

IN THE SUPREME COURT OF OHIO

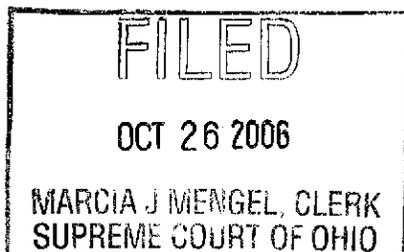
DUGAN & MEYERS CONSTRUCTION :
COMPANY, INC. :
 :
 :
Appellant, :
 :
v. : Case No. 05-1698
 :
 : On Appeal from the
STATE OF OHIO DEPARTMENT OF : Franklin County Court of Appeals
ADMINISTRATIVE SERVICES, et al., : Tenth Appellate District
 :
Appellees. : Case No. 03AP-1194
 :

**NOTICE OF ADDITIONAL AUTHORITY RELIED UPON BY
APPELLEES THE OHIO STATE UNIVERSITY AND THE STATE OF OHIO
DEPARTMENT OF ADMINISTRATIVE SERVICES**

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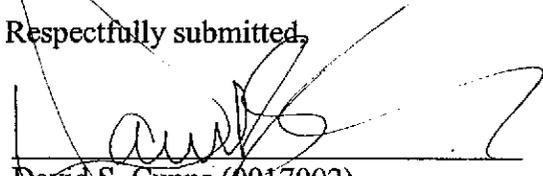
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NOTICE OF ADDITIONAL AUTHORITY RELIED UPON BY
APPELLEES THE OHIO STATE UNIVERSITY AND THE STATE OF OHIO
DEPARTMENT OF ADMINISTRATIVE SERVICES

In accordance with Ohio Supreme Court Rules of Practice VI, § 8 and IX, § 9, Appellees The Ohio State University and the State of Ohio Department of Administrative Services hereby give notice of their intent to rely upon the additional authority of Strand Hunt Construction, Inc. v. Lake Washington (Wash.App. Div. 1), 2006 WL 2536315 (copy attached hereto).

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by ordinary mail postage prepaid on this 1st day of October, 2006, upon the following:

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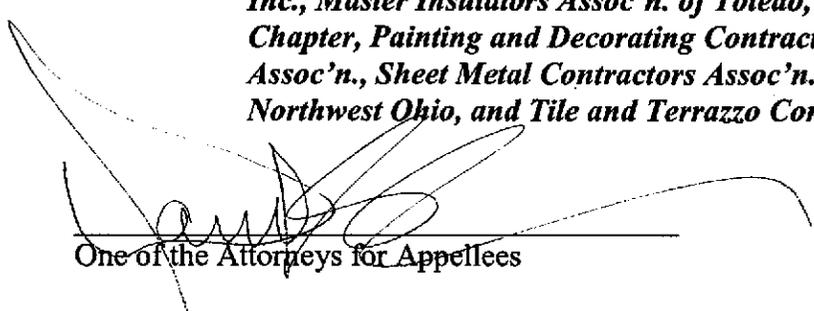
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One of the Attorneys for Appellees

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 1.

STRAND HUNT CONSTRUCTION, INC.,

a Washington Corporation, Appellant,

v.

LAKE WASHINGTON SCHOOL

DISTRICT NO. 414, Respondent.

No. 56910-4-I.

Sept. 5, 2006.

Appeal from Superior Court of King County; Hon. Bruce W. Hilyer, J.

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David Alexander Alskog, Kevin Blair

Hansen, Livengood Fitzgerald & Alskog, Kirkland, WA, for Respondent.

UNPUBLISHED OPINION

DWYER, J.

*1 This is a public works contract dispute case. The contractor, Strand Hunt Construction, Inc. (SHC), appeals the trial court's summary judgment dismissal of its claims against the project owner, the Lake Washington School District (District), for overhead and "cumulative impact" damages. Finding no error, we affirm.

FACTS

This dispute arises out of a \$37,000,000 public works contract for the construction of a new high school in Redmond, Washington.

On April 26, 2001, following a public bid process, the District awarded the contract to SHC.

A. The Contract

Under the contract, the project was divided into two phases. Phase 1, construction of the new high school building, was to start on May 1, 2001, and be substantially completed by April 1, 2003. SHC was to complete the new building by June 16, 2003.

Phase 2 of the project, which was scheduled to begin after substantial completion of Phase 1, specified that the demolition of the existing school building was to begin on June 25, 2003.

