

[Cite as *Dugan & Meyers Constr. Co., Inc. v. Ohio Dept. of Admin. Serv.*, 2003-Ohio-3709.]

IN THE COURT OF CLAIMS OF OHIO

DUGAN & MEYERS CONSTRUCTION :
CO., INC., et al. :
 :
Plaintiffs : CASE NO. 2001-07084
 :
 : REFEREE REPORT
v. :
 : William L. Clark, Referee
STATE OF OHIO DEPARTMENT :
OF ADMINISTRATIVE SERVICES, :
et al. :
 :
Defendants :

: : : : : : : : : : : : : : : :

Statement of the Case

{¶1} In the summer of 1997 the Ohio Department of Administrative Services (ODAS) received competitive bids for the construction of Phase II of the Fisher College of Business on the campus of The Ohio State University (OSU). Phase II involved the construction of three separate buildings identified as the Undergraduate Building, the Resource Center, and the Executive Education Building. The successful bidders were Dugan & Meyers Construction Company (DM) for the general trades work and for lead contractor services; Teepe's River City Mechanical, Inc. (Teepe) for the HVAC work; Accurate Electric Construction, Inc. (Accurate) for the electrical work; J.A. Croson Company (Croson) for the plumbing and fire protection work; and The Sherman R. Smoot Co. (Smoot) for the site work.

{¶2} In mid-August 1997 ODAS entered into construction contracts with the successful bidders in the following original amounts: DM, \$20,932,500; Teepe, \$3,850,000; Accurate, \$4,593,000; Croson, \$929,979; and Smoot, \$2,682,900. A notice to proceed was issued on August 15, 1997, establishing May 13, 1999, as the completion date for the Resource Center and June 12, 1999, as the completion date for the Undergraduate and Executive Education Buildings. The contract declared time to be of the essence and provided for the assessment of liquidated damages for late completion. Project funding for Phase II was provided in part by the Ohio General Assembly (\$24,311,860) and in part from local University funds (\$16,300,000).

{¶3} ODAS, through the office of the State Architect, was responsible for general supervision over the project, including such duties as interpreting the construction drawings and specifications, acting as impartial judge of the contractors' performance, and making decisions on all claims of the contractors relating to the execution and progress of the work and on other matters relating thereto with the consultation of the associate and the sponsor agency.

{¶4} Karlsberger & Associates (Karlsberger) served as the associate architect (associate). As associate architect, Karlsberger was responsible for preparing the construction drawings and specifications; visiting the job site to observe the quality and progress of construction; approving shop drawings; responding to contractor requests for information concerning perceived conflicts, errors, omissions or other discrepancies in the contract documents; and administering any design changes necessitated thereby.

{¶5} Gilbane Building Company (Gilbane) was retained by ODAS as the construction manager, and, as such, was responsible for reviewing and approving the lead contractor's initial construction schedule; monitoring compliance therewith; negotiating and processing change orders; providing input to the associate and owner regarding contractor payment applications; assisting in the submission, review and approval of shop drawings; and dealing with on-site safety and cost control issues. Gilbane was required to conduct weekly progress meetings among the prime contractors, associate, owner and construction manager and to evaluate and assist with the resolution of all schedule issues raised at progress meetings.

{¶6} As lead contractor DM was responsible for coordinating the work of all contractors and developing in cooperation with the other contractors, a critical path method (CPM) construction schedule. The CPM schedule was to provide for the reasonable, efficient, and economical execution of all work under the contract by the stipulated contract end dates. During construction the lead contractor was required to monitor the progress of the work for conformity with the construction schedule, publish monthly schedule updates, and propose an affirmative recovery plan if it became apparent during construction that critical path activities, schedule milestones or contract completion dates would not be met.

{¶7} The initial construction schedule signed by all contractors was to be submitted to the associate for approval within 30 days of the date of the notice to proceed, i.e., by September 15, 1997. While that schedule was being developed, a delay was experienced in the availability of structural steel for the project. In recognition of that delay the parties agreed to a

no-cost change order extending the contract completion date for each building by four weeks, i.e., to June 11, 1999, for the Resource Center and to July 12, 1999, for the Undergraduate and Executive Education Buildings. Although subsequent events would give rise to contractor assertions of entitlement to additional time extensions, there were no further agreed modifications of the contract completion dates. One of the reasons the University was reluctant to grant any further time extensions was the University's need to occupy the new buildings for the fall quarter of 1999, there being no other available space for classes scheduled therein.

The contractors were repeatedly reminded of that time constraint as scheduling problems developed during the course of construction.

{¶8} As a result of the delay in the availability of steel the initial construction schedule (sometimes referred to as the "baseline schedule") was not finalized until January 1998. Notwithstanding the absence of an approved schedule, work on the project commenced in August 1997, shortly after issuance of the notice to proceed. No objection was raised by the state to the tardy finalization of the baseline schedule.

{¶9} The work was scheduled to proceed from floor to floor and building to building in a logical, coordinated sequence of more than 2,400 construction activities to be performed by the five prime contractors and their subcontractors. To facilitate contractor efficiency and productivity each trade was scheduled to complete its work in a given location within a specified time frame following completion of the scheduled predecessor work of another trade. Work on all three buildings was to begin in September 1997 and be substantially completed by April 1999, leaving some "float" in the schedule to accommodate unanticipated delays or changes in

the work. Weekly progress meetings conducted by the construction manager and coordination meetings convened by the lead contractor were to be held to provide a contractual mechanism for monitoring the progress of the work and addressing various problems as they might arise.

{¶10} In February 1998 ODAS assigned its responsibility for administering the Phase II construction contracts on behalf of the state to OSU in order to save \$418,000 in administrative fees otherwise payable to ODAS for providing that service. That assignment was one of several measures taken to reduce a projected funding deficit of approximately \$1.4 million for Fisher Phases I and II. The Phase II prime contractors executed no-cost change orders acknowledging that assignment. After February 27, 1998, ODAS ceased to administer the contracts and withdrew its field representative who had been on site during the first five months of construction. OSU made no changes in its staffing of the project following the assignment.

{¶11} During the first year of construction the work progressed essentially as scheduled. The monthly schedule updates prepared by the lead contractor during that period consistently forecasted completion of the project within the extended contract end dates. By June 1998 the foundations, steel frameworks, concrete floors, stairs, exterior metal framing, sheathing, masonry, and roofs of all three buildings were either in place or nearing completion, and the interior work (framing, drywall, painting, ceiling grids, millwork, etc., and the interrelated HVAC, plumbing, fire protection, and electrical work) was underway. The interior framing, drywall, and ceiling work was performed by DM's subcontractor, Cleveland Construction, Inc. (CCI).

{¶12} At this point in the project, significant slippage in the schedule began to occur and continued thereafter throughout the balance of the project. As the interior work progressed numerous omissions, inaccuracies, and conflicts in the design documents for all three buildings were discovered that required the contractors, before proceeding with their work, to seek a determination by the associate as to what was intended or required. Between June 1998, and the end of September 1998, 176 requests for information (RFI) had been submitted, and 48 field work orders (FWO) and 15 architect supplemental instructions (ASI) had been issued dealing with such problems as framing conflicts in tiered classrooms, insufficient space for plumbing in lavatory walls, conflicts of ceiling heights with mechanical, electrical and plumbing (MEP) systems, soffit depth clearance problems, questions regarding rolling window shade specifications, and a variety of other issues.¹

{¶13} Many of the RFIs related to the work of CCI. When CCI's framing, drywall, or ceiling work in an affected area was suspended awaiting the associate's response to an RFI, often the successor activities of the plumbing, electrical and/or HVAC contractors in that area were delayed. In general, the associate's responses to RFIs were made within contractual time requirements, although a problem regarding framing conflicts and design changes in the tiered classrooms of the Undergraduate Building required five months (April to September 1998) to resolve.

1

If the response to an RFI did not require a change to the contract, the response would be provided on the RFI itself. If the response required a change to the plans or specifications but did not involve extra time or money, an ASI would be issued. If the response required a change to the plans or specifications and did involve time and/or money, an FWO would be issued, followed by a written change order (CO). A contractor was not permitted to proceed with work involving a change to the plans or specifications until an ASI or FWO authorizing the change had been issued. RFIs were initiated by contractors and/or their subcontractors. Responses to RFIs were due within three days of receipt of the request.

{¶14} The issue of schedule slippage was discussed at the weekly progress meetings and was a matter of continuing concern both to the state's design team (representatives of OSU, the associate and the construction manager) and to the contractors. Special meetings seeking a solution were held in October and December 1998 and in January and March 1999. The lead contractor asserted that the frequent need for clarification, modification, or completion of the design documents relating to its work and the necessity of suspending or relocating its activities pending the associate's responses thereto were seriously affecting the ability of all contractors to maintain the project schedule and to conduct their operations with expected efficiency and productivity. During this period there were disagreements among the parties as to whether the incidence of RFIs, ASIs, and FWOs was excessive; whether the schedule slippages were caused by ineffective coordination, lack of contractor cooperation or insufficient staffing; whether float in the schedule was primarily for the benefit of the contractors or OSU; and why, despite their combined efforts, a schedule recovery was not being achieved. Meanwhile, as the work proceeded the schedule continued to slip.

{¶15} The February 1999 schedule update was the first schedule that showed projected completion of all three buildings beyond the contract end dates.² It was becoming apparent to the design team at this time that, despite assurances from DM's project manager that the completion dates shown in the February 1999 schedule update were realistic, something had to be done to ensure

2

Resource Center, August 16, 1999; Undergraduate and Executive Education Buildings, September 15, 1999.

completion of that portion of the project that OSU needed for the fall quarter.

{¶16} In early April the design team began to push for completion of the Undergraduate Building and several floors of the Resource Center, the space most needed for classes in the fall. The contractors were told that if all parties agreed to commit to the February 1999 schedule update, to instill in their personnel a sense of urgency toward completion, to cooperate in identifying problems and solving them quickly, the University would approach the College of Business to obtain its approval to extend the completion dates for the Executive Education Building and the remaining portion of the Resource Center. The contractors committed themselves to those objectives. However, during the ensuing two months the RFIs, ASIs, and FWOs continued to be submitted and issued, and the schedule continued to slide.

{¶17} In early July OSU relieved DM of its responsibilities as lead contractor and employed the construction manager (Gilbane) to take over DM's scheduling and field coordination responsibilities. DM remained on the job as the general trades contractor. The justification given for this action was that DM had "failed or neglected to prosecute the Work with the necessary diligence so as to complete the work by the applicable milestones and the time specified in the contract, pursuant to General Conditions 5.3.1." (DM Exhibit 39.) In its written response, DM took issue with the design team's assessment of its performance as lead contractor and proposed specific remedial measures "to curb and ideally correct the recent slide in completion." (DM Exhibit 337.) The design team found those measures to be insufficient. When Gilbane took over as lead contractor, DM was informed that the cost of employing

Gilbane under the new arrangement would be backcharged to DM. (DM Exhibit 338.)

{¶18} Upon assuming its role as lead contractor, Gilbane resequenced the construction schedule, giving priority to and directing completion of the work in the Undergraduate Building and Resource Center at the expense of the Executive Education Building.

During June, July, and August no progress was made in the framing of that building, which remained eighty percent complete. As a result OSU was able to hold classes in the Undergraduate Building and Resource Center starting in September 1999. Final completion of the Executive Education Building was not achieved until January 16, 2000, six months after the stipulated contract completion date.

{¶19} OSU subsequently backcharged DM a total of \$264,340 for the cost of Gilbane's lead contractor services and assessed liquidated damages against DM, Accurate, Croson, and Teepe in the amounts of \$325,000, \$20,000, \$11,000 and \$115,000, respectively, apportioning responsibility for 186 days of delay (July 12, 1999, to January 16, 2000) allegedly attributable to lack of coordination between prime contractors, inadequate management of subcontractors, and failure to effectively utilize resources. (DM Exhibit 344.) No part of the delay was attributed to the owner.

{¶20} The contractors subsequently filed claims pursuant to Article 8 of the contract seeking to recover their respective contract balances, reversal of back-charges, and extra costs for delays allegedly attributable to the owner. Hearings regarding those claims were held, and all such claims were rejected.

{¶21} Thereafter, DM filed this action against ODAS and OSU for breach of contract and, in the alternative, unjust enrichment, including a claim on behalf of its subcontractor, Cleveland

Construction, Inc. Accurate, Teepe, and Croson joined in the action as additional plaintiffs, also seeking to recover damages on theories of breach of contract and unjust enrichment.³ ODAS/OSU denied liability as to all claims and asserted a counterclaim against DM for liquidated damages, for the cost of replacing DM as lead contractor, and for indemnification for any amounts it might be required to pay Accurate, Croson, and/or Teepe. William L. Clark was appointed referee pursuant to R.C. 153.12 and 2743.03, to conduct the trial of the case and report his findings and recommendations to the court.

{¶22} A 17-day trial was held between February 10 and March 5, 2003. The trial record consists of nearly 6,000 pages of testimony and 636 exhibits comprising several thousand pages of job records, correspondence and other documents. Proposed findings of fact and conclusions of law, together with post-trial briefs were filed by the parties on April 1, 2003. The referee's findings of fact and recommendations regarding all issues are set forth below.

