[Cite as *Cent. Allied Ents., Inc. v. Adjutant Gen.'s Dept.*, 2011-Ohio-4920.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Central Allied Enterprises, Inc.,	:	
Plaintiff-Appellant/ Cross-Appellee,	:	
	:	
v.	:	No. 10AP-701 (C.C. No. 2007-07841)
The Adjutant General's Department,	:	(REGULAR CALENDAR)
Defendant-Appellee/ Cross-Appellant.	:	
	:	

D E C I S I O N

Rendered on September 27, 2011

Stark & Knoll, LPA, and *Terrence L. Seeberger*, for Central Allied Enterprises, Inc.,

Michael DeWine, Attorney General, and *William C. Becker*, for The Adjutant General's Department.

APPEAL from the Court of Claims of Ohio

CONNOR, J.

{¶1} Plaintiff-appellant/cross-appellee, Central Allied Enterprises, Inc. ("Central Allied"), appeals the judgment rendered by the Court of Claims of Ohio in favor of defendant-appellee/cross-appellant, The Adjutant General's Department ("AGD"), following a bench trial. For the reasons that follow, we affirm the judgment of the Court of Claims of Ohio.

{¶2} This matter concerns a public works contract entered between Central Allied and AGD for the reconstruction of a helicopter apron and taxiway at the Akron Canton Army Aviation Support Facility ("Akron-Canton airbase"). Central Allied performed the original construction in the 1980s. The apron consisted of 8 inches of asphalt built directly on top of the soil. In 2001, AGD contracted with Superior Paving to remove, or "mill," 4 inches of the existing asphalt and replace it with new asphalt to the same thickness. This reconstruction was necessary because the apron was going to have to accommodate heavier, CH-47 Chinook helicopters. As Superior Paving began its work, its milling equipment began sinking and shifting due to the moist conditions of the soil underneath the apron. As a result, Superior Paving informed AGD that the reconstruction should consist of something more than merely placing new asphalt on top of the soil. Therefore, Superior Paving recommended that AGD contact Whitworth-Borta & Co. ("WB"), an engineering company specializing in the design of airports.

{¶3} AGD contracted with WB to create plans and specifications for a reconstruction design of the apron and taxiway. WB was also to serve as AGD's representative by observing the construction, answering questions of the contractors, conducting weekly progress meetings, and performing quality assurance testing at the site. WB's primary people involved in the project were Augustine Ubaldi and Steve Potoczak.

{¶4} WB's reconstruction design depended upon the characteristics of the soil at the site. Generally, the strength of soil is assigned a numeric value known as its California Bearing Ratio ("CBR"). In relative terms, the higher a CBR value is, the stronger the soil will be. There is generally an inverse relationship between the soil

strength and the amount of asphalt needed to bear a load. That is, if the soil strength is strong, less asphalt is needed to properly bear a load. Conversely, weaker soils need more asphalt. Typical CBR values of soil in Northeast Ohio range from 4.5 to 5.0.

{¶5} Given that the design depended upon the characteristics of the soil, WB hired Hall's Testing and Consulting ("Hall's Consulting") to test and analyze the soil at the site. Barbara Hall, of Hall's Consulting, and Potoczak selected four random locations around the site from which soil samples were removed and analyzed. The results were summarized in a report drafted by Hall's Consulting ("Soils Investigation Report"). This report noted: "The general soil stratum consists of soft to hard glacial tills that are restrictive to good drainage." (Defendant's exhibit B.) It indicated that the soil strength at the site was 5.7 CBR. Further, it set forth a description of the characteristics of the soil found at each of the four locations before concluding, "[t]hese soils are suitable * * * for airport construction when brought to proper moisture conditions." (Defendant's exhibit B.)

{¶6} Based upon the information contained in the Soils Investigation Report, WB's awareness of the difficulties Superior Paving previously encountered, and its observations during various site visits, WB created a design for the reconstruction. The design called for the removal of the existing asphalt and for the excavation of soil to a depth of 20 inches. It also established that the apron and taxiway would consist of 12 inches of aggregate base materials to be placed beneath 8 inches of new asphalt. Finally, WB's design also included specifications to provide for better drainage at the Akron-Canton airbase.

