
 19 work of their scope. They also indicated that at
 20 that point in time, we were ahead of schedule.
 21 Q. If we go to the next page. You can see
 22 the reference to the 4/25 meeting.
 23 A. Correct. They indicate casework Lend
 24 Lease requested from contractors, their scopes for

1 activities that may be affected by casework. And
 2 they indicate that TA activities were submitted.
 3 Final inspections will be issued. And then they
 4 indicated, needed activities from TP, Jutte and
 5 Vaughn.
 6 Q. So when it was requested of
 7 TransAmerica to provide what the effect was going
 8 to be of the casework, did TransAmerica submit
 9 information?
 10 A. Yes, it did.
 11 Q. And as part of that information that
 12 the inspections could be affected on this project?
 13 A. That was part of it, but not all.
 14 Q. What else do you recall was a part of
 15 the response TransAmerica gave with respect to the
 16 casework?
 17 A. Most of the finishes would be impacted.
 18 You would have I think quite a significant impact.
 19 Q. If we could go to page 10.
 20 What's being discussed with respect to
 21 the project drawings? This is as of April 25th,
 22 2011?
 23 A. Correct. Let's see, I'm trying to find
 24 it on my page here. They're indicating that

1 construction set would be done by Wednesday and
 2 it's going to the printer Thursday and that it
 3 would --
 4 MR. BECKER: I'm going to object, Your
 5 Honor. There's been no foundation laid for what
 6 he just said, which is based on handwriting on
 7 this document.
 8 THE COURT: Sustained.
 9 Now, you were at this meeting?
 10 THE WITNESS: Yes, I was.
 11 THE COURT: Okay. Do these notes
 12 refresh your recollection of what was said at that
 13 meeting?
 14 THE WITNESS: Yes, they do.
 15 THE COURT: Okay. You can go ahead and
 16 testify.
 17 A. Okay. They're indicating that the
 18 construction set would be done by Wednesday. It
 19 was going to the printer on Thursday and that it
 20 would be issued on Friday under a PR 10.
 21 Q. (By Mr. Madigan) What does it say
 22 under the typed 4/25/11? What was being discussed
 23 between SHP and its consultant? Its
 24 subconsultant?

1 A. Okay. That they're having a -- SHP
 2 noted a subconsultant had a major issue with the
 3 server and is being delayed, and it is delaying
 4 the submission of construction drawings. They're
 5 saying that they've had some sort of a computer --
 6 computer error.
 7 Q. Further down on April 18th, 2011 did
 8 SHP request submission of dimensional issues?
 9 A. That's right. They were asking -- they
 10 said construction set to be issued by the end of
 11 the week. SHP noted that all dimensions in need
 12 of clarification be submitted ASAP.
 13 Q. Now, were you providing dimensional --
 14 the dimensional information as you were
 15 experiencing it out in the field?
 16 A. That's correct. That kind of was
 17 our -- the way it was preceding out there. We
 18 were -- we were giving them I guess the feedback
 19 from the field and expecting them to update the
 20 drawings.
 21 Q. If we could go to TA 315.
 22 This is an e-mail from yourself to Clay
 23 Keith dated April 26th, 2011. What was the
 24 purpose of sending this e-mail?

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1 A. Right. This is in response to what was
2 discussed in that project meeting. And I
3 indicated, as requested in the project meetings,
4 depending on when the casework is installed, the
5 following activities could be impacted for
6 TransAmerica. Also these activities were added to
7 the schedule. The successors should be available
8 from that list. I'm indicating what I had given
9 them in December of 2010. Here are the items that
10 I believe will need to be kept in mind and managed
11 if the casework is delayed. I listed the
12 activities from the blind high school five, but
13 these would apply to all buildings.

14 And I indicate the ceramic tile, and I
15 give the schedule number so that they could find
16 it on the schedule, but ceramic tile, additional
17 material to finish under the casework or you would
18 have to wait to finish to the casework is what I'm
19 implying.

20 Wood trim. Trim cannot be returned to
21 the casework. It would -- could be left long, but
22 it would need to be finished later. Cabinets and
23 countertops. It's not our scope, it's on the
24 schedule to be impacted. Finish paint. Late

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1 installation would require -- or late installation
2 would -- I got my words mixed up here, would
3 require additional touch-up, repair.

4 And then install built-in desk shelves
5 and entertainment center. I indicated that
6 activity would be impacted as well. And then VCT
7 and carpet. Again, additional material under the
8 casework or you would have to wait to finish it to
9 the casework. Plumbing fixture installation. I
10 noted that was by TP Mechanical. Potential delay
11 in final inspections. Toilet accessories, I
12 indicated depending on location, may interfere
13 with installation of casework.

14 And appliances. You can't set the
15 kitchen appliances. Kitchen microwave is
16 dependent on casework. Similarly, the other
17 appliances may need moved or disconnected and
18 reconnected to allow casework installation. And I
19 indicated final cleaning, a second cleaning or
20 delayed cleaning would be required because you
21 would be doing the work after the fact. I also
22 indicated after that main e-mail that the blocking
23 could be a problem. We would need to know where
24 the blocking should go as well.

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1 Q. Further down in that last -- that last
2 sentence, what was the purpose of the -- of your
3 comment about many areas in these buildings are
4 plus or minus the dimensioning shown on the
5 drawing?

6 A. Right. This actually has a personal
7 history for me, too. I indicated I was a finished
8 carpenter, so I've had this happen to me. But
9 I -- I indicated that we would also need to make
10 sure the casework installer manufacturer field
11 measures. As you know, we may have many areas in
12 these buildings that are plus or minus the
13 dimensions shown on the drawings, see RFI 109,
14 112, 125.

15 Also protection of existing finishes
16 installed late in the project -- if installed late
17 in the project would need to be figured in. So
18 I'm telling them they're going to need to field
19 measure, because, you know, the walls and the
20 space shown on the drawings at this point are more
21 than likely not going to be the actual dimension
22 that they get.

23 Q. If we could go to TA 316.
24 This is another e-mail from yourself to

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1 Mr. Keith. What was the purpose of this e-mail?
2 A. Okay. They kept asking for submittals
3 for the -- for fire ratings -- fire-rated
4 materials or fire-rated assemblies and I kept
5 objecting because there were none. There was
6 nothing shown on the drawings to be a fire-rated
7 assembly. And I didn't know why they kept
8 insisting on it. So I -- I followed up a meeting
9 in writing to make sure it was in the record that
10 we were -- I'll just read it.

11 After yesterday's meeting, Josh, SHP
12 and I reviewed the attached list of fire stopping
13 submittals per RFI 115. While we maintain the
14 rated assemblies will remove the addendum, we will
15 submit the required information so -- and this I
16 put in quotes because this is what they were
17 telling us, if a condition requires, we'll have an
18 approved system. And, again, that's per the
19 meeting yesterday. And then I attached the list
20 that we had gone through and the notes from my
21 meeting.

22 Q. So at this point in time you didn't
23 believe that there was going to be a fire-rating
24 requirement?

1 A. No. And I was -- you know, sure of
2 that.

3 THE COURT: Mr. Wilhelm, when you say
4 if a condition require we will have an approved
5 system, was that -- I mean, was that your effort
6 to be ahead of the curve on that or --

7 THE WITNESS: That was their reasoning
8 to me. I had argued with them that there are no
9 rated assemblies, there were none, none on the
10 wall types or anything.

11 THE COURT: Okay.

12 THE WITNESS: And so I kept arguing
13 that I shouldn't have to submit these. And it
14 wasn't that I was afraid of doing submittals. I
15 felt there was something more to it. And so their
16 logic was do this so that if there are conditions
17 that need rated, we'll already have an approved
18 system, so -- and that's why I put it in quotes.

19 THE COURT: Why -- you mentioned you
20 felt there might be more to it. What do you mean
21 by that?

22 THE WITNESS: Well, you know, we hadn't
23 gotten the drawings. Again, the whole tone of
24 this project when I'm -- I said earlier when I go

1 into these meetings and they're argumentative with
2 me when I'm bringing up a lot of these dimension
3 meetings -- in fact, the reason I'm e-mailing a
4 lot of this stuff back to them after meetings is
5 because I'm worried that it's not going to make it
6 into the record.

7 So the reason I'm -- you know, I'm
8 saying, per our meeting this morning is because
9 they're not documenting this. They're not
10 putting -- like this meeting -- this occurred
11 probably at a project meeting and you're not going
12 to find a record of it.

13 THE COURT: You get those minutes and
14 you can comment on those minutes, right?

15 THE WITNESS: You get them when you
16 first walk in a minute before the meeting starts.
17 So what I continually --

18 THE COURT: So they're not circulated
19 before the meeting starts?

20 THE WITNESS: No.

21 THE COURT: Okay.

22 THE WITNESS: So you continually have
23 these meetings and -- and, again, I'm -- like the
24 dimension meetings, you know, they're giving me

1 dimensions. The dimension always goes back to the
2 architect and Lend Lease and they -- they -- I
3 always document, this is what you told me, this is
4 what we took from it so that there's no confusion
5 as to what we were told and what we were doing.
6 And this is another example of that.

7 THE COURT: Okay. Mr. Madigan, it's
8 almost 10:30. Do you think this would be a good
9 time for a morning break?

10 MR. MADIGAN: Yes, it would be fine.

11 THE COURT: Okay. We'll be in recess
12 for 15 minutes.

13 (A recess is taken.)

14 THE COURT: Back on the record in
15 TransAmerica Building Company versus Ohio School
16 Facilities Commission, Case No. 2013-00349.

17 Mr. Wilhelm, you're still under oath.
18 Mr. Madigan?

19 MR. MADIGAN: Yes.

20 Q. (By Mr. Madigan) Going a little bit
21 out of order here, Josh. I would like to turn
22 your attention back to the as-planned sequence and
23 duration of the deaf, and I would like to
24 reference you to TA 1406, which is another

1 animation. And this is similar to -- I'll ask you
2 a similar line of questions as I did with respect
3 to the blind. This is of the deaf site?

4 A. Yes. You can tell the difference
5 between the two, the blind side is laid out
6 linearly and the deaf side has an arc to it.

