[Cite as *J & H Reinforcing & Structural Erectors, Inc. v. Ohio School Facilities Comm.*, 2013-Ohio-3827.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

J & H Reinforcing & Structural Erectors, Inc.,	:	
	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
	:	No. 12AP-588
v.		(C.C. No. 2010-07644)
	:	
Ohio School Facilities Commission,		(REGULAR CALENDAR)
	:	
Defendant-Appellant/ Cross-Appellee.	:	

D E C I S I O N

Rendered on September 5, 2013

Kegler, Brown, Hill & Ritter Co., LPA, Donald W. Gregory and *Michael J. Madigan*, for appellee/cross-appellant.

Michael DeWine, Attorney General, *James E. Rook* and *David A. Beals*, for appellant/cross-appellee.

Dinsmore & Shohl, LLP, Donald B. Leach, Jr. and *Gregory P. Mathews*, for amicus curiae Central Ohio Chapter, Associated Builders and Contractors, Inc.

O'Rourke & Associates Co., L.P.A., Daniel J. Myers and *R. Russell O'Rourke*, for amicus curiae American Sub-contractors Association.

APPEAL from the Court of Claims of Ohio

McCORMAC, J.

{¶ 1} Defendant-appellant/cross-appellee, Ohio School Facilities Commission ("OSFC"), appeals the judgment of the Court of Claims of Ohio in favor of plaintiff-appellee/cross-appellant, J&H Reinforcing & Structural Erectors, Inc. ("J&H").

{¶ 2} On May 28, 2010, J&H instituted this action against OSFC for breach of contract, equitable adjustment to the contract, and breach of express and implied warranties, seeking damages for delays and inefficiencies allegedly caused by OSFC during the course of a school construction project. OSFC filed a counterclaim for breach of contract and breach of warranties seeking damages for J&H's allegedly defective and incomplete work on the project.

{¶ 3} On June 6, 2010, J&H filed a motion pursuant to R.C. 2743.03(C) requesting that the Chief Justice of the Supreme Court of Ohio appoint a referee to hear and determine the action. R.C. 2743.03(C) requires the Chief Justice to make such an appointment upon request of either party to a dispute arising between the state and a contractor concerning a public improvement contract let by the state. Although the referee need not be an attorney, he or she must be "knowledgeable about construction contract law, a member of the construction industry panel of the American arbitration association, or an individual * * * deemed qualified by the chief justice to serve." R.C. 2743.03(C)(3). In accordance with this legislative mandate, the Chief Justice, by entry filed May 24, 2011, appointed Thomas R. Yocum, Esquire, to serve as the referee.

{¶ 4} The matter proceeded to trial over the course of nine days in November and December 2011. At that trial, numerous witnesses testified to the following facts.

{¶ 5} In 2006, J&H was awarded a $16,026,000 contract to perform general trades work, masonry, and interior casework for a project involving the construction of a K-12 school in the Wheelersburg Local School District ("Wheelersburg"). A separate site preparation package was awarded to J&H prior to the award on the multi-prime package. In addition, OSFC hired Tanner Stone Holsinger Donges & Company ("TSHD") as the project architect, Bovis Lend Lease Company ("Bovis") as the construction manager, and several additional prime contractors to perform other work on the project, including mechanical and electrical work.

{¶ 6} On October 2, 2006, Bovis issued a notice to proceed directing J&H to immediately commence work on the project. The notice designated March 17, 2008 as the project completion date.

{¶ 7} J&H immediately encountered problems with unstable soil conditions, which prevented it from beginning construction. OSFC directed J&H under its site package to perform additional soil-stabilization work. The delay caused by the unstable soil conditions extended the start of building construction to December 26, 2006. In a February 28, 2007 e-mail to other prime contractors, William Palonis, Bovis' project manager, acknowledged the soil-stabilization delay and the fact that such delay was not yet reflected in Bovis's construction schedule.

