

[Cite as *Norment Sec. Group, Inc. v. Ohio Dept. of Rehab. & Corr.*, 2003-Ohio-6572.]

IN THE COURT OF CLAIMS OF OHIO

NORMENT SECURITY GROUP, INC. :
Plaintiff : CASE NO. 2001-11472
v. : Judge J. Warren Bettis
OHIO DEPT. OF REHABILITATION : DECISION
AND CORRECTION, et al. :
Defendants :
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{¶1} Plaintiff brought this action against defendants, alleging breach of contract. The case was tried to the court on the issues of liability and damages.

{¶2} This case arises out of the construction of a close-security prison building at the Toledo Correctional Institute (TCI), which is owned by the Ohio Department of Rehabilitation and Correction (DRC). The project was administered by the Office of the State Architect, a division of the Ohio Department of Administrative Services (DAS). Defendants contracted with plaintiff to perform the detention and security trades work. Plaintiff subcontracted the majority of its work to RMF Industrial Contracting, Inc. (RMF). Defendants also hired Poggemeyer Design Group (Poggemeyer) as the associate architect for the project and CRSS Constructors, Inc./Finkbeiner, Pettis and Strout, Inc. (CRSS/FPS) as the construction manager.

{¶3} On November 10, 1998, plaintiff was issued a notice to proceed with a projected completion date of August 8, 2000. The completion date was subsequently extended by a change order due to

a modification of the law concerning construction contract set-asides for minority contractors. Under the new law, the state was required to rebid the general trades contract for the administration building. According to the change order, plaintiff received \$106,046 for delay damages to settle the "field dispute" and the project completion date was extended 60 days to October 8, 2000.¹ (Defendants' Exhibit G.)

{¶4} There is no dispute that CRSS/FPS did not effectively perform its scheduling duties as the project construction manager.

On March 12, 1999, Rick Kusmer, the project manager for the general contractor, Mosser Construction, Inc. (Mosser), wrote a letter to CRSS/FPS that claimed the project schedule was "worthless, without logic, and has absolutely nothing in common with the actual project." (Plaintiff's Exhibit 10.) Kusmer's letter was also forwarded to DRC and Poggemeyer. On May 19, 1999, the six prime contractors submitted a combined construction schedule to a representative of CRSS/FPS that purported to fulfill the contractor's scheduling requirements with respect to the contract drawings. (Defendants' Exhibit H.)

{¶5} On June 11, 1999, defendants notified CRSS/FPS that its contract was being terminated and that a request had been made for Mosser to perform as the "lead contractor." Approximately five months after removing CRSS/FPS, the Office of the State Architect recommended, and DAS approved, a change order that made Mosser responsible for coordination and scheduling functions. The change

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The change order also provided that "[t]he 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 to the work."

order states that the assignment was made as a result of defendants' "decision to modify project leadership from the construction management approach to a lead contractor approach."

{¶6} Although Mosser accepted the change order and continued to schedule the project, Kusmer testified that it did not accept the duties of lead contractor for the project. (See Plaintiff's Exhibit 22.) Kusmer explained that the contractors had participated in coordination meetings prior to CRSS/FPS's termination and that it was understood that the only new duty Mosser assumed as a result of the change order was scheduling. According to Kusmer, Mosser never functioned as a lead contractor and it had no authority to enforce the schedule. Kusmer further testified that Mosser assumed its scheduling duties well before the change order was finally approved on November 3, 1999.

{¶7} On January 13, 2000, Mosser submitted the December 31, 1999, construction schedule update that had been reviewed and accepted by all of the prime contractors, including plaintiff. (Defendants' Exhibit I.) Kusmer testified that Mosser had continued to conduct weekly progress and coordination meetings among all of the contractors after the construction manager was removed.