7 MR. BECKER: You're going to have to
8 keep your voice up. I didn't hear any of that.

9 THE COURT: Yes, you'll have to speak
10 up.

11 A. Okay. Sorry. The blind side is laid
12 out linearly. The road that goes through is
13 straight. And the deaf site has the kind of arc
14 to it.

15 Q. (By Mr. Madigan) So, again, is the
16 sequence of construction five, one, six, two,
17 seven, three?

18 A. Yes. Originally, yes.

19 Q. And that's based on the baseline
20 schedule?

21 A. Yes.

22 Q. And is the animation that we just
23 looked at with respect to the deaf site, does that
24 accurately reflect what's depicted in the baseline

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1 schedule?

2 A. Yes, it does.

3 Q. I would like to pick up where we left

4 off before the break. We were talking about fire

5 stopping and fire -- fire stopping submittals. If

6 I could reference you to TA 901, which is the deaf

7 elementary bid set. And it's TA 901. And for the

8 Court's convenience, blue is blind and green is

9 deaf in terms of how we have the plans labeled.

10 THE COURT: You mean dark blue and

11 light blue?

12 MR. MADIGAN: Yes. It's the closest we

13 had at the --

14 THE COURT: I was starting to think

15 maybe I was color blind. I'm not arguing with

16 you.

17 Q. (By Mr. Madigan) So if you have TA

18 911, which is the deaf bid elementary, if I could

19 reference you to plan A-002. And, Josh, could you

20 describe what A-002 is?

21 A. Okay. The plan A-002, and we are

22 looking at the deaf elementary school, middle

23 school, and it is construction-type details, which

24 are the wall types.

Page 84

1 Q. So is it showing cross-sections of the

2 wall types?

3 A. That's correct.

4 Q. And are those wall types then depicted

5 on the floor plans?

6 A. That's -- that's correct, yes.

7 Q. Now, with the wall types that are

8 shown, are any of them shown as fire rated?

9 A. No. In fact, they -- they -- they all

10 show as nonrated.

11 Q. What about the ceilings, what does it

12 say about the ceilings?

13 A. They all show as nonrated.

14 Q. If we could turn to Joint Exhibit F-03,

15 which is change order No. 3. And did you sign

16 this change order, Josh?

17 A. I did.

18 Q. And what's this change order for?

19 A. This change order is for --

20 specifically for the foundation plan

21 modifications, but it's -- it's just the concrete

22 portion at this point.

23 Q. If we could go to page 3. And if we

24 could highlight that first -- that first section

Page 85

1 above, it's -- what was meant by this price does

2 not include lowering piers?

3 A. There were additional changes being

4 discussed in conjunction with this and the piers,

5 a similar solution potentially.

6 Q. And what was your direction when

7 pricing -- this type of change order in terms of

8 what to include, what not to include?

9 A. Well, they always asked for a very

10 detailed, itemized breakdown, and so it was always

11 very specific what the -- what the change was for.

12 THE COURT: Is this a -- does this have

13 to do with the sleeves? I mean, the modification

14 being made to the --

15 THE WITNESS: Part of it, yes.

16 THE COURT: Okay.

17 THE WITNESS: Yes.

18 THE COURT: All right.

19 Q. (By Mr. Madigan) And if we go down

20 further, was an extension of time requested?

21 A. Yes.

22 Q. And was that approved by Mr. Keith?

23 A. It was not. I would -- I submitted it

24 that way.

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1 Q. And what was the -- what's the note

2 over to the right indicate?

3 A. It indicates that direction to proceed

4 given on option one, OSSB No. 5, referring to

5 blind five, and work on other buildings ahead of

6 schedule. And then he indicates, foundation

7 drains just completed as part of critical path

8 work.

9 Q. And what's the date that you signed

10 this change order?

11 A. I would have sent this April 18th,

12 2011.

13 Q. What's the date that you -- that you

14 signed it?

15 A. Oh. April 28th, 2011.

16 Q. Had the work proceeded and been

17 completed prior to that?

18 A. Yes.

19 Q. And is that based on direction from

20 Lend Lease?

21 A. Yes.

22 Q. If we go to page 6 of this change

23 order, you indicated Lend Lease oftentimes would

24 mark up your pricing?

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1 A. Yes.

2 Q. Would they mark it up to conform to
3 what they believe was the discrete request?

4 A. That's correct.

5 MR. BECKER: Objection. Excuse me,
6 calls for speculation as to why they did what they
7 did.

8 THE COURT: Sustained. You can
9 rephrase the question.

10 Q. (By Mr. Madigan) Did Lend Lease mark
11 up these change orders to focus on certain
12 specific items?

13 A. Yes. We -- I would meet with Clay and
14 Clay and I would sit there and he would go through
15 in painstaking detail every step and argue
16 everything.

17 Q. And these itemized lists would get
18 attached to these change orders?

19 A. That's correct.

20 Q. And was it your understanding that
21 that's what the change order was for?

22 A. It was just for that, yes.

23 Q. And did this change order include
24 anywhere updated set of structural drawings -- or

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1 I'm sorry, in this change order, does it include
2 any updated set of architectural plans?

3 A. It does not.

4 Q. Now, it does include a set of
5 structural plans?

6 A. It includes structural sheets. Again,
7 I would -- I would -- my comment I said earlier
8 that it should be narrowly used for what they're
9 releasing it for. My -- it wouldn't necessarily
10 be the entire sheet, it would be what they've
11 clouded and called your attention to. Again, the
12 very answer they're giving you on a certain sheet
13 may negate other information on that same sheet.

14 Q. But in terms of -- in terms of your
15 pricing, it was only including what was changing
16 on these structural plans?

17 A. That's correct.

18 Q. Wasn't including what was going to be
19 the change on the architectural plans?

20 A. That's correct.

21 Q. If we could go to TA 322, which is
22 another weekly progress meeting. It's meeting
23 No. 12, dated May 2nd, 2011. And you were in
24 attendance at this meeting?

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1 A. Yes, I was.

2 Q. If we could go to page 7. Under the
3 comment that took place on March 28th, 2011, was
4 Lend Lease okay if an activity started earlier
5 than projected?

6 A. Yes. And they're actually indicating
7 that the superintendents need to make sure to put
8 the actual start date on the schedule, and when
9 finished also plug in the actual finish date.

10 It's okay if an activity starts earlier than
11 projected.

12 Q. So what was TransAmerica's hope with
13 respect to starting this project?

14 A. That we would get ahead of schedule.

15 Q. And as of March 28th, 2011, did anybody
16 at Lend Lease have a problem with that?

17 A. No.

18 Q. If we could go to page 8. If we could
19 go to that first comment under May 2, 2011. What
20 was discussed about the casework package at this
21 meeting?

22 A. They indicate that the casework, we've
23 received the impact of casework package from TA
24 last week, final inspections will be an issue,

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1 still need TP, Jutte and Vaughn.

2 Q. Further down on April 18th, 2011,
3 what's being discussed at that meeting?

4 A. Casework. And they're asking that the
5 contractors -- we need actual dates when
6 contractors will need casework. They will need to
7 let us know what areas they can work around and
8 what areas are critical. SHP is expecting a
9 couple of dorms where the casework will be running
10 late. Patrick to review schedule sequence related
11 to casework flooring and fixtures.

12 Q. And is Patrick the reference to
13 Mr. Patillo?

14 A. Yes.

15 Q. So at this point in time, did anybody
16 have a problem with the information that
17 TransAmerica had submitted with respect to the
18 casework?

19 A. No.

20 Q. I would like to go to page 9. And I
21 would like to talk about what's being discussed
22 with the project drawings.

23 A. Okay. They -- they say that PR 10 will
24 change construction set. Issued Friday. SHP

1 expected to have it by Wednesday and out to the
2 printer Thursday 5/5/15 -- or '11.

3 Q. So was your expectation that an updated
4 set was going to be forthcoming with the PR?

5 A. Yes.

6 Q. Did that happen?

7 A. No, it did not.

8 Q. And you can see there's references in
9 the earlier meetings with respect to the
10 construction set?

11 A. That's correct. The notes that -- from
12 prior meetings all indicating that sets are still
13 to be issued.

14 Q. At this point in time, is anybody from
15 Lend Lease or SHP or the OSFC directing
16 TransAmerica to stop?

17 A. No.

18 Q. Is anybody -- is anybody with the OSFC,
19 Lend Lease or SHP informing TransAmerica that the
20 architectural drawings are inaccurate?

21 A. Not -- I would say sometimes.

22 Q. Let me put it this -- let me ask it
23 this way: Is anybody from the OSFC, SHP or Lend
24 Lease telling TransAmerica not to rely on the

1 architectural drawings?

2 A. They're telling us to proceed with the
3 information that we have, which includes the
4 drawings that we have and the other information
5 that we have and all that other stuff, yes.

6 Q. Let's -- you brought up concerns at
7 this meeting. What were your concerns that you
8 brought up?

9 A. My concerns were that the information
10 is scattered in multiple RFIs, PRs, and if
11 something is missed, it will have to be reworked.
12 I'm referring to probably my earlier
13 correspondence where I basically say we're relying
14 on everything but the documents. And this would
15 also include the meetings and all the other things
16 where information is -- is, you know, coming in
17 and being given to us.

18 MR. BECKER: Your Honor, I'm going to
19 again object, move to strike that testimony. It's
20 clear that he has testified from handwriting from
21 the progress meeting minutes. We still do not
22 know if that handwriting was part of the official
23 record of the progress meeting minutes. We don't
24 know who put that handwriting on there or whose

1 handwriting that is.

2 THE COURT: I'll sustain that. And why
3 don't you lay a foundation, Mr. Madigan.

4 Q. (By Mr. Madigan) Mr. Wilhelm, were you
5 in attendance at this meeting that took place on
6 May 2nd, 2011?

7 A. Yes, I was.

8 Q. And what did you discuss at this
9 meeting with respect to concerns you had regarding
10 the status of the plans?

11 MR. BECKER: I'm sorry, Your Honor,
12 that doesn't address the objection. That's not a
13 foundation that I'm objecting to. He clearly read
14 from handwritten notes and I'm trying to establish
15 whose notes those are.