{¶ 8} After completing the soil-stabilization work, J&H's general trades work progressed steadily from January to July 2007. However, during this time, J&H learned that several Air Handling Units ("AHUs") to be supplied by the mechanical contractor, which were originally scheduled to be delivered in June or July 2007, were not going to arrive until September 2007. As a result, J&H had to leave large gaps in many of the masonry walls to accommodate ingress and egress of the equipment required for delivery and installation of the AHUs.

{¶ 9} On August 28, 2007, Mark Rollins, J&H's project manager, wrote to Palonis summarizing the impact the late arrival of the AHUs was having on the construction process. In particular, Rollins stated that the AHUs "were supposed to begin being set in place around the end of June or beginning of July 2007." (Plaintiff's Exhibit 102.) Rollins averred that the late arrival of the AHUs compromised J&H's ability to complete work it had begun in June and July 2007 in a sequential and timely manner. Rollins specifically noted that J&H's "roofing activity has been impacted to the point that we have fallen behind schedule in several areas. (Area H was to begin July 18, 2007; Area G was to begin August 9, 2007; Area D is to begin September 18, 2007)." (Plaintiff's Exhibit 102.) Accordingly, Rollins requested that Bovis publish a request for proposal extending J&H's contract an additional 44 days. He also stated that J&H reserved the opportunity to revisit the impact the delayed arrival and installation of the AHUs would have on J&H's contract.

{¶ 10} Thereafter, in a letter dated November 5, 2007, Rollins informed Palonis that the AHUs were installed on September 26, 2007 and that J&H had been able to

regain its construction sequencing and schedule. Rollins revised J&H's August 28, 2007 request for a 44-day extension of its contract to a request for proposal extending its contract 73 days to account for the delayed arrival and installation of the AHUs. Rollins again averred that J&H reserved the opportunity to revisit the impact the delayed arrival and installation of the AHUs would have on J&H's contract.

{¶ 11} In a separate letter dated November 5, 2007, Rollins requested that Bovis publish a request for proposal to extend J&H's contract an additional 84 days, from March 17 to June 7, 2008, to account for the October 2 to December 26, 2006 delay caused by the soil-stabilization issues.

{¶ 12} By January 2008, it had become clear that the March 17, 2008 project completion date would be impossible to meet and that project completion prior to commencement of the 2008-2009 school year was also in jeopardy. As a result, representatives from OSFC, Bovis, J&H, and the other prime contractors held a partnering session on January 16, 2008, during which all parties agreed to revise the construction completion date to July 15, 2008. The contractors were to submit costs associated with extending the project completion date to July 15, 2008.

{¶ 13} To that end, in a letter dated January 24, 2008, Rollins requested that Bovis immediately process a formal change order, extending the contract completion date from March 17 to July 15, 2008 with associated costs of $113,479.04, which included a proposed cost of $73,251.87 to extend J&H's general conditions, as well as $40,227.17 in premium time to complete selected finish activities. On February 19, 2008, J&H, Bovis, Wheelersburg, and OSFC executed Change Order 29 ("CO 29") to that effect.

{¶ 14} Following execution of CO 29, Bovis, on February 28, 2008, issued a new project schedule, which revised activities to reflect the new completion date of July 15, 2008. In an e-mail sent that same day to project contractors, including J&H, Palonis stated, "[w]e feel that at this time the schedule is displaying an accurate approach of how the project team is going to meet the completion date of July 15, 2008." (Plaintiff's Exhibit 129.)

{¶ 15} However, even before Palonis sent his e-mail, Rollins questioned the accuracy of the new Bovis schedule. In letters dated February 14 and 22, 2008, Rollins notified Palonis that J&H was being delayed in numerous areas due to predecessor

activities of other contractors not being completed. Although Rollins did not formally request an extension of time, he indicated that J&H was evaluating the extent of the delays and, once able to commence work activities as scheduled, J&H would be able to determine the full extent of the delays.