{¶8} Plaintiff claims that defendants breached their contract with plaintiff because the project had no coordinating entity, no construction management and no effective scheduling. Specifically, plaintiff asserts that defendants breached the construction contract by: 1) failing to provide access to the control room as required by the project schedule; 2) improperly installing building components out of sequence; 3) failing to provide rough door openings in conformance with approved shop drawings; and 4) failing

to properly coordinate and schedule the project. Plaintiff also asserts that defendants are liable for damages in the form of unabsorbed home office overhead incurred by plaintiff due to project delays that were caused by defendants. Additionally, plaintiff seeks prejudgment interest.

{¶9} Defendants maintain that plaintiff's claims are not based upon any deficiency in the project plans or specifications and that they should not be held liable for any delay that was caused by the other prime contractors' failure to complete work in a timely manner. Defendants assert that the construction contract contained language granting plaintiff a remedy against the delaying contractor based upon a third-party beneficiary theory.

{¶10} Only a party to a contract or an intended third-party beneficiary may bring an action on a contract. *Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 161. In order for a contractor to be considered a third-party beneficiary, it must appear that the parties to the contract intended that such contractor receive a benefit under their agreement. *Laverick v. Children's Hosp. Medical Ctr. of Akron* (1988), 43 Ohio App.3d 201, 204.

{¶11} The contract between the parties incorporated the project specifications by reference. Article 4 of the specifications provided in part:

{¶12} "4.1.2.1 Should the Contractor, or the Contractor's Subcontractors or Material Supplier, 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, injury or expense.

{¶13} "4.1.2.2 The intent of paragraph GC 4.1.2.1 is to benefit the other Contractor on the Project and to demonstrate that each other Contractor who performs Work on the Project is third party beneficiary of the Contract." (Defendants' Exhibit J.)

{¶14} Plaintiff does not dispute defendants' contention that plaintiff had a contractual right to seek recovery against the other prime contractors. However, the fact that a third-party beneficiary under the contract may have shared responsibility for plaintiff's delay damages does not preclude plaintiff from pursuing its claims against defendants for ineffective coordination and scheduling. Therefore, defendants' argument that they have no liability in this case because plaintiff had a remedy against other prime contractors is without merit.

CONTROL ROOM DELAYS

{¶15} Plaintiff's first claim relates to damages for delay in completing the construction of control rooms that were located in both the TCI administration building and four housing units. Plaintiff asserts that it was unable to install conduit, wiring, and electronic security systems in accordance with its contractual obligations because it did not have timely access to the control rooms due to the inadequate performance of other prime contractors.

Plaintiff also claims that its work was delayed because, when RMF acquired access to them, the control rooms were not completed in accordance with the required specifications.

{¶16} According to the project specifications, the contractors were required to "[c]ooperate to [the] fullest extent to ensure that work, in the areas of Control Rooms and Communications

Equipment Room Y1.104, are completed by the date established in the overall schedule in order to allow installation of Detention Security Work. In order for Detention/Security Work to proceed these areas must be completely enclosed, including permanent glazing, thoroughly clean, dust free, and environmentally conditioned." (Plaintiff's Exhibit 2.)

{¶17} According to the project schedule, Mosser was required to turn over the first control room to plaintiff on February 1, 2000.

Al Columbus, RMF's project manager, testified that plaintiff's access to each control room was delayed by at least 26 days. Columbus testified about the length of the delay in each control room by using a chart that summarized the periods of delay which were documented by daily work logs. On cross-examination, Columbus conceded that plaintiff's counsel had prepared the control room delay exhibits, but he maintained that the data was accurate.

{¶18} Tony Perales, Poggemeyer's field representative, testified that he had inspected the control rooms on May 22, 2000, and determined that they did not meet the project specifications that were required prior to installation of the electronic security equipment. Furthermore, trial testimony established that other trade contractors continued to work in the control rooms after the scheduled completion dates and during the time that RMF was installing the electronic equipment. Columbus testified that RMF's work crew was further delayed because it had to continuously clean the control rooms due to the debris generated by the other contractors. Columbus identified photographs that he took which show dust, debris, and uninstalled windows in the control rooms. Columbus further testified that the control room delays prevented RMF from testing the electronic security devices after they were

installed and forced RMF to expend overtime hours to complete the installation work in a timely manner.