16 THE COURT: Sustained.

17 MR. MADIGAN: Well, shouldn't he be
18 able to testify as to what he discussed at this
19 meeting?

20 THE COURT: But not from handwritten
21 notes until he identifies what they are. We need
22 a foundation.

23 MR. MADIGAN: Sure.

24 Q. (By Mr. Madigan) You've received

1 handwritten -- hand writings from individuals at
2 Lend Lease?

3 A. I have.

4 Q. And whose handwriting is this?

5 A. I believe this is Clay Keith's notes.

6 Q. And did you discuss what's reflected in
7 these notes?

8 A. Yes. That -- again, that's consistent
9 with what my concerns were and consistent with my
10 prior correspondence to him.

11 Q. If we could go to TA 325.

12 A few days after that May 2nd, 2011
13 progress meeting, what did you do with respect to
14 the wall panels?

15 A. Okay. I -- I wrote Clay a note here.
16 As discussed, we are working on -- and I believe I
17 am referring back to that meeting. We are working
18 on wall panels and layouts and still running into
19 dimensional issues in the architectural drawings.
20 We have not seen the construction set of drawings
21 to date. We are concerned that we will continue
22 to have these problems as we begin erecting the
23 building next week. At this point we plan to lay
24 out off of the known walls. And I indicate those

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1 are bearing walls shown on the approved truss and
2 construction foundation drawings. We have
3 corrected in RFIs and with our surveyor.
4 So what I'm saying is, again, going
5 back to the truss shop drawings, we know what the
6 outside bearing wall is, we know what the corridor
7 wall is, we know what the other corridor wall is
8 and we know what the other outside wall is. We
9 can lay out certain walls based on that, but what
10 we still don't know is what are the -- what are --
11 what are the dimensions of the things inside of
12 those pieces?
13 Q. What did you say is the best solution?
14 A. The best solution is to have the
15 corrected construction set issued.
16 Q. And you can see Mr. Keith took your
17 e-mail and provided it to Mr. Predovich?
18 A. Yes.
19 Q. Did he copy you in on that e-mail?
20 A. He did not.
21 Q. And he said, we are going to get hit
22 with costs for every wall that is wrong on OSSB
23 five and it will come back to confusion on the
24 drawings. Did Mr. Keith ever indicate to you that

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1 the -- that costs -- that a -- did Mr. Keith ever
2 indicate to you what he said to Mr. Predovich --
3 A. He did not.
4 Q. -- on this issue?
5 A. Huh-uh.
6 Q. I would like to turn to TA 335, which
7 is another RFI.
8 MR. KASAI: 235?
9 MR. MADIGAN: 335. And if we could
10 blow up the description.
11 THE COURT: I'm sorry, the RFI number?
12 MR. MADIGAN: The RFI number is 134.
13 THE COURT: Thank you.
14 Q. (By Mr. Madigan) So what's happening
15 with this RFI?
16 A. This is being asked by TP Mechanical,
17 and they're asking in lieu of the architectural
18 changes, are there an update -- are there updated
19 drawings for fire smoke ratings in all buildings?
20 And he gives an example of the life safety plans.
21 Q. And what's the response date of this
22 RFI?
23 A. It is the May 16th, 2011.
24 Q. And what does it say about cost impact?

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1 A. It says no cost impact.
2 Q. What does it say about is drawing
3 update required?
4 A. No.
5 Q. Now, in this response, were there
6 attached plans?
7 A. Yes, there were.
8 Q. And what plans are those?
9 A. They are the life safety drawings
10 titled construction set.
11 Q. Are there any wall sections with
12 these -- with these plans?
13 A. No.
14 Q. Are there any architectural layout
15 plans with this set?
16 A. No.
17 Q. Did you respond to this RFI?
18 A. Later I did.
19 Q. And what ended up happening in your
20 response?
21 A. They reopened the RFI.
22 Q. Did this issue take a while to get
23 resolved?
24 A. It did. This took a very long time to

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1 get resolved.
2 Q. At this point in time, were you aware
3 that the plans had only been approved for
4 foundation shell?
5 A. No, I was not.
6 Q. If we can go to TA 337.
7 What's the date of this e-mail?
8 A. It originates on May 16th, 2011.
9 Q. And what's the -- what's the subject?
10 A. It is -- the subject is -- let's see,
11 I'm lost in here.
12 Q. Well, let me -- what does it say in the
13 subject line?
14 A. Ultimately it's RFI 132 R-1, blind high
15 school five dimensions.
16 Q. So RFI 132 is still going back and
17 forth on?
18 A. Yes.
19 Q. Are there meetings taking place to try
20 to get the dimensional issues worked out?
21 A. Correct. We are still coming up with,
22 on this example, an inch and a quarter difference
23 somewhere.
24 Q. If we can go to page 2.

1 A. Yeah, that's what I'm referring to.
 2 And we're trying to set up, again, another meeting
 3 to review it and find out what -- what the answer
 4 is.
 5 Q. Are you having problems getting the
 6 structural dimensions to sync up with the
 7 architectural dimensions?
 8 A. Yes. In fact, we're taking the
 9 information we've been given and we're noting that
 10 specifically the construction set drawings I
 11 referred to earlier, those give a dimension, sheet
 12 A-102 gives a dimension, and there's an inch and a
 13 quarter difference.
 14 Q. What did you say about the production
 15 of wall panels?
 16 A. We need to get the production of wall
 17 panels resumed. The perimeter walls have been
 18 manufactured. Building five blind panels are
 19 already on the site and we're required time to
 20 modify in the field depending on the results of
 21 this RFI. So we've -- it's -- I said the -- let
 22 me go back to the beginning of the note. This is
 23 for building five and other blind high schools.
 24 Deaf high school buildings are different. We are

1 still working on deaf seven high school layout and
 2 review. We need to get the production wall panels
 3 resumed.
 4 Q. If we could go to TA 343. And what's
 5 taking place in this e-mail?
 6 A. So we're sending drawings and sketches
 7 we received from SHP today to the panel
 8 manufacturer along with an attached plan of
 9 perimeter and bearing dimensions that we generated
 10 incorporating information we received from the
 11 architect. We're telling them to incorporate
 12 these revisions into future detailing for the
 13 blind and deaf high school wall panels. More
 14 information is forthcoming.
 15 Q. If we could go to TA 343-B.
 16 So are you attaching a bunch of
 17 sketches and information to your truss people?
 18 A. Yes. Yep.
 19 Q. And is an example of one of the
 20 sketches that you're attaching to your truss
 21 supplier this?
 22 A. Right. And this to answer another --
 23 help answer another question is the sketch that I
 24 was referring to when we got the information

1 for -- to lay out that mechanical room, that is
 2 the masonry wall depicted in this sketch.
 3 THE COURT: Okay.
 4 Q. If we can go to TA 343-C.
 5 For the benefit of everybody's eyes, we
 6 have a better copy of this and I'll bring right it
 7 up. But this is another -- this is another sketch
 8 that was included in this e-mail?
 9 A. That's correct.
 10 Q. And we can go to a clearer picture of
 11 this if we go to TA 344.
 12 A. There it is, yeah.
 13 Q. So what's happening here with the --
 14 with the dimensions on the architectural plans?
 15 A. Well, the truss drawings primarily
 16 address dimensions going to other direction,
 17 perpendicular to these. And now we're trying to
 18 figure out the dimensions across the building.
 19 And, again, we're trying to take the information
 20 we've been given to date and, you know, the
 21 dimensions on the drawings aren't working and so
 22 here we're marking across the building what the
 23 dimensions should be at different key points.
 24 Q. Now, did you ever receive a PR for

1 this?
 2 A. No, I did not.
 3 Q. But is this how the project was
 4 constructed?
 5 A. It was.
 6 Q. And could we see evidence of that if we
 7 went to look at the as-built plans?
 8 A. Yes.
 9 Q. And I have it flagged with the yellow.
 10 MR. BECKER: Mike, what exhibit is
 11 that?
 12 MR. MADIGAN: That's TA --
 13 THE WITNESS: 919.
 14 MR. MADIGAN: -- 919. And let's --
 15 THE COURT: There we go. Thanks.
 16 Q. (By Mr. Madigan) And maybe you could
 17 show the referee where you found it. The pages
 18 aren't exactly numbered.
 19 A. Yeah. What it would be is when they
 20 copy these, it would have been pasted on the back
 21 of sheet A-104, which shows up as the next sheet.
 22 THE COURT: Okay.
 23 THE WITNESS: So those are pasted to
 24 the drawings. Both that --

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1 THE COURT: Mine start at A-301.
 2 THE WITNESS: Yeah. It's --
 3 THE COURT: Oh, here we go.
 4 THE WITNESS: Oh, it's in the middle.
 5 THE COURT: Yeah, I got it. But I'm
 6 not there yet, but I get the idea. Okay. So it's
 7 the blank -- yeah, I see it. It's the un-numbered
 8 page following A-104 --
 9 THE WITNESS: Right.
 10 THE COURT: -- in Exhibit TA 919.
 11 THE WITNESS: On the full size set that
 12 would be on the reverse.
 13 THE COURT: Right. Okay. But we'll
 14 need a copy of it, it's just the next page.
 15 THE WITNESS: Right.
 16 THE COURT: Okay.
 17 MR. BECKER: I'm sorry, so what page
 18 are you on?
 19 THE COURT: If you go to A-104,
 20 Mr. Becker, and you're in about, I would say about
 21 a quarter-inch thickness, so probably a good 40
 22 pages or so. And then the next page is the one
 23 we're talking about.
 24 MR. BECKER: Thank you. It's actually

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1 somehow smaller than what's on the screen.
 2 THE COURT: Yeah, that's why we have
 3 the screen I think.
 4 MR. BECKER: All right.
 5 Q. (By Mr. Madigan) So this sketch was
 6 end up taped to the as-built plans?
 7 A. Yes.
 8 Q. So this was used to construct the
 9 buildings?
 10 A. Yes. And it was actually we knew it as
 11 RFI 134 R two would be how you'll see it referred
 12 to.
 13 Q. Now, did you ever receive a change
 14 order for all the changes that took place with
 15 this sketch?
 16 A. No, we did not.
 17 Q. Did Mr. Keith ever indicate to you that
 18 TransAmerica had submitted correspondence to
 19 protect themselves for any field errors?
 20 A. Not to me he had not.
 21 Q. I would like to go to TA 1105, which is
 22 a recovery schedule issued. The date of this
 23 schedule is May 20th, 2011. Now, at some point in
 24 time, did the sequence of dorm construction for