I. Liability Issues

A. Overview

{¶23} The fundamental factual question in this case is what caused the project to be delayed six months beyond the stipulated contract completion date. The lead contractor (DM) attributes the overall delay to the multiple errors and omissions in the design documents and to ODAS' "abdication" of its statutory responsibility to administer the contracts, which, DM contends, deprived it and the other contractors of an experienced, impartial interpreter of

3

The Sherman R. Smoot Co., the prime contractor for the site work on Phase II, is not a party to this litigation.

the contract documents, assessor of the contractors' performance, and evaluator of contractor claims. DM argues that OSU's inexperience with a project of this size and its inability to effectively manage the many design changes so as to allow the work to proceed as efficiently as possible exacerbated the scheduling problems caused by the defective plans. DM argues further that it fulfilled its obligations as lead contractor and that the state breached the contract by relieving it of that role and back charging it for the amount OSU paid to its successor (Gilbane).

{¶24} The electrical contractor (Accurate) maintains that its work was delayed and disrupted by delays in the performance of predecessor activities which the state failed to rectify through the exercise of its exclusive contractual enforcement authority.

{¶25} The plumbing and HVAC contractors (Croson and Teepe) assert that their operations were delayed and made less efficient as a result of the state's failure to enforce a realistic schedule, to provide accurate and complete plans, and to promptly resolve issues as they arose.

{¶26} All of the contractors contend that the assessment of liquidated damages against them was inappropriate in light of the fact that the state had caused the delay.

{¶27} The state denies that it was guilty of any breaches of contract and places the entire responsibility for the delay in completion of the project at the feet of the contractors, citing as contributing causes the incompetence of CCI, CCI's interference with successor activities, understaffing by DM, inexperience of DM's key personnel, lack of proper coordination of the work by all contractors, and failure to have the baseline schedule in place within 30 days of the issuance of the notice to proceed. The state

contends that the number of RFIs, ASIs and FWOs was not excessive for a project of this size and complexity; that each of the design changes was covered by a written CO specifically excluding any further recovery therefor; that the contractors failed to give proper notice of their claims, to timely file their claims, or to make contractually required requests for time extensions; and that, in any event, the contractors' claims are barred by the "no damage for delay" clause contained in the contract.

B. Referee's Finding Re: Cause of Delay

{¶28} On the basis of the evidence presented the referee finds that the principal cause of the delay in completion of Fisher Phase II was the existence of an excessive number of errors, omissions and conflicts in the design documents furnished to bidders by the state and incorporated into the plaintiffs' contracts. Despite the concerted efforts of the state's design team and the efforts of the lead contractor and the other prime contractors during construction both to address those design issues as they arose and to maintain scheduled progress, it became impossible in constructing the interiors of the three buildings to overcome the frequent disruptions of the work caused thereby and to perform the required activities with the efficiency and productivity reasonably contemplated in the plaintiffs' bids and in the approved baseline schedule. As a consequence the contractors were delayed in completing their work and incurred unanticipated additional costs relating thereto.

{¶29} The state's election in July 1999 to complete the Undergraduate Building and portions of the Resource Center and to defer further work on the Executive Education Building until that had been accomplished added a further period of delay in achieving

final completion. If the work had progressed simultaneously in all three buildings as originally planned, final completion might well have been achieved in November or December 1999.⁴ While the decision to change priorities accomplished OSU's goal of obtaining occupancy of two of the buildings for the fall quarter, it kept the contractors on the project longer and added further to the inefficiency and disruption of their operations. Evidence supporting the above findings is highlighted below.

{¶30} A total of 732 RFIs were submitted to the associate by DM throughout the course of the project.⁵ Approximately half of those RFIs required the issuance of a clarification, ASI or FWO by the associate before work in the area involved could proceed. Of the 264 FWOs issued to DM in response to RFIs, 46 percent were classified by the associate as errors or omissions, 30 percent were classified as user agency requests (changes), and 14 percent were classified as field conditions. Thus, at least 76 percent of all FWOs resulted from matters within OSU's control, and at least 90 percent thereof resulted from matters outside DM's control. (DM Exhibit 361.)

{¶31} Comparing the number of document changes on this project with other, similar projects, Robert Fredelake, DM's project executive with over 25 years of relevant construction experience, testified as follows (Transcript 3093-4):

4

Gilbane's proposal of June 21, 1999, to take over DM's lead contractor responsibilities anticipated completion of all three buildings by October 31, 1999. (DM Exhibit 40.)

5

208 related to the Undergraduate Building; 246 to the Resource Center; 198 to the Executive Education Building; and 80 to all three buildings. The locations of the changes resulting therefrom are detailed in the as-built drawings (DM Exhibit 129 to 134, inclusive) and in DM Exhibits 141 to 155.

{¶32} "Q. Okay. Have you had occasion in your experience to have that kind of effect on other projects that you just described?

{¶33} "A. Well, certainly every project's going to have something of this nature, *but this project, by far, had more than could ever be anticipated at bid time or even early in the project.*

{¶34} "Q. More than you've ever seen in your experience?

{¶35} "A. I - - I'd have to say as far as change documents - - not - - not scope increases, not where an owner wants to paint a room a different color, wants to make a little bigger addition to the building, I mean, those things happen, but *as far as actual document changes, I've never seen it like this.*" (Emphasis added.)

This testimony was echoed by Tim Sullivan, the project superintendent of CCI from January 1999 to the time of final completion (Transcript 2570):

{¶36} "Q. You said earlier you've worked on projects of a similar size and scope. And you told me with respect to RFIs that Fisher College during the time you were there had a greater number of RFIs than similar projects. I want to ask you more specifically about changes. In your experience, how does Fisher College of Business compare to similar size and scope projects with respect to the number of changes?

{¶37} "A. There were just a great deal of changes. I mean, there were a large number of changes that we made at Fisher College that normally we wouldn't have had to deal with, that were dealt with on other projects." [sic]

{¶38} The impact of these changes on the project scheduling was described by Wayne Seiler, DM's scheduler and project engineer (Transcript 1335-36):

{¶39} "Q. Now, we've talked about a lot of these RFIs, we've had a number of these that you've gone through in the last couple days. Were these the only instances that you experienced on this job, or were there others?

{¶40} "A. Of - - only instances of - -

{¶41} "Q. The kinds of conflicts that we looked at and issues that needed to be resolved, or were there more than that?

{¶42} "A. Oh, there was more than what we have here. There's 700 plus RFIs. I mean they all came up.

{¶43} "Q. Okay. And did - - did that have an impact on your ability to schedule the work?

{¶44} "A. Yes. Every time you end up with a delay in an area, then you have to decide on exactly how you're going to maintain a schedule for that area. So an area gets delayed and then it drags out, and then when you go to reflect that in the schedule, you know, you're - - it's almost like you've got contractors that are in the area, but they're - - they're only working in part areas instead of full areas, and then they're mobilizing other areas. So it - - the more you try to schedule and schedule and reschedule, then the more difficult it gets."

{¶45} The effect of such changes on CCI's productivity was explained by Tim Sullivan (Transcript 2571-2):

{¶46} "Q. Did the fact that there were RFIs and changes, did that have any effect on the productivity of CCI that you were able to observe?

{¶47} "A. Oh sure. I mean, if the fellows couldn't complete what they were working on, naturally that would affect their productivity. I mean, we'd have to start them out on a certain

floor working on a certain thing, get as far as we can go, and then move them, you know ***."

{¶48} As to the effect of these changes on the morale of CCI's work force, Mr. Sullivan testified as follows (Transcript 2609-10):

{¶49} "Q. What was the morale of your crews like?

{¶50} [Objection by Mr. Brunetto. Overruled.]

{¶51} "A. Well, the morale was pretty bad. I mean, as I say, these guys that were working for us on the job were, you know, the best we had to offer. And they are proud of their work, and when they can't make the production numbers and they are under the gun - - because I'm not shy about the way I drive a crew. I mean, they are expected to be productive and we're all - - we've got our shoulders to the grindstone. I mean, the morale was not good at all. People generally didn't want to work there. They wanted to go someplace where they could be successful and, you know, feel good about their job."

{¶52} Waiting on responses to RFIs significantly impacted DM's ability to coordinate the work as lead contractor. Regarding that subject, Cindy Stumm (formerly Paladino), DM's project engineer with responsibility for coordination between the construction manager, the contractors, the associate and OSU to make sure that the work complied with the drawings, testified as follows (Transcript 1787):

{¶53} "Q. And, again, with respect to these RFIs that you've testified about, did you observe if it impacted the base contract work in any fashion?

{¶54} [Objection by Mr. Brunetto. Overruled.]

{¶55} "A. If you look at the working drawings that we used, they're - - they're completely marked up from the original base contract drawing to what we actually had to build on-site.

{¶56} "Q. Well, can you describe how it impacted the work then, if you observed it?

{¶57} "A. Well, when there is an RFI that would come up that would concern Cleveland Construction, they would get to the point, they would find the discrepancy or the confusion, they would come to me - - Butch Hutchinson would specifically come to me so he would stop his guys from working in that area before proceeding until he had clarification.

{¶58} "Butch and I would investigate the problems, we'd look to the drawings to see if we could come up with a solution. If we couldn't, then we'd put the question into writing in the form of an RFI to Tom Snearey. We could not complete work in that area or continue work until we had the response from Tom Snearey. Once we did get responses to RFIs, we had to update the working drawings with his response and changes if any.

{¶59} "Q. And did that just happen overnight or did that take time?

{¶60} "A. No, that took time.

{¶61} "Q. A significant amount of time?

{¶62} "A. Some RFIs were answered quicker, but there were some cases where the RFIs might have taken a few days where, in that case, Cleveland Construction stopped work in that area for the amount of days that it took to reconcile the RFI.

{¶63} "Q. Okay. Did that impact your ability to - - to try to coordinate the work with the other primes when you'd sit and have

your meetings that we referred to earlier, those Monday morning meetings?

{¶64} "A. Yes, if we were all - - Accurate Electric would come in or Croson and they'd say, we can't complete work in this area, we're waiting on the framing. They were impatient because we couldn't finish the framing due to waiting for responses on RFIs or field work orders getting executed into COs.

{¶65} "So it did impact the coordination and proceeding in that area with the other primes."

{¶66} James Highfill and Robert Reed of A.W. Hutchison & Associates, a construction management firm from Atlanta, Georgia, were called by DM to testify as experts regarding the cause of the delay in the completion of Fisher II. Their methodology included a review of the plans and specifications, as-planned and as-built schedules, job correspondence, pay applications, interviews with project personnel, analysis of critical paths including the reasonableness of the as-planned critical path, and measurement of milestones along the critical path against their planned counterparts to determine the passages of delay along the critical path of the project. Mr. Highfill prepared several graphs, illustrating the delays experienced in each building and in the overall project. His opinion as to the amount of critical delay in the project was stated as follows (Transcript 2840):

{¶67} "Q. And then as it relates to the overall project critical path that you say went through the executive education building, do you have an opinion to a reasonable degree of professional certainty as to the amount of critical delay to the project?

{¶68} "A. Yes, I do.

{¶69} "Q. And what is that?

{¶70} "A. The amount of critical delay to the project compared to the original plan is 220 days, but if you adjust for the time extension that was given to the project as a result of the steel delivery change order, the total delay to the project then goes to 192 days."

{¶71} Mr. Reed then took the stand to give opinion testimony as to the cause or causes of that critical delay. He described in detail an empirical analysis he made of all of the RFIs, ASIs, FWOs, COs and drawing revisions involved in the project, which he characterized as "excessive." At the conclusion of his testimony he stated the following opinion as to the cause of the delay (Transcript 2980-82):

{¶72} "Q. Based on your analysis, what is your opinion as to whether these RFIs and the various FWOs and ASIs impacted Dugan & Meyers' ability to progress the work as it had originally intended?

{¶73} "A. The multitude and the magnitude of all these ASIs, FWOs and RFIs, drawing revisions did impact Dugan & Meyers in the performance of its work.

{¶74} "Q. And how was that manifested? How was that impact manifested, in terms of what happened to the job?

{¶75} "A. What happened to the job in certain areas of the job, the job was just completed in disarray. The progress of the work could not flow from floor to floor, building to building, like they originally planned.

{¶76} "What we saw in analyzing the project is portions of the building would be completed. One room would be completed here. The next room there would not be completed. The workers were hopscotching all over the building, floor to floor, room to room,

in total disorganization because of certain areas that were placed on hold, certain areas that were released to be finished. And like I mentioned earlier, the morale from talking with all the project participants, the morale of the project was very, very bad, and the working conditions were bad.

{¶77} "Q. And did that impact Dugan & Meyers' ability, in your opinion, to complete by the original contract completion date?

{¶78} "A. It certainly did. It delayed the completion of the work.

{¶79} "Q. By how many days?

{¶80} "A. 190 days."

{¶81} The state offered no expert or lay testimony to rebut plaintiffs' evidence that the design documents were incomplete and inaccurate and constituted the underlying cause of the delay in achieving project completion.