Article 7 of the contract specified that changes to the work that might be made during construction and provided the parties' terms regarding such changes. Paragraph 7.1.1 stated that “[c]hanges in the Work may

be accomplished after execution of the Contract, and without invalidating the Contract.” Paragraph 7.5.7 stated that “[t]here could be changes made to this Project up to 10% of the total contract amount. The Contractor shall be prepared to incorporate these changes into the scope of work.”

Article 7 also addressed how SHC was to be compensated for minor changes to the work. The amount of compensation was to be determined by specific pricing components, which included direct labor costs, direct material costs, construction equipment usage costs, cost of change in insurance or bond premium, subcontractor costs, and a fee for combined overhead, profit, and other indirect costs. Paragraphs 7.5.1 through 7.5.6 provided the manner of calculating the value of changes to the project, including a “fee” that would be an “allowance for all combined overhead, profit and other costs,

including all office, home office and site overhead, and includes delay and impact costs of any kind.” The fee was to be calculated as a percentage of the direct costs identified in paragraphs 7.5.1 through 7.5.4:

.1 The Contractor shall receive 15% of the cost of any materials supplied or work performed by the Contractor's own forces.

.2 The Contractor shall receive 8% of the amount owed directly to a Subcontractor or Supplier for materials supplied or work performed by that Subcontractor or Supplier.

.3 Each Subcontractor (including lower tier subcontractors involved) shall receive 12% of the cost of any materials supplied or work performed by its own forces.

.4 Each Subcontractor of any tier shall receive 8% of the amount it owes for materials supplied or work performed by its suppliers or subcontractors of any lower tier.

*2 Article 3 of the contract specifically addressed possible errors and omissions in

the construction plans: “The Contractor shall carefully study and compare the Contract Documents with each other ... and shall at once report to the Architect errors, inconsistencies or omissions discovered.” Article 3 further stated, Contractor shall take field measurements and verify field conditions and shall carefully compare such field measurements and conditions and other information known to the Contractor with the Contract Documents.... Errors, inconsistencies or omissions discovered shall be reported to the Architect at once.

Finally, Article 4 of the contract provided specific dispute resolution terms. Paragraph 4.4.2 of the contract stated how SHC was to submit claims for additional costs or time: The Contractor shall submit in writing to the Owner and the Architect all Claims within fourteen (14) days of the event giving rise to them and shall include a clear description of the Claim, the proposed

change in the Contract Sum and/or Time of the Claim and provide data supporting the Claim. The Claim, as it may be clarified during the agreed dispute resolution procedure, shall be deemed to include all changes, direct and indirect, in cost and in time to which the Contractor ... is entitled. Claims not made in accordance with the requirements of the Contract Documents are waived.

*B. Disputes and Project Changes During
Construction*

On January 20, 2003, SHC sent a letter to the District, stating that Phase 2 could not be completed within the time frame specified in the contract and that the commencement date for demolition of the existing school building, June 25, 2003, was problematic. SHC proposed four construction schedule revisions with time and cost estimates. The

District rejected SHC's proposals for demolishing the existing high school before June 25, 2003, on the basis that it would be disruptive to the students, staff, and operation of the existing school to move into the new building earlier.

On May 28, 2003, the District then issued a Construction Change Directive, CCD 263, which modified the sequence of the remaining work. CCD 263 provided SHC additional time to complete the project and increased SHC's compensation by \$230,838.

On June 19, 2003, SHC sent a letter to the District, requesting compensation for additional work related to "the inordinate number" of requests for information (RFI) ^{ENI} that SHC claimed were directly caused by "defective drawings." SHC claimed that "over 1500 RFIs have been written, and although some 400 were directly related to change orders, the entire 1500 have had a dramatic accumulative effect on the cost for

performing the work.” SHC also submitted “preliminary” figures of direct cost impacts totaling \$752,053, and claimed an additional indirect cost impact of labor “inefficiency” totaling \$426,045. The District responded to SHC’s June 19 letter, stating that it did not constitute a claim under the terms of the contract because it did not comply with the contractual dispute resolution terms.

FN1. An RFI is a request for guidance submitted by the contractor to the owner regarding the construction plans.

*3 On July 23, 2003, SHC sent a letter to the District entitled “Claim for Multiplicity Impacts.” SHC requested “a contract adjustment in the amount of \$2,434,813 to compensate [SHC] for the impacts that [SHC] experienced due to the inordinate number of RFI’s issued on this project and other defects in the contract documents.”

The District denied this request.