{¶19} With regard to control room damages, plaintiff claims both direct and "impact" damages for delay related to RMF's work. Plaintiff's damages calculations include overtime required to complete the control rooms, additional project supervision, project manager and foreman time, additional costs to store equipment, and cleaning charges. Plaintiff's claim for impact damages includes losses for overtime inefficiencies as a result of the electricians working overtime to complete the control rooms. Plaintiff relied on documents published by the National Electrical Contractor's Association (NECA) to calculate extended overtime inefficiencies and the productivity loss for RMF's electricians who worked overtime to complete the control rooms on schedule.

{¶20} Defendants maintain that plaintiff has not established that RMF was damaged by any delay regarding its work on the control rooms. According to Kusmer, RMF's foreman stated that his electricians would need only one week to complete the work in each control room. Defendants also assert that RMF cannot prove its damages because: its bid documents are missing; neither its foreman nor its project manager kept any contemporaneous records; and, as a result, Columbus has merely estimated the company's damages.

{¶21} This court has previously held that "a contractor can recover against the state for the state's failure to coordinate the project if this failure amounts to the state's inability to provide the contractor with a building site." *Valentine Concrete, Inc. v. Ohio Dept. of Admin. Serv.* (1991), 62 Ohio Misc.2d 591, 617. Upon review of the evidence, the court finds that the condition of the control rooms at the time that plaintiff was scheduled to perform

its work was in such a disruptive state that plaintiff was effectively denied access to the building site. The court concludes that plaintiff has proved by a preponderance of the evidence that RMF incurred direct damages in the amount of \$87,603.18 and that according to the contract, plaintiff is entitled \$8,760.32, which represents a ten percent "mark-up" profit on its subcontractor's work. However, the court finds that plaintiff presented insufficient evidence to establish that either RMF or plaintiff incurred impact damages related to productivity loss or overtime inefficiencies.

WIRE MESH FRAMES

{¶22} Plaintiff's second claim involves added work that was required to modify "wire mesh frames" for installation around building components that were installed by other contractors "out of sequence." Columbus testified that the frames were designed and manufactured to be installed before pipes and ducts were run through the frame openings. Columbus explained that the wire mesh frames were assembled in panels that were fitted into channels formed in the concrete slab floors. Columbus testified that in some areas, the piping was installed before the concrete slab was poured. Columbus explained that RMF had to cut the manufactured frames into sections and rebuild those sections around the installed pipes so that a secure seal was formed. The modified frame sections were then welded, sanded, primed, and painted to restore their structural integrity. Columbus further testified that the additional work was documented in daily log entries.

{¶23} Defendants do not dispute that the pipes were installed out of sequence. Rather, defendants assert that plaintiff and RMF should have mitigated their damages by quickly installing the wire

mesh frames when they first noticed that pipes were being installed. However, Columbus explained that it was impossible to install the frames before the concrete slab was poured and that pipes had been installed in some areas before the slab was constructed.

{¶24} Based upon the testimony and evidence, the court finds that plaintiff has proved it incurred damages for performing work to modify the wire mesh frames as a result of defendants' failure to coordinate that aspect of the construction project. The court further finds that plaintiff is entitled to \$93,376.92 which represents work performed by plaintiff and RMF, including a ten percent "mark-up" profit on RMF's work.

HOLLOW METAL FRAMES

{¶25} Plaintiff's third claim is for additional work that RMF performed to modify prefabricated hollow metal security door frames. The frames had to be modified because they would not fit into rough openings that had been improperly constructed. Defendants and Poggemeyer approved plaintiff's shop drawings for the hollow metal frames; plaintiff does not claim that the specifications or drawings were inaccurate. Rather, plaintiff asserts that the general contractor did not build the rough openings to the proper specifications. Plaintiff had contracted to install the hollow metal frames in rough openings that Mosser had constructed in poured concrete walls.

