

filing of the decision, regardless of whether the court has adopted the decision pursuant to Civ.R. 53(E)(4)(c). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. ***" The parties have timely filed objections. The court shall address each objection individually.¹

OBJECTIONS OF PLAINTIFF, DUGAN & MEYERS CONSTRUCTION CO., INC.
(D&M)

{¶3} 1) The referee erred by failing to find that the state's failure to provide complete, accurate and buildable plans and specifications was a breach of contract.

{¶4} Upon review of the referee's report, specifically pages 11-19 and 28-30, the court finds that the referee based his findings throughout the report on the theory that the state breached its contract with plaintiffs by failing to provide complete, accurate and buildable plans and specifications. D&M's first objection is well-taken, and is, accordingly, SUSTAINED. The referee's report is hereby MODIFIED as follows: The court finds that defendants' failure to provide complete, accurate and buildable plans and specifications was a breach of contract, thereby entitling plaintiffs to damages proven by a preponderance of the evidence;

{¶5} 2) The referee erred by failing to find that D&M is entitled to recover prejudgment interest at the rate of ten percent from November 15, 1999, "until paid."

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On October 24, 2003, Accurate Electric Construction, Inc. (Accurate), and defendants filed settlement papers which were approved by the court on October 28, 2003. Therefore, the objections filed by Accurate and defendants' objections as to Accurate's claims are OVERRULED as moot.

{¶6} Upon review of the referee's report, specifically pages 74-75, the referee recommended that plaintiffs be awarded prejudgment interest on the amounts recommended "calculated in accordance with law." Pursuant to R.C. 2743.18(A), a claimant is entitled to prejudgment interest upon a judgment or decision rendered by the Court of Claims against the state. See *Royal Electric Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 115, 1995-Ohio-131. Pursuant to R.C. 1343.03(A), the statutory rate of prejudgment interest is ten percent per annum, unless otherwise stated in the contract between the parties. Upon review of the contract, the court finds that the rate of interest specified in Section 9.2.2.2 of the contract pertaining to late payment of a contractor's pay applications does not apply to prejudgment interest on the damages recommended by the referee. Accordingly, the statutory rate of ten percent per annum applies.

{¶7} D&M asserts that the date of substantial completion was November 15, 1999. However, D&M's controller, Jeffrey Kelly, and Bob Fredelake, D&M's project executive, both testified that they were on the job until January 17, 2000. (See pages 3016 and 3258 of the transcript.) Therefore, the court is persuaded that prejudgment interest for the amounts recommended in favor of D&M should be calculated from January 17, 2000, to the date of this judgment. Accordingly, D&M's second objection is SUSTAINED in part, and based upon the referee's report, prejudgment interest shall be awarded on D&M's claims from January 17, 2000, to the date of this judgment at the rate of ten percent per annum;

{¶8} 3) The referee erred by failing to recommend an award to D&M in an amount equal to its original bid profit.

{¶9} The referee addressed D&M's claim for its original bid profit on pages 67-68 of his report. Upon review of the referee's report, the court finds that the referee did not err in denying D&M's claim for original bid profit. Therefore, D&M's third objection is OVERRULED;

{¶10} 4) The referee erred by failing to recommend an award of damages to D&M for "unabsorbed (extended) home office overhead."

{¶11} The referee addressed D&M's claim for unabsorbed home office overhead on pages 40-43 of his report. Upon review of the referee's report, the court finds that the referee did not err in denying D&M's claim for unabsorbed home office overhead. Therefore, D&M's fourth objection is OVERRULED;

{¶12} 5) The referee erred in finding that the contractors waived any right to challenge the illegal assignment of the contract.

{¶13} The referee addressed D&M's claim regarding the illegal assignment of the contract on pages 19-22 of his report. Upon review of the referee's report, the court finds that the referee did not err in finding that the contractors waived any right that they might have had to challenge The Ohio State University's (OSU) assumption of administrative responsibility for work of Fisher Phase II. Accordingly, D&M's fifth objection is OVERRULED.
OBJECTIONS OF PLAINTIFF, J.A. CROSON, INC. (CROSON) AND TEEPE RIVER CITY MECHANICAL, INC. (TEEPE)

{¶14} "1) The referee erred by failing to find that the state breached its contracts with Croson/Teepe by failing to properly and adequately administer the contracts and to use its exclusive authority to enforce compliance with the baseline schedule.

{¶15} The referee found on pages 11-12 of his report 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."