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1 the deaf change?
 2 A. Yes. After the initial schedule
 3 meeting, some correspondence, I'm not sure if it
 4 was e-mail or verbal, occurred that they wanted to
 5 change the sequence of the deaf site to
 6 essentially reverse. And that's what occurred.
 7 Q. Was recovery schedule -- was this
 8 schedule ever incorporated into a change order?
 9 A. It was not.
 10 Q. Now, did you sign schedules on this
 11 project, sign off on schedules?
 12 A. I did. But it was also required to be
 13 paid, so...
 14 THE COURT: Just so I understand, if
 15 you signed off on a schedule, was that to then be
 16 incorporated into a change order?
 17 THE WITNESS: No. Signed-off schedules
 18 were not.
 19 THE COURT: Okay.
 20 THE WITNESS: Always incorporated in
 21 the change orders.
 22 THE COURT: Okay.
 23 THE WITNESS: So...
 24 THE COURT: Was there to be a PR issued

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1 for that?
 2 THE WITNESS: On some schedules there
 3 were or were put out there.
 4 MR. BECKER: I'm sorry, I'm having
 5 trouble hearing you. You can't just talk to the
 6 referee.
 7 THE COURT: Yeah, you have to speak up.
 8 THE WITNESS: Okay. There were some
 9 schedules that were associated with PRs, but not
 10 -- the majority of the schedule updates were not.
 11 THE COURT: Okay.
 12 Q. (By Mr. Madigan) If we could go to TA
 13 347. And if we could start with the lower e-mail.
 14 This is an e-mail from Clay Keith to
 15 yourself dated May 24, 2011 at 10:42 a.m. And
 16 what is Mr. Keith requesting in this e-mail?
 17 A. He's stating that there have been
 18 several requests from Jim Smith to receive the
 19 panel layout drawings that you are working from to
 20 erect the buildings. This request has not been
 21 fulfilled to date. If Lend Lease does not receive
 22 a copy of these drawings, we'll not be processing
 23 any change orders associated with panel layouts as
 24 there's no way to determine if corrective action

1 is needed due to design, documents provided or due
2 to errors on the panel fabrication layout process.
3 Please provide a copy of the panel -- the layouts
4 immediately.

5 Q. And did you provide a copy?

6 A. Yeah, I did, within -- within about,
7 what -- in under an hour.

8 Q. And now that Lend Lease has a copy of
9 the wall panel drawings, or at least a portion of
10 them, did they ever get back to you with respect
11 to their review to determine whether a change
12 order was necessary because of changes due to
13 design documents?

14 A. No, they did not. And I would add that
15 the reason I hadn't gotten them to them was
16 because we were still meeting with our -- with our
17 suppliers. I indicated in my response I said,
18 here are the panel five documents or the building
19 five panel documents. We met with Automated in
20 our office, Steve, Don and I ask -- and the
21 purpose was to check the wall panel drawings and
22 compare them to provide the dimensions, approved
23 truss drawings, revised construction set
24 foundation plans and the architectural drawings.

1 And then I said, as you know, later
2 dimensions changed. And then I said, building
3 seven was derived from building five as of RFI
4 132, 312 R one, 132 R two, and the difference
5 between those high school buildings sites have
6 increased. So I'm -- I'm explaining to him that
7 he -- because he's making it sound like in his
8 lower e-mail that I've -- I've been dodging them
9 on the issue. And I'm reiterating the problem
10 we're having and why it's -- it took me until then
11 to respond to them and those requests and the
12 difficulty that we're having.

13 Q. Is the difficulty that you're having
14 that there's so many dimensional problems?

15 MR. BECKER: Now, that's leading.
16 Objection.

17 THE COURT: Sustained. You can
18 rephrase the question.

19 Q. (By Mr. Madigan) Were you having more
20 than one dimensional problem at this point in
21 time?

22 A. Yes. And what we're running into is
23 you're running into some of the changes are now
24 starting to be, you know, like they teach you like

1 in a language class you've got, you know, past,
2 present, future, you know, now you're starting to
3 talk about dimension changes to buildings that
4 have already been built, buildings that you're
5 working on building and buildings that will be
6 built in the future.

7 So these changes have more than one
8 solution to them, because now you have some
9 instances where the building exists or is
10 panelized, and then there's the ones that you're
11 currently working on and then the ones that will
12 go on in the future.

13 Q. If we could go to TA 360.

14 Now, this is a stop work order issued
15 by Lend Lease on June 7th, 2011?

16 A. That's correct.

17 Q. And what's going on here?

18 A. Mr. Smith went out to I believe
19 building one, yes, and had some layout concerns
20 and specifically states, I'm very concerned with
21 the location of several wall panels. He's
22 referring to the interaction of the wall panel to
23 the foundation. And he's -- and he's noting that
24 one was off as much as an inch and a quarter.

1 Q. Now, is this -- is this area -- is this
2 the area that was depicted in those sketches that
3 we looked at earlier along the -- that relate to
4 the foundation and the wall panel?

5 A. It is. What -- what's -- what was
6 frustrating to me, and I responded at some point
7 to this, is I believe that very morning that he
8 writes this it was -- although it was another
9 issue in a meeting with them discussing yet again
10 dimensions. And the best answer I get is, you
11 know, it's close enough.

12 And then later that same day I'm
13 getting an e-mail where it's a stop work order
14 because something's messed up. And what you have
15 here is you've got repeatedly dimensions that
16 don't work, you're told to proceed with truss shop
17 drawing layouts, and then you're given this ab --
18 different from that, some untimed, hard and fast
19 rule about the -- where the face of stud is
20 supposed to line up. And somehow that's just all
21 supposed to work.

22 You know, you've got -- you've got a
23 foundation that was built with the old structural
24 drawings, you've got modifications issued that

1 have issues with them with the new structural
 2 drawings. You've got architectural drawings that
 3 have never been reissued and you've got truss shop
 4 drawings that have some -- none of the above
 5 answer to them, and then they come out and are
 6 upset to find that it doesn't lay out perfectly.
 7 Q. At this point in time, did Mr. Smith
 8 come out with the sketch that we looked at that
 9 had the handwritten dimensions on it?
 10 A. No, he does not.
 11 Q. And that was the sketch I'm referring
 12 to was the sketch that Mr. Predovich created back
 13 in January of 2011?
 14 A. That's correct.
 15 Q. If we could go to TA 361.
 16 And this is an e-mail you wrote on
 17 June 10th, 2011 with respect to smoke walls?
 18 A. Yes. I had picked up in a meeting or
 19 somewhere in conversation or something that there
 20 was a pending PR for smoke walls, and that was
 21 news to me. So they had referred to there being a
 22 PR for smoke walls. And I looked back through the
 23 record and said I don't see a PR for the smoke
 24 walls. The last one I received is PR 12. If the

1 additional drywall or layers of fireproofing, if
 2 there are additional layers or fireproofing, we'll
 3 need a PR.
 4 Also in the superintendent's meeting it
 5 was unclear if additional walls separating the
 6 attic space to deck would be required. If so,
 7 we'll need drawings, details, et cetera. Let me
 8 know if I'm missing something. So I'm hearing
 9 discussions about something that I don't know
 10 anything about.
 11 Q. So at this point in time, what happened
 12 with respect to RFI 134?
 13 A. It gets reopened. And she indicates --
 14 this is Karin from Lend Lease. She indicates, I
 15 just reopened RFI -- this RFI asking for
 16 clarification on the smoke fire ratings above
 17 ceiling.
 18 Q. And RFI 134 was that RFI we looked at
 19 earlier that had some life safety plans with it?
 20 A. That's correct.
 21 Q. So as of June 10th, 2011, it's still
 22 unresolved as to what's going to happen with the
 23 life safety plans?
 24 A. That's correct.

1 Q. As of this point in time, is anybody
 2 from Lend Lease, SHP or the OSFC directing
 3 TransAmerica to stop?
 4 A. No.
 5 Q. Is anybody from Lend Lease, SHP or the
 6 OSFC directing TransAmerica to build the project
 7 from something other than what's been provided to
 8 them up to that point in time?
 9 A. No.
 10 Q. If we would go to Joint Exhibit F-6,
 11 which is change order No. 6. What's this change
 12 order for?
 13 A. This change order is the second part of
 14 the foundation plan modifications, and this part
 15 is just for the masonry.
 16 Q. So is this an example where the change
 17 orders are being ordered piecemeal?
 18 A. Yes.
 19 MR. BECKER: Objection. That's leading
 20 and argumentative.
 21 THE COURT: Sustained. Rephrase the
 22 question.
 23 Q. (By Mr. Madigan) Is this an example
 24 where a change order is issued for a specific item

1 with the understanding that another change order
 2 would be issued for a following item?
 3 A. That's correct. This -- that -- that
 4 change was broken up into these several change
 5 orders. And, again, when they ask for the
 6 pricing, they're very -- they're very, very
 7 specific with the amount of backup that would be
 8 required in order to process the change order. I
 9 mean, it was time tickets, there's a very, very
 10 specific understanding of what the work is that's
 11 being included.
 12 Q. What's the date that the OSFC executed
 13 this change order?
 14 A. June 27th of 2011.
 15 Q. If we could go to page 6 of this change
 16 order. And if we could blow up that first --
 17 yeah, that first e-mail chain.
 18 This is an e-mail from Clay Keith to
 19 you on April 12th, 2011. And what's he directing
 20 you to do?
 21 A. He says, consider this e-mail as
 22 notification to proceed on time and material basis
 23 for a PR one, option one. This work includes the
 24 necessary footer revisions to the blind high

1 school building five in order to allow plumbing to
 2 pass through as needed.
 3 Q. He says, due to disagreements as noted
 4 below and no response from your firm regarding
 5 these concerns, we are directing you to proceed on
 6 a time and material basis not to exceed \$1,629.41.
 7 Do you agree that your -- that
 8 TransAmerica wasn't responsive to the pricing --
 9 pricing requested -- pricing requested at this
 10 point in time?
 11 A. No. We were responsive. It's just we
 12 didn't come to an agreement. I met with them
 13 multiple times over this.
 14 Q. And what does he say about the -- this
 15 work and how it could affect the schedule?
 16 A. This work is critical to the schedule
 17 to allow the plumbing contractor to be able to
 18 proceed as planned. I fully expect the work to
 19 start immediately per the directive above.
 20 Q. So did you then proceed based on that
 21 direction?
 22 A. We did.
 23 Q. And if we go to page 2 of this change
 24 order, did you request an extension of time?