{¶26} Plaintiff claims that it relied on the shop drawings to prefabricate the door frames before the rough openings were constructed. According to Columbus, the door frames were manufactured so that they could be installed within a two-inch tolerance from the building specifications to account for minor

variations in the frame openings. Columbus testified that several door frames had to be field-modified because the rough openings exceeded the two-inch tolerance. Columbus explained that Mosser did not correct any of the rough openings that were constructed out of tolerance and that, as a result, it would have been difficult to make such modifications once the concrete had been poured. Defendants contend that plaintiff is not entitled to damages for modifying the hollow metal frames because the construction specifications required plaintiff and RMF to field-verify the openings before the frames were manufactured and installed.

{¶27} The specifications provided, in part:

{¶28} "1.04 SUBMITTALS:

{¶29} "A. Shop Drawings: Shop Drawings on all materials and equipment of this Section shall be submitted for approval. They shall indicate item location, size, type of materials, construction, finishes, spacing of anchors and joinery details with adjacent work. The DSC/ESS [detention security contractor] will extensively check each of the submittals under his scope of work, insuring their correctness and compatibility not only with each other, but with the contract documents. It shall be the *DSC's responsibility to coordinate* the DSC's work with other trades and to *field verify all necessary dimensions prior to releasing documents for fabrication. Failure of manufactured or prefabricated equipment to fit field conditions will not be cause for any additional cost to the Owner.*" (Defendants' Exhibit K at 11190-10, emphasis added.)

{¶30} Plaintiff's project manager identified the "face sheet" of the shop drawing for the hollow metal frames. A note on the drawing states that "these dimensions are not to be used to pre-

mortise doors, order glass or order materials to be used with these openings." Poggemeyer approved the shop drawing, and stamped it with a notice that read, in part: "*** The Contractor shall verify all dimensions, quantities and field conditions." (Defendants' Exhibit L.)

{¶31} The court finds that the contract specifications and the notes on the shop drawings required plaintiff to field-verify the rough openings prior to installing the doors. Moreover, the plain language of the specifications preclude a claim for any additional cost to defendants related to the failure of a prefabricated item to fit field conditions. Plaintiff did not request a change order or waiver regarding its obligation to field verify the dimensions. Accordingly, the court concludes that plaintiff's claim concerning the hollow metal frames must be denied.

INADEQUATE COORDINATION

{¶32} Plaintiff's next claim is for impact damages caused by defendants' failure to provide a workable schedule; failure to properly coordinate the project; and, failure to provide timely access to the job site. As stated above, defendants do not dispute that the original project manager, CRSS/FPS, did not adequately perform its scheduling duties. However, defendants assert that the primary scheduling duties were assigned to and assumed by Mosser and that all prime contractors had a duty to coordinate with each other.

{¶33} The Tenth District Court of Appeals has previously considered a case involving allegations that DAS was negligent and in breach of the contract because it "failed to properly supervise the construction of the project; failed to compel other contractors to perform their duties within the time for completion in the

contracts; and failed to provide a construction site in a ready state of completion to allow appellant to perform its duties in a timely manner." *States Elec. Co. v. State* (Dec. 14, 1978), Franklin App. No. 78AP-439. Similar to the contract in this case, the contract at issue in *States Elec. Co.* placed responsibility upon prime contractors to coordinate their work with each other.² The Court of Appeals held that without a "specific showing of negligence or abuse of discretion, a [party] to a construction contract is not liable in damages to third-party contractors for failure to impose discretionary sanctions upon an inadequately performing contractor." *Id.* at 11. The Court of Appeals also concluded that there was no statutory authority that subjected the state to liability for the inadequate performance and contractual duties of its contractors. *Id.*