{¶ 16} On February 28, 2008, Rollins executed a written acceptance of Bovis' revised schedule. Unbeknownst to Rollins, however, Bovis had manipulated its scheduling software by switching to a "progress override" mode so that the schedule would be produced with a July 15, 2008 completion date, even though Bovis was aware that such a schedule was both unrealistic and unmanageable.

{¶ 17} Work on the project continued to fall behind, resulting in J&H experiencing delays in performing its work in accordance with Bovis's revised schedule. In a series of letters sent between March and June 2008, Rollins notified Bovis of delay issues and requested time extensions and associated costs. More particularly, in a March 4, 2008 letter, J&H requested that Bovis immediately issue a formal change order extending the contract for 30 days, making the new completion date August 15, 2008, with an associated cost of $18,312.07. By letter dated March 7, 2008, Palonis rejected J&H's request for a schedule extension, citing J&H's written acceptance of the revised schedule.

{¶ 18} In letters dated March 21 and 31, 2008, Rollins identified additional areas of delay and requested that Bovis immediately issue formal change orders extending the contract completion date, with additional associated costs. By letter dated April 7, 2008, Rollins suggested that Bovis review the delay issues and provide a plan to recover the lost time identifiable by reviewing the schedule and the current conditions on-site, and to schedule a meeting to discuss the issues.

{¶ 19} In an April 11, 2008 letter, Palonis acknowledged receipt of Rollins' March and April letters. Palonis averred that J&H's notices of delay did not comply with several provisions of Article 6 of the contract. Palonis particularly noted that the delay letters lacked identification of persons or entities responsible for the delays, dates of commencement of the delays, anticipated duration of the delays, and recommended action to avoid or minimize any future delays.

{¶ 20} However, as a result of J&H's letters, Bovis, on April 11, 2008, issued 72-hour notices to several of its other prime contractors, apprising them of J&H's delay notices. These 72-hour notices stated, in part:

> Bovis Lend Lease has received notification of delay from J&H Erectors that specifically addresses your scope of work as cause of delay. Let this notification serve as a 72 hour notice that any scope of work directly related to your contract that is impacting the completion of J&H Erectors work will be your responsibility.

(Plaintiff's Exhibit 140.)

{¶ 21} Contemporaneously, Bovis vice-president, Jim Swartzmiller, and Bovis senior project manager, Clayton Keith, exchanged corporate e-mails evidencing Bovis's intention to cast J&H in a bad light with the other contractors and Wheelersburg. Swartzmiller stated that he "like[d] the idea of putting all contractors on 72 notice, attaching the J&H letter and sitting back to watch the fireworks" and "[i]t will put J&H in the 'bad guy' light with the other contractors and paint them as an instigator with the district! Win – win." (Plaintiff's Exhibit 137.)

{¶ 22} In weekly letters from the beginning of May through the end of June 2008, Rollins notified Palonis of additional delays in several specified activities and requested time extensions and attendant associated costs. In his final letter, dated June 30, 2008, Rollins averred that, since February 22, 2008, J&H had requested a total of 161 days to be added to the contract completion date at a total additional cost of $101,270.61 associated with extended general conditions only, and that other cost-impact issues were currently being evaluated.

{¶ 23} In response to Rollins's letters, Keith, on June 16, 2008, issued a letter reiterating that J&H's notices of delay did not comply with Article 6 and urged compliance with Article 6 so that Bovis could properly respond to J&H's letters. Keith also suggested that J&H concentrate its efforts on meeting the project completion date, rather than spending time on written correspondence reiterating delay issues.

{¶ 24} During this timeframe, Bruce Wilson assumed responsibility for the day-to-day management of the project for Bovis. Wilson proved to be an effective manager with the authority and ability to promptly and competently respond to contractor concerns without further consultation or prior approval. Wilson commonly authorized payment for

additional work by issuing informal tickets, allowing work to proceed in advance of a formal change order.