C. Trial Court Proceedings

On July 31, 2003, SHC filed a complaint in superior court, alleging that the District was obliged to pay SHC for “extra work, breaches of warranty, and the delays, interferences and hindrances it caused to Strand Hunt.” SHC sought quantum meruit damages, i.e., damages outside the contract that are warranted when substantial changes occur that were not within the contemplation of the parties.

In November 2004, in preparation for the parties’ March 3, 2005 mediation of this dispute, SHC submitted a “Consolidated Request for Equitable Adjustment” (CREA) to the District. In the CREA, SHC increased its claim for additional compensation again, this time to \$4,538,366. This amount was calculated by adding the following alleged

damages:

Costs

Periodic Cleanup	\$216,843
RFI Processing Costs	\$536,720
Field Overhead Delay Costs	\$557,882
Home Office Overhead	\$716,634
Cumulative Impact Labor Inefficiencies	\$581,220
CREA Preparation Costs	\$222,008
CCD 263 Direct Costs	\$261,477
Subcontracts (Painting)	\$559,121
Total All Costs	\$3,651,905

Markups

B & O Tax, etc.	\$89,420
Subtotal	\$3,741,326
Profit	\$187,066
Subtotal	\$3,928,392
Unresolved Pending Changes	\$178,217
Interest	\$554,393
Attorney Fees	\$108,202

Not Reported in P.3d
 Not Reported in P.3d, 2006 WL 2536315 (Wash.App. Div. 1)
 (Cite as: Not Reported in P.3d)

Less Amount Paid in change order 21	(\$230,838)
TOTAL	\$4,538,366

The District subsequently moved for partial summary judgment seeking dismissal of SHC's claims for (1) cumulative impact damages of \$581,220, (2) field overhead delay damages of \$557,882, and (3) home office overhead damages of \$716,634. In support of its motion, the District argued that SHC was barred from seeking its alleged "cumulative impact" damages because it failed to comply with the contract's dispute resolution provisions. The District further argued that SHC was barred from seeking its alleged damages related to field and home office overhead costs because they were indirect delay damage claims which, under the contract, could only be asserted in conjunction with direct damage claims pursuant to the contract's dispute resolution provisions.

On March 7, 2005, the trial court granted the District's motion for partial summary judgment.

In July 2005, the District filed a second motion for partial summary judgment, seeking dismissal of SHC's claims under its CREA for (1) "excessive painting and finishes requirements" in the amount of \$559,121; (2) "RFI processing costs" in the amount of \$536,720; (3) "periodic cleanup" in the amount of \$216,843; and (4) interest on any damages to which SHC might be entitled. The motion also sought clarification of the March 7 order.

*4 SHC subsequently requested that the District withdraw its motion as to SHC's claims for "excessive painting and finishes requirements," "RFI processing costs," "periodic cleanup," and interest, agreeing that SHC would dismiss them without prejudice. The District agreed to withdraw its motion for partial summary judgment as to those claims, leaving before the court only the District's request for clarification as to the status of SHC's quantum meruit claim.

I. Standards of Review

On August 18, 2005, after a hearing on the motion, the trial court entered an order “clarifying that plaintiff SHC's quantum meruit claims were dismissed in [the] March 7, 2005 order granting partial summary judgment.” The court further ordered that, based on the stipulation of the parties, all of SHC's claims that had not been previously dismissed by the court had been voluntarily withdrawn and were thereby dismissed without prejudice.

SHC appeals the trial court's orders dismissing its claims.

DISCUSSION

SHC assigns error to the trial court's summary judgment dismissal of its claims for additional compensation for “cumulative” direct costs and overhead costs allegedly caused by delays attributable to the District.

The appellate court engages in the same inquiries as the trial court, determining whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Trimble v. Wash. State Univ., 140 Wn.2d 88, 93, 993 P.2d 259 (2000). The court considers all facts and reasonable inferences from them in the light most favorable to the nonmoving party, and “ [t]he motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” “ Trimble, 140 Wn.2d at 93 (quoting Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993)). Bare assertions that a genuine material issue exists, however, will not defeat a summary judgment motion in the absence of actual evidence. Trimble, 140 Wn.2d at 93.

II. Delay Damage Claims Conditioned on the

Contract

The District argues that SHC's "cumulative impact" claim involves claims for direct delay damages that SHC abandoned by failing to comply with the contract's dispute resolution procedures. The District further contends that, because indirect overhead damages are specifically provided for in the contract as a "fee" calculated as a percentage of direct damages, SHC is also barred from pursuing its claims for overhead damages. We agree.