C. Legality and Effect of Assignment of Contract Administration to OSU

{¶82} The referee finds that ODAS' assignment to OSU of its statutory responsibility to administer the Fisher Phase II contract was illegal in that it did not fall within the statutory exception for local administration provided by former R.C. 3345.50. The referee finds further, however, that by acknowledging and agreeing to the transfer of administrative responsibility in written COs and proceeding with the work and accepting payment therefor without objection the contractors waived the right to challenge OSU's assumption of administrative responsibility for Phase II and remained obligated to perform their work in accordance with the terms of the contract.

{¶83} State administrative agencies are given their respective duties by the General Assembly and have no authority to amend, modify, ignore or otherwise circumvent the will of the General Assembly as set forth in the legislation it enacts. *Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency, Inc.*, 88 Ohio St.3d 166, 2000-Ohio-282; *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377.

{¶84} The General Assembly has specifically delegated responsibility for the administration of publicly funded improvement contracts to the Department of Administrative Services. R.C. 123.01 states, in part:

{¶85} "(A) The department of administrative services, in addition to those powers enumerated in Chapters 124 and 125 of the Revised Code, and as provided elsewhere by law, shall exercise the following powers:

{¶86} "***

{¶87} "(2) To have general supervision over the construction of any projects, improvements or public buildings constructed for a state agency and over the inspection of materials previous to their incorporation into those projects, improvements, or buildings.
***"

{¶88} At the time of the Fisher project R.C. 3345.50 permitted local administration of capital facilities projects by state universities where the total amount of the appropriation did not exceed \$4 million, as follows:

{¶89} "Notwithstanding anything to the contrary in sections 123.01, 123.15 and 153.01 to 153.20, *** a state university *** may administer any capital facilities project for the construction *** of a public improvement under its jurisdiction for which the total

amount of funds expected to be appropriated by the general assembly does not exceed four million dollars without the supervision, control, or approval of the department of administrative services.

***." ⁶

{¶90} Since the legislative appropriation for Fisher Phase II exceeded \$24 million, local administration was clearly not authorized. ODAS had exercised general supervision over Phase I of the project, and it had the statutory obligation to provide the same services for Phase II. Nevertheless, ODAS assigned those responsibilities to OSU to enable OSU to reduce the project funding deficit by \$418,000, the fee which ODAS would have charged for providing general supervision over Phase II.

{¶91} The assignment took effect in February 1998, some six months after commencement of the work on Phase II, and was agreed to by the prime contractors in written COs. As indicated above, the referee finds that by affirming the illegal assignment and proceeding with the work and accepting payment without objection therefor, the contractors waived any right they might have had to challenge OSU's assumption of administrative responsibility for Phase II. Accordingly, they remained obligated to perform their work pursuant to the terms of the contract.

{¶92} The evidence does not support DM's contention that OSU lacked the necessary experience and practical ability to locally administer Fisher Phase II. Jill Morelli and Chuck Hamilton of the

6

The statute has subsequently been amended to permit local administration of projects involving appropriations in excess of \$4 million, provided the institution establishes its administrative capabilities under criteria established by the Board of Regents. (147 v. H850. Eff. March 18, 1999.)

University Architect's office, working with Richard Carpenter and Tom Snearey of Karlsberger and Carol Benkert and Lisa Helmke of Gilbane, had sufficient background and experience collectively to properly administer the project on behalf of the state. It was not their lack of administrative expertise that caused the project to finish six months late but rather the inability of all concerned to overcome the serious operational and scheduling problems occasioned by the defective plans.

{¶93} The referee observes in passing that the interest of OSU in completing the project in time for the fall quarter and in avoiding any substantial addition to the project funding deficit, and the interest of Karlsberger in defending the quality and integrity of the design documents, may have caused them to be less receptive to the contractors' claims for extensions of time and additional compensation than a more impartial ODAS administration would have been.

D. Removal of DM as Lead Contractor

{¶94} The evidence clearly establishes that DM fulfilled its responsibilities as lead contractor from the outset of the project to the time in July 1999 when OSU relieved it of those responsibilities and assigned them to Gilbane. The referee finds that OSU breached the contract by removing DM as lead contractor and back-charging DM for the amount paid to Gilbane as DM's successor. Accordingly, DM is entitled to reversal of that back-charge.

{¶95} The contract documents at General Conditions Sections 4.2, 4.3 and 4.6 set forth the duties and responsibilities of the lead contractor. The lead contractor was required to coordinate the work of all contractors with each other and with the activities

and responsibilities of the owner, the associate and the department (paragraph 4.2.2); to develop a construction schedule for the project (paragraph 4.2.3); to monitor the progress of the work for conformance with the construction schedule and initiate revisions thereof as required by the contract documents (paragraph 4.2.4); to update the construction schedule on a monthly basis (paragraph 4.3.6); and to schedule weekly coordination meetings for all contractors and appropriate subcontractors and material suppliers, including MEP coordination meetings to establish the exact location of each piece of equipment, pipe, duct, conduit or other component of the project (paragraph 4.6.1).

{¶96} It is undisputed that DM prepared and submitted the required CPM construction schedules in consultation with the other primes. The first schedule was delayed as a result of various factors including the delay in steel delivery but was ultimately accepted by OSU and the associate in early January 1998. While that schedule was not submitted within 30 days of receipt of the notice to proceed per Specification 1.04(C), the state did not object to its delayed finalization at the time and did not raise the issue until it was asserted in defense of this action long after the project was completed. The record is devoid of evidence that the lack of a finalized schedule during the first four months of construction negatively impacted the progress of the work.

{¶97} Regarding coordination, the evidence establishes that DM produced MEP coordination drawings through the use of overlays and regular meetings with affected contractors. The efforts of Wayne Seiler, DM's MEP coordinator, were extensive and involved all of the prime trade contractors. The resulting coordination drawings were submitted for approval to the associate and its MEP

consultant, Korda/Nemeth. The drawings were approved by both the associate and Korda/Nemeth for construction. The evidence also shows that DM continued to conduct weekly coordination meetings and, later, daily coordination meetings until DM was terminated from its lead contractor responsibilities. DM updated the CPM schedule at least monthly and regularly attended weekly progress meetings conducted by the construction manager where additional coordination of the work of all contractors occurred.

{¶98} Perhaps of greatest significance regarding the performance of DM as lead contractor was the regular on-site involvement from October 1998 until project completion of Robert Fredelake, DM's project executive, who brought to bear his extensive experience in large, complex construction projects to assist the state's design team and the other prime contractors in trying to minimize the continuing schedule slippage and other impacts attributable to the excessive changes in the design documents during the performance of interior work in all three buildings.

{¶99} DM argues that aside from lacking reasonable justification for terminating DM as lead contractor the state failed to follow the applicable contractual requirements relating thereto. DM asserts that the decision to terminate was made at a meeting of the design team on June 21, 1999, six days before the associate issued a 72-hour notice which purported to give DM the opportunity to cure the alleged default, but that no serious consideration was given to DM's response, thereby violating both the letter and spirit of the contract. DM also claims that the termination procedures followed by OSU ignored Article 13.3 of the contract which requires notice of default to the contractor and its

surety followed by a 20-day cure period before the state can terminate any contractor. The referee finds it unnecessary to determine this issue of procedural irregularity in light of his finding that the termination of DM by OSU constituted a breach of contract.

E. Liquidated Damages

{¶100} The referee finds that liquidated damages were improperly assessed against the plaintiffs, being contrary to the evidence and the law, and therefore must be reversed.

{¶101} Defendants assert that the state assessed liquidated damages against plaintiffs on an equitable basis, allocating the total 186 days of delayed completion ratably among the contractors based upon the design team's determination of their relative contributions to the delays. In making this allocation the state did not accept any responsibility for causing the delayed completion through the furnishing of defective design documents, re-prioritizing the construction schedule, or otherwise.

{¶102} At trial the evidence revealed that no objective analysis or evaluation of the project delays was made by the state in determining responsibility therefor. Carol Benkert, Gilbane's project manager, testified that the allocation was determined at OSU's request by herself and Greg Honzo of Gilbane, Brian Braaksma of Korda/Nemeth, and Tom Snearey of Karlsberger, based upon their collective belief as to which contractors were responsible for what portion of the total delay. On this point, Ms. Benkert testified as follows (Transcript 5700-5701):

{¶103} "THE WITNESS: The - - the four of us got together and talked about the circumstances.

{¶104} "REFEREE CLARK: Right. But the question is how did you know that coordination of the work affected the project 40 percent?

{¶105} "THE WITNESS: We discussed different instances where coordination was a problem, and we discussed instances where management of resources were a problem, and it's a - - a gut feeling or just a - - relative assessment. It's not - -

{¶106} "REFEREE CLARK: So it was a gut feeling, it wasn't based on the - - a specific analysis or a computation of particular numbers?

{¶107} "THE WITNESS: That's correct. It was the identification of circumstances that affected the project, and we felt that management of subcontractors contributed more to the delays than the actual coordination of the work between the contractors."

{¶108} Since the referee has found the state to have been the party principally responsible for causing the delay in completion, the basic premise on which liquidated damages were assessed against the contractors was erroneous. For that reason alone the assessments cannot stand.

{¶109} Furthermore, under Ohio law liquidated damages may not be assessed where there are mutual or concurrent delays or where, as here, the delays are caused by the owner or were beyond the control of the contractor. In *Lee Turzillo Contracting Co. v. Frank Messer & Sons, Inc.* (1969) 23 Ohio App.2d 179, the Court of Appeals for Hamilton County stated the rule as follows (at 184):

{¶110} "*** [W]here an owner and a contractor are each responsible for a certain amount of unreasonable delay in completing the work, the owner is barred from assessing the contractor with liquidated damages for whatever delay might have occurred in the completion of the work." See, also, *Mt. Olivet*

Baptist Church, Inc. v. Mid-State Builders, Inc. (Oct. 31, 1985), Franklin App. No. 84AP-363; *Carter Steel and Fabricating Co. v. Ohio Dept. of Transp.* (1999), 102 Ohio Misc.2d 1, 4-5.

II. DM's Claims

A. Cumulative Impact Claim

{¶111} In addition to its request for payment of the balance of its adjusted contract and reversal of the back-charges for liquidated damages and the state's payments to Gilbane for lead contractor services, and other back-charges, DM seeks to recover additional compensation herein for the "cumulative impact" or "ripple effect" to DM's base contract work caused by the excessive number of design changes to the contract plans.

{¶112} This claim is based upon the well-established law in Ohio and elsewhere, commonly known as the *Spearin* doctrine, that a public owner impliedly warrants the sufficiency of the plans and specifications for the purpose intended. When plans contain errors and omissions affecting the work, a contractor has the right to be compensated for additional costs resulting from those deficiencies.

Sherman R. Smoot Co. v. State (2000), 136 Ohio App.3d 166, 176-177; *Cent. Ohio Joint Vocational School Dist. Bd. of Edn. v. Peterson Constr. Co.* (1998), 129 Ohio App.3d 58, 65; *Conti Corp. v. Ohio Dept. of Admin. Svs.* (Nov. 30, 1992), Court of Claims No. 88-14568, aff'd, in part, 90 Ohio App.3d 462; *Valentine Concrete v. Ohio Dept. of Admin. Svs.* (1991), 62 Ohio Misc.2d 591; *Rieth Riley Construction Co., Inc. v. ODOT* (April 29, 1997), Court of Claims No. 95-12273; *United States v. Spearin* (1918), 248 U.S. 132.

The owner's obligation to the contractor to provide complete, accurate and constructable plans and specifications under *Spearin* is to be distinguished from the architect's duty to meet

professional standards in performing the architectural services and the architect's obligation under R.C. 153.01 to provide the owner:

{¶113} "(A) Full and accurate plans, suitable for the use of mechanics and other builders in the construction, improvement, addition, alteration, or installation; [and]

{¶114} "(B) Details to scale and full-sized, so drawn and represented as to be easily understood."

{¶115} Depending on the nature and extent of deficiencies in the design documents, the owner may have a right of action against its architect for professional negligence. But under the *Spearin* doctrine the contractor has a contractual right to expect complete, accurate and buildable plans and may recover its damages resulting from the owner's failure to meet that contractual obligation.

{¶116} In this case the evidence demonstrates that the number and nature of design errors, omissions and owner-initiated changes substantially hampered DM's efforts to timely complete construction in the manner it reasonably anticipated in its bid. The numerous changes significantly impacted DM's base contract work and disrupted successor activities downstream on the critical path. As a result, the contractors could not maintain the planned flow of work running through the project's three buildings, making the work disjointed and inefficient, thereby extending the construction period beyond its expected duration.