{¶16} The referee further stated on page 22 of the report, "Jill Morelli and Chuck Hamilton of the 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."

{¶17} Upon review of the referee's report, the court finds that the referee did not err in failing to find that the state breached its contracts with Croson/Teepe by failing to properly and adequately administer the contracts. Accordingly, Croson/Teepe's first objection is OVERRULED;

{¶18} 2) The referee erred by failing to award unabsorbed home office overhead damages.

{¶19} At pages 40-43 of his report the referee recommended that plaintiffs' claims for unabsorbed home office overhead be denied. Upon review of the evidence before the court, the court finds that the referee did not err in failing to recommend damages for unabsorbed home office overhead. Accordingly, Croson/Teepe's second objection is OVERRULED.

{¶20} 3) The referee erred by failing to find that prejudgment interest upon Croson/Teepe's claims began to accrue on December 3, 1999 at ten percent per annum.

{¶21} For the reasons previously stated with respect to D&M's second objection, Croson/Teepe's third objection is SUSTAINED. Timothy Pierce, project manager for Croson/Teepe, testified that the substantial completion date for Croson/Teepe's work on Fisher Phase II was December 3, 1999. (See page 4773 of the transcript.)

In addition, the referee found on page 73 of his report that the extended supervision costs were incurred from July 11, 1999, to December 2, 1999. Therefore, the court is persuaded that prejudgment interest for the amounts recommended in favor of Croson/Teepe should be calculated from December 3, 1999, to the date of this judgment, at the rate of ten percent per annum. Accordingly, the court finds that the date of substantial completion for Fisher Phase II for Croson/Teepe was December 3, 1999, and the referee's report is MODIFIED accordingly.

OBJECTIONS OF DEFENDANTS REGARDING CLAIMS OF D&M

{¶22} "1) The referee erred by recommending an award of \$730,760 to D&M for cumulative impact damages since that claim is barred by the express provisions of the contract and Ohio law.

{¶23} The referee discussed D&M's cumulative impact claim on pages 27-30 of his report. Upon review of the evidence before the court, the court finds that the referee's finding as to this issue is not contrary to law. Therefore, defendants' first objection is OVERRULED;

{¶24} In defendant's second (2) and third (3) objections, defendants argue that the referee erred by recommending damages upon D&M's cumulative impact claims because the exclusionary language in the change orders and the doctrine of accord and satisfaction bar these claims.

{¶25} The referee discussed the effect of agreed change orders and the defense of accord and satisfaction on pages 31-32 of his report. Upon review of the evidence before the court, the court finds that the referee's findings as to these issues are not contrary to law. Therefore, defendants' second and third objections are OVERRULED;

{¶26} 4) The referee's determination of D&M's alleged damages relating to its cumulative impact claims is flawed as a matter of law and fact.

{¶27} The referee discussed D&M's cumulative impact damages on pages 66-67 of his report. Upon review of the evidence before the court, the court finds that the referee's finding as to this issue is not contrary to law and is based upon the facts in evidence. Therefore, defendants' fourth objection is OVERRULED;

{¶28} 5) The referee erred in recommending an award of damages to D&M based upon delay where the express terms of the contract preclude an award of damages for delay.

{¶29} The referee discussed the "no damage for delay" clause of the contract on pages 34-38 of his report. Upon review of the

report and the evidence before the court, the court finds that the referee's finding as to this issue is not contrary to law and is supported by the evidence. Therefore, defendants' fifth objection is OVERRULED;

{¶30} 6) The recommended finding that the design documents were defective is not supported by the evidence; and,

{¶31} 7) The referee's finding that design errors were the cause of delays is not supported by any credible evidence.

{¶32} The referee discussed his findings relating to the cause of delay on pages 11-19 of his report. Included in that discussion is testimony from individuals who worked on the project, including Robert Fredelake, Tim Sullivan, and Wayne Seiler, as well as testimony from James Highfill and Robert Reed, D&M's experts. Based upon the evidence before the court, the court finds that the referee's findings that the design documents were defective and that the design errors were the cause of delay are supported by the evidence. Therefore, defendants' sixth and seventh objections are OVERRULED;

{¶33} 8) The referee erred by failing to find that the delays in completion were caused by D&M's multiple breaches of contract.

