

[Cite as *Wood Elec., Inc. v. Ohio Facilities Constr. Comm.*, 2016-Ohio-7120.]

WOOD ELECTRIC, INC.

Plaintiff

v.

OHIO FACILITIES CONSTRUCTION
COMMISSION

Defendant

Case No. 2014-00987

Judge Dale A. Crawford

DECISION

Introduction

{¶1} This case came to be heard on a trial to the Court held on March 31-April 1, 2016, and continued on April 5, 2016 and April 11-12, 2016. On April 26, 2016, the parties filed simultaneous post-trial briefs and both parties also filed a motion for leave to file their briefs in excess of the page limitation. Upon review, both motions for leave are GRANTED.

{¶2} Plaintiff, Wood Electric, Inc. (Wood Electric), contracted with Defendant, Ohio Facilities Construction Commission (OFCC), to do the electrical work on a school project in Dalton, Ohio. Wood Electric's accepted bid was \$2,477,414.00. Wood Electric asserts that there were numerous delays in the project caused by CT Taylor, the general contractor, which caused it to expend funds in excess of its bid. Wood Electric seeks to recover \$254,027.00 as its additional costs incurred as a result of the delays caused by CT Taylor.

{¶3} OFCC asserts that while there were delays in the temporary enclosures and permanent enclosures, these delays did not proximately cause any damage to Wood Electric. In addition, OFCC asserts that Wood Electric failed to comply with the dispute resolution provisions of Article 8 of the contract in regard to its original certified claim and its supplemental claim.

{¶4} The following constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Civ.R. 52.

Findings of Fact

(1) Contract

{¶5} The contract was signed in April 2013 between Wood Electric, as the electrical prime contractor, and OFCC for \$2,477,414.00 to complete the Dalton Local School District School Project.

(2) Milestone Dates

{¶6} The contract set forth four milestone dates which impacted Wood Electric's work. The first milestone for temporary enclosure of the building was set for December 19, 2013. Each specific area's temporary enclosure was to be completed by the following dates:

| Area | Finish | Late Finish |
|-------------|-------------------|--------------------|
| A | October 2, 2013 | November 14, 2013 |
| B | November 15, 2013 | December 13, 2013 |
| C | December 11, 2013 | December 13, 2013 |
| D | October 21, 2013 | October 22, 2013 |
| E | December 6, 2013 | December 13, 2013 |

Full enclosure of the building was to take place on March 24, 2014. Substantial completion of the work was scheduled for July 9, 2014, and final acceptance of the work was planned for July 17, 2014. Pursuant to the contract documents, temporary enclosure was "[t]he condition in which the permanent exterior walls and roofs are in place, insulated and weathertight, and windows and entrances are provided with suitable temporary enclosures." Joint Exh. D, 0113. The permanent enclosure was the

“condition in which the permanent exterior walls and roofs are in place, insulated and weathertight, and permanent windows and entrances are in place.” *Id.*

(3) Project Delays

{¶7} In October 2013, Scaparotti, the Project’s Construction Manager-Agent, recognized that the work was not going to be completed pursuant to the original contract schedule. According to the contract, if a milestone completion date was not going to be achieved, “the CM shall direct the Contractor to submit within 3 days a recovery plan to avoid or minimize the delay of the Project.” Joint Exh. D, 0137. However, a recovery schedule was not issued until January 2014. Once issued, the recovery schedule set temporary enclosure for January 21, 2014, full enclosure for April 29, 2014, substantial completion for July 8, 2014, and final completion for July 18, 2014. The recovery schedule also set the following dates for temporary enclosures for the specific areas of the Project:

| Area | Finish | Late Finish |
|-------------|-------------------|--------------------|
| A | November 14, 2013 | December 31, 2013 |
| B | December 24, 2013 | January 10, 2014 |
| C | January 31, 2014 | February 27, 2014 |
| D | November 14, 2013 | December 31, 2013 |
| E | January 31, 2014 | February 27, 2014 |

{¶8} Pursuant to the original milestone dates, temporary enclosure was to be completed by December 13, 2013, but on that date Area B’s roof was approximately sixty percent complete, installation of Area C’s roof was still in progress, and installation of the roof over Area E had not been started. Furthermore, Area D, which was

supposed to have temporary enclosure by December 31, 2013 according to the recovery schedule, was still not dry by January 8, 2014.