Under Washington law, contractors are required to pursue their delay damage claims in accordance with applicable contractual notice procedures unless those procedures are waived.

Mike M. Johnson, Inc. v. County of Spokane,
150 Wn.2d 375, 386, 78 P.3d 161 (2003);

Absher Constr. Co. v. Kent Sch. Dist. No. 415,
77 Wn.App. 137, 142, 890 P.2d 1071 (1995).

Here, Article 4 of the contract required SHC to pursue delay damages by submitting "a clear description of the Claim, the proposed change in

the Contract Sum and/or Time of the Claim and provide data supporting the Claim." The contract also required strict compliance with the claims and dispute resolution provisions, stating that "[n]o act, omission, or knowledge, actual or constructive, of the Owner or the Architect shall in any way be deemed to be a waiver of the requirement for timely written notice and a timely written Claim unless the Owner provides the Contractor with an explicit, unequivocal written waiver." The District made no written waiver of the contract's claim requirements.

*5 SHC nonetheless argues that it would have been impossible for it to have submitted the claims at issue here in the manner and time-frame specified in the contract. Remarkably, SHC claims specific costs totaling \$4,538,366, yet it does not explain how it could fail to notice such expenses as they accrued. We are not persuaded.

We are similarly unconvinced by SHC's construction of the contractual claims

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 Not Reported in P.3d, 2006 WL 2536315 (Wash.App. Div. 1)
 (Cite as: Not Reported in P.3d)

procedure. SHC attempts to bypass the 14-day claim period that runs from the “event” giving rise to the claim by asserting the “event” giving rise to its cumulative impact claim was its dispute with the District. It was only at that time that SHC purports to have first realized that the “inordinate number of RFI's” added up to millions of dollars in undue costs.

SHC's proposed definition of “event” is nonsensical and, if successful, “would render contractual claim requirements meaningless.” Mike M. Johnson, 150 Wn.2d at 391. The contract defines a “claim,” in part, as “a demand or assertion by one of the parties seeking, as a matter of right, ... payment of money.” Moreover, common sense dictates that an “event” giving rise to a claim is an occurrence that required SHC to incur an expense, not some subsequent moment of realization that it had incurred an expense in the past.

II. Quantum Meruit

SHC next argues that the trial court erred in dismissing its quantum meruit claim because (1) a jury should decide as a factual issue whether, at the time of contract formation, the parties contemplated the changed conditions encountered by SHC, and (2) SHC presented substantial evidence of changed conditions that would warrant giving the question of recovery in quantum meruit to a jury. We disagree.

Quantum meruit is an appropriate basis for recovery when substantial changes occur that are not covered by the contract and are not within the contemplation of the parties, and the effect of such changes is to require extra work or to cause substantial loss to the contractor. Bignold v. King County, 65 Wn.2d 817, 826, 399 P.2d 611 (1965). “The critical factor in application of the [quantum meruit] doctrine is whether the contractor should have discovered or anticipated the changed condition.” V.C. Edwards Contracting Co. v. Port of Tacoma, 83 Wn.2d 7, 13, 514 P.2d 1381 (1973).

The question is one of mixed fact and law. The first step in the analysis is for the trial court to decide whether the contract contains any ambiguity based on which a trier of fact could reasonably find that the damages or changed conditions were not contingencies contemplated by the parties. If, by looking at the four corners of the document, the court can determine that the contract unambiguously contemplates the changes or disruptions experienced by the complaining party, no issue of fact exists and the quantum meruit claim must be dismissed. If, on the other hand, the provisions are ambiguous, issues of fact exist, and resolution of the question is for the trier of fact. *Spokane Helicopter Serv., Inc. v. Malone*, 28 Wn.App. 377, 382-83, 623 P.2d 727 (1981).

*6 Here, the contract clearly anticipated changes in the work during construction and contained several provisions regarding the degree and nature of possible changes. The contract also contained unambiguous terms regarding how

the parties would address disputes over the “adjustment of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract.”

Because there is no ambiguity in the contract regarding the parties' contemplation of work changes, the matter is not one for the jury and the trial court properly dismissed SHC's quantum meruit claim on summary judgment.

III. RCW 4.24.360

SHC also argues that the contract provision regarding delay damages is prohibited by RCW 4.24.360, which states:

Any clause in a construction contract, as defined in RCW 4.24.370,^{FN2} which purports to waive, release, or extinguish the rights of a contractor, subcontractor, or supplier to damages or an equitable adjustment arising out of unreasonable delay in performance which delay is caused by the acts or omissions of the contractee or

persons acting for the contractee is against public policy and is void and unenforceable.