1 A. I did. I requested two days.
 2 THE COURT: What was the number for
 3 the -- was that -- what was the PR number for
 4 that?
 5 MR. MADIGAN: This is change order
 6 No. 6.
 7 THE COURT: Okay.
 8 THE WITNESS: The PR would be PR number
 9 one.
 10 THE COURT: Right. Okay.
 11 THE WITNESS: R one actually, revised.
 12 It got revised.
 13 THE COURT: Right. All right. Good.
 14 Thank you.
 15 Q. (By Mr. Madigan) If we could go to
 16 page 16.
 17 Is this an example where after the work
 18 was proceeding, Mr. Keith had objections to the
 19 pricing that was submitted?
 20 A. That's correct.
 21 Q. And did he mark it up as he saw fit?
 22 A. He did. And he struck -- you'll see
 23 through a lot of change orders he struck things
 24 out.

1 Q. And anywhere in this change order is
 2 there an updated set of architectural plans?
 3 A. No, there is not.
 4 Q. If we could go to TA 1008. Now, is
 5 this point -- as of this point in time, has
 6 construction proceeded on the project? Where are
 7 we in terms of the overall construction of the
 8 project as of July of 2011?
 9 A. This would be a picture of the deaf
 10 site probably from the window in my trailer. And
 11 you would -- you see here building seven in the
 12 background and building three in the foreground.
 13 THE COURT: Is this about 4:30 in the
 14 morning?
 15 THE WITNESS: Actually, it looks like
 16 it's raining that day.
 17 THE COURT: Okay.
 18 THE WITNESS: So I'm hiding in the
 19 trailer.
 20 THE COURT: All right.
 21 THE WITNESS: And it's probably through
 22 the window and the screen is why it's --
 23 THE COURT: Because for what it's
 24 worth, I can't tell anything --

1 THE WITNESS: Oh, okay.
 2 THE COURT: -- from this photo.
 3 THE WITNESS: Okay.
 4 MR. MADIGAN: We'll --
 5 THE COURT: Okay. It's just too dark.
 6 Q. (By Mr. Madigan) Okay. We'll go to TA
 7 384. Will you go to page -- page 2 first.
 8 And the date of this e-mail chain is
 9 July 11th, 2011?
 10 A. Uh-huh.
 11 THE COURT: Mr. Madigan, it's going to
 12 help if you lay a little more foundation before
 13 you start asking these questions to know who this
 14 e-mail is from. I mean, you're going quick and I
 15 know you're trying to.
 16 MR. MADIGAN: Sure.
 17 THE COURT: It helps me to know who the
 18 e-mail is from and who it's to before you get into
 19 the substance. Then my brain is flowing.
 20 MR. MADIGAN: Sure.
 21 THE COURT: Well, trying to flow.
 22 Q. (By Mr. Madigan) On July 11th, 2011,
 23 did you write an e-mail to Lend Lease regarding
 24 issues that you were having at that point in time?

1 A. Yes, I did. I also included Madison
 2 Dowlen.
 3 Q. And if we go to the second page, we can
 4 see some of those issues that include the smoke
 5 walls?
 6 A. That's correct. I was, you know,
 7 tracking some issues we had with a list and I was
 8 letting everybody know what the items that we
 9 needed were.
 10 Q. And what else did you note with respect
 11 to that item three?
 12 A. We need the blocking drawings to
 13 complete rough framing.
 14 Q. And what do the blocking drawings
 15 pertain to?
 16 A. Well, they -- that's actually a wide --
 17 a wide variety of things. The -- you would have
 18 blocking for a lot of different finish stuff, but,
 19 you know, that would include casework, it would
 20 include bathroom accessories, blocking for
 21 potentially mechanical items or other things, but
 22 anything that requires blocking there was none of
 23 that shown in the original drawings.
 24 Q. Lend Lease responded on July 11th,

1 2011?
 2 A. That's correct.
 3 THE COURT: Mr. -- excuse me,
 4 Mr. Wilhelm, when you say none of that was shown
 5 in the original drawings, you're talking about the
 6 bid set, the bid set drawings?
 7 THE WITNESS: That's correct.
 8 THE COURT: Okay. We've called them
 9 that, and you weren't here for all the testimony.
 10 So when you're thinking original, if you would
 11 just for the record say the bid set.
 12 THE WITNESS: Okay.
 13 THE COURT: That will be helpful.
 14 THE WITNESS: Okay.
 15 Q. (By Mr. Madigan) What was the response
 16 that Lend Lease gave to your request about
 17 blocking drawings?
 18 A. They said that the blocking drawings
 19 are to be issued on July 11th of 2011. This issue
 20 was originally brought up via RFI June 29th.
 21 Q. What does it say about smoke walls?
 22 A. Smoke walls PR to be issued by
 23 July 12th. And he's indicating this issue was
 24 originally brought up via 4/11 and subsequent RFI

1 issued 6/10/11.
 2 Q. So this issue with the smoke walls, has
 3 this been going on for a while?
 4 A. It appears it has, yes.
 5 Q. Is anybody directing you to stop?
 6 A. No.
 7 Q. Item No. 7, what was the response given
 8 about the dropped ceilings and bulkheads?
 9 A. That there would be a PR for drop
 10 ceilings and bulkheads to be issued by July 15th.
 11 And they noted that the issue was originally
 12 brought up by RFI on 7/8/11.
 13 Q. So at this point in time, was it your
 14 expectation that all these changes coming about
 15 would be -- would be resolved through PRs and
 16 change orders?
 17 A. That's correct.
 18 Q. If we could go to Joint Exhibit I-21,
 19 which is weekly progress meeting 21. It's dated
 20 July 11th, 2011.
 21 And during this meeting, was the
 22 construction set being discussed? And I can point
 23 you to page 10.
 24 A. Yes, they are.

1 Q. And as of July 11th, 2011, what is Josh
 2 Predovich with SHP noting?
 3 A. He's noting that construction drawings
 4 will be issued on July 18th, a CD will be
 5 submitted to all contractors with information.
 6 Q. If we go further down into this topic,
 7 what did Mr. Keith discuss or note during the
 8 July 5th, 2011 meeting?
 9 A. He asked -- he says: Clay noted there
 10 are four prototypes built right now, do we
 11 actually need drawings at this point? Josh P.
 12 doesn't want to waste all those man hours invested
 13 trying to get the drawings corrected.
 14 Q. But in the next meeting, SHP is
 15 indicating you're going to get updated drawings?
 16 A. That's correct.
 17 Q. And that's as of July 11th, 2011?
 18 A. That's correct.
 19 Q. Talk about your comment made on
 20 June 13th, 2011.
 21 A. What I was noting was I asked how these
 22 will be issued as -- well, I'll just read what's
 23 said, then I'll tell you what -- Josh W. asked how
 24 these will be issued as he is concerned that

1 corrections made will not show up on new sets.
 2 Josh P. has been working with Berardi to ensure
 3 that this happens. Review will be made by the
 4 Lend Lease team before distribution to
 5 contractors.
 6 What I'm referring to is the fact that
 7 we've gotten updated drawings that are still
 8 incorrect. So what I'm -- what I'm saying is
 9 it -- we need to make sure that everything that
 10 has occurred gets into these new drawings.
 11 Q. In the June 6th, 2011 meeting is the
 12 construction set being discussed?
 13 A. Yes. He indicates that construction
 14 sets have not been received yet. SHP to follow up
 15 with Berardi after this meeting to follow up with
 16 e-mail to the teams. So he's supposed to go back
 17 and report back.
 18 Q. If we can go to the next page, page 11,
 19 what's being discussed at the May 16th, 2011,
 20 meeting?
 21 A. They state that SHP got the -- what I
 22 believe is the elementary school drawings and it's
 23 downloaded to the FTP site, high school drawings
 24 will be downloaded form after revision. Lend

1 Lease requested a set for review prior to
 2 releasing to contractors. TA requested a set.
 3 Clay noted that he prefers that they review
 4 these -- or that Lend Lease go over these drawings
 5 prior to anyone else, so docs can send back to
 6 Berardi, SHP if issues are found.
 7 Q. There's a note with Bill with TA?
 8 A. Uh-huh. Bill noted concern regarding
 9 potential dimension issues once trusses are
 10 delivered on site. SHP confirmed availability of
 11 all next week if needed.
 12 Q. The previous week May 9th, 2011, what's
 13 being discussed about the construction set?
 14 A. SHP indicates that they received a set
 15 last week from Berardi. There are still issues
 16 with these drawings. SHP met with Berardi last
 17 Friday to discuss the issues found on documents.
 18 SHP cannot promise when drawings will be complete
 19 since Berardi didn't provide a date to SHP. Bill
 20 Koniewich.
 21 MR. BECKER: Your Honor, I'm just going
 22 to object to him reading what's in the document.
 23 THE COURT: I assume this will be
 24 offered into evidence?

1 MR. MADIGAN: Yeah.
 2 THE COURT: I can read, too.
 3 MR. MADIGAN: Yeah.
 4 Q. (By Mr. Madigan) But -- so the issues
 5 are being discussed in the May 9th, 2011 meeting
 6 as well?
 7 A. Yes.
 8 Q. And then we can also see the May 2nd,
 9 2011 meeting where a PR was going to be issued
 10 with this construction set?
 11 A. Right. They're to be issued by PR.
 12 Q. It says at this point in time, what's
 13 your understanding with the construction set?
 14 A. That we are going to get a construction
 15 set issued by a PR. PR 10 to be specific.
 16 Q. If we can go to page 7. Was Mr. Smith
 17 at Lend Lease at this point in time having
 18 frustrations with the information that
 19 TransAmerica was providing?
 20 MR. BECKER: Objection to the form of
 21 the question in terms of them being frustrated.
 22 THE COURT: Sustained.
 23 Q. (By Mr. Madigan) At this meeting, did
 24 Mr. Smith at Lend Lease express any frustrations

1 with the information that TransAmerica was
 2 submitting?
 3 A. Yes. They -- they often argued with us
 4 about the accuracy of our two-week look aheads and
 5 -- which was frustrating because, and as I noted
 6 here, we always had problems that we were asking
 7 them for, weren't typically getting, we didn't
 8 have drawings and we were constantly dealing with
 9 those kinds of issues. And then all of a sudden
 10 it's our fault to -- you know, when things take
 11 longer than they should or -- or don't go exactly
 12 per plan, we have to skip around buildings or do
 13 other things like that, then suddenly it's our
 14 two-week look ahead that's at fault.
 15 Q. At this point in time, were you aware
 16 that the plans had only been approved up to shell
 17 and foundation?
 18 A. I was not aware.
 19 Q. At this point in time, were you aware
 20 that the fire-rating designation of the buildings
 21 was changing?
 22 A. I was not aware of that.
 23 Q. At this point in time, was TransAmerica
 24 given access to inspections with the DIC

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1 inspector?

2 A. No. In fact, we were specifically

3 prohibited from being at those meetings.

4 Q. If we could go to Joint Exhibit I-22,

5 which is another progress meeting.

6 THE COURT: Excuse me, Mr. Madigan, I

7 want to hear that again. Could I have that last

8 question and answer back, please.

9 (The record is read as requested.)

10 THE COURT: I have a question.

11 Mr. Wilhelm, did anybody ever explain

12 to you why you were prohibited from attending

13 those meetings, those inspections?

14 THE WITNESS: There was explanations of

15 that they were going over how things were supposed

16 to be done with the DIC inspector and other things

17 like that, and that they didn't want us in those

18 meetings. And, again, it wasn't, please don't

19 attend, it was, you'll not be at that meeting.

20 THE COURT: I understand. But did

21 anybody explain to you why?

22 THE WITNESS: Not thoroughly, no.

23 THE COURT: Okay. What explanation, if

24 any, did you get?

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1 THE WITNESS: The explanation we got

2 was they were working out problems with the

3 inspector; that they needed to talk to him. It

4 was primarily meetings with SHP and Lend Lease and

5 that they were going to be the ones to relay the

6 information back to us.

7 THE COURT: And who told you that?

8 THE WITNESS: Lend Lease.

9 THE COURT: And from Lend Lease?

10 THE WITNESS: Clay Keith and Jim Smith

11 both.

12 MR. BECKER: I'm -- I didn't hear any

13 of that last part of that.

14 THE COURT: Clay Keith and Jim Smith

15 both told him that.

16 MR. BECKER: Thank you.

17 THE COURT: When you're talking, you'll

18 have to still aim at the speaker. I know I'm

19 talking to you and it gets a little bit --

20 THE WITNESS: Sorry.

21 THE COURT: Just either speak up or aim

22 at the speaker.

23 Okay. Thank you.

24 Q. (By Mr. Madigan) If we could go to

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1 Joint Exhibit I-22, which is another weekly

2 progress meeting. This is meeting No. 22, it's

3 dated July 18th, 2011. And at this meeting, was

4 the construction set being discussed?

5 A. Yes.

6 Q. And if we go to page -- if we go to

7 page 12. Yeah, it's page 12.

8 What was discussed about the

9 construction set as of the July 18th, 2011

10 meeting?

11 A. They indicate that they -- everything

12 that is in the project drawings has been issued

13 via PR, therefore, construction set of drawings

14 will not be issued. Current set of posted

15 drawings will be available for those contractors

16 that need it or as needed or whatever. Clay asked

17 if there was any specific -- that the contractor

18 was waiting to get answered from construction set.

19 He notes that everybody seems okay. I would

20 disagree.

21 Madison suggested posting these sets in

22 prologue, Clay agreed. Madison is concerned about

23 several versions floating around. The reason Lend

24 Lease offered contractors a copy of the posted

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1 sets, all contractors requested hard copies of

2 posted sets. And then I noted that we were still

3 hoping for a construction set, however, there are

4 six buildings built as we speak.

5 Q. What did you mean by that?

6 A. You know, here -- we would still, you

7 know, for my prior comments about the coordination

8 of trades, the subsequent activities and all of

9 those reasons, I would still want to have a set of

10 drawings. However, as far as the framing goes, we

11 were six buildings in at that point, halfway.

12 Q. So what was your expectation with

13 respect to getting compensated for all the changes

14 that had been taking place at this point in time?

15 A. At this point in time, I expected that

16 we would be paid through a PR or a change for

17 these changes, which is what they were -- they

18 told us and continued to tell us.

19 Q. And they say here, everything in the

20 project drawings has been issued via PR. Do you

21 agree with that?

22 A. I do not.

23 Q. Can you give me an example of changes

24 that have not been issued through a PR?

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1 A. The best example was the dimensions
2 that we looked at earlier through that prior RFI
3 of every dimension across that building, the same
4 with the truss shop drawings and all of those
5 things, none of those things appear in a PR.
6 Q. They make reference to this posted set.
7 A. Uh-huh.
8 Q. Explain what the posted set is.
9 A. The posted set of drawings is the set
10 that sits in the Lend Lease trailer that is a bid
11 set document that the contractors ourselves would
12 go into and keep as up to date as we could of the
13 changes that have been issued. So you would
14 literally post on to that set of drawings
15 information as it -- as it was or if there were
16 changes in the field, what would become the
17 as-built set.
18 Q. So the as-built set that we just looked
19 at, was that the posted set at some point in time?
20 A. That's correct.
21 Q. And as the project was constructed and
22 it was finished, it then became the as-built set?
23 A. Right. And the key is it is a bid set
24 of documents.

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1 THE COURT: I'm going to need a couple
2 questions, and we're almost to noon here, to clear
3 my head.
4 MR. MADIGAN: Sure.
5 THE COURT: Just to get clear in my
6 head. Mr. Wilhelm, this posted set, was that a --
7 was that the same set whenever they started using
8 it throughout the project?
9 THE WITNESS: Yes. It was -- it was
10 the same set. It's -- you know, we've all seen
11 it. You go in the trailer, you -- there's a roll
12 of tape, you literally paste the stuff right on
13 top of the drawings. If there's any changes, it's
14 that set of drawings.
15 THE COURT: When was the last time you
16 saw the posted set?
17 THE WITNESS: Well, we saw it
18 continually through the project.
19 THE COURT: When was the last time you
20 saw it if you can recall?
21 THE WITNESS: Like me personally?
22 THE COURT: Yes. You.
23 THE WITNESS: I last saw it, it would
24 be when we were doing discovery and taking a copy

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1 of it for reproduction.
2 THE COURT: So you have a copy of that
3 posted set?
4 MR. MADIGAN: Yes.
5 THE WITNESS: Yes, we do. Yes.
6 MR. MADIGAN: Yes, we copied --
7 THE COURT: Not the as-builts. You've
8 got the as-builts, right? Are they the same?
9 THE WITNESS: Yes.
10 MR. MADIGAN: In June of 2012 we made a
11 public records request to get the posted set, we
12 copied that, which is -- we have that here.
13 THE COURT: What is the posted set that
14 was in a motion to compel? I'm completely lost
15 here.
16 MR. MADIGAN: It's the -- we were
17 requesting the as-built set.
18 THE COURT: No. Wait a minute. Wait a
19 minute. I remember this because I had to read it
20 until my eyes bled. You had the posted set of
21 drawings?
22 MR. MADIGAN: Right.
23 THE COURT: Item number one?
24 MR. MADIGAN: Right.

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1 THE COURT: You had the as-builts, item
2 number two. You had e-mails. And I forget what
3 the other one was.
4 MR. MADIGAN: Right.
5 THE COURT: You got everything -- I
6 thought you got -- the as-builts were being copied
7 and being furnished to you during one of our
8 pretrial conferences, but that the posted set
9 didn't exist?
10 MR. MADIGAN: Right.
11 THE COURT: Am I confused?
12 MR. MADIGAN: No. The set that we were
13 asking was the signed, posted set.
14 THE COURT: Okay. Okay.
15 MR. MADIGAN: Mr. Smith, you know,
16 indicated in his deposition that it was signed by
17 TransAmerica, which we made a public records
18 request back in June. It's not signed by anybody
19 from TransAmerica.
20 THE COURT: Okay.
21 MR. MADIGAN: We were repeatedly -- and
22 that was the issue.
23 THE COURT: Okay. I understand. So
24 then -- okay. I'm fine. Thank you.

1 MR. BECKER: Your Honor, is this a good
2 point in time to --

3 THE COURT: Yeah, it's a good time to
4 break. It's noon. And, Mr. Wilhelm, you're still
5 under oath and, in turn, you're not to discuss
6 your testimony with anybody, okay?

7 We're in recess.

8 -----

9 Thereupon, a luncheon recess is taken
10 at 12:03 p.m.

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1 MR. BECKER: Thank you.

2 Q. (By Mr. Madigan) So does the posted
3 set of drawings say construction?

4 A. They do not.

5 Q. Now, were the sets that were issued to
6 DIC for plan approval, at least in 2011 and 2012,
7 did those say construction set on them if you --
8 you can look at the -- at the plans for the deaf.
9 And in particular, I would reference you to the
10 deaf set from August 2011 that's stamped by DIC.

11 A. Yes. They say they are the
12 construction set.

13 Q. And is that a complete construction set
14 with architectural, MEP drawings?

15 A. Yes.

16 Q. Did you --

17 THE COURT: Do we have an exhibit
18 number?

19 THE WITNESS: Exhibit No. TA 914.

20 Q. (By Mr. Madigan) Did TransAmerica ever
21 receive that complete construction set?

22 A. No.

23 Q. So in terms of what TransAmerica has,
24 it has this bid set and then there's this posted

1 Friday Afternoon Session
2 May 22, 2015, 1:02 p.m.

3 -----

4 THE COURT: We're back on the record in
5 TransAmerica Building Company, Inc. versus Ohio
6 School Facilities Commission, Case No. 2013-00349.

7 Mr. Wilhelm, you're still under oath.

8 Mr. Madigan?

9 MR. MADIGAN: Thank you.

10 Q. (By Mr. Madigan) Josh, before we left
11 for lunch, we were talking about the -- this
12 progress meeting minute from July 18th, 2011. And
13 in this meeting minute, there's a reference to a
14 posted set of drawings. And I would like for you
15 to explain what the posted set of drawings is
16 versus what the bid set of drawings is.

17 A. Okay. The posted set of drawings is
18 simply the bid set of drawings with changes that
19 are known to date pasted to them.

20 MR. BECKER: I'm sorry, I didn't hear
21 the first part of that answer.

22 A. The bid -- the posted set of drawings
23 are simply the bid set of drawings with changes to
24 date posted to them.

1 set that's in the Lend Lease trailer?

2 A. That's correct. And that posted set
3 would be, again, the changes that we had to date
4 posted to it, but it doesn't have all the
5 information that we don't have, you know, all the
6 dimensions, the -- what we were needing the things
7 coordinated. And like I said, if there's a
8 drawing issued and the answer on that drawing
9 negates the other dimensions on the drawing, none
10 of that is reflected in the posted set.

11 Q. So the posted set doesn't clear up all
12 the dimensional issues?

13 A. No, not at all.

14 Q. So how are you constructing the project
15 when you had this bid set and there's this posted
16 set that's in the trailer and then there's
17 additional information that's being submitted in
18 between?

19 A. What we had to do was we ended up
20 arriving at a system where we made a binder for
21 each building. And the reason we did that was,
22 again, as I referred earlier, you have buildings
23 that are built or being built. You have buildings
24 that you're building and then buildings that you

1 will build. So at a certain point in time,
 2 these -- all these answers get a lot more
 3 complicated because there's -- there's three
 4 different conditions in the field that you're
 5 dealing with for any given solution depending on
 6 which type of building you're talking about. So
 7 what we did for the carpenters in order to keep
 8 this straight was we literally made a three-ring
 9 binder with tabs in it and had the different
 10 pieces of information for that building in that
 11 binder.

12 Q. Now, I have a box of binders here.
 13 Now, these were binders that the field, the
 14 carpenters used? And I'll show them to you. Is
 15 this what you were referring to?

16 A. Yes, it is.

17 THE COURT: Do those have an exhibit
 18 number or any --

19 MR. MADIGAN: They weren't copied. We
 20 have them identified as a -- as an exhibit number.

21 THE COURT: Mr. Madigan, if you would,
 22 take them up and show them to the witness and then
 23 we'll get an exhibit number just so we have a
 24 record. You know, I hate for you to have to exert

1 Q. (By Mr. Madigan) When you say the
 2 answer could have different effects in different
 3 buildings, we looked yesterday at how the
 4 architectural plans on these buildings were --
 5 were created and we talked about the mirror image?

6 A. Uh-huh.

7 Q. Is the fact that there was these mirror
 8 image of these plans, did that create further
 9 difficulty in trying to keep track of all these
 10 dimensions?

11 A. It helped -- it was one factor, but
 12 there was also in the -- in the -- as the project
 13 progressed, you know, there's that -- that six
 14 inch versus one foot I think 7/8ths, and I'm
 15 rounding here, difference in the steps of the --
 16 of the foundation and the element -- one building
 17 to another that wouldn't be shown on a drawing.
 18 So there's other things. But, yes, as the project
 19 goes on, each building type -- and when I say that
 20 I mean a blind high school, a deaf high school, a
 21 blind elementary school or a deaf elementary
 22 school, there start to become greater differences
 23 than day one.

24 Day one, you know, we always knew that

1 yourself.

2 MR. BECKER: Mind if I look over their
 3 shoulder?

4 THE COURT: Sure. Mr. Becker, you're
 5 always free to do that.

6 MR. BECKER: Appreciate that.

7 A. That's them.

8 Q. (By Mr. Madigan) So these are the
 9 various binders that you gave your field team?

10 A. Yes.

11 Q. In an attempt to keep track of all the
 12 changes?

13 A. Yes. And they are -- you know, I
 14 should note for the record that, you know, you can
 15 see there's various states of preservation here.
 16 They were used, so...

17 THE COURT: I understand. They're
 18 field documents.

19 THE WITNESS: Yes. But they're the
 20 changes that we've discussed and the sketches that
 21 were issued. And, again, we did them by building
 22 because, again, the answer can vary by building or
 23 have different effects in different buildings.

24 THE COURT: Okay.

1 the blind elementary school had a reverse dormer
 2 on the backside of it and all that, but
 3 dimensionally, they were supposed to be, you know,
 4 very similar or the same.

5 As time goes on, they become more and
 6 more different. And then -- and then within that,
 7 within any one group, again, let's -- so let's say
 8 a blind high school, blind high school five is the
 9 first building, so a lot of the changes occur
 10 after it's been framed or after the panels are
 11 ordered. And so it has different solutions than
 12 perhaps six or seven because those were in
 13 different stages of completion when the other
 14 things were found or added or changed or whatever.

15 Q. And is all of this --

16 MR. BECKER: Excuse me, Your Honor. So
 17 we are going to mark those, right?

18 THE COURT: Yes. It's a good time to
 19 do that. Thank you, Mr. Becker.

20 Do we want to just mark those
 21 collectively as an exhibit? And then if you have
 22 to pull one out, they have separate
 23 identifications on them.

24 THE WITNESS: Yeah. Yeah.

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1 THE COURT: Just like pages in a
2 document?
3 THE WITNESS: I don't think every
4 one -- like there's -- I don't know if there's 12
5 binders there or not, you know.
6 THE COURT: Well, whatever's there is
7 there.
8 THE WITNESS: Yeah, a majority of them
9 are there.
10 MR. MADIGAN: We had these identified
11 as TA 800, which is blind high school building
12 five binder.
13 THE COURT: Okay.
14 MR. MADIGAN: TA 801, blind high school
15 building six binder. TA 802, deaf binder. TA
16 803, unnamed carpenter work binder. TA 804, OSSB
17 dorms punch list.
18 THE COURT: Do we have five --
19 MR. BECKER: Seems like there are more
20 than five binders there.
21 THE COURT: It does. Are there more
22 than one binder that cover -- more than one binder
23 that covers a single building?
24 THE WITNESS: There's deaf six, blind

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1 five -- well, the confusion is going to be for
2 some of the lead men I made a combined binder that
3 has multiple buildings in it by tab, so...
4 THE COURT: Okay. Well, we're going to
5 have to -- if we're going to -- if there's --
6 MR. MADIGAN: Here are the --
7 THE WITNESS: Yeah, there's the deaf.
8 MR. MADIGAN: How many -- that's five.
9 THE WITNESS: There's -- yeah.
10 MR. MADIGAN: We have --
11 THE WITNESS: This is a punch list.
12 This probably can be different categories of
13 things.
14 MR. MADIGAN: Yeah, we have that
15 identified. That's 80 --
16 THE WITNESS: Okay.
17 MR. MADIGAN: This is an RFI PI binder,
18 which doesn't --
19 MS. TACKETT: Yeah, there's two binders
20 for the 801. There's two of the blind high school
21 binders. There's two binders of that. That's
22 where you're messing up, I think. I think there's
23 two of the blind high school binders.
24 MR. MADIGAN: Oh, okay. So there's two

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1 for 801.
2 MS. TACKETT: Yeah, he said to keep
3 those as one number. There's two binders I think.
4 MR. MADIGAN: Okay. Do you have --
5 let's --
6 THE COURT: I would like the witness
7 to -- since he's identifying these in his words,
8 identify by exhibit number if he would.
9 MR. MADIGAN: Sure.
10 THE COURT: And he may have to work
11 with you on the exhibit number, but just so
12 Mr. Becker knows and so I know and Mr. Becker's
13 team and I know --
14 THE WITNESS: This is TA 0800. This is
15 the blind high school building number five.
16 MR. BECKER: Okay. Let me make a note.
17 So blind five is which sticker now?
18 THE WITNESS: TA 0800.
19 MR. BECKER: Okay. 800. All right.
20 THE WITNESS: I actually think that's
21 noted incorrectly. This is deaf high school
22 number six, and that is TA 0801.
23 MR. MADIGAN: So deaf high school
24 number six is 801?

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1 THE WITNESS: Okay. Deaf binder,
2 that's this one, so this is TA 0802.
3 MR. MADIGAN: You mean --
4 THE WITNESS: I'm sorry.
5 MR. MADIGAN: Yeah, that's right.
6 THE WITNESS: Yeah, 802.
7 THE COURT: And which building is that?
8 THE WITNESS: This is the deaf -- this,
9 again, would have been the -- one of the foreman's
10 books.
11 THE COURT: For deaf number --
12 THE WITNESS: It includes multiple
13 buildings.
14 THE COURT: Okay. I understand that,
15 yeah. Okay.
16 THE WITNESS: And then here is --
17 MR. MADIGAN: Unnamed -- this is TA
18 803, unnamed carpentry work binder?
19 THE WITNESS: Yeah. This includes
20 multiple buildings. This may have -- I don't
21 know. This has blind and deaf in it. This may
22 have lived in my office for a while, but then
23 ultimately got handed to someone. And this is --
24 this is the TA 803, and we're calling that the

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1 unidentified carpenter work binder.
2 MR. BECKER: But that's what you just
3 described as multiple blind and deaf buildings,
4 correct?
5 THE COURT: Multiple?
6 THE WITNESS: Yes. Yes.
7 THE COURT: Okay.
8 MR. BECKER: Okay. Is this sticker
9 just something that was put on there for trial
10 purposes?
11 THE WITNESS: Actually, I think this
12 was when you guys went through and marked them for
13 discovery.
14 MR. BECKER: Well, that can come off
15 then as far as I'm concerned.
16 THE COURT: Yeah.
17 THE WITNESS: And then this is blind --
18 blind five punch list, which --
19 MR. MADIGAN: Which is --
20 THE WITNESS: -- is TA 804.
21 MR. BECKER: You've got a couple on the
22 floor here.
23 THE WITNESS: Okay. Blind high school
24 six.

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1 MR. MADIGAN: We can -- we can call
2 that TA 801-A.
3 THE COURT: Right. Okay.
4 MR. BECKER: Can I have a clarification
5 how that compares to 801?
6 THE COURT: 801 is deaf number six.
7 MR. BECKER: Okay.
8 THE COURT: And 801-A is blind number
9 six; is that right?
10 MR. BECKER: Okay.
11 THE COURT: Mr. Madigan?
12 MR. MADIGAN: Yes.
13 THE WITNESS: This is a blind
14 specifically multiple building binder.
15 THE COURT: And which number does that
16 correlate to?
17 THE WITNESS: It actually is multiple
18 buildings. It's got them all.
19 MR. MADIGAN: We can reference it as TA
20 800, which is -- we can reference it as TA 800-A.
21 THE COURT: Okay.
22 MR. BECKER: I guess I don't
23 particularly mind, but I don't see the
24 relationship back to 800 if this has got multiple

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1 buildings.
2 THE COURT: Well, it's just because
3 it's a numbering system we've got. 800 is the
4 blind number five and then blind multiple 800-A.
5 So it ties with the blind. Could tie to 803 I
6 suppose just as easily.
7 MR. MADIGAN: Right.
8 THE COURT: But as long as we know what
9 it's part of.
10 MR. MADIGAN: TA 800-A.
11 THE COURT: Is that all of them?
12 MR. MADIGAN: Yes.
13 THE COURT: Thank you.
14 All right. Are you going to ask any
15 more questions about these books right now?
16 MR. MADIGAN: If you have some
17 questions.
18 THE COURT: Well, I may have a couple,
19 but I didn't want to interrupt your questioning if
20 you were going to question him on these books.
21 MR. MADIGAN: No, I was going to move
22 off the topic.
23 THE COURT: Okay. I thought you were.
24 Mr. Wilhelm, were you employed by

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1 TransAmerica at the time of the bid for the
2 project?
3 THE WITNESS: I was not at the time of
4 the bid.
5 THE COURT: Approximately how long
6 between the bid date and the time that you were
7 employed, if you can recall?
8 THE WITNESS: Yeah, the bid date on
9 this was sometime in October and I was -- I
10 started work in November.
11 THE COURT: Are you aware of whether
12 the process of maintaining these binders was
13 envisioned at bid time based on anything you've
14 learned from anybody at TransAmerica?
15 THE WITNESS: No, it wouldn't be. In
16 fact, I -- this was my idea to come up with. I
17 struggled with how to handle the situation and I
18 guess I've always kind of used binders in my work
19 and keep lists and things, so I did the same
20 thing.
21 THE COURT: Have you ever had to
22 construct a project of this size using this
23 method?
24 THE WITNESS: No.

1 THE COURT: Okay.

2 THE WITNESS: It -- it came -- the
3 biggest thing that it came out of is -- actually,
4 we had when we started, we had built like the job
5 made work tables that you put out in the middle of
6 the site where you lay the drawings out. Well, I
7 had to go take those drawings off the site because
8 what was happening is as we would get, like I
9 referred to earlier, drawings you could use this
10 on but not that, you know what I mean?

11 So what happens is is that's laying on
12 a table in the middle of a building and I got -- I
13 can't tell everybody on the site that you can use
14 this and not this, so I had to -- I had a problem.
15 So what I did is I brought those drawings back
16 into the trailer and then issued these binders to
17 the lead foreman. And then the reason you see
18 multiple versions is -- and then usually they had
19 a lead guy for certain activities and stuff. And
20 so that's how we communicated something we learned
21 down out to the people actually doing the work
22 because you -- you know, normally you could take
23 an experienced carpenter, you know, some of these
24 guys had 20-some years experience or more and --

1 starting to bring up that there's going to be
2 required smoke and rating walls, or smoke rated
3 walls, I'm sorry, for the -- for the project.

4 Q. So at this point in time the fire-
5 rating issue is still unresolved?

6 A. That's correct.

7 Q. If we could go to TA 396 now.

8 That same day that progress meeting
9 that we just talked about was PR 18 issued?

10 A. That's correct, July 18, 2011.

11 Q. And in terms of description, what does
12 it say?

13 A. It says, provide -- well, pricing for
14 revisions to fire separation walls between dorm
15 sleeping units for the attached sketches.

16 Q. And if we could take a look at the
17 attached sketches down below. That's the
18 reference to what you're supposed to price?

19 A. That's correct.

20 Q. Okay. Now, if we look to see what's
21 included in this PR, what's included in it?

22 A. It -- it -- well, what it is, as it
23 indicates, it's RFI 134, but specifically it's
24 just the -- it's just what's shown on the attached

1 and you could say, go build this and they would go
2 build that. And we couldn't do that, so we had
3 to -- we had to carefully control what was given
4 to them.

5 THE COURT: Okay. Thank you.

6 Q. (By Mr. Madigan) So coming out of this
7 meeting, what was your expectation in terms of how
8 the project was going to work and how you were
9 going to be compensated?

10 A. Well, as I noted, I was still hoping
11 for a construction set, but ultimately that it was
12 to be handled through the PR process as we were
13 repeatedly told that would occur.

14 Q. And as of this point in time, you
15 weren't aware that the plans had all been approved
16 up through foundation and shell?

17 A. No, I was not.

18 Q. If we could go to page -- page 6 of
19 this meeting minute. You can see the note from
20 the July 5th, 2011 meeting, and there's a
21 reference there to fire smoke walls, SHP needs to
22 issue PR. What's going on here?

23 A. This has to do with, you know, that RFI
24 that we were talking about earlier. They're

1 drawings.

2 Q. And what are the attached drawings?

3 A. The attached drawings are the life
4 safety sheets marked as the construction set, and
5 then there's clouded changes. And then they would
6 be calling your attention to the clouded changes.

7 Q. Now, is there a revised architectural
8 floor plan with this submission?

9 A. No, there's not.

10 Q. Did this PR resolve the fire-rating
11 issue?

12 A. No, it did not.

13 Q. What ended up happening with this
14 issue?

15 A. This was revised multiple times and
16 becomes the subject of a lot of correspondence.

17 Q. Did you have to submit multiple pricing
18 on it?

19 A. Yes, numerous times.

20 Q. If we could go to TA 399. And if we
21 could start from the bottom.

22 This is a July 20th, 2011 e-mail from
23 yourself to Mr. Keith. Now, this is two days
24 after PR 18 was issued?

1 A. That would be correct, yes.
 2 Q. And what's going on with respect to the
 3 drywall work at this point in time?
 4 A. I let Clay know that as -- as we had
 5 planned with them, the drywallers were here today
 6 to do the miscellaneous drywall ceilings. That
 7 was something that had come up that they wanted us
 8 to do ahead of plan to help with the -- the
 9 mechanical work. I indicate that I was planning
 10 to do these per the revised reflected ceiling plan
 11 and PR 16. I was letting them know that the
 12 mechanical contractors believe eight-foot ceilings
 13 are to go in the water room and the storage room
 14 per other direction that they had received.
 15 So I was letting Clay know that for now
 16 I have stopped this work and we need to confirm
 17 what ceiling heights are to be in the meeting
 18 tomorrow. So I indicate that I need to either
 19 build a drop ceiling or install blocking in the
 20 trusses to proceed.
 21 Q. And what was the direction you received
 22 from Mr. Keith?
 23 A. He tells me, per discussion at progress
 24 and coordination meetings, the water room and

1 electrical room will be lowered to eight foot and
 2 the storage will remain per the PR.
 3 Q. Is this an example where you're being
 4 directed to do work that's not encompassed in a
 5 change order?
 6 A. That's correct.
 7 Q. And is this an example where you're
 8 being directed to do work that's not shown on a
 9 set of plans anywhere?
 10 A. That's correct.
 11 Q. Now, we talked a little bit about the
 12 posted set that was kept in the Lend Lease
 13 trailer. Did anybody from TransAmerica ever sign
 14 that set?
 15 A. Not that I'm aware of, no.
 16 Q. Did you ever indicate to Lend Lease
 17 that it was fine to construct the buildings this
 18 way from the posted set with everything else --
 19 with everything else that was being issued in
 20 terms of -- in terms of the project?
 21 A. No. And to be honest, on those
 22 drawings, you know, as a contractor when that's --
 23 when you have what was going on in this project,
 24 you're not putting a lot of effort into the posted

1 drawings because you believe that they're going to
 2 change. So the fact is they're not even very good
 3 posted drawings because you're expecting and
 4 you're being told repeatedly that these drawings
 5 are going to get supplemented and completely
 6 replaced, and so you're not exactly sending a guy
 7 over there hours a day to update a set of drawings
 8 that's going to get put in the trash can.
 9 Q. If we could go to TA 403.
 10 This is -- if we could start from the
 11 e-mail that you quote to Mr. Keith on July 22nd,
 12 2011 and subject line is PR 18.
 13 A. Yes, that's correct. PR 18 questions.
 14 I'm letting him know as we discussed earlier today
 15 we need some additional information in order to
 16 price PR 18. Some of which will come from the
 17 state building inspector which you plan to have on
 18 site Tuesday, 7/26/11. We need wall connection
 19 and U.L. details for these walls.
 20 Basically what I'm saying is how to get
 21 a rating at chases, tubs, showers, exterior walls,
 22 et cetera. We will need additional details from
 23 SHP once these things are determined. We also
 24 believe that this will require additional

1 inspections and time due to adding ratings. We'll
 2 need the inspector's plan and direction to know
 3 what they will want to see. And I let him know
 4 that I'm holding off on pricing until we review
 5 with the inspector. Then get direction from SHP.
 6 So I'm letting him know that pending
 7 their meeting with the inspector, I -- they need
 8 to ask these questions and let me know what the
 9 answer is.
 10 Q. Now, you made this request in terms of
 11 what the inspectors needed to see to Lend Lease.
 12 Why didn't you make this request right to the
 13 inspectors?
 14 A. Because we weren't to be in that
 15 meeting. We weren't allowed to be in that
 16 meeting.
 17 THE COURT: I have a question.
 18 THE WITNESS: Yes.
 19 THE COURT: Have you ever been on a
 20 project where you're not allowed to be in meetings
 21 with inspectors?
 22 THE WITNESS: Prior to this, no.
 23 THE COURT: Thank you.
 24 Q. (By Mr. Madigan) In the e-mail above