{¶ 25} Although the project was not completed by the scheduled July 15, 2008 date, it was completed in time for the opening of the school year. Although some minor construction and punch-list items remained, substantial completion was achieved on August 4, 2008, and a temporary certificate of occupancy was issued on that date.

{¶ 26} On October 6, 2008, Rollins submitted a "Cost Claim" letter to Palonis, summarizing J&H's costs incurred through September 29, 2008 due to delays to the contract completion date. Rollins attached to the letter an itemized cost accumulation report prepared by Carothers & Company, CPAs, which totaled $1,382,769. Neither Bovis nor the OSFC responded to J&H's letter.

{¶ 27} On November 3, 2008, Rollins wrote to Palonis formally requesting a meeting pursuant to Article 8 of the contract to discuss various unresolved issues pertaining to costs associated with the project. Rollins sent nearly identical letters almost weekly to Palonis through February 20, 2009. J&H received no response to any of its letters.

{¶ 28} A certificate of final occupancy was issued on December 18, 2008.

{¶ 29} On August 19, 2009, J&H submitted a formal request for equitable adjustment and Article 8 demand to TSHD, OSFC, Bovis and Wheelersburg. J&H requested an equitable adjustment of $2,469,479.50, excluding the remaining contract balance of $253,998.37. J&H supported its request with exhibits prepared by its consultant, Timothy Calvey. J&H noted that the request represented costs incurred for the general trades, masonry, and interior casework only, and did not include any costs arising from the early site work package. Neither Bovis nor OSFC responded to the claim. In an August 21, 2009 e-mail to Wheelersburg Superintendent Mark Knapp and OSFC project administrator Jennifer Fetty, Swartmiller averred that his proposed response to J&H's Article 8 claim was to "do a simple rejection and send them packing." (Plaintiff's Exhibit 214.) Swartzmiller advocated dispensing with a formal Article 8 hearing and taking J&H "to the mat on this one." (Plaintiff's Exhibit 214.)

{¶ 30} In addition to the delay issues noted above, another problem arose during the project. Before the building was occupied in August 2008, Wheelersburg employees

noticed water leaking from the roof in numerous locations in the building and immediately notified J&H. J&H located and successfully repaired many, but not all, of the leaks. As a consequence, the leaks continued after the building opened for the school year and persisted for many months. Between July 2009 and February 2011, OSFC sent J&H several warranty notifications regarding the water intrusion.

{¶ 31} OSFC retained an outside company, StructureTec, to investigate the source of the leaks. Eric Seaverson, manager of StructureTec's restoration group, conducted a preliminary visual field investigation to assess deterioration and discover potential sources of the water infiltration. This preliminary investigation revealed deficient or missing through-wall flashing. Following the visual inspection, StructureTec conducted water testing to determine the capability of the through-wall flashing to divert water. When this testing revealed water intrusion, StructureTec hired a subcontractor, Western Waterproofing, to conduct exploratory destructive testing. This process involved the removal of masonry in specified areas to determine the path of water leakage. Because the destructive testing revealed through-wall flashing defects in all tested areas, StructureTec concluded that J&H had not properly installed the through-wall flashing and recommended removal and replacement of all 2,200 linear feet of through-wall flashing. StructureTec also recommended enhancements to the original design to be incorporated into the replacement. StructureTec prepared a detailed report of its findings in September 2010.

{¶ 32} Upon receipt of StructureTec's report, J&H e-mailed Bovis on October 11, 2010 and accepted responsibility for, and offered to replace at no additional cost, 270 linear feet of the through-wall flashing in specified areas. J&H maintained, however, that much of the through-wall flashing problem resulted from original design issues, not J&H's construction. Accordingly, J&H offered to remove and replace the remaining through-wall flashing only upon receipt of a mutually agreeable change order.