FN2. “ ‘Construction contract’ for purposes of RCW 4.24.360 means any contract or agreement for the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith.” RCW 4.24.370.

Specifically, SHC contends that the contract's terms effectively extinguished SHC's rights to compensation for damages it incurred due to delays caused by the District. We see no such bar to recovery in this contract.

To the contrary, the contract provides explicit, agreed-upon methods for calculating both direct

and indirect damages. The fact that the parties agreed to terms that could curtail the extent of SHC's compensation does not render invalid that which was available. Washington and other courts uphold contractual provisions limiting damages for overhead costs. S.L. Rowland Constr. Co. v. Beall Pipe & Tank Corp., 14 Wn.App. 297, 540 P.2d 912 (1975). The parties agreed to these terms. Contracting parties may ordinarily allocate risks as they see fit. Scoccolo Constr., Inc. v. City of Renton, 102 Wn.App. 611, 614-15, 9 P.3d 886 (2000) (citing Dravo Corp. v. Municipality of Metro. Seattle, 79 Wn.2d 214, 218, 484 P.2d 399 (1971)).

Accordingly, to the extent that SHC may have been precluded from recovering its overhead damages, that preclusion is due to SHC's assent to pricing terms that it now disfavors and because it failed to comply with the contract's dispute resolution provisions. The trial court properly dismissed SHC's claim that the parties' contract violated RCW 4.24.360.

IV. Eichleay Formula

Finally, we address the parties' dispute regarding whether SHC was entitled to use the *Eichleay* formula to calculate its alleged damages for uncompensated home office overhead costs.

A contractor may calculate its home office delay damages under a formula set forth in an Armed Services Board of Contract Appeals case, *Eichleay Corp.*,^{FN3} if the contractor shows that the owner caused a construction delay that was sudden and of unpredictable duration, and the delay caused actual damage because the nature of the delay made it impractical for the contractor either "to undertake the performance of other work,"^{FN4} or to cut back on home office personnel or facilities.

^{FN3}. Under the *Eichleay* formula, the total home office overhead for the

contract performance period is multiplied by the ratio of contract billings to total company billings; this calculation results in the amount of home office overhead allocable to the contract. That amount is then divided by the number of days of contract performance; the result is the daily home office overhead rate allocable to the contract. That rate is then multiplied by the number of days of delay; the result is the amount of recovery. *Eichleay Corp.*, 1960 ASBCA LEXIS 1207, 60-2 B.C.A. (CCH) ¶ 2688 (1960), aff'd, 61-1 B.C.A. (CCH) ¶ 2894 at 15,117 (Armed Servs.1960).

^{FN4}. *W.G. Cornell Co. v. Ceramic Coating Co.*, 626 F.2d 990, 994 (D.C.Cir.1980).

*7 The application of this damages formula is severely limited, however. As has been noted, such damages are utilized to compensate a

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contractor for its indirect costs that cannot be allocated to a particular contract for the period during which the government has made contractual performance impossible, while requiring the contractor to remain available to resume performance on short notice. As long as the contractor is able to continue performing the contract, although not in the same way or as efficiently or effectively as it had anticipated it could do so, it can allocate a portion of its indirect costs to that contract. There is accordingly no occasion in that situation to resort to “recovery under the *Eichleay* formula,” which is “an extraordinary remedy.” [*Charles G. Williams Constr., Inc. v. White*], 271 F.3d [1055,] 1058 [(Fed.Cir .2001)] (quoting *West v. All State Boiler, Inc.*, 146 F.3d 1368, 1377 (Fed.Cir.1998)); cf. *Melka Marine, Inc. v. United States*, 187 F.3d 1370, 1376 (Fed.Cir.1999) (“If work on the contract continues uninterrupted, albeit in a different order than originally planned, the contractor is not on standby.”).

Charles G. Williams Constr., Inc. v. White, 326 F.3d 1376, 1380-81 (Fed.Cir.2003).

The District argued before the trial court, as it does on appeal, that SHC failed to set forth facts sufficient to show that it is entitled to apply the *Eichleay* formula to calculate its home office overhead damages. We agree.

In this case, the *Eichleay* formula was not applicable. The factors required to properly employ the *Eichleay* formula are not present. To the contrary, the record shows that the contract work was never suspended and that SHC worked continuously throughout the project.

Affirmed.

WE CONCUR: BECKER and BAKER, JJ.

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