{¶117} As specific authority for its cumulative impact claim DM relies upon several decisions of the General Services Administration Board of Contract Appeals and other cases outside this jurisdiction, there being no Ohio cases directly in point. In *David J. Tierney, Jr., Inc.* 1988 GSBGA LEXIS 151, 88-2 B.C.A. Section 20, 806, the contractor entered into a contract to

construct a federal building for a lump sum price of approximately \$1.4 million, to be completed within 365 calendar days. During construction the government issued 44 change orders, impacting a total of 133 separate items. Tierney was paid an additional \$79,000 for those changes but complained that collectively they had delayed its completion of the job. The Board awarded Tierney \$179,093, plus interest, summarizing the rationale for its decision as follows:

{¶118} "*** Principally, we find on balance that the Government's numerous changes to the contract impeded appellant's completion of the job, substantially increasing its costs and eradicating its anticipated profit. Although we are not able to pinpoint, day by day, the effect of each change on each item of work, we do find that some of those changes had a cumulative impact on job progress as a whole, for which appellant is entitled to compensation. In addition, the negotiated prices of the contract changes failed to address this cumulative impact experienced, and therefore do not preclude appellant's claim by way of an accord and satisfaction. We also find, however, that certain deficiencies in appellant's performance contributed to the losses it incurred, and we consider those deficiencies in determining the amount of compensation appellant is due.

{¶119} "Our award is not based upon any specific quantum associated with appellant's individual claims. Rather, the award is in the nature of a jury verdict based upon a perceived balance of liability between appellant and respondent for overall delay in the completion of the construction project as a whole." Id. at 4-5.

{¶120} In *Tierney* the board defined "cumulative impact" costs as follows:

{¶121} "'Cumulative impact' costs are costs associated with impact on distant work, and are not readily foreseeable or, if foreseeable, as [sic] not readily computable as direct impact costs. The source of such costs is the sheer number and scope of the changes to the contract. The result is an unanticipated loss of efficiency and productivity which increases the contractor's performance costs and usually extends his stay on the job." *Tierney*, supra, at 207.

{¶122} See, also, *Charles G. Williams Constr. Inc.* ASBCA No. 33766 (Feb. 27, 1989); *Atlas Construction Co., Inc.* GSBCA No. 8593 (Mar. 1, 1990); *Appeal of Saudi Tarmac. Co. Ltd.*, ENG BCA No. 4841 (Aug. 4, 1989); *Centex Bateson Constr. Co.*, 1998 VA BCA LEXIS 14; 99-1 B.C.A. (CCH) P30, 153; *State v. Guy F. Atkinson Co.* (1986), 187 Cal. App.3d 25; *Castagna & Son v. Board of Education of the City of New York* (N.Y.A.D. 1991), 570 N.Y.S.2d 286.

{¶123} In the case at bar Mr. Fredelake testified that the multiple changes to the design documents had their most pronounced impact upon the "general conditions" scope of DM's work. Ms. Stumm, Mr. Seiler, Mr. Cooper, and others explained how the volume of changes resulted in an increase in DM's cost to coordinate work of the co-prime contractors, supervise the project, maintain and update the schedule, update the working drawings, and process related paperwork. These costs were entered into DM's accounting records under the "general conditions" cost code. The cumulative impact also affected the duration of the work, as discussed above.

{¶124} The state presented no evidence to refute DM's evidence of cumulative impact resulting from the many design changes

attributable to defective plans and owner-initiated requests and did not call the project architect or offer any expert testimony in defense of the design documents. In the absence of any such evidence, the referee has found in favor of DM as to those issues.

B. Effect of Agreed Change Orders

{¶125} The referee finds that the individual COs executed in connection with the numerous changes to the design documents during construction do not bar DM's claim for recovery of cumulative impact costs.

{¶126} The evidence establishes that all FWOs and COs with the exception of those for liquidated damages and removal of DM as lead contractor were signed by both the owner and the contractors and contained the following language:

{¶127} "The compensation or time-extension provided by this Change Order constitutes full and complete satisfaction for all direct and indirect costs, and interest related thereto, which has been or may be incurred in connection with this change in the work."

{¶128} The state contends that these agreed COs constitute an accord and satisfaction between the parties barring any further recovery relating to those changes. In response, DM contends that accord and satisfaction is an affirmative defense that must be proved by the party asserting it [Civ.R. 8(C)] and that the state's failure to plead accord and satisfaction in its answer is a waiver of that defense, citing *Complete General Constr. Co. v. Ohio Dept. of Transp.* (May 25, 2000), Franklin App. No. 98AP-1619, citing *State ex rel. Tubbs Jones v. Suster* (1998) 84 Ohio St.3d 70, 75. The referee finds that the state did not plead accord and satisfaction in its answer and made no request to amend its answer

during trial under Rule 15. Accordingly, the referee finds that the defense of accord and satisfaction has been waived and is not before the court.

{¶129} Furthermore, even if defendants had timely asserted this defense, the evidence establishes that the negotiation of the individual COs did not include any discussion or consideration of claims for cumulative impact. As to this point, Carol Benkert, Gilbane's project manager, testified on cross-examination as follows (Transcript 5873-74):

{¶130} "Q. You never did negotiate with DM anything having to do with cumulative impact of all of the changes and FWOs, did you?

{¶131} "A. No.

{¶132} Mr. Fredelake's testimony is in accord (Transcript 3512):

{¶133} "Q. And do you know if Dugan and Meyers had knowledge as to whether or not those FWOs and answers to RFIs would have a cumulative impact on the progress at the time that they received those?

{¶134} "A. Not at the time."

{¶135} The referee finds that the claims for cumulative impact were not within the contemplation of the parties when the COs were executed and therefore are not barred by the exclusionary language contained therein. See *Tierney, supra*, citing *Roberts Construction Co.*, GSBICA No. 5724, 81-1 BCA p. 15,104 at 74,732; *Pittman Construction Co.*, 81-1 BCA at 73,313-14.

{¶136} The state's reliance upon the cases of *DiGioia Bros. Excavating, Inc. v. Cleveland Dept. of Pub. Util., Div. of Water* (1999), 135 Ohio App.3d 436; *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353; and *Spohn Corporation v. Ohio Dept. of Admin. Services* (Feb.

11, 1987), Court of Claims No. 81-01771 as to this issue, is misplaced. In none of those cases did the contractor's claim for extra compensation involve a category of additional cost which, as here, was as yet unquantifiable and admittedly not considered by the parties in their CO negotiations.

C. Notice of Claims

{¶137} The referee finds that the state had actual notice of plaintiffs' claims during construction, that it was not prejudiced by any technical noncompliance with the notice requirement of Article 8 of the General Conditions, and that the claims were filed with the state prior to contract completion in accordance with Article 8.

{¶138} Article 8.1 of the General Conditions provides as follows:

{¶139} "Any claim against the State shall be made in writing to the Associate and filed prior to Contract Completion, provided the Contractor notified the Associate no more than ten (10) days after the initial occurrence of the facts which are the basis of the claim. 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."

{¶140} The record is replete with evidence that the state had actual notice of the facts forming the basis of the contractors' claims, i.e., that the multiple changes to the design documents were seriously affecting their ability to maintain the construction schedule and causing them to incur unanticipated additional costs in performing the work. Mr. Fredelake brought this issue to the design team's attention in October 1998, and it was the subject of regular discussions thereafter at the weekly progress meetings,

coordination meetings and the special scheduling meetings of December 16, 1998, and April 8, 1999. Through its involvement in processing the RFIs and issuing ASIs, FWOs, and COs, the design team was fully apprised of the number of design changes being made. The record also discloses that in March 1999 the design team began a series of regular meetings for the purpose of "damage control against claims," providing further evidence of the state's awareness that contractor claims were in the offing. Prior to contract completion the associate invited the contractors to file their claims under Article 8, held hearings thereon and denied the claims in their entirety. The state did not assert lack of notice or untimely filing of claims as the reason for such denial.

{¶141} Under Ohio law, actual notice of claims overcomes an owner's reliance on strict, technical compliance with contractual notice provisions. *Craft Gen. Contractors, Inc. v. The City of Urbana, Brundage, Baker & Stauffer, Ltd.* (Feb. 2, 1982), Franklin App. No. 81AP-346. See, also, *Roger J. Au and Son v. N.E. Ohio Reg. Sewer Dist.* (1986), 29 Ohio App.3d 284 (holding that failure of formal written notice is harmless where the owner was aware of the facts constituting the basis of the claim - in that case differing site conditions - and had adequate opportunity to investigate them).

{¶142} Thus, any technical non-compliance by the contractors with the written notice requirement of Article 8 was overcome by the state's actual knowledge of the facts underlying their claims and the absence of any prejudice to the state due to the lack of written notice. See, also, *Shepherd v. United States* (1953), 113 F.Supp. 648.

D. No Damage for Delay Clause

{¶143} Paragraphs GC 6.2, 6.3, and 6.4 of the contract provide for extension of the contract time for delays beyond the control of the contractor upon timely, written application, and purport to preclude recovery from the state of any damages for any such delays:

{¶144} "6.2 If the Contractor is delayed at any time in the progress of the Work by any of the following causes, the Contract time shall be extended for such reasonable time which the Associate determines, in consultation with the Department and the Owner, has been caused by the delay in the Work:

{¶145} "6.2.1 Delay due to suspension of the Work for which the Contractor is not responsible: inclement weather conditions not normally prevailing in the particular season; labor dispute; fire; flood;

{¶146} "6.2.2 Neglect delay or fault of any Contractor having a Contract for adjoining or contiguous Work; or

{¶147} "6.2.3 By any unforeseeable cause beyond the control and without fault or negligence of the Contractor.

{¶148} "6.3 Any extension of time granted pursuant to paragraph GC 6.2 shall be the sole remedy which may be provided by the Department. *In no event shall the Contractor be entitled to additional compensation or mitigation of Liquidated Damages for any delay listed in paragraph GC 6.2, including, without limitation, costs of acceleration, consequential damages, loss of efficiency, loss of productivity, lost opportunity costs, impact damages, lost profits or other similar remuneration.*⁷ (Emphasis added.)

7

To the extent that this clause would waive or preclude liability for delay when the cause of the delay is the owner's act or failure to act, it has now been declared void and unenforceable as against public policy. See R.C. 4113.62 (C)(1), effective September 30, 1998. This statute does not apply to contracts entered into before

{¶149} "6.4 Any request by the Contractor for an extension of time shall be made in writing no more than ten (10) days after the initial occurrence of any condition which, in the Contractor's opinion, entitles the Contractor to an extension of time. Failure to timely provide such notice to the Associate shall constitute a waiver by the Contractor of any claim for extension or for mitigation of Liquidated Damages."

{¶150} The state contends that DM is barred from recovering any damages for the delays of which it complains by the "no damage for delay" language of paragraph GC 6.3, citing *Carrabine Constr. Co. v. Chrysler Realty Corp.* (1986), 25 Ohio St.3d 222, 228; *DiGioia Bros. Excavating, Inc. v. Cleveland Dept. of Pub. Util., Div. of Water* (1999), 135 Ohio App.3d 436, 450; *Cleveland Const. Inc. v. Reynoldsburg City Schools Bd. of Educ.* (June 28, 1996), Franklin App. No. 96APE02-242.

{¶151} In *Carrabine*, supra, the Ohio Supreme Court observed that "no damages for delay" clauses have generally been accepted as valid under Ohio law, subject to certain exceptions. *Carrabine* at 228. One of the exceptions is where the delay complained of was beyond the contemplation of the parties at the time they signed the contract. In *DiGioia*, supra, the Court of Appeals for Cuyahoga County found upon review of the contract and surrounding circumstances that utility interferences not detailed on the plans were clearly contemplated by plaintiff and denied plaintiff's claim for delay damages attributable thereto. In *Cleveland Constr. Inc.*, supra, the Franklin County Court of Appeals reversed the trial court's ruling granting defendant's motion for summary judgment and

remanded the case for a determination whether the eight-month delay to the plaintiff's work caused by another contractor was foreseeable and therefore within or beyond the scope of the "no damage for delay" clause.

{¶152} The exception to the rule was applied in favor of the contractor by the Court of Appeals of Franklin County in *Nix, Inc. v. City of Columbus*, (1959), 111 Ohio App. 133. In that case the delay was caused by the City's failure to provide the necessary right of way for construction of a bridge. The trial court had sustained the City's demurrer to plaintiff's claim for delay damages based upon the "no damage for delay" clause and because the contractor had not filed a written claim on or before the 15th day of the month following that in which the damages for delay allegedly occurred, as required by the contract provisions. Finding no controlling law in Ohio, the Court of Appeals, after reviewing two extensive ALR annotations on the subject, stated as follows:

{¶153} "In every case where the contractor had no knowledge that the contractee did not have the right of way, the contractor was permitted to recover damages for the delay caused by the failure to have the right of way, a fortiori, where, as in this case, both parties signed the contract on the assumption that the defendant had acquired the right of way. The rationale of the opinions of the courts in those cases is that the 'no damage' provision in the contract has no application, on the ground that the damages arising from the delay were not within the contemplation of the parties at the time the contract was made. Such ruling appears to this court to be a sound proposition of law and the better reasoning and more in accord with our sense of justice." *Nix* at 145. See, also,

JWP/Hyre Electric Co. of Indiana v. Mentor Village Sch. Dist. (N.D. Ohio 1996), 968 F.Supp. 356; *Royal Electric Constr. Corp. v. Ohio State Univ.*, (Feb. 19, 1993), Court of Claims No. 90-05520, pp. 29-31; *affd.* (Dec. 21, 1993) Franklin App. No. 93AP-399, *rev'd* on other grounds (1995), 73 Ohio St.3d 110.