{¶34} Throughout the referee's report, the referee found 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 by the state. This finding is supported by credible evidence that is referenced throughout the referee's report. Upon review of the evidence before the court, the court finds that the referee did not err when he did not find that the delays in completion of the project were

caused by D&M's multiple breaches of contract. Accordingly, defendants' eighth objection is OVERRULED;

{¶35} 9) The referee erred by finding that D&M was damaged by its removal as the lead contractor where D&M presented no competent evidence in support of that claim.

{¶36} The referee discussed D&M's claim that it incurred damages when it was removed as lead contractor in pages 22-25 of his report. Upon review of the evidence before the court, the court finds that the referee did not err when he found that D&M incurred damages as a result of being removed as lead contractor. Therefore, defendants' ninth objection is OVERRULED;

{¶37} 10) The referee erred by finding that defendants were not entitled to assess liquidated damages against D&M in accordance with the terms of the contract and that D&M's failure to request a time extension did not preclude it from making any claim for recovery of liquidated damages.

{¶38} The referee found on pages 25-27 of his report that liquidated damages were improperly assessed against plaintiffs. Based upon the rationale stated in the report, the court finds that the referee did not err in this finding. Therefore, defendants' tenth objection is OVERRULED;

{¶39} 11) The referee erred by failing to find that D&M's claims are barred for failure to give notice as required by Article 8.

{¶40} The referee addressed the issue of notice regarding plaintiffs' Article 8 claims in pages 33-34 of his report. Upon review of the report and the evidence before the court, the court finds that the referee did not err when he found that the state had actual notice of plaintiffs' claims during construction; that the

state 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. Therefore, defendants' eleventh objection is OVERRULED;

{¶41} 12) The referee erred by finding that the assignment of the contract administration to OSU was illegal.

{¶42} On pages 19-22 of his report the referee found that the Department of Administrative Services' (ODAS) assignment to OSU of its statutory responsibility to administer the Fisher Phase II contract was illegal because it did not fall within the statutory exception for local administration provided by R.C. 3345.50.

{¶43} Based upon the evidence before the court, the court finds that the referee did not err in this finding. Accordingly, defendants' twelfth objection is OVERRULED.

DEFENDANTS' OBJECTIONS TO CLAIMS OF CROSON AND TEEPE

{¶44} In defendants' first, second, and third objections, defendants contend that the referee's recommendation of an award of damages to Croson/Teepe was against the manifest weight of the evidence and contrary to law because:

{¶45} "1) The plans were not defective;

{¶46} "2) There is no causal connection between allegedly defective plans and delay to Croson/Teepe; and

{¶47} "3) There is no causal connection between allegedly defective plans and damage to Croson/Teepe."

{¶48} Defendants' first three objections are interrelated, so they will be discussed together. The referee discussed his findings concerning the cause of delay on pages 11-19 of his report, and specifically as to the delay caused to Croson/Teepe on pages 55-60

of his report. Included in that discussion is the expert testimony of Roger Au. On page 60, the referee found that the state breached its contract with Croson and Teepe by failing to provide accurate and complete design drawings, which delayed and disrupted the performance of predecessor activities to Croson and Teepe's detriment. Based upon the evidence before the court, the court finds that the referee's findings that the design documents were defective and that the design errors were the cause of delay to Croson and Teepe are supported by the evidence. Therefore, defendants' first, second, and third objections are OVERRULED;

{¶49} 4) The referee erred by failing to find that D&M's subcontractor, Cleveland Construction, Inc. (CCI), delayed this project through no fault of OSU or DAS; and

{¶50} 5) The referee erred in finding that there was no evidence challenging the quality of CCI's work.

{¶51} On pages 61-62 of his report the referee addressed defendants' contention that CCI was the cause of delays to the project. Based upon the evidence before the court, the court finds that the referee did not err in finding that "[t]he 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." (Report, page 62.) Therefore, defendants' fourth and fifth objections are OVERRULED;

{¶52} 6) The referee erred by recommending an award of damages to Croson and Teepe because Croson and Teepe are not the real parties in interest.

{¶53} On pages 55-56 of his report the referee discussed the fact that in September 1998, Croson and Teepe 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 Phase II without amending their separate contracts with the state. Upon review of the evidence before the court, the court finds that Croson and Teepe are real parties in interest in this case. Accordingly, defendants' sixth objection is OVERRULED;

{¶54} In defendants' seventh (7), eighth (8), and ninth (9) objections, defendants argue that the referee erred in relying upon the testimony of Croson/Teepe's expert for the following reasons:

{¶55} "7) Croson/Teepe's expert was not qualified by education or experience;

{¶56} "8) Croson/Teepe's expert lacked a sufficient foundation to testify; and

{¶57} "9) Croson/Teepe's expert relied upon inadmissible hearsay evidence."