(4) Contract Remedies

{¶9} The contract provided that the contract manager was responsible for keeping the project on schedule. Joint Exh. B, 0015-16. The contract further provided that if there were delays caused by a contractor, the offending contractor was responsible to pay any claims resulting from the delays. Specifically, the contract provided that “[i]f the Contractor fails to progress their work sufficiently to achieve a specific Milestone Completion Date, the contractor failing to progress their work sufficiently shall be subject to liquidated damages as described in the Contract Form.” Joint Exh. D, 0227. The parties agreed that there were delays and that the delays were caused by CT Taylor. For whatever unidentified reason, OFCC chose not to seek liquidated damages from CT Taylor.

(5) Article 8 Claim/Supplemental Claim

{¶10} Article 8.1.3 provides that “[t]he Contractor’s written notice of a Claim shall provide the following information to permit timely and appropriate evaluation of the Claim, determination of responsibility, and opportunity for mitigation:

{¶11} 8.1.3.1 nature and anticipated amount of the impact, including all costs for any interference, disruption, hindrance, or delay, which shall be calculated in accordance with Section 7.7 and be a fair and reasonably accurate assessment of the damages suffered or anticipated by the Contractor;

{¶12} 8.1.3.2 identification of the circumstances responsible for causing the impact, including, but not limited to, the date or anticipated date, of the commencement of any interference, disruption, hindrance, delay;

{¶13} 8.1.3.3 identification of activities on the Construction Progress Schedule which will be affected by the impact or new activities which may be created and the relationship with existing activities;

{¶14} 8.1.3.4 anticipated impacts and anticipated duration of any interference, disruption, hindrance, delay or impact, and any remobilization period; and

{¶15} 8.1.3.5 recommended action to avoid or minimize any interference disruption, hindrance, delay or impact.

{¶16} Furthermore, Article 8.2¹ sets forth the requirements of substantiation of claims and requires that substantiation occur within thirty days of the initiation of a claim.

{¶17} After the failure to complete a temporary enclosure of the building on December 19, 2013 per the milestone date, Wood Electric filed an Article 8 notice pursuant to Article 8.1 of the contract. Wood Electric's Article 8 notice requested an extension of time to address the delays but the request was denied by Scaparotti on December 26, 2013. Instead, Scaparotti proposed to develop a recovery schedule. At the recovery schedule meeting, Wood Electric reserved its right for additional time and compensation when it signed the new schedule. On February 27, 2014, the parties to the Project issued a no-cost change order, which Wood Electric refused to sign.

{¶18} On January 16, 2014, Wood Electric requested a sixty-day extension to file its Article 8 Certified Claim. A second request for an extension of time was rejected,

¹Specifically, Article 8.2.2 requires that "[t]he Contractor shall substantiate all of its Claims by providing the following minimum information:

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

"8.2.2.2 detailed identification of the Work * * * affected by the event giving rise to the claim;

"8.2.2.3 copies of the CM's daily log * * * for each day of impact;

"8.2.2.4 copies of relevant correspondence and other information regarding or supporting Contractor entitlement;

"8.2.2.5 copies of the Contractor's most recent income statement, including segregated general and administrative expenses for the most recent reporting period, and for the period of the Contract, if available, and similar information for any Subcontractor Claim included; * * *"

requiring Wood Electric to file its Certified Claim on April 11, 2014 for the amount of \$207,467.57. Wood Electric filed a supplemental claim in a letter on October 21, 2015, for an additional amount of \$35,006.00 for overhead costs from the time of its original claim to the completion of the Project for a total of \$242,473.57. On June 26, 2014, Wood Electric's claim was rejected by OFCC and its appeal filed on July 9, 2014 was also denied.

(6) Damages Claimed/Wood Electric's Expert—Measured Mile

{¶19} Wood Electric's claim totaling \$254,027.00 consists of four categories: (1) Loss of productivity and added labor (\$201,000.00); (2) Additional supervision (\$17,172.00); (3) Additional rentals and expenses (\$849.00); and (4) Home office overhead (\$35,006.00).

{¶20} Wood provided the testimony of Timothy Calvey (Calvey), a licensed professional engineer with over thirty years of experience. Calvey used the measured mile approach for his calculations, which compares the cost of completing work without the delay or acceleration with the cost of completing the work during an impacted period. The difference of the costs would be the measure of damages. Calvey testified that his calculations were based on the least impacted period compared with the most impacted period.

{¶21} With regard to the loss of productivity, Calvey concluded that Wood Electric was required to expend 3,024 additional hours due to the acceleration, trade stacking, and out of sequence work required for the project. Calvey then multiplied the number of hours by the journeyman rate of \$56.43 for a total cost of \$170,614.00. To reach \$201,000.00 for total loss of labor productivity, Calvey also included overhead (10%), profit (5%), and bond (2%).