{¶154} In the instant case the evidence demonstrates that neither DM nor the state nor the other contractors could have reasonably anticipated the excessive number of changes to the project arising from the incomplete and inaccurate plans and owner-initiated revisions. The referee finds that the delays and additional expenses attributable thereto were beyond the contemplation of the parties at the time of contracting and that recovery of damages therefor is not barred by the "no damage for delay" provision of the contract.

{¶155} The referee further finds that any request by DM for an extension of time for completion would have been a vain act in light of OSU's insistence upon completion by the adjusted contract end dates and its consistent refusal to acknowledge any responsibility for causing the delay.

E. DM's Claim for Indemnification for Payments to Subcontractors

{¶156} DM seeks to recover from the state the amount of \$117,798.23 which it paid CCI, its framing, drywall and ceiling subcontractor, for "resolution of all back-charges" and the sum of \$134,008.58 which it paid Spears Shamrock, its painting subcontractor, for "resolution of all back-charges" in subcontractor closeout negotiations with those two companies. (DM Exhibits 287, 364.) The state was not notified of and did not participate in those negotiations. It is not clear from the

evidence what factors went into the computation of those amounts or the basis on which DM claims to be entitled to indemnification therefor from the state.

{¶157} Mr. Fredelake testified regarding the payment to CCI (Transcript 3287-88):

{¶158} "Q. And you've got a line item on this Item 3-C of \$117,798 to Cleveland Construction. Is there something in the liquidating agreement that you can point to?

{¶159} "A. *** the resolution of back-charges is what we agreed to. As we would review a host of back-charges both ways, we would come up with that number. So in this particular case, that was \$117,798."

{¶160} As to the settlement with Shears Shamrock, Mr. Fredelake explained (Transcript 3289-90):

{¶161} "Q. Go on to Spears Shamrock. Can you tell us what occurred with respect to Spears Shamrock?

{¶162} "A. Well, we - - it was primarily a meeting just like Cleveland where Jeff Asman, who is one of the owners of Spears Shamrock, came in - - this one was a little bit more hurried - -

{¶163} "Q. Well, let's - - first of all, describe what you did and then we'll identify the exhibit.

{¶164} "A. Well we did the same thing. We surfaced the amount of their contract, change orders, to get a revised contract amount. We - - negotiated a resolution to all their back-charges and then we agreed to an initial payment and subsequent payments of payoff.

{¶165} "Q. And you're seeking that amount back from Ohio State and the state of Ohio?

{¶166} "A. That's correct.

{¶167} "Q. Why?

{¶168} "A. Well, as I explained earlier, these two contractors were clearly the ones that were affected mostly by accelerating their work towards the end of the job. And why I say that is because of the back-charge process, the tickets that we had to sign to get this work done. ***"

{¶169} On cross-examination Mr. Fredelake acknowledged that the payments for "resolution of back-charges" did not include any consideration of the subcontractors' claims against DM for lack of productivity, rework or inefficiencies. (Transcript 3477-78.)

{¶170} The referee finds that DM has failed to establish any basis for recovering damages from the state as an implied indemnitor of DM for payments made by DM to its subcontractors in settlement of their accounts.

{¶171} Further, even if a right of indemnity did exist, recovery therefore would be barred as a matter of law in light of DM's failure to involve the state in the settlement of the subcontractors' claims. *United Services Automobile Association v. Barger* (C.A. 6, 1990), 910 F.2d 321 (applying Ohio law). In *Barger* the Sixth Circuit held the insurer was not entitled to seek indemnification because it afforded Barger no opportunity to participate in the defense or settlement of an earlier action. That is precisely what happened here. See, also, *Allstate Insurance Company v. U.S. Associates Realty, Inc.* (1983), 11 Ohio App.3d 242; *The Globe Indemnity Co. v. Schmitt* (1944) 142 Ohio St. 595.

{¶172} Accordingly, the referee finds that DM's claim for recovery of payments to its subcontractors in the aggregate amount of \$251,807 must be denied.

F. Unabsorbed Home Office Overhead

{¶173} Each of the plaintiffs herein seeks to recover unabsorbed home office overhead as an element of its damages, calculated in accordance with the *Eichleay* formula.⁸ Recovery for unabsorbed home office overhead under *Eichleay* is governed in Ohio by the recent decision of the Supreme Court in *Complete Gen. Constr. Co. v. Ohio Dept. of Transp.*, 94 Ohio St.3d 54, 2002-Ohio-59, wherein the court identified two elements a contractor must prove to establish a prima facie case: 1) that it was on "standby" during a period of owner-caused delay; and 2) that it was unable to take on other work while on standby.

{¶174} Quoting with approval from *West v. All State Boiler, Inc.* (Fed. Cir. 1998), 146 F.3d 1368, the court in *Complete General*, supra, states that "a contractor is on standby 'when work on a project is suspended for a period of uncertain duration and the contractor can at any time be required to return to work immediately.' *All State Boiler*, 146 F.3d at 1373. In effect, the contractor is not working on the project, yet remains bound to the project. The contractor must be ready to immediately resume performance at any time." *Complete Gen. Constr.*, supra, at 58.

{¶175} The rationale for allowing recovery of unabsorbed home office overhead is stated in *Complete Gen. Constr.*, supra, at 57:

{¶176} "Each project a contractor undertakes derives benefits from the home office, and each contributes to paying for home office overhead. Contractors typically do not apportion overhead costs among individual projects. Each project in some degree is

⁸The Eichleay formula is an equation first used by federal courts in determining home office overhead costs during delay periods in construction projects. See *Eichleay Corp.* (1960), ASBCA No. 5183, 60-2 BCA p. 2688, 1960 WL 538.

responsible for the contractor's costs of simply doing business, and each project plays its proportionate part in paying those costs. When a delay occurs on a particular construction project, that particular project ceases to carry its weight in regard to running the business, which can result in damages to the contractor."

{¶177} In the instant case the state claims that the contractors are not entitled to home office overhead because their work was not suspended at any time and, therefore, they were never on standby. Plaintiffs' counter argument is that the owner-caused delays constructively placed them on standby, unable to productively perform their work and unable to bid additional work. Plaintiffs further contend that "standby" does not depend upon whether a contractor's work force is idle or if the contractor's work is under complete suspension, citing *Interstate Gen. Govt. Contractors, Inc. v. West* (Fed. Cir. 1993), 12 F.3d 1053, 1057; and *Altmayer v. Johnson* (Fed. Cir. 1996), 79 F.3d 1129.

{¶178} In each of the cases relied upon by plaintiffs there was a significant government-caused suspension of at least a portion of the work, which extended the time of project completion and cutoff the flow of income for that portion of the work during the period of suspension. In *Complete Gen. Constr.*, supra, the erection of three bridges and widening of another, being part of a highway construction project, was suspended for one year to correct design errors relating to the bridges, while work on other parts of the project continued. In *Interstate*, supra, commencement of a contract for renovation of an army barracks was suspended for over four months to allow the owner to address a bid protest. In *Altmayer*, supra, the government delayed a contractor for seven

months in specifying carpet and wood trim for a contract to "build out" space prior to commencing a ten-year lease.

{¶179} In the case at bar there was no comparable suspension of the work. The flow of income for the work which was being performed was not interrupted and was available to bear its share of home office overhead. Furthermore, plaintiffs' recovery of other categories of damages herein includes a markup for overhead. Allowance of *Eichleay* damages on top of those items would constitute a double recovery.

{¶180} Accordingly, the referee finds that plaintiffs' requests for reimbursement of unabsorbed home office overhead under the *Eichleay* formula must be denied.

III. Claim of Accurate Electric Construction, Inc. (Accurate)
A. Findings

{¶181} The referee finds on the evidence presented that the state's failure to provide complete, accurate, and buildable design documents for Fisher Phase II was a proximate cause of the delays, disruptions, and inefficiencies for which Accurate seeks recovery herein. As discussed above, the problems related primarily to performance of the interior work in all three buildings starting in the spring of 1998. Questions raised by CCI and DM regarding the framing, drywall, and ceiling design required suspension of CCI's work in the affected areas until the associate analyzed the problems and provided solutions. Those delays in turn delayed performance of the sequentially-scheduled successor activities of the electrical, plumbing, and HVAC contractors, causing stacking of those trades when the areas subsequently became available and disrupting the flow, efficiency, and productivity of the work of

all contractors. These problems continued to occur throughout the remainder of the project and proved not to be recoverable.

{¶182} The record establishes that Accurate is a reputable electrical contractor with substantial experience in projects of the type and complexity of Fisher Phase II. Robert Beal, Accurate's president and project executive, participated in the preparation of Accurate's \$4.8 million bid, relying upon the plans and specifications provided to all bidders. Accurate bid the job on the assumption that the work would be performed in a reasonable, efficient, and economical manner as required by GC Section 4.2.3.1 of the contract. A competent management team was assigned to direct the performance of Accurate's work. (Accurate Exhibit 13B.)

{¶183} The planned sequence of Accurate's work as laid out in the baseline schedule was described by Brad Muter, Accurate's assistant project manager and superintendent, as follows (Transcript 3597):

{¶184} "Q. When you assisted in the planning of the field forces for Fisher Phase II, Mr. Muter, how did you expect to perform the rough-in work on this project?

{¶185} "A. The way it was scheduled, we were going to follow the metal stud framing contractor in, they were going to start metal studs on a given floor, and if it was a 15-day duration, usually about ten days into that, we were scheduled to start our wall conduits. They would complete a floor, go to the next, and we would continue to follow them starting in the Undergraduate Building basement up through that building over to the resource center, the middle building up through the basement to the top of that building, and then finishing in the executive education building to the penthouse of that building."

{¶186} Beginning in mid-April 1998, due to delays in the performance of CCI's framing and drywall work, that sequence of construction could not be followed. For example, when the metal stud framing started in the basement of the Undergraduate Building, most of the framing was completed on that floor except for the areas around the stair towers and the elevators. As a consequence, Accurate could perform only about 80 percent of its wall conduit rough-in in the basement before having to move on to the first floor, where it encountered the same condition at the stair towers and elevators. Accurate had to move onto the second floor after doing 70-80 percent of the first floor wall conduit rough-in. At the second floor they found a great deal of the framing incomplete. Similar conditions prevailed in other areas of the building. These conditions significantly impacted the efficiency and productivity of Accurate's operations and raised serious questions about the impact thereof on the cost and duration of their operations.

{¶187} On June 5, 1998, Accurate notified the associate of these concerns, identifying six different areas in which delays in completion of predecessor work was affecting their operations. (Accurate Exhibit 1-6.) Accurate solicited the associate's suggestions for dealing with these problems, noting that all contractors needed to be involved in finding solutions. (Accurate Exhibit 7.) The associate responded on June 11, expressing surprise that these issues had not been raised at the weekly progress meetings and requesting that that process be followed in the future. (Accurate Exhibit 8.)

{¶188} Although the issues were then raised and discussed at the weekly progress meetings, conditions did not improve during the

next two months. Accurate again requested the help of the associate. In a letter dated July 28, 1998, Accurate identified 16 predecessor activities that were delaying its work in the Undergraduate Building and Resource Center and called attention to the contractual requirement for development of a recovery schedule. (Accurate Exhibit 9.) Accurate followed up on July 30, 1998, stressing the urgent need for a recovery plan. (Accurate Exhibit 10.) Mr. Muter testified as to the conditions affecting their work at the time of that letter (Transcript 3624-25):

{¶189} "Q. Are you in your letter referring to the delay in stair installation in the resource center?

{¶190} "A. Yes.

{¶191} "Q. Mr. Muter, as of July the 30th, 1998, were you working in the Undergraduate Building?

{¶192} "A. Yes, in the basement and first floor of the resource building.

{¶193} "Q. And in the basement and first floor of the resource center. So you're working both buildings at once, is that correct?

{¶194} "A. Yes, sir.

{¶195} "Q. Were there, nonetheless, incomplete walls, lack of door frames, and other impediments to your electrical rough-in in each building?

{¶196} "A. Yes, sir.

{¶197} "Q. Were you hopscotching at this time from place to place and floor to floor in each of these buildings?

{¶198} "A. Yes, I was."

{¶199} On August 4, 1998, the associate directed DM to develop a recovery schedule for those activities that were behind schedule,

including those identified in Accurate's letter of July 28, 1998. (Croson/Teepe Exhibit 23.) A recovery schedule was developed and subsequently approved by all contractors on August 14, 1998. The schedule called for substantial acceleration of the work and forecasted project completion by July 9, 1999. (DM Exhibit 115, Tab. 14.) The evidence shows that the recovery called for by that schedule was not achieved.

{¶200} The associate's basic position at this point was that the contractors were responsible for resolving these scheduling issues through cooperative interaction and that the design team would become involved only when the contractors were unable to do so. (Accurate Exhibit 12.) No 72-hour notices were issued at that time alleging that either the lead contractor or the other primes were failing to fulfill their contractual obligations. The challenge of completing the job on time was complicated by the significant operational problems caused by the defective plans.