{¶34} Although plaintiff asserts that defendants did not assign anyone to schedule or coordinate the project after CRSS/FPS was removed, the testimony and evidence shows that the contractors assumed at least some responsibility for coordination among the trades. The contractors worked together to complete the May 19, 1999, schedule that was signed by representatives of all the contractors. After Mosser accepted scheduling responsibility, the contractors continued to conduct weekly progress and coordination meetings that led to the December 31, 1999, schedule update that was also signed by all the contractors. Considering the continuing

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In *States Elec. Co.*, the plaintiff was a construction contractor and third-party beneficiary to a contract between the general contractor and the state of Ohio to construct a project at the Ohio State University. Similarly, the contract in this case included language that specifically created third-party beneficiary rights between the contractors such that if one contractor delayed another, the delayed contractor had the right to seek its remedy from the delaying contractor. (Defendants' Exhibit J.)

obligation of the prime contractors to coordinate with each other, the court finds that defendants' decision to assign scheduling duties to Mosser was reasonable under the circumstances. Although the evidence reflects some scheduling conflict among the contractors, the signed schedules establish that the contractors had coordinated their respective tasks and approved a working project schedule. Unlike the specific and substantial evidence that was presented to support plaintiff's claims concerning the control rooms and wire mesh frames, the court finds that plaintiff has provided insufficient evidence to substantiate its claim for impact damages.

{¶35} In addition to the issue of whether plaintiff and its subcontractor were damaged by delay that is attributable to defendants' failure to schedule and coordinate, there is also an issue regarding whether plaintiff has proven with a reasonable degree of certainty the extent of damages. Plaintiff relied on the testimony of David Herring, its project manager, regarding damages that resulted from management and scheduling problems. Herring's testimony was largely based upon estimates that he had received from his superintendents, Keith Barron and Ken Burton. However, there were no contemporaneous records to document the additional time that plaintiff claims was required to complete its work. Plaintiff was also unable to compare its time estimates to RMF's original bid because it was unable to locate the bid documents.

{¶36} Plaintiff calculated impact damages for scheduling and coordination problems based on additional supervision and productivity losses for electricians, carpenters, and ironworkers. Plaintiff's calculations included figures from the Mechanical Contractors Association (MCA) productivity manual that purports to

quantify factors affecting labor productivity. Al Columbus provided detailed testimony regarding his estimates for the factors that were considered to calculate plaintiff's impact damages. Columbus acknowledged that he relied on his memory and judgment to estimate additional work time. Using the MCA manual, Columbus estimated that inadequate scheduling and coordination caused a 23.92 percent productivity loss on the electrician, carpenter, and ironworker labor hours. Columbus explained that his productivity loss assessment was a reasonable estimate that represented an average or medium impact on productivity.

{¶37} Plaintiff acknowledged that it received its anticipated profit for the project when it was paid by defendants for its contracted work. The majority of plaintiff's claim for impact damages is based upon an estimate of damages incurred by RMF for inadequate coordination problems. However, in a breach of contract claim, plaintiff has the burden to produce credible evidence from which the court can ascertain the extent of damages. *Barrington Square Ltd. v. Action Lumber Co.* (May 8, 1975), Franklin App. No. 74AP-568. The court finds that the testimony and evidence presented at trial was insufficient to prove that either plaintiff or RMF incurred impact damages proximately resulting from defendants' actions or inactions. Additionally, the court finds that plaintiff's calculations that were based upon data contained in the MCA manual are arbitrary and speculative and do not represent a reliable measure of damages. Specifically, plaintiff's estimate of the subjective factors that are quantified in the manual, such as attitude and morale, were not supported by the greater weight of the evidence. The court concludes that plaintiff

has produced insufficient evidence to establish its claim for impact damages due to inadequate scheduling and coordination.