{¶7} AGD solicited bids for lump-sum contracts to cover the reconstruction of the apron and taxiway. AGD provided prospective bidders with WB's design and various

addenda, including the Soils Investigation Report. These contract documents informed bidders of the estimated excavation to be expected in addition to the materials required for the construction.

{¶8} Central Allied was the low bidder and was awarded the lump sum contract. It submitted a schedule of values, which allowed for estimated progress payments to be made to Central Allied over the course of the project.

{¶9} First, Central Allied removed the asphalt and took it off site. Next, Central Allied hired Deckert Excavating ("Deckert") as a subcontractor to perform the required excavation. Unlike the lump-sum contract between Central Allied and AGD, the contract between Central Allied and Deckert was a unit price contract. Therefore, the cost of the excavation to Central Allied was tied directly to the specific amount of excavation Derkert performed. After the excavation was thought to have been completed, the next step of the project involved the installation of catch basins and drain pipes. After this was completed, the entire site was proof rolled.

{¶10} Proof rolling is the process whereby the subgrade, or soil that would eventually be underneath the asphalt apron, is tested and inspected by driving a loaded truck over it. Potoczak and Joseph Seck, who was Central Allied's field manager, walked alongside the loaded truck as it traversed the approximate 11 acres of the site. As the proof rolling occurred, Potoczak and Seck noticed failure areas where unstable soils created deflections, which left uneven ruts in the subgrade. These areas were staked off in order to identify them as areas in need of further work. It was determined that these areas needed to be undercut, or excavated an additional 12 inches or more, and strengthened by layering in geotextile fabrics with more aggregate base materials. Before

the extra excavation occurred, these failure areas were measured in order to see how much extra excavation and aggregate base materials would be required.

{¶11} On January 11, 2006, Central Allied submitted a request for extra payment based upon the extra excavation and extra materials used in the project. When Central Allied submitted this request to WB, the contract between WB and AGD had expired. As a result, WB could not process the request. Therefore, Central Allied submitted its request directly to AGD. When no further payment was forthcoming, Central Allied filed the instant suit.

{¶12} In its complaint, Central Allied presented claims for breach of contract, unjust enrichment, and constructive change order. On November 15, 2007, AGD submitted its own deduct change order, which alleged that Central Allied actually performed less excavation than was originally estimated in the lump-sum contract. AGD then filed a counterclaim for breach of contract based upon this deduct change order.

{¶13} The matter proceeded to bench trial, and the parties submitted post-trial briefs. Judgment was rendered in favor of AGD on Central Allied's claims, while it was rendered in favor of Central Allied on AGD's counterclaim. This timely appeal and cross-appeal followed. By way of Central Allied's appeal, it raises the following assignments of error:

> 1. The Court of Claims erred by not allowing Central Allied Enterprises additional compensation for additional work and materials that were not part of the contract and that it was directed to do by The Adjutant General's Department's representative.
>
> 2. The Court of Claims erred by not shifting to The Adjutant General's Department the cost of extra excavation and material used on the helicopter apron that was not shown on the plans and specifications prepared by its own architect.

> 3. The Court of Claims erred where it failed to recognize the existence of an unforeseen concealed condition for which extra compensation should have been allowed.
>
> 4. The Court of Claims erred where it determined that Central Allied Enterprises failed to follow the contract's change order procedure and was thus barred from a claim for additional compensation.
>
> 5. The Court of Claims erred to the extent that it factored in The Adjutant General's Department's deduct change order (subject of the counterclaim) to deny Central Allied Enterprises claim for additional compensation.
>
> 6. The Court of Claims erred to the extent it failed to award Central Allied Enterprises damages for constructive change order.
>
> 7. The Court of Claims erred to the extent it failed to award Central Allied Enterprises any compensation for unjust enrichment.

With respect to AGD's cross-appeal, we note that nowhere does AGD present an assignment of error challenging the trial court's resolution of its counterclaim. See App.R. 3(C). Rather, AGD simply argues that it should be entitled to an offset in the event that any of Central Allied's claims are found to be valid. It is well-settled, however, that appellate courts do not address mere arguments and instead only rule on assignments of error. *Olentangy Condo. Assn. v. Lusk*, 10th Dist. No. 09AP-568, 2010-Ohio-1023, ¶25, citing *In re Estate of Taris*, 10th Dist. No. 04AP-1264, 2005-Ohio-1516, ¶5. Nevertheless, the substance of AGD's cross-appeal seemingly presents a contingent cross-assignment of error that only becomes ripe in the event we reverse some portion of the judgment on Central Allied's claims. In the interest of justice, we will address it as such if necessary.