{¶22} For the additional supervision costs, Calvey testified that he took the contract substantial completion date of July 10, 2014 and the electrical substantial completion date of August 24, 2014 and calculated that Wood Electric worked an

additional 31 days. With an additional 31 days, the number of supervision hours was calculated to be 248 at a foreman's blended rate of \$58.77, totaling \$14,575.00. Again, Calvey included the same rates of overhead, profit and bond to reach \$17,172.00.

{¶23} Concerning the rentals and expenses, Calvey's method took the average cost for equipment rental and field expenses for the period of the scheduled project, which was \$16.00, and multiplied it by the 31 additional work days for a total of \$720.00. Calvey also included overhead, profit, and bond to obtain the \$849.00 figure.

{¶24} Lastly, Calvey calculated the home office overhead for the period of July 18, 2014, the OFCC final completion date, to October 6, 2014, the date Calvey testified that final completion was achieved. Calvey arrived at the amount of \$35,006.00 by using the Ohio Department of Transportation's (ODOT) HOOP method,² which is based on an 8% overhead cost on the original contract amount and then calculated as an overhead cost per day. The cost per day is then multiplied by the number of additional work days. Calvey calculated \$429.00 as the overhead cost per day and multiplied it by 80 additional days for a total of \$34,320.00 plus a 2% bond amount of \$686.00 for a complete total of \$35,006.00.

(7) OFCC's Expert

{¶25} OFCC presented the testimony of Joseph Raccuia (Raccuia), a licensed professional engineer with a master's degree in construction engineering and management from Stanford University and thirty-eight years of experience. Raccuia testified that a measured mile approach for estimating loss of productivity does not explain why a contractor was unproductive. He also testified that in order to properly use a measured mile approach, one has to look at a specific scope of work, make sure that all other factors are the same, and then compare an impacted period with a non-impacted period. Raccuia was critical of Calvey's method stating that Calvey was

²The HOOP method only requires an excusable and compensable delay of at least ten calendar days and that the delay was due to the neglect of the Department or its failure to act in a timely manner.

comparing different work items in his calculations for impacted and non-impacted periods, i.e. running conduit at the beginning of the project compared to installing fixtures at the end. Raccuia was also critical of the lack of documentation on the daily reports indicating out of sequence work or what work could not be done due to stacking of trades. He also opined that Wood Electric did not properly staff the project during the impacted period. However, Raccuia offered no specific testimony on a different approach other than the measured mile or any opinion on what the amount of damages should be.

Conclusions of Law

{¶26} Contract interpretation is a matter of law for the court. *City of St. Marys v. Auglaize City Bd. Of Comms.*, 115 Ohio St.3d 387, 2007-Ohio-5026, ¶ 38. When interpreting a contract, a court's principle objective is to ascertain and give effect to the intent of the parties. *Hamilton Ins. Servs. V. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273 (1999). "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. In determining the parties' intent, a court must read the contract as a whole and give effect, if possible to every part of the contract. *Foster Wheeler Enviresponse v. Franklin Cty. Convention Facilities Aut.*, 78 Ohio St.3d 353, 361-62 (1997). If there are ambiguities in a contract, the document will be strictly construed against the party who drafted it or selected its language. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 667 N.E.2d 949 (1996).

{¶27} OFCC believes that Wood Electric's claim is fallacious because Wood Electric did not complain enough when their work was delayed. There is nothing in the contract that says a claimant must complain—once, twice, or three times—all they need to do is file an Article 8 claim to express their belief that they have been damaged by the actions of OFCC.

{¶28} It appears that Scaparotti, in managing the contract, made certain “executive decisions” that were not in conformance with the contract. Mike Scaparotti testified that he did not recommend enforcing the liquidated damages provision against CT Taylor because he feared that CT Taylor would proceed with other legal avenues and would not be willing to complete the contract within the recovery schedule, which they ultimately did not comply with even without the enforcement of the liquidated damages provision.³

{¶29} Secondly, Brian Malinski (Malinski), Project Manager for Scaparotti, believed that temporary enclosure meant that the building was warm and dry. The contract clearly stated what temporary enclosure means and it is not even close to what Malinski believed it to be. When asked about this, Malinski replied “what’s the difference?” Upon further questioning by the Court about his interpretation, he admitted that his definition was different from the contract definition, and that throughout the process, he was using his own definition of temporary enclosure rather than the contract definition. Accordingly, the Court finds that OFCC did breach its contract with Wood Electric and that Wood Electric complied with the Article 8 requirements when it filed its notice and substantiated its claim.

{¶30} With regard to damages, Larry Wood testified that he lost \$76,000.00 on the job. He expected to receive a profit of \$162,000.00 before the acceleration. The total of \$238,000.00 is close to Calvey’s calculation using the measured mile method, which considers the acceleration damages.