HOME OFFICE OVERHEAD UNDER THE *EICHLEAY* FORMULA

{¶38} The bids on the project incorporated both direct and indirect costs. The most significant indirect cost is home office overhead which includes such items as accounting and payroll services, insurance, upper-level management salaries, heat, electricity, taxes, depreciation, etc. See *Mech-Con Corp. v. West* (Fed. Cir. 1995), 61 F.3d 883, 886. These costs are recovered by the contractor indirectly by allocating them on a proportionate basis among all of the contractor's projects. *Id.* When performance on a particular project is suspended, the contractor's indirect costs exceed the amount originally allocated to the project. These "unabsorbed" indirect costs are generally recoverable by the contractor in an action against the government entity. *Id.*

{¶39} The federal courts have developed a method, which is known as the *Eichleay* formula, for estimating a government contractor's unabsorbed home office overhead during construction delays. The *Eichleay* formula is a mathematical means of assigning a value to the effect of a construction delay on the home office overhead for each contractor. The Supreme Court of Ohio has held that the *Eichleay* formula is a valid means to determine unabsorbed home office overhead damages in public construction delay cases. *Complete Gen. Constr. Co. v. Dept. of Transp.*, 94 Ohio St.3d 54; 2002-Ohio-59.

{¶40} In order to establish a prima facie case under *Eichleay*, a contractor must prove: 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. *Id.* at 58. "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.' 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." *Id.* quoting *West v. All State Boiler, Inc.* (Fed. Cir. 1998), 146 F.3d 1368, 1373. (Citations omitted.)

{¶41} Plaintiff contends that defendants' failure to adequately schedule and coordinate the project caused delays that extended the date of completion and that the project extensions resulted in reduced income which would otherwise be used to absorb overhead costs. Defendants claim that plaintiff is not entitled to *Eichleay* damages because neither plaintiff nor RMF was ever on standby.

{¶42} In order to recover *Eichleay* damages, a contractor must prove that there was an "owner-caused construction delay."³ *Complete Gen. Constr.*, *supra* at 60. "The *Eichleay* formula goes nowhere without causation." *Id.* As noted above, the court finds that defendants acted reasonably when they removed CRSS/FPS and assigned scheduling duties to Mosser. Although plaintiff incurred damages as a result of control room delays, RMF completed the job in a timely manner through the use of overtime hours and the evidence does not suggest that either plaintiff or RMF was placed on standby with regard to that phase of the project. With regard to the other phases of the project, the court finds that plaintiff has failed to establish that any delay in the completion of the

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The delay must also prevent the contractor from taking other projects to cover its home office overhead costs.

project was "owner-caused." Moreover, the court notes that plaintiff's recovery for damages related to both control rooms and wire mesh frames includes a ten percent mark-up for profit and overhead. It would be improper for plaintiff to recover for both *Eichleay* damages and overhead costs for those claims.

{¶43} Additionally, the court in *Complete Gen. Constr.*, modified the use of the *Eichleay* formula in Ohio to allow owners to challenge certain "unallowable direct costs" that are identified in the Federal Acquisition Regulations (FAR) and not recoverable in a case applying the *Eichleay* formula, *supra*, at 61. Stan Sasser, plaintiff's Vice President of Finance and Administration, testified that his calculations of home office overhead did not exclude FAR-prohibited costs such as interest on borrowings, entertainment expenses, contributions and donations, bid costs, and bad debts. Therefore, even if plaintiff had proved that it was placed on standby as a result of an owner-caused delay, its calculation of *Eichleay* damages was overstated and the court would be unable to determine an accurate figure from plaintiff's cost exhibits.

{¶44} Accordingly, the court finds that plaintiff's claim for unabsorbed home office overhead damages based upon the *Eichleay* formula must be denied.

INTEREST

{¶45} In its claim for interest, plaintiff asserts that it received late payment for work that was completed in accordance with the contract and that defendants failed to provide interest as required by the contract and R.C. 153. Paragraph GC 9.2.2 of the contract provides, in part:

{¶46} "Payment of an approved Application for Payment shall be made within 30 days from the date of approval by the Associate. ***

{¶47} 9.2.2.2.