{¶201} The problems continued as the work progressed through the fall of 1998. Mr. Muter testified that by the first of the year 1999 the morale of Accurate's field forces was "pretty bad," with work behind schedule all over the job site. Work was not being performed in an efficient, reasonable, and economic sequence, and productivity was low. (Transcript 3635-37.)

{¶202} On February 24, 1999, Accurate submitted a written request for an extension of time of 101 calendar days for completion of the Resource Center and 88 calendar days for completion of the Executive Education and Undergraduate Buildings. The extension was sought due to delays in its access to rough-in work that was caused by untimely drywall framing. Accurate asserted that the state was responsible for causing these delays

because of its failure to exercise its enforcement authority under the contract (Accurate Exhibit 15):

{¶203} "Despite the fact that the late and out-of-sequence drywall framing continued month after month with the university's full knowledge, the university choose [sic] to not exercise its rights under Article 5.3 of the contract, resulting in the severe delays we now have on the project."

{¶204} The associate responded to Accurate's request for a time-extension on March 10, 1999, requesting additional supportive information called for in GC Article 6.4.1. (Accurate Exhibit 16.)

On March 12, 1999, Accurate provided additional information in support of its request. (Accurate Exhibit 18.) The associate acknowledged receipt of Accurate's letter and said that it would take the request under consideration and make recommendations for time-extensions as appropriate. (Accurate Exhibit 19.)

{¶205} At about this time the February 1999 schedule update had been prepared and, for the first time, showed the project not being completed within the extended contract end dates. Croson and Teepe refused to approve the schedule as proposed. As a consequence, the state withheld payment to all contractors under authority of GC Article 4.3.3.2, which provides: "No payment will be made without a Construction Schedule approved by all the Contractors, the Associate and the Department." Accurate protested the withholding of its payment and notified the associate that it would hold the university liable for damages for failure to pay promptly. (Accurate Exhibit 17.)

{¶206} Accurate also notified the university on March 30, 1999, that the disruption to its operations caused by the failure of the owner to require predecessor work to be timely performed and the

owner's failure to grant an additional time-extension had forced it to accelerate its work and to perform out-of-sequence work; that this caused Accurate to incur additional costs that were then in excess of \$850,000, for which it expected to submit a claim when the actual cost-impact could be determined. (Accurate Exhibit 20.)

The associate responded on April 6, denying the state's responsibility for any of Accurate's excess costs, pointing out that an extension of time is a contractor's sole remedy against the state for delays. The associate stated further that an extension of time could be approved by the associate only after new contract completion dates were determined, based upon an accurate schedule agreed to by all contractors and approved by the associate. The associate emphasized that the Undergraduate Building and portions of the Resource Center must be completed by the contract end dates but that liquidated damages could be waived and extensions considered for the buildings or portions thereof not needed for fall classes, provided the contractors would waive claims for additional costs of any kind, including acceleration, re-sequencing, or extended overhead, in accordance with Article 6.3. (Accurate Exhibit 21.)

{¶207} The university's position was reaffirmed by Jill Morelli at the "schedule concerns" meeting of April 8, 1999. The contractors agreed to attempt to complete the project in accordance with the February 1999 schedule update. (DM Exhibit 332.) That did not occur, and the schedule continued to slip.

{¶208} In July 1999, after Gilbane took over DM's scheduling and coordination responsibilities, Accurate was directed to install electrical work out-of-sequence in the Undergraduate Building and Resource Center in order to get the university into those buildings

for the fall quarter. Accurate and Esquire Data, its data subcontractor, were directed to complete final electrical systems in an accelerated manner, working 12-14 hour shifts, seven days a week, ahead of painting, millwork, and other finishing activities of other contractors, to achieve desired dates for life-safety inspections for those buildings. After the life-safety inspections had been performed, Accurate had to go back and take electrical devices and plates off the walls, so the woodwork, wall covering, and painting activities could be completed. (Transcript 3640-42.)

Mr. Muter described the effect these circumstances had on his crews' morale and the company's performance (Transcript 3643-44):

{¶209} "Q. What, if anything, Mr. Muter, did you observe about the attitude and morale of your field forces at this time? And at this time I'm talking about now July, August, and early September of 1999.

{¶210} "A. They were just pretty well worn out and, you know, tired.

{¶211} "Q. You've indicated the work being performed at this time is out of sequence. Did you find that they were unable - - your field forces - - to perform the electrical work in an efficient, reasonable, and economic sequence?

{¶212} "A. Yes, sir. We were in there with drywallers, painters, every particular - - every type of finish trade you can imagine were stacked on top of each other, and every - - all the materials for each one of those trades were crammed in the building and everyone was trying to get done, you know - - doing six months of work in two months. You know, that's what we were up against.

{¶213} "Q. Other than to turn Gilbane loose on Accurate in the last few months that you were on the site, what did Ohio State do, if anything, to assist you to perform your work in a reasonable, efficient, and economic sequence?

{¶214} "A. Absolutely nothing."

{¶215} Assessing the situation which existed after Gilbane replaced DM as scheduler and coordinator, Robert Beal of Accurate testified as follows (Transcript 4010-4011):

{¶216} "Q. Did Accurate's ability to prosecute the work improve after Gilbane took over certain lead contractor responsibilities?

{¶217} "A. I felt like it - because we were asked to go into areas that were incomplete and provide the finish material, that that hurt our production. So, no, we didn't improve."

{¶218} Accurate presented the expert testimony of Craig Hutchison, Senior Project Consultant of R.V. Buric Management Consultants, in support of its claim for acceleration, loss of productivity and delay. Mr. Hutchison has been involved in the construction industry for 30 years and for the past 15 years he has been with the Buric organization working with contractors, owners, bonding companies, and attorneys in claims analysis relating to construction disputes. His area of expertise includes the development of scheduling analyses to determine delay, productivity analyses to calculate inefficiency and calculation of direct impact and other costs associated with delays, disruptions, changed conditions, acceleration, termination, and weather.

{¶219} Based upon the contract documents, correspondence, meeting minutes and Accurate's internal records including man-hour reports, financial cost reports and pay applications, Mr. Hutchison prepared a series of computer-generated charts and graphic displays

to demonstrate what happened to Accurate in the performance of this project. (Accurate Exhibits 31, 36-45.) As a result of his investigation and analysis, Mr. Hutchison expressed the following opinions:

{¶220} "1. Accurate experienced a delay in the performance of its work on each of the three buildings in Fisher Phase II." (Transcript 4126.)

{¶221} "2. Accurate suffered a loss of productivity of its labor force on this project caused by the ongoing delays and piecemeal, out-of-sequence work that was done by predecessor activities, which required Accurate to have multiple come-backs and to perform its work in a manner that would not have been anticipated." (Transcript 4127; 4133-34.)

{¶222} "3. The failure of the state to grant Accurate a time-extension as requested in its letter dated February 24, 1999, affected Accurate's productivity in that a time-extension would have allowed the contractors to try to schedule the remaining work in a more logical manner and do it more efficiently." (Transcript 4134.)

{¶223} "4. The manner in which the job was finished had a substantial impact on Accurate's productivity because the contractors didn't have time to logically sequence the remaining work, having to work in multiple areas with stacking of trades." (Transcript 4135.)

{¶224} "5. The elements of Accurate's claim as reflected in Accurate's Exhibit 25 are a true, fair, and accurate representation of the actual loss sustained by Accurate on Fisher Phase II." (Transcript 4155.)

{¶225} Aside from its vigorous cross-examination of Mr. Hutchinson and Accurate's other witnesses regarding these issues, the state did not offer any evidence to refute Accurate's claim that the job as bid was not the job it was required to build. However, the state stands firmly on the proposition that it did not cause any of the delays or increased expenses experienced by Accurate on the project and cannot be held accountable therefor in this action.

B. Breaches of Contract

{¶226} The referee finds that the state breached its contract with Accurate in the following particulars:

{¶227} 1. By failing to provide complete and accurate plans and specifications for the project, which delayed and disrupted the performance of predecessor activities and, in turn, prevented Accurate from performing its work in the manner reasonably anticipated;

{¶228} 2. By failing to grant Accurate a reasonable extension of time for completing its work, which was delayed by causes beyond its control;

{¶229} 3. By assessing liquidated damages against Accurate for delays in completion of its work which were due to causes beyond its control.

C. State's Defenses

{¶230} In opposition to Accurate's claims the state contends that DM is the real party at fault in that it failed to provide a workable schedule; failed to properly coordinate the work; and failed to require its framing, drywall, and ceiling subcontractor to perform its work so as not to interfere with the successor activities of the electric, plumbing, and HVAC contractors. The

state argues that Accurate's remedy, if any, is a third-party beneficiary claim against DM under GC paragraphs 4.1.2.1 and 4.1.2.2, which provide:

{¶231} "4.1.2.1. Should the Contractor, or the Contractor's Subcontractors or Material Suppliers, cause damage or injury to the property or Work of any other Contractor, or by failure to perform the work with due diligence, delay, interfere, hinder, or disrupt any Contractor who suffers additional expense or damage thereby, the responsible Contractor shall be responsible for such damage, loss or claim.

{¶232} "4.1.2.2. The intent of paragraph GC 4.1.2.1 is to benefit the other Contractors on the Project and to demonstrate that each other Contractor who performs Work on the Project is third party beneficiary under the Contract."

{¶233} The referee finds that DM provided a workable schedule which was approved by all concerned, that DM fulfilled its obligations as lead contractor in coordinating the work until it was relieved of that responsibility by the state, and that CCI's inability to perform its work in accordance with the approved schedule was caused by the failure of the state to provide adequate design documents for the work in question. The electric, plumbing, and HVAC contractors have not asserted claims against DM and are seeking recovery from the state as the responsible party. The state's contention that DM was the party at fault is not supported by the evidence.

{¶234} The state claims that in July 1998, Todd Cooper, DM's Construction manager, reportedly threatened "to do everything possible to damage your company if you don't back off these scheduling issues." (Defendant's Exhibit Q.) There is no evidence

that Accurate ceased calling attention to the scheduling issues as the result of any such threat or that Mr. Cooper ever attempted to carry it out. The state claims further that CCI had a "contentious" superintendent who at one point in August 1998, made attempts to cover up certain areas without providing Accurate sufficient rough-in and inspection time. (Accurate Exhibit 11.) These events provide some evidence of the increased tension among the parties arising from the frustration they felt in not being able to keep up with the scheduled activities. The record does not disclose how frequently those instances may have occurred or that they materially affected the progress of the work.

D. Accurate's Request for Time Extension

{¶235} Accurate submitted a written request for a time-extension on February 24, 1999. (Accurate Exhibit 15.) The state contends that this request did not meet the requirements of GC 6.4, which provides:

{¶236} "Any request by the Contractor for an extension of time shall be made in writing to the Associate no more than ten (10) days after the initial occurrence of any condition which, in the Contractor's opinion, entitles the Contractor to an extension of time. Failure to timely provide such notice to the Associate shall constitute a waiver by the Contractor of any claim for extension or for mitigation of Liquidated Damages."

{¶237} On March 10, 1999, the associate acknowledged receipt of Accurate's request for extension and requested that Accurate provide the information called for in GC Article 6.4. (Accurate Exhibit 16.) Accurate replied on March 12, 1999, specifically addressing paragraphs GC 6.4.1.1 through 6.4.1.7, inclusive, as requested. (Accurate Exhibit 18.) Thereafter, on March 18, 1999,

the associate acknowledged receipt of Accurate's March 12, letter and said it would respond to Accurate's request after it had the opportunity to review the current signed-off schedule and see what time-extensions were justified. (Accurate Exhibit 19.)

{¶238} The referee finds that by not raising any further question as to its form, content, or time of submission the associate accepted Accurate's request for extension as being in substantial compliance with the requirements of the contract and has waived the right to assert the contrary in this action.

E. No Damage for Delay Clause

{¶239} The referee finds that Accurate's claim against the state is not barred by the "no damage for delay" clause of the contract (GC Section 6.3) for the reasons stated in section pp. 34-38 of this report.

IV. Claims of Croson and Teepe

{¶240} On Fisher Phase II, J.A. Croson, Inc. (Croson) and Teepe River City Mechanical, Inc. (Teepe) were the prime contractors for the plumbing and HVAC work, respectively. The record demonstrates that both companies had significant prior experience in those areas and staffed the project with competent personnel. No objection was raised during the project or at trial as to the quality of their work or the adequacy of their staffing. Croson's bid of \$929,979 was low by about 3.7 percent, and Teepe's bid of \$3,850,000 was low by about 5.7 percent. In September 1998 the two corporations combined to form a partnership known as Croson/Teepe, LLP, which later changed its name to AMPAM Commercial Midwest. Both corporations performed their work on Fisher II without amending their separate contracts with the state, and they remain in good standing with the state of Ohio. Both corporations are represented

by the same counsel in this action and they filed a single post-trial brief. Both companies reasonably expected that they could efficiently complete their work by the contract deadlines without exceeding their labor-hour estimates.