{¶ 33} OSFC determined that, since the destructive testing revealed problems with the through-wall flashing in all tested areas, the most prudent way to resolve the problem was to replace all 2,200 linear feet of the through-wall flashing. To that end, OSFC rejected J&H's offer and thereafter solicited public bids to remove and replace all 2,200 linear feet of the through-wall flashing. Edifice Restoration Contractors ("Edifice"), was

the successful bidder and entered into a contract for the remediation project on May 10, 2011. Edifice began the remediation project in June 2011. During the course of the remediation, John Hall, president of Edifice, noted deficiencies in the through-wall flashing in the 1,800 linear feet that was ultimately replaced. He concluded that the through-wall flashing had not been originally installed in a workmanlike manner and that remediation was necessary to repair the faulty workmanship. Edifice completed the project in August 2011.

{¶ 34} After the trial, the referee issued a decision on February 10, 2012, concluding that J&H proved its claim for breach of contract (which the referee found included the additional claims of equitable adjustment and breach of warranties) and was, therefore, entitled to judgment against OSFC in the amount of $959,232.00. That sum included $723,733.55 for labor inefficiency, $12,208.60 for home office overhead and extended general conditions, $36,035.40 for idle equipment, $27,934.24 for increased wage rate, and $159,320.21 for scope-of-work claims that are not the subject of this appeal. The referee further concluded that OSFC proved its counterclaim for breach of contract (which the referee found included the additional claim of breach of warranty) in the amount of $252,624.07. That sum included $230,201.86 for Edifice's through-wall flashing remediation work and $22,422.21 for other remediation claims that are not the subject of this appeal. After adjusting the counterclaim damages for the $72,291.40 contract balance due J&H, the referee recommended that a net award on the counterclaim of $180,332.67. Concluding that the allegations in the complaint and counterclaim arose from the same transaction or occurrence, the referee recommended that the award to J&H be offset by the award to OSFC, resulting in an award to J&H in the amount of $778,899.33, plus prejudgment interest and costs of the action. The referee found that "[i]nasmuch as the contract rate has not been stipulated, such rate shall be determined at a subsequent proceeding and the court shall thereafter issue a final judgment in this case." (Feb. 10, 2012 Referee's Decision, 39.)

{¶ 35} Both parties filed objections to the referee's decision pursuant to Civ.R. 53, as set forth in R.C. 2743.03(C). In a judgment entry issued June 6, 2012, the trial court overruled the parties' objections and adopted the referee's decision as its own. The trial court rendered judgment in favor of J&H in the amount of $778,924.33, which included

the $25.00 filing fee paid by J&H. The court also awarded prejudgment interest "to be determined at a subsequent proceeding" and held in abeyance a motion for costs filed by J&H on March 14, 2012. (June 6, 2012 Judgment Entry, 11.)

{¶ 36} By journal entry issued May 7, 2013, this court sua sponte stayed this matter pending the trial court's determination of the prejudgment-interest issue. Following a July 8, 2013 hearing and a stipulation by the parties as to prejudgment interest, the trial court, on July 25, 2013, filed a judgment entry in favor of J&H in the amount of $854,922.93, which included the $778,899.33 net award, the $25.00 filing fee paid by J&H, $68,801.43 in prejudgment interest, and court costs of $7,197.17. By entry filed July 26, 2013, this court sua sponte supplemented the record with the trial court's July 25, 2013 judgment entry and vacated the May 7, 2013 stay.

{¶ 37} OSFC appeals to this court, and J&H has asserted a cross-appeal.

{¶ 38} OSFC has set forth the following 21 assignments of error for our review:

> **Assignment of Error No. 1**
>
> The Court of Claims and Referee erred by failing [to] grant Ohio School Facilities Commission's pretrial motions to continue the trial and/or to prevent J&H Reinforcing and Structural Erectors, Inc. from presenting evidence of damages as a key piece of evidence relied upon by the Ohio School Facilities Commission, its job cost report [,] was claimed by J&H to be "inaccurate," "admittedly incomplete" and "misleading."
>
> **Assignment of Error No. 2**
>
> The Court of Claims and Referee erred by failing [to] grant Ohio School Facilities Commission's pretrial motion to dismiss J&H Reinforcing and Structural Erectors, Inc.'s claims because, on the eve of trial, J&H claimed its job cost report was "inaccurate," "admittedly incomplete" and "misleading."
>
> **Assignment of Error No. 3**
>
> The Court of Claims and Referee erred by failing to find J&H Reinforcing and Structural Errors, Inc. failed [to] exhaust its administrative remedies as required by R.C. 153.12(B).