{¶48} "Payments due and not paid to the Contractor within such 30 day period shall bear interest from the date payment is due under the Contract Documents at the average of the prime rate established at the commercial banks in the city of over 100,000 population that is nearest to the Project, pursuant to Section 153.14, ORC."⁴

{¶49} David Herring testified that plaintiff was generally not paid within 30 days after its payment applications were approved and that it was never paid interest on the late payments. Herring further testified that the figures contained in the trial exhibits were an accurate representation of the calculation results that were based upon documents presented by plaintiff and RMF. (Plaintiff's Exhibit 52M.) Defendants did not dispute any of the dates that are included in plaintiff's interest exhibits. However, plaintiff used an interest rate of ten percent to calculate the late interest amounts rather than the rate that is required by the contract and R.C. 153.14. Plaintiff has the burden of proof with regard to damages and plaintiff did not provide the court with sufficient evidence to calculate interest on the late payments in accordance with the contract. In short, the court will not award interest on late payments to plaintiff.

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R.C. 153.14 states, in part: "*** Payment on approved estimates filed with the owner or its representative shall be made within thirty days. Upon the failure of the owner or its representative to make such payments within thirty days, or upon an unauthorized withholding of retainage, there shall be allowed to the contractor, in addition to any other remedies allowed by law, interest on such moneys not paid within thirty days. *** The rate of such interest shall be the average of the prime rate established at the commercial banks in the city of over one hundred thousand population that is nearest the construction project."

{¶50} Plaintiff also asserts a claim for prejudgment interest. R.C. 2743.18(A)(1) provides that interest shall be allowed with respect to any civil action on which a judgment or determination is rendered against the state for the same period of time and at the same rate as allowed between private parties to a suit. R.C. 1343.03(A) provides the applicable rate of interest as follows: "*** [w]hen money becomes due and payable upon any *** contract or other transaction, the creditor is entitled to interest at the rate of ten per cent per annum, and no more, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract."

{¶51} Under R.C. 1374.03(A), prejudgment interest attached to plaintiff's damage award in this case when the money owing plaintiff became "due and payable." A government contractor's money becomes due and payable when the contractor substantially completes its work on the project. *Royal Electric Const. Corp. v. The Ohio State University*, 73 Ohio St.3d 110, 117, 1995-Ohio-131.

{¶52} Determining the date of substantial completion is complicated by the fact that David Herring, Al Columbus, Stan Sasser, and Kathy Gummow, Manager of Project Controls for RMF, each testified to a different completion date for the project. Gummow testified that she was informed by RMF's operations department that work was completed on January 21, 2001. Based upon Gummow's testimony, the court finds that substantial completion occurred on January 21, 2001, the date when RMF completed its work on the project. Consequently, under *Royal Electric*, supra, plaintiff is entitled to prejudgment interest on the \$189,740.42 award from January 21, 2001, to the date of this court's judgment entry.

{¶53} Finally, plaintiff asserts a claim for additional damages related to time spent in preparation of this case. Al Columbus estimated the number of hours that he worked in December 2000 and early 2001 to gather documents and prepare calculations that were forwarded to plaintiff's counsel. Columbus did not keep a record of his work on this claim; rather, he estimated the percentage of his normal working hours that he devoted to this case to be in a range from 10 percent to 40 percent of his total time, where the majority of time occurred prior to the project completion date. The court finds that plaintiff has failed to prove to a requisite degree of certainty that it incurred additional damages for claim preparation.

{¶54} Accordingly, judgment shall be rendered in favor of plaintiff in the amount of \$189,740.42 plus prejudgment interest at the rate of ten percent per annum from January 21, 2001, to the date of this judgment in the amount of \$244,011.38, plus the \$25 filing fee.

{¶55} This case was tried to the court on the issues of liability and damages. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is hereby rendered in favor of plaintiff in the amount of \$244,036.38 which includes the filing fee paid by plaintiff and prejudgment interest at ten percent per annum from January 21, 2001, to the date of the journalization of this entry.

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.

Case No. 2001-11472

-21-

JUDGMENT ENTRY

Judge

Entry cc:

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