{¶31} The Court finds that Wood Electric is not limited on its damages as a result of its claim. The Court believes that once a case reaches the Court of Claims for trial, a party is not limited to the damages it sought in its Article 8 claim. Supplemental

³The Court notes that CT Taylor and Scaparotti share a joint interest in an entity called ICON, which combines their resources for construction projects in the state. Although the Court makes no determination as to whether this relationship affected the events that occurred on this Project, it acknowledges the appearance of impropriety in their decision making.

damages and damages not contemplated at the time of the claim was filed may be obtained at trial. This Court's responsibility is to determine what damages Wood Electric proved by a preponderance of the evidence were reasonably incurred as a result of the breach by OFCC. The fact that Wood Electric originally filed a claim for \$207,467.57, then supplemented it to claim \$242,473.57 and finally, after having an expert compute damages, claim \$254,027.00 is not relevant to this Court's determination.⁴

{¶32} OFCC asserts that while ODOT recognizes the HOOP method for determining home office overhead, OFCC does not recognize the method and sought to have the Court reject the method. OFCC offered no alternative calculation. The Court realizes that every department of the State of Ohio has the authority to set its own rules for enforcing their own contracts. In this case, OFCC has not established their own method for determining home office overhead so the Court believes that a reasonable method for determining the HOOP figure is the figure recognized by ODOT. Furthermore, OFCC's expert's opinion was somewhat discounted by the Court because he relied upon completion dates given to him by Malinski, which all parties know were false.

{¶33} The Court also notes that while it has accepted Calvey's measured mile and HOOP calculations as proper for this case, the measured mile and HOOP analyses may not be appropriate methods to calculate damages in other situations. The Court must consider the facts of each case and the methodology used in determining whether those methods should be applied. In this case, the only opinion given to this Court

⁴It is unfortunate that the School Board and the State of Ohio will have to pay this judgment when all parties agree that the only entity that proximately caused these damages was CT Taylor. However, for reasons not adequately explained to the Court, OFCC and the School Board agreed to accept the recommendation of Scaparotti and not impose what appears to be a mandated liquidated damages provision against CT Taylor. The Court hopes that Scaparotti's recommendation had nothing to do with the significant business partnership Scaparotti had with CT Taylor.

regarding the overall damages incurred by Wood Electric was the expert opinion of Calvey. While OFCC's expert testified that in his opinion, Calvey's figures were flawed, he offered no alternative opinion. The Court is aware that its responsibility as the fact finder is to weigh all of the evidence and reach an independent decision on the amount of damages proximately caused by OFCC's breach. In doing so, the Court cannot speculate.

{¶34} “[T]he extent of damages suffered by a plaintiff is a factual issue, it is within the jury’s [or fact finder’s] province to determine the amount of damages to be awarded.” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 475, 2007-Ohio-6948, 880 N.E.2d 420 (2007). “Where a right to damages has been established, such right will not be denied merely because a party cannot demonstrate with mathematical certainty the amount of damages due.” *Tri-State Asphalt Corp. v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 94API07-986, 1995 Ohio App. LEXIS 1554 (Apr. 11, 1995), citing *Geygan v. Queen City Grain Co.*, 71 Ohio App.3d 185, 195, 593 N.E.2d 328 (12th Dist.1991). Furthermore, “a party seeking damages for breach of contract must present sufficient evidence to show entitlement to damages in an amount which can be ascertained with reasonable certainty. *Id.* at 14.

{¶35} The Court has applied the proper standards and has determined that the expert opinion rendered by Calvey sets forth Wood Electric's damages within a reasonable degree of certainty. Although, the comparisons used for impacted and non-impacted periods in the measured mile calculations may not be identical, the Court finds that Calvey reasonably calculated damages with the data available to him. Accordingly, judgment shall be rendered in favor of Wood Electric in the amount of \$254,027.00.

DALE A. CRAWFORD
Judge

[Cite as *Wood Elec., Inc. v. Ohio Facilities Constr. Comm.*, 2016-Ohio-7120.]

WOOD ELECTRIC, INC.

Plaintiff

v.

OHIO FACILITIES CONSTRUCTION
COMMISSION

Defendant

Case No. 2014-00987

Judge Dale A. Crawford

JUDGMENT ENTRY

{¶36} This case was tried to the Court on the issues of liability and damages. The Court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of Plaintiff in the amount of \$254,027.00. Court costs are assessed against Defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DALE A. CRAWFORD
Judge

cc:

Donald W. Gregory
Michael J. Madigan
Capitol Square Office Building
65 East State Street, Suite 1800
Columbus, Ohio 43215-4294

David A. Beals
William C. Becker
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Filed August 12, 2016
Sent to S.C. Reporter 9/30/16