Assignment of Error No. 4

The Court of Claims and Referee erred by awarding damages to J&H Reinforcing and Structural Erectors, Inc. when it made more money than it expected to when it was awarded a lump sum contract.

Assignment of Error No. 5

The Court of Claims and Referee erred by not following this Court's precedent for State of Ohio construction projects, *Stanley Miller Constr. Co. v. Ohio School Facilities Comm.*, 2010-Ohio-6397 (10th Dist.); *Cleveland Const. Co. v. Kent State Univ.*, 2010-Ohio-2906 (10th Dist.); as well as prior decisions of the Court of Claims[,] *Tritonservices, Inc. v. University of Cincinnati*, 2011-Ohio-7010, 2009-002324; and *Stanley Miller Constr. Co. v. Ohio School Facilities Comm.*, 2012-Ohio-3994, Court of Claims Case Nos. 2006-04351 and 2006-05632 PR.

Assignment of Error No. 6

The Court of Claims and Referee erred by awarding damages to J&H Reinforcing and Structural Erectors, Inc. when it failed to prove it was entitled to such damages.

Assignment of Error No. 7

The Court of Claims and Referee erred by awarding damages to J&H Reinforcing and Structural Erectors, Inc. as it was against the manifest weight of the evidence.

Assignment of Error No. 8

The Court of Claims and Referee erred by misapplying the terms of the contract to the facts of the case.

Assignment of Error No. 9

The Court of Claims and Referee erred by awarding damages to J&H Reinforcing and Structural Errors, Inc. when it failed to provide the contractually required notice and failed to provide notice in a timely manner.

Assignment of Error No. 10

The Court of Claims and Referee erred when they failed to enforce and give meaning to a contract amendment titled Change Order 29 which unambiguously extended the time for contract completion and where the compensation for that change order was complete – "The compensation or time extension provided by the 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 work, including but not limited to, any delays, inefficiencies, disruption or suspension, extended overhead, acceleration, and the cumulative impact of this and other change orders issues as of this date."

Assignment of Error No. 11

The Court of Claims and Referee erred by failing to find J&H Reinforcing and Structural Erectors, Inc. failed to pursue the other contractors J&H blamed for a substantial portion of its damages.

Assignment of Error No. 12

J&H Reinforcing and Structural Erectors, Inc. breached the contract in this case by failing to follow the change order procedures of the contract which govern requests for additional days or dollars to be added to a low bid, lump sum contract.

Assignment of Error No. 13

J&H Reinforcing and Structural Erectors, Inc. breached the contract in this case by failing to provide the contractually required notice of its claims.

Assignment of Error No. 14

The Court of Claims and Referee erred by awarding damages for an increased wage rate to J&H Reinforcing and Structural Erectors, Inc. when J&H failed to timely notify the Ohio School Facilities Commission of any increase in the wage rate.

Assignment of Error No. 15

The Court of Claims and Referee erred by awarding damages for an increased wage rate to J&H Reinforcing and Structural

Errors, Inc. when that increased wage rate was contemplated in agreeing to Change Order 29.

Assignment of Error No. 16

The Court of Claims and Referee erred by awarding damages for any equipment claim J&H Reinforcing and Structural Erectors, Inc. when J&H failed to prove any entitlement to such compensation.

Assignment of Error No. 17

The Court of Claims and Referee erred by awarding damages for extended general conditions to J&H Reinforcing and Structural Erectors, Inc. when J&H failed to provide the contractually required notice.

Assignment of Error No. 