{¶241} Croson and Teepe presented detailed evidence at trial through job logs, lay and expert testimony, photographs, and other documentation that their rough-in and finish-work on all floors of all three buildings was repeatedly delayed by the untimely performance of predecessor activities, which required them to perform their work significantly less efficiently than contemplated. This evidence stands essentially undisputed. Croson and Teepe contend that their inefficiencies and inability to complete their work as scheduled is attributable to the state's failure to use its exclusive authority to enforce compliance with the contract schedule, to provide accurate and complete plans, and to promptly resolve issues that arose during the course of construction, all of which they define as breaches of contract by the state entitling them to recover their additional costs attributable thereto.

{¶242} The state denies any liability to Croson or Teepe on the grounds that it did not breach the contract; that putting together a workable schedule after input from the other prime contractors was the responsibility of DM as lead contractor; that Croson or Teepe may have third-party beneficiary rights against DM if the scheduling was done improperly; that coordination of the work was the responsibility of all contractors led by DM; that the real cause of the problems on this project was DM's subcontractor, CCI; that Croson and Teepe never properly requested a time-extension during the course of the project; and, that its claim for damages

was not timely filed and is barred by the "no damage for delay" clause of the contract. In addition, the state raises numerous questions regarding the elements of the damages being sought by Croson and Teepe and the calculation thereof.

A. Inaccurate and Incomplete Design Documents

{¶243} The evidence establishes that the baseline schedule approved by the prime contractors and the state in February 1998 was a good schedule that, if followed, would have provided for completion of the project within the contract end dates and would have enabled the contractors to perform their work in a reasonable, efficient, and economical manner, as contemplated in their bids and as required by GC Section 4.2.3.1 of the contract. As the referee has previously found, the principal obstacle preventing performance of the work in that manner was the existence of an excessive number of errors, omissions and owner changes in the contract design documents, relating primarily to the interior work on all floors of all three buildings. Questions raised by CCI and DM regarding the framing, drywall, and ceiling design required suspension of CCI's work in the affected areas until the associate analyzed the problems and provided solutions. Those delays in turn delayed performance of the sequentially-scheduled successor activities of the electrical, plumbing, and HVAC contractors, causing stacking of those trades when the areas subsequently became available and disrupting the flow, efficiency and productivity of the work of all contractors. These problems continued to occur throughout the remainder of the project and proved not to be recoverable.

{¶244} As discussed above (p. 27, supra), the owner impliedly warrants that the plans and specifications which the contractor is required to follow are accurate and complete. A contractor is

entitled to recover its extra costs caused by inaccurate and incomplete plans and specifications. Here we have a proper case for the application of that rule. The referee finds that the failure of the state to provide accurate and complete design documents for the construction of Fisher Phase II constituted a breach of its contract with Croson and Teepe, entitling them to recover their damages directly and proximately related thereto.

{¶245} Roger Au, Croson and Teepe's expert witness, expressed the following opinions regarding the effect which delays, disruptions and out-of-sequence predecessor work had on Croson and Teepe's operations:

{¶246} Their work was delayed. (Transcript 5292.)

{¶247} They experienced losses of efficiency. (Transcript 5267.)

{¶248} They suffered losses of productivity. As to the causes of their lost productivity, Mr. Au testified as follows. (Transcript 5310.)

{¶249} "Q. And what, in your opinion, caused them to suffer losses of productivity on this job?

{¶250} [Objection by Mr. Becker. Overruled.]

{¶251} "A. The losses of productivity were caused by interruption of the logical flow of -- sequence of activities, extended durations of activities, they were caused by out-of-sequence work, and large gaps in time between the completion of rough-in work and the start of their finish activities."

B. Enforcement of Baseline Schedule

{¶252} Croson and Teepe's claim that the state breached the contract by failing to use its exclusive authority to enforce compliance with the baseline schedule is somewhat more difficult to

assess. Their argument assumes that if the state had ordered DM to develop a recovery schedule to correct or avoid the delays pursuant to GC Section 4.3.5.1, the problem would have been solved. The one time that such an order was issued on this project, in August 1998, calling for substantial acceleration of the work, the recovery called for was not achieved. (Croson/Teepe Exhibit 23; DM Exhibit 115, Table 14.) The failure of the state to pursue that course thereafter as the schedule continued to slide was a tacit recognition that the cause of the delays and disruptions was something a 72-hour notice could not remedy, i.e., incomplete and inaccurate design documents which had to be dealt with through the RFI, ASI, and FWO process as the conflicts and other problems were encountered.

C. Approval of Field Work Orders

{¶253} Croson and Teepe also contend that the state's failure to approve FWOs in a timely fashion contributed to their delays and inefficiencies. In support of that assertion they reference DM Exhibits 138, 139, and 140, which list all of the Croson (28) and Teepe (38) COs that were issued during the project. Those lists show in a few cases a lapse of up to four months between the date of Croson or Teepe's response to a request for pricing and the date the FWO was approved, which was when the work could begin. In most cases, the interval was closer to one to six weeks. However, there was insufficient evidence presented regarding individual transactions for the referee to make a finding that the FWO processing time significantly impacted Croson or Teepe's performance.

{¶254} Thus, the breach of contract upon which Croson and Teepe's claims must rest is the state's failure to provide accurate

and complete design drawings, which delayed and disrupted CCI's predecessor activities and, in turn, delayed and disrupted Croson and Teepe's successor activities, to their detriment.

D. State's Defenses

1. DM's Duty to Schedule and Coordinate Work

{¶255} The state claims that DM failed to properly schedule, monitor and coordinate the work pursuant to the contract. DM had the responsibility as lead contractor to develop an appropriate construction schedule (GC 4.2.3), to report actual performance and progress thereunder and coordinate all remaining work (GC 4.2.3.2), and to initiate revisions as required (GC 4.2.4). The referee has found that DM performed those duties until relieved thereof in July 1999. The situation did not significantly improve after Gilbane took over because the same problems continued to arise. The referee is of the opinion that the fundamental flaw in the state's position in this case is its refusal to acknowledge that its failure to provide accurate and complete design documents was the principal cause of the delays and other problems of which the plaintiffs complain.

2. Third Party Beneficiary Issue

{¶256} It is true as the state asserts that each prime contractor is a third-party beneficiary of the state's contracts with the other primes. (GC Section 4.1.2.1; 4.1.2.2.) If another contractor fails to perform the work with due diligence, delays, interferes with, hinders, or disrupts any other contractor, the offending contractor is responsible for the offended contractor's damages. That is not the situation here, where all plaintiff contractors contend that the state is the party at fault and are not asserting claims inter se.

3. Cleveland Construction, Inc.

{¶257} The state argues that CCI, DM's framing, drywall, and ceiling subcontractor, was the real cause of the problems on this project. In support of that assertion it points to the testimony of Croson and Teepe's field superintendents, Dan Truxall and Randy Callahan, who testified in substance that it was hard to get along with Butch Hutchinson, CCI's "contentious" field superintendent, from project start-up to December 1998; that CCI cared only about its own work, was uncooperative and on occasion would install drywall out of sequence, covering areas before Croson and Teepe had performed their activities in that location; and that those actions were intentional and without any consideration being given to other trades. This evidence has to be weighed against the testimony of Robert Fredelake, DM's project executive. Mr. Fredelake attested to the quality of CCI's work (Transcript 3064) but acknowledged the contentious nature of Butch Hutchinson. Therefore, Mr. Fredelake had CCI replace Hutchinson with Tim Sullivan, a better communicator, in December 1998. Mr. Callahan testified that the situation changed after Tim Sullivan was on the scene (Transcript 4555):

{¶258} "Q. Cooperation. I think Mr. Becker asked you if there was a total lack of cooperation from Cleveland Construction. At some point in the project, were you able to obtain some cooperation?"

{¶259} "A. Yes. When Tim Sullivan took the project over, yeah. Tim was a very good guy to work with."

{¶260} The main complaint about CCI was its inability to complete its work on time, which gave rise to verbal and sometimes bitter criticism of CCI by the other contractors whose work was

being delayed but who may not have been fully apprised of the reasons for CCI's delays. No questions were raised during construction or at trial as to the quality of CCI's work. The evidence does not support the state's contention that CCI was "the real cause of the problems on this project" and its inference that if DM had selected a more competent, cooperative subcontractor the project could have been constructed on time and within budget in accordance with the original baseline schedule.

4. Request for Time Extension

{¶261} The state contends that neither Croson nor Teepe ever requested a time extension during the course of the project and that at a special meeting of the design team and the prime contractors on April 8, 1999, Steve Teepe said that Croson and Teepe did not want a time-extension. The state argues further that any documents which Croson and Teepe might claim constitute such a request can be shown as untimely and unresponsive to the requirements of GC Section 6.4, which requires any request for extension of time to be made within ten days of the occurrence of any condition entitling the contractor thereto and to provide specific information regarding the nature of the delay, the persons responsible, affected activities, anticipated duration and recommendations regarding avoidance of future delays. Failure to provide such notice is said to constitute a waiver of any claim for extension or for mitigation of liquidated damages.

{¶262} The correspondence which was exchanged between the parties beginning in February 1999 is instructive as to this issue. In February 1999, DM presented a schedule update that, for the first time, reflected completion dates after the contract deadline. Through a February 15, 1999, letter, Tim Pierce declined to sign

the schedule and put the state on notice that a "recovery schedule will most certainly be required." (Croson/Teepe Exhibit 32.)

{¶263} Croson and Teepe eventually signed the schedule upon their understanding of the state's commitment to enforce compliance by other trades. By May 1999, the state had not required a recovery schedule. Therefore, Croson and Teepe notified the associate by letter dated May 3, 1999, that it could no longer ignore "the cost impacts and damages resulting from the owner's and its agents' thorough knowledge of trades responsible for causing schedule deficiencies and lack of immediate and equitable resolution in accordance with the General Conditions Articles 5, 6, 7." (Croson/Teepe Exhibit 19.)

{¶264} In a written response dated May 11, 1999, the state stated that it was willing to consider Croson and Teepe's request for additional time and additional compensation based upon the February 1999 schedule completion dates, to be requested in accordance with Article 6 of the General Conditions. (Croson/Teepe Exhibit 20.)

{¶265} The state's willingness to discuss Croson and Teepe's request for additional time and money led to a meeting on June 4, 1999, at which Croson and Teepe presented their request for a time-extension and claim for additional money to representatives of the state's design team. The state promised to consider the merits of Croson and Teepe's request and to provide them with a response. The state did not indicate that the request was untimely. As requested by the state during the meeting, Croson and Teepe submitted cost information in support of their claim. (Croson/Teepe Exhibit 17.) Over a month after the June 4, 1999, meeting, Mr. Pierce wrote to inquire as to the status of Croson and

Teepe's claims and an accompanying time-extension. The state did not respond for another four (4) months.

{¶266} On November 19, 1999, the state granted Croson and Teepe a time-extension but assessed liquidated damages against them in the amounts of \$19,000 and \$100,000 respectively, for failures regarding coordination, management of subcontractors, and/or effective utilization of resources. (Croson/Teepe Exhibits 24 and 25.)

{¶267} The referee finds that the state had actual notice from at least October 1998 of the facts giving rise to Croson and Teepe's claims of entitlement to an extension of time due to delays to their work resulting from the untimely performance of predecessor activities. Any technical noncompliance with the notice requirements of GC Section 6.4 did not prejudice the state nor deprive it of the opportunity to investigate such conditions as they would over time. In May and June 1999, the state's design team actively engaged in discussions with Croson and Teepe concerning both their requests for time extensions and their claims for additional compensation and raised no questions regarding the timeliness of the contractors' submissions.

{¶268} The referee finds that the purpose of the notice provisions of GC Section 6.4 was satisfied and that the state should not now be permitted to raise technical noncompliance therewith, if any, to defeat plaintiffs' claims. *Craft Gen. Contractors, Inc. v. City of Urbana* (April 6, 1982), Franklin App. No. 81AP-346; *Roger J. Au & Son, Inc. v. Northeast Ohio Regional Sewer District* (1986), 29 Ohio App.3d 284.

E. No Damage for Delay Clause

{¶269} The referee finds that Croson and Teepe's claims against the state are not barred by the "no damage for delay" provision of the contract (GC Section 6.3) for the reasons stated in pp. 34-38 of this report.

F. Liquidated Damages

{¶270} The referee finds that liquidated damages were improperly assessed against Croson and Teepe and must be reversed, for the reasons stated in pp. 25-27 of this report.

V. Damages

A. Dugan & Meyers

{¶271} DM's damage evidence was offered through the testimony of Jeffrey Kelly, its controller, and Robert Fredelake, President of Dugan & Meyers Construction Services, based upon relevant, properly-authenticated books and records of the company. The referee's findings are set forth below:

Item	Claimed	Allowed	Reason
1. Contract balance complete	\$ 602,745	\$ 602,745	Clearly due, job complete
2. Reverse backcharges	325	325,	See pp. 25-27 of report
Liquidated damages	,500	500	
Lead contractor	0	264,	See pp. 22-25 of report
Clean arcade stone	264,340	340	
	0	-0-	Insufficient evidence
3. Cumulative impact	730,760	730,760 plus	See below

			10%
			73,0
			76
4. Subcontractor			
liquidation	117	-0-	See pp. 38-40 of
Cleveland	,79		report
	8	-0-	
			See pp. 38-40 of
Construct	134		report
ion	,00		
b. Spears Shamrock	9		
5. Unresolved	60,	-0-	Insufficient
backcharges	217		evidence
6. Extended home	203	-0-	See pp. 40-43 of
office	,63		report
overhead	3		
7. Profit	1,0	-0-	See below
	00.		