{¶58} In reference to these objections, Croson/Teepe offered the expert testimony of Roger Au, a registered professional engineer. Evid.R. 702 states: "A witness may testify as an expert if all of the following apply:

{¶59} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶60} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶61} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. ***"

{¶62} At trial, defendants conducted a voir dire examination of Au, after which counsel for defendants made an oral motion to exclude Au's testimony based upon a lack of qualifications and on the basis that Au relied on inadmissible hearsay evidence in rendering his opinions. After hearing arguments from counsel for defendants and counsel for Croson/Teepe, the referee overruled defendants' objections and found that Au was qualified to testify as an expert pursuant to Evid.R. 702. (Transcript, pages 5217 to 5234.) Based upon the evidence before the court, the court finds that the referee did not err in finding that Au was qualified as an expert. Therefore, defendants' seventh, eighth, and ninth objections are OVERRULED;

{¶63} 10) The referee erred by recommending an award of damages to Croson/Teepe where the award is arbitrary, subjective, and speculative.

{¶64} On pages 71-75 of his report the referee recommended an award of damages to Croson/Teepe. Based upon the evidence before the court, the court finds that the referee did not err in recommending an award of damages for Croson/Teepe. Therefore, defendants' tenth objection is OVERRULED;

{¶65} 11) The referee erred in recommending an award to Croson/Teepe upon its claim for future bond costs because that claim is speculative and was not proven to the requisite degree of certainty.

{¶66} On page 72 of his report the referee found that Croson and Teepe were entitled to additional bond costs. However, upon review of the testimony of Thomas Wilson, chief financial officer

for AMPAM, at pages 5152 to 5154, and 5173-5175 of the transcript, the court finds that Croson and Teepe admitted that any additional bond costs were negotiable and that those costs had not yet been incurred as of the date of trial. Therefore, the court finds that the referee erred in recommending an award of additional bond costs to Croson and Teepe. Defendants' eleventh objection is SUSTAINED, and the referee's report is hereby MODIFIED as follows: Croson and Teepe have failed to prove that they incurred additional bond costs to a requisite degree of certainty. Therefore, the referee's recommendation to award Croson \$1,206 and to award Teepee \$2,986.78 is REDACTED from page 72 of the referee's report;

{¶67} 12) The referee erred by recommending an award to Croson/Teepe for job extension and wage escalation costs.

{¶68} At pages 72-74 of his report the referee found that Croson and Teepe were entitled to job extension costs and wage escalation costs. Based upon the evidence before the court, the court finds that the referee did not err in making this recommendation. Therefore, defendants' twelfth objection is OVERRULED;

{¶69} 13) The referee erred in recommending damages to Croson/Teepe in the form of interest.

{¶70} For the reasons stated regarding defendants' second objection as to D&M's claims, defendants' thirteenth objection is OVERRULED;

{¶71} 14) The referee erred by reversing defendants' assessment of liquidated damages against Croson/Teepe.

{¶72} For the reasons previously stated regarding defendants' tenth objection as to D&M's claims, defendants' fourteenth objection is OVERRULED.

* * * * *

{¶73} Accordingly, pursuant to Civ.R. 53, the court adopts the referee's report as its own, including the findings of fact and conclusions of law contained therein, subject to the modifications stated in this entry.

{¶74} Judgment is rendered in favor of plaintiffs in the following amounts:

{¶75} D&M: \$2,749,069.37, which is comprised of \$1,996,421 plus prejudgment interest at the rate of ten percent per annum from January 17, 2000, to the date of this judgment in the amount of \$752,623.37 plus the \$25 filing fee;

{¶76} Croson: \$195,899.98, which is comprised of \$141,004.72 plus prejudgment interest at the rate of ten percent per annum from December 3, 1999, to the date of this judgment in the amount of \$54,895.26;

{¶77} Teepe: \$643,546.34, which is comprised of \$463,211.23 plus prejudgment interest at the rate of ten percent per annum from December 3, 1999, to the date of this judgment in the amount of \$180,335.11.

{¶78} Court costs are assessed against defendants. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. WARREN BETTIS

Judge

Entry cc:

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HTS/cmd
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