{¶14} This appeal presents four positions that we will address in the following order. The first four assignments of error regard Central Allied's request for additional

compensation based upon differing site conditions and additional work ordered by WB. The sixth assignment of error regards Central Allied's claim for constructive change order. The seventh assignment of error regards Central Allied's claim for unjust enrichment. Finally, the fifth assignment of error regards AGD's counterclaim.

{¶15} Central Allied's first four assignments of error challenge the trial court's interpretation of the contract documents, in addition to its findings on factual issues. Contract interpretation involves issues of law that appellate courts review de novo. *Alexander v. Buckeye Pipe Line Co*. (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. The goal of contract interpretation is to realize and give effect to the intent of the parties. *Skivolocki v. East Ohio Gas Co*. (1974), 38 Ohio St.2d 244, paragraph one of the syllabus. "[T]he intent of the parties to a contract resides in the language they chose to employ in the agreement." *Shifrin v. Forest City Enterprises, Inc*., 64 Ohio St.3d 635, 638, 1992-Ohio-28, citing *Kelly v. Med. Life Ins. Co*. (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. See also *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, ¶9, (it is presumed that the intent of the parties to the contract lies within the language used in the contract). When contract terms are clear and unambiguous, courts will not, in effect, create a new contract by finding an intent which is not expressed in the clear language utilized by parties. *Alexander* at 246, citing *Blosser v. Enderlin* (1925), 113 Ohio St. 121, paragraph one of the syllabus.

{¶16} When conducting a manifest weight of the evidence review, an appellate court will not reverse a judgment supported by some competent, credible evidence on all of the essential elements of the case. *C.E. Morris Co. v. Foley Constr. Co*. (1978), 54 Ohio St.2d 279, syllabus. When conducting such a review in a civil case, an appellate

court must also presume that the findings of the trier of fact are correct because the trier of fact had the opportunity to observe the witnesses and reach credibility determinations. See *Tejeda v. Toledo Heart Surgeons, Inc*., 6th Dist. No. L-07-1242, 2009-Ohio-3495, ¶32, citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81. "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court." Id. at 81.

{¶17} Central Allied's first four assignments of error all regard the obligations established by the contract documents. Central Allied argues that the Akron-Canton airbase contained differing site conditions. It argues that AGD impliedly warranted the accuracy of the affirmative indications regarding the job site conditions, and it should not be held responsible for the defects contained therein.[1] Central Allied essentially argues that the subsurface soil conditions were materially different from what the plans specified because substantial undercutting beneath the planned subgrade was required. Central Allied also argues that AGD, through WB, ordered it to perform additional work and provide extra materials, such that Central Allied is entitled to additional compensation. As a result, Central Allied argues that AGD breached the contract by not adjusting the contract price for the extra work and extra materials it provided.

{¶18} With respect to the first four assignments of error, the contract documents and recent case law from this court belie Central Allied's positions. Indeed, the contract documents contain provisions relating to differing site conditions. They also contain

[1] In this appeal, Central Allied presents arguments pertaining to the doctrine espoused in *United States v. Spearin* (1918), 248 U.S. 132, 39 S.Ct. 59. Because these specific arguments were never presented to the trial court, we refuse to address them for the first time herein.

provisions regarding ordered changes in the work. Finally, they contain provisions that contractors must follow in order to preserve their rights to additional compensation.

{¶19} Courts apply clear and unambiguous contract provisions without regard to the relative advantages gained or hardships suffered by parties. *Dugan & Meyers Constr. Co. v. Ohio Dept. of Adm. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, ¶29, quoting *Ohio Crane Co. v. Hicks* (1924), 110 Ohio St. 168, 172. Courts may not rewrite clear and unambiguous contract provisions to achieve a more equitable result. Id. at ¶39, citing *Ebenisterie Beaubois Ltee v. Marous Bros. Constr., Inc*. (Oct. 17, 2002), N.D.Ohio No. 02CV985, 2002 U.S. Dist. LEXIS 26625, 2002 WL 32818011. Absent fraud, bad faith, or other demonstrated unlawfulness, "courts are powerless to save a competent person from the effects of his own voluntary agreement." Id. at ¶29, quoting *Ullman v. May* (1947), 147 Ohio St. 468, 476.

{¶20} With respect to differing site conditions, our court has distinguished amongst two separate types of claims. See *Sherman R. Smoot Co. v. Stat*e (2000), 136 Ohio App.3d 166, 173:

> Differing site conditions claims arise from two separate and distinct circumstances, usually referred to as Types I and II differing site conditions. *H.B. Mac, Inc. v. United States* (C.A.Fed., 1998), 153 F.3d 1338, 1343; Cushman, Jacobsen & Trimble, Proving and Pricing Construction Claims (2 Ed. 1996), Section 7.2. A Type I differing site condition occurs where actual site conditions differ from the conditions indicated in the contract. A Type II differing site condition occurs where actual site conditions differ from conditions normally encountered in work of the character provided for in the contract. *Youngdale & Sons Constr. Co., Inc. v. United States* (1993), 27 Fed.Cl. 516, 528; *H.B. Mac, Inc., supra.*

Id.

{¶21} From the arguments presented herein, it is unclear what type of differing site conditions claim Central Allied raises. Nevertheless, the contract documents contain provisions for both types of claims. Indeed, Article 7.3.2 provides:

> If the Contractor encounters, during the progress of the Work, subsurface or concealed physical conditions at the Project, differing materially from those indicated or reasonably inferred from the Contract Documents [Type I claims,] or differing materially from those ordinarily encountered and generally recognized as inherent in the Work of the character provided for in the Contract [Type II claims], the Contractor shall notify the Architect/Engineer in writing of such conditions, before they are disturbed.

(Defendant's exhibit G.) If the contractor fails to provide the written notice prescribed by Article 7.3.2, then 7.3.2.2 indicates that "[n]o claim * * * shall be allowed." (Defendant's exhibit G.)

{¶22} Nowhere in the record is there evidence of the written notice prescribed by Article 7.3.2. Regardless, the trial court reached factual findings based upon the conflicting evidence presented at trial. Specifically, with respect to any purported Type II differing site conditions claim that Central Allied may have raised, the trial court held that there was insufficient evidence showing that the actual nature of the soil differed from the type of soil normally encountered during excavation in Northeastern Ohio. Central Allied fails to specifically challenge this finding on appeal. As a result, to the extent that Central Allied presented a Type II differing site conditions claim, the trial court did not err in refusing to recognize the validity of such a claim.

{¶23} With respect to Type I differing site conditions claims, our court has previously held that a contractor must demonstrate:

> * * * (1) that its contract contains an affirmative indication regarding the subsurface or latent physical condition that

> forms the basis of the claim, (2) that the contractor interpreted the contract as would a reasonably prudent contractor, (3) that the contractor reasonably relied upon the contract indications regarding the subsurface or latent physical condition, (4) that the contractor encountered conditions at the job site that differed materially from the contract indications regarding the subsurface or latent physical condition, (5) that the actual conditions encountered by the contractor were reasonably unforeseeable, and (6) that the contractor incurred increased costs that are solely attributable to the materially different subsurface or latent physical condition.

Sherman R. Smoot at 174, citing *Youngdale & Sons Constr. Co., Inc. v. United States* (1993), 27 Fed.Cl. 516, 528.

{¶24} To the extent that Central Allied raised a Type I differing site conditions claim, again, the trial court reached factual findings based upon the evidence adduced at trial. Specifically, it found that the subsurface soil conditions at the site were not materially different than those specified in the contract documents. It found that the presence of excessive moisture and drainage problems was disclosed to potential bidders in the Soil Investigations Report. Further, the court found that the conditions at the site were reasonably foreseeable. Based upon its findings, the trial court held that Central Allied's Type I differing site conditions claim failed on the fourth and fifth elements described above.

{¶25} The evidence in the record supports these findings. Indeed, Ubaldi and Potoczak testified that the conditions at the Akron-Canton airbase were no different than what was expected and included within the contract documents. The Soil Investigations Report was made available to potential bidders and described conditions not materially different than what Central Allied encountered. Further, Central Allied had the opportunity to inspect the premises and attended a pre-bid meeting. It had no questions regarding

the Soil Investigations Report or the soil conditions in general. Thus, there exists competent, credible evidence supporting the trial court's findings on Central Allied's arguments pertaining to differing site conditions. The trial court did not err in granting judgment in this regard.

{¶26} We next address Central Allied's argument that AGD, through WB, ordered it to perform additional work and provide extra materials and therefore breached the contract by not adjusting the contract price accordingly. In this regard, Article 7.1.1 provides:

> The Department, without invalidating the Contract, may order changes in the Work consisting of additions, deletions or other revisions, including without limitation revisions resulting from an extension granted in accordance with Paragraph GC 6.4. To the extent the time for Contract Completion or Contract Price is affected, the Contract will be equitably adjusted by Change Order in accordance with this Article and the Change Order Procedure and Pricing Guidelines (CO).

(Defendant's exhibit G.) Additionally, Article 7.1.1.3 provides: "[t]he Contractor shall not proceed with any change in the Work without the required written Authorization." (Defendant's exhibit G.)

{¶27} With respect to Central Allied's argument, we find direction from *Foster Wheeler Enviresponse v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 360, 1997-Ohio-202. In that case, contract provisions indicated that there would be no alterations in the work absent a written order issued by the owner. Id. at 362. Provisions also defined an alteration as an increase in the quantity of work. Id. Thus, the removal of excess contaminated waste constituted an alteration under the contract, for which a written order was required. Id. at 362-63. The court also noted that architects or engineers in construction projects generally have no authority to waive the requirement

for a written order for alterations, unless such authority is expressly conferred by contract. Id. at 364, citing *Baltimore & Ohio R.R. Co. v. Jolly Bros. & Co.* (1904), 71 Ohio St. 92, paragraph one of the syllabus. Upon examining the relevant contract provisions, the court found that the authority of the architect was limited to ordering only minor changes that did not involve changes to the contract price or time.[2] Id. at 365. Based upon the contract provisions underlying *Foster Wheeler*, and because no written order authorized the alteration in the work, the court upheld a summary judgment in favor of the owner. Id. at 365. Specifically, the court held: "where a building or construction contract, public or private, stipulates that additional, altered, or extra work must be ordered in writing, the stipulation is valid and binding upon the parties, and no recovery can be had for such work without a written directive therefor in compliance with the terms of the contract, unless waived by the owner[.]" Id. at 360. (Internal citations omitted.)

{¶28} As *Foster Wheeler* relates herein, we find the language of Article 7.1.1 and 7.1.1.3 to be clear and unambiguous. Central Allied was not to undertake additional work absent written authorization. The fact that Central Allied proceeded with additional work without the required written authorization is undisputed. Indeed, there was neither an argument nor a suggestion that there was written authorization. Instead, Central Allied seemingly suggests that WB waived the written authorization requirement by entering an oral agreement. However, Central Allied failed to cite any provisions of WB's contract with AGD that would have provided WB with the express authority to waive the written order requirement on behalf of AGD. See *Foster Wheeler* at 362, citing *Baltimore & Ohio*

[2] While *Foster Wheeler* regarded an environmental consultant and not an architect or engineer, the court held that "nothing about the nature and duties of an environmental consultant" suggests it should be treated any differently. *Foster Wheeler* at 365.

R.R. Co. at syllabus. As such, we find no error in the trial court's resolution of this portion of Central Allied's claim.

{¶29} Aside from the foregoing analysis of Article 7, Central Allied's contract claim also fails under the provisions of Article 8 and recent case law interpreting such contract provisions in public works contracts.[3] See *Cleveland Constr., Inc. v. Kent State Univ.*, 10th Dist. No. 09AP-822, 2010-Ohio-2906; see also *Stanley Miller Constr. Co. v. Ohio School Facilities Comm.*, 10th Dist. No. 10AP-298, 2010-Ohio-6397.

{¶30} This entire matter presents appellant's efforts to obtain additional compensation for the work and materials performed at the Akron-Canton airbase. According to the contract documents, a contractor must fulfill certain requirements before seeking additional compensation. Under Article 8.1.1:

> Whenever the Contractor intends to seek additional compensation or mitigation of Liquidated Damages, whether due to delay, extra Work, additional Work, breach of Contract, or other causes arising out of or related to the Contract or the Project, the Contractor shall follow the procedures set forth in this Article. To the fullest extent permitted by law, failure of the Contractor to timely provide such notice shall constitute a waiver by the Contractor of any claim for additional compensation or for mitigation of Liquidated Damages.

(Defendant's exhibit H.) Further, according to Article 8.1.2:

> The Contractor shall make a claim in writing filed with the Architect/Engineer and prior to Contract Completion, provided the Contractor notified the Architect/Engineer, in writing, no more than ten (10) days after the initial occurrence of the facts, which are the basis of the claim. * * *

(Defendant's exhibit H.) Moreover, within each written Article 8 claim, a contractor must demonstrate, inter alia, the amount of the claim, the reason for the claim, the impact of

[3] While AGD also presents arguments under R.C. 153.12, these arguments were never presented to the trial court and will therefore not be addressed herein.

the claim on the construction schedule, and the recommended response to the claim. (Defendant's exhibit H.)

{¶31} In *Cleveland Constr.* and *Stanley Miller*, this court had the chance to review similar provisions in public works contracts. In those cases, our court found the language of similar Article 8.1.1 provisions to be clear and unambiguous. See *Cleveland Constr.* at ¶39 ("the language of Article 8.1.1 is unambiguous: [the Contractor] waived all claims for additional compensation that it did not file with [the Architect/Engineer]"). In those cases, the contractors failed to comply with the Article 8 procedures, but the trial courts excused their non-compliance for various reasons. Id. at ¶30; *Stanley Miller* at ¶16. Our court reversed those portions of the judgments based, in part, upon language of Article 8, which the trial courts either disregarded or misapplied. *Cleveland Constr.* at ¶35; *Stanley Miller* at ¶18-20.

{¶32} This matter is quite different. Rather than excusing Central Allied's non-compliance with Article 8, in the instant matter, the trial court found that Central Allied failed to preserve its right to seek additional compensation. We therefore begin our analysis at the opposite starting point as compared to *Cleveland Constr.* and *Stanley Miller*. Indeed, in the instant matter, the court accorded little weight to Central Allied's evidence. It found that Central Allied failed to demonstrate the timing and sequence of events. It found that Central Allied failed to submit an Article 8 claim to WB or to AGD before contract completion. It also rejected the position that Central Allied could not file an Article 8 claim without prior verification from WB because Central Allied maintained its own records. Finally, in response to Central Allied's argument that AGD waived its ability

to enforce the Article 8 provisions, the trial court found that there was insufficient evidence supporting such a position.

{¶33} Within this appeal, Central Allied raises procedural issues pertaining to Article 8. Specifically, it argues that AGD neglected to raise waiver and the failure to exhaust administrative remedies in its pleadings as affirmative defenses. As a result, Central Allied argues that these affirmative defenses have been waived. We note, however, that these issues were the subject of the trial. Under Civ.R. 15(B), "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Because the issues of waiver and failure to exhaust administrative remedies were the subject of the trial, AGD did not waive these affirmative defenses by failing to specifically raise them in its pleading.

{¶34} With respect to the substance of Article 8, we find the language of Article 8.1.1 and 8.1.2 to be clear and unambiguous. In order to preserve its right to seek additional compensation for additional work, Central Allied needed to file a written Article 8 claim with WB before contract completion. Otherwise, Central Allied waived its right to seek additional compensation.

{¶35} Within this appeal, Central Allied never disputes the trial court's factual finding that no Article 8 claim was filed before contract completion. It similarly does not dispute the finding that the record lacks evidence demonstrating when the contract was completed. Instead, Central Allied argues that its non-compliance with Article 8 should be excused because WB's contract with AGD had expired when Central Allied submitted its claim to WB. Without evidence regarding Central Allied's contract completion date, this

argument carries no weight. Were we to hold differently, contractors could wait months or years after contracts have been completed and simply submit claims to former architects and engineers in order to resurrect claims that have otherwise been lost. We refuse to do so because the contract language clearly and unambiguously established the procedure for preserving a contractor's right to additional compensation. Central Allied simply failed to follow this procedure. We may not now rewrite the contract to provide for more equitable results.

{¶36} Having considered and rejected Central Allied's arguments relating to differing site conditions, the change order procedure, and the Article 8 provisions, we find that the trial court did not err in granting judgment in favor of AGD on Central Allied's breach of contract claim. We accordingly overrule Central Allied's first four assignments of error.

{¶37} In its sixth assignment of error, Central Allied argues that it is entitled to damages for constructive change order. It argues that the trial court erred in denying this claim on timeliness grounds and cites to the trial court's decision in *Stanley Miller Constr. Co. v. Ohio School Facilities Comm.*, Ct.Cl. No. 2006-04351, 2010-Ohio-1528. However, as we previously noted, we reversed portions of *Stanley Miller* after having found that the trial court misapplied the contract provisions. *Stanley Miller* at ¶18-20. Further, as we previously noted, "when a contract has an express provision governing a dispute, that provision will be applied; the court will not rewrite the contract to achieve a more equitable result." (Internal citations omitted.) *Dugan & Meyers* at ¶39. Because the contract contained express provisions concerning the procedure for obtaining change orders, we find that the trial court did not err in granting judgment in favor of AGD on Central Allied's

claim for constructive change order. As a result, we overrule Central Allied's sixth assignment of error.

{¶38} By way of its seventh assignment of error, Central Allied argues that the trial court erred by refusing to award compensation for unjust enrichment.

{¶39} Absent bad faith, fraud, or some other illegality, an equitable action for unjust enrichment will not lie when the subject of the claim is governed by an express contract. *National/RS, Inc. v. Huff*, 10th Dist. No. 10AP-306, 2010-Ohio-6530, ¶28, citing *Kucan v. Gen. Am. Life Ins. Co.*, 10th Dist. No. 01AP-1099, 2002-Ohio-4290; see also *Cleveland Mack Leasing, Ltd. v. Chef's Classics, Inc.*, 7th Dist. No. 05 MA 59, 2006-Ohio-888; *Davidson v. Davidson*, 3d Dist. No. 17-05-12, 2005-Ohio-6414; *Delicom Sweet Good of Ohio, Inc. v. Mt. Perry Foods, Inc.*, 5th Dist. No. 04 CA 4, 2004-Ohio-6645; *Ingle-Barr, Inc. v. Scioto Valley Local School Dist. Bd.*, 4th Dist. No. 10CA811, 2011-Ohio-2353.

{¶40} In the instant matter, as we have previously set forth, the relationship and obligations of the parties were governed by an express contract. Furthermore, Central Allied has not alleged bad faith, fraud, or some other illegality. As a result, we find no error in the trial court's resolution of Central Allied's unjust enrichment claim. We therefore overrule Central Allied's seventh assignment of error.

{¶41} In its fifth assignment of error, Central Allied argues that the trial court erred "to the extent" it considered AGD's counterclaim when it was determining Central Allied's claims. The substance of its argument consists of nothing more than a recitation of the evidence Central Allied offered to refute AGD's counterclaim. Nowhere is there a legal argument challenging the trial court's actual analysis of the counterclaim. Nor is there a single citation to a legal authority of any kind.

{¶42} The burden of affirmatively demonstrating error on appeal rests with the party asserting error. *Prater v. Dashkovsky*, 10th Dist. No. 07AP-389, 2007-Ohio-6785, ¶8, citing App.R. 9 and 16(A)(7). Moreover, an appellant must present his or her contentions with respect to each assignment of error and the reasons supporting those contentions, including citations to legal authorities and parts of the record upon which the appellant relies. Id. " 'Failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal.' " Id. at ¶8, quoting *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60.

{¶43} We find that Central Allied has not met its burden of affirmatively demonstrating an error within this assignment of error. See *Prater* at ¶8, citing *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, appeal not allowed 110 Ohio St.3d 1439, 2006-Ohio-3862. As a result, we find no error on the part of the trial court and accordingly overrule Central Allied's fifth assignment of error.

{¶44} Based upon the foregoing, we overrule Central Allied's seven assignments of error, which renders moot AGD's contingent cross-assignment of error. We accordingly affirm the judgment rendered by the Court of Claims of Ohio.

Judgment affirmed;
contingent cross-assignment of error rendered moot.

KLATT and TYACK, JJ., concur.

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