1. Cumulative Impact Damages

{¶272} The legal justification for this claim is discussed at pp. 27-30 of this report. The determination of damages for breach of a contract is an inexact science and the sum reached by whatever method used will never be more than an approximation. This impossibility of precise determination is generally recognized and the law does not require mathematical certainty. *Harrison Construction Co. v. Ohio Turnpike Commission* (C.A. 6, 1963), 316 F.2d 174. When the evidence adequately proves the existence of damages owing to a delay in work on a project, the extent of those damages need not be quantified to a mathematical certainty. *Conti Corp. v. Ohio Dept. of Admin. Svs.*, supra, at 468.

{¶273} As a result of incomplete, inaccurate, and unconstructable plans and specifications, DM suffered damages for which it has not been compensated. Given the nature of the impacts DM experienced due to defective plans, it was impractical or

impossible to segregate the cost of undifferentiated changes to the base contract work that resulted therefrom. The damages claimed by DM for this item are limited to a conservative assessment of the impact on the general conditions items of its project budget.

{¶274} There was sufficient evidence presented to show that DM's bid was reasonable. DM's general conditions estimate, as modified by Mr. Fredelake, was reasonable, based upon the reasonableness of the overall bid and Mr. Fredelake's 28 years of experience with DM, including experience as the company's chief estimator.

{¶275} The referee finds that as a direct and proximate result of the cumulative impact of multiple changes to the plans and specifications, for which the state is responsible, DM incurred additional cost over and above its adjusted bid item for general conditions in the amount of \$730,760. Under the contract's pricing guidelines, DM is entitled to a ten percent markup for profit on that item, in the amount of \$73,076.

2. Profit

{¶276} DM also seeks to recover its original bid markup on the Fisher II project in the amount of \$1 million. The rule for recovery of lost profits in a breach of contract action appears in paragraph 1 of the syllabus of *City of Gahanna v. Eastgate Properties, Inc.* (1988), 36 Ohio St.3d 65:

{¶277} "In order for a plaintiff to recover lost profits in a breach of contract action, the amount of the lost profits, as well as their existence, must be demonstrated with reasonable certainty." Based on the evidence presented, the referee finds that the amount claimed for this item has not been demonstrated with reasonable certainty. Therefore, recovery must be denied.

B. Damages of Accurate Electric

{¶278} Accurate's damage evidence was offered through the testimony of Robert Beal, its president, and Craig Hutchison, its expert witness, together with relevant, properly-authenticated books and records of the company. The referee's findings are set forth below:

Item	Claimed	Allowed	Reason
1. Extra work	\$ 21,472	\$ -0-	See below
Job extension cost	170,012	110,642.73	See below
3. Extended project closeout	5,169	-0-	See below
4. Wage escalation	24,051	24,051	See below
5. Overtime & temporary labor	114,412	-0-	See below
6. Loss of productivity	603,709	603,709	See below
7. Home office overhead	115,303	-0-	See pp. 40-43 of report
8. Balance owed on contract	19,876	20,000	Reversal of liq. damages, See pp. 25-27 of report
9. Interest on money owed (Late payment of January 1999 pay application)	3,926	-0-	See below

10. Bond cost	6,5 76	Yes	Amt. to be determined following notice to bonding company of Accurate's recovery herein.
---------------	-----------	-----	---

{¶279} Accurate seeks to recover from the state the sum of \$21,472 for extra work claimed to be the net amount due for offsetting backcharges and a "Cadd Drawing Fee" paid in error. The backcharges allegedly due Accurate were not the subject of negotiations with OSU during the project. Accurate sent the bills to DM believing it to be the responsible party. The referee finds that this claim is not supported by sufficient evidence and should be denied.

{¶280} The second item of Accurate's claim is for job extension costs including field office and job equipment, project management and supervision, offsite storage of equipment, and increased material handling, temporary lighting and cleanup, in the aggregate amount of \$170,012, including a contract markup of ten percent for profit. These are overhead costs incurred by Accurate after the individuals and equipment involved were expected to be off the project but whose presence was required due to delayed completion.

The extended period is measured from May 8, 1999, to November 15, 1999, (6.3 months) with individual variations as indicated in Accurate Exhibit 27. Recovery of this item is consistent with the referee's finding, based upon the evidence presented, that the state breached the contract with Accurate by its failure to provide adequate design documents for the project, which was the principal cause of delayed completion. However, the referee is of the opinion that the period of delay should be measured from July 12, 1999, to November 15, 1999, a period of 126 days, or 4.1 months,

rather than the 6.3 month period used in Accurate's calculation. Accordingly, the referee reduces the amount of the claim to the shorter period: $\$170,012 \times 4.1 \div 6.3 = \$110,642.73$.

{¶281} Accurate claims the amount of \$5,169, including a contract markup of ten percent for profit, representing the extended project closeout by project manager, Mike Sommer, for a period of 26.7 weeks after the date of substantial completion (November 15, 1999, to May 20, 2000). The referee finds that this item is an expense that Accurate would have incurred if the project had been completed on time. Thus, this expense is unrelated to delayed completion. Accordingly, it should be disallowed.

{¶282} Accurate seeks to recover wage escalation costs of \$24,051, including a contract markup of ten percent for profit, for increased wages paid during the delay period. Recovery of this item is consistent with the referee's finding, based upon the evidence presented, that the state breached the contract with Accurate by its failure to provide adequate design documents for the project, which was the principal cause of delayed completion. Accordingly, the referee finds that this item should be allowed in its entirety.

{¶283} Accurate seeks to recover the sum of \$114,412, including a ten percent markup for profit, for 3,126 actual overtime hours paid to its regular employees and the cost of 4,248 man hours for temporary employees, representing the premium Accurate had to pay in its accelerated effort to complete the project after its request for an extension of time was denied. Mr. Fredelake testified on cross-examination that this overtime and the temporary labor cost would have been incorporated into a pay application submitted during the project and paid by the university. (Transcript 3967.)

Accordingly, this item must be disallowed, having already been paid.

{¶284} Accurate seeks to recover the sum of \$603,709, which sum includes a contract markup of 20 percent for overhead and profit, for loss of productivity involving a manhour overrun of 18,849 hours, as evidenced by the testimony of Craig Hutchison, Accurate's expert witness. Mr. Hutchison testified that Accurate's loss of productivity was caused by the ongoing delays and the piecemeal, out-of-sequence work done by predecessor activities, which required Accurate to have multiple "come-backs" and to perform their work in a manner that would not have been contemplated. (Transcript 4134.)

Recovery of this item is consistent with the referee's finding, based upon the evidence presented, that the state breached the contract with Accurate by its failure to provide adequate design documents for the project, which was the principal cause of the delays and disruptions experienced by DM and CCI, which in turn delayed and disrupted the successor activities of Accurate and the other prime contractors.

{¶285} Accurate seeks to recover interest in the amount of \$3,926 for a 50-day delay in the state's payment of Accurate's January 1999 pay application. The referee finds that the state had the right to withhold payment from Accurate during that period because the January 1999 schedule update had not been approved by all of the prime contractors. Therefore, this claim should be disallowed.

C. Damages of Croson and Teepe

{¶286} The damage evidence of Croson and Teepe was offered through the testimony of Tim Pierce, project manager for Croson, Steve Teepe, former president of Teepe, Tom Wilson, CFO of AMPAM

Commercial Midwest, David Croson, former president of Croson, and Roger Au, who testified as an expert for both companies, together with relevant, properly authenticated books and records of the companies. The referee's findings are set forth below:

Croson's Damages Item	Claim ed	Allowe d	Reason
1. Extended home office overhead	\$ 58,43 4	\$ -0-	See pp. 40-43 of report
Ext end ed sup erv isi on	16,45 6.51	16,456 .51	See below
cos ts			
3. Wage rate escalation	1,130 .39	1,130. 39	See below
4. Add'l. labor hrs. due to inefficiency	110,9 76.64	110,97 6.64	See below
5. Liquidated damages reversal	11,00 0	11,000	See pp. 25-27 of report
6. Interest on retainage	1,441 .18	Yes	To be calc. as of date of Ct. of Cl. decision
7. Add'l. bond cost	1,206	Yes	To be calc. as of date of Ct. of Cl. decision
Teepe's Damages Item	Claim ed	Allowe d	Reason
1. Extended home	\$	\$	See pp. 40-43 of

office overhead	116,868	-0-	report
2. Extended supervision costs	65,826.06	65,826.06	See below
3. Extended field costs	1,605.04	-0-	See below
4. Wage rate escalation	2,162.16	2,162.16	See below
5. Add'l. labor hrs. due to inefficiency	274,096.98	274,096.98	See below
6. Liquidated damages	115,000	115,000	See pp. 25-27 of report
7. Interest on retainage of \$86,000	6,126.03	Yes	To be calc. as of date of Ct. of Cl. decision
{¶287} 8. Add'l. bond cost	{¶289} {¶290} 986.78	{¶291} {¶292} Y	{¶293} {¶294} To be calc. as of date of Ct. of Cl. decision

{¶295} Extended supervision costs totaling \$82,282.57, principally for the time of supervisor Randy Callahan and for his use of a vehicle, were incurred by Croson and Teepe after scheduled completion between July 11, 1999, and December 2, 1999. This figure includes a contract markup of 20 percent for overhead and profit and was allocated 20 percent to Croson (\$16,456.51) and 80 percent to Teepe (\$65,826.06). Recovery of this item is consistent with the referee's finding, based upon the evidence presented, that the state breached the contracts with Croson and Teepe by its failure to provide adequate design documents for the project, which was the principal cause of delayed completion.

{¶296} An item for extended field cost of \$1,605.04 for OSU's land telephone units, including a markup of 20 percent for overhead and profit, is included in Teepe's damage claim. The record does

not provide sufficient information to enable the referee to determine recoverability of this item. Therefore, it is disallowed.

{¶297} Wage rate escalation costs of 99 cents per hour on 2,771.5 hours of labor after July 11, 1999, are claimed by Croson and Teepe in the total amount of \$3,292.55, which includes a 20 percent markup for overhead and profit. This amount is allocated \$1,130.39 to Croson and \$2,162.16 to Teepe. Recovery of this item is consistent with the referee's finding, based upon the evidence presented, that the state breached the contracts with Croson and Teepe by its failure to provide adequate design documents for the project, which was the principal cause of delayed completion.

{¶298} Additional labor hours due to inefficiencies experienced by each company during construction as a result of disruption of their operations and performance of out-of-sequence work totaled 2,430.5 additional hours for Croson and 6,003 additional hours for Teepe. Using a journeyman rate of \$38.05 per hour and applying a 20 percent markup for overhead and profit, yields a total cost for these additional hours attributable to inefficiencies of \$110,976.64 for Croson and \$274,096.98 for Teepe. Recovery of this item is consistent with the referee's finding, based upon the evidence presented, that the state breached the contracts with Croson and Teepe by its failure to provide adequate design documents for the project, which was the principal cause of disruption of predecessor activities and, in turn, the activities of Croson and Teepe.

VI. Defendants' Counterclaim Against DM

{¶299} Defendants' counterclaim against DM for liquidated damages and for the amount paid to Gilbane for lead contractor

services should be dismissed, in light of the referee's finding that those items were improperly backcharged to DM.

VII. Defendants' Indemnification Claim Against DM

{¶300} Defendants' claim against DM for indemnification as to any amounts it might be required to pay Accurate, Croson and/or Teepe in this action should be dismissed, in light of the referee's finding that DM did not materially breach the contract.

VIII. Recommendation

{¶301} The referee recommends that the court enter judgment in favor of plaintiffs in accordance with the findings and conclusions set forth in this report. In addition, the referee recommends that plaintiffs be awarded prejudgment interest on the amounts recommended herein, calculated in accordance with law.

WILLIAM L. CLARK
Referee

Entry cc:

Peter D. Welin
Daniel F. Edwards
Michael W. Currie
10 W. Broad Street, 7th Floor
Columbus, Ohio 43215-3435

Attorneys for Plaintiff
Dugan & Meyers Construction
Company, Inc.

James S. Savage
175 South Third Street
Suite 210
Columbus, Ohio 43215

Attorney for Plaintiffs
Teepee River City Mechanical
and J.A. Croson, Inc.

John J. Petro
338 South High Street
Second Floor
Columbus, Ohio 43215

Attorney for Plaintiff
Accurate Electric Construction
Co.

William C. Becker
Assistant Attorney General

Attorneys for Defendants

Case No. 2001-07084

-78-

REFEREE REPORT

65 East State St., 16th Fl.
Columbus, Ohio 43215

Joseph A. Brunetto
William G. Porter
Special Counsel to Attorney General
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

WLC/cmd
Filed 6-27-2003
To S.C. reporter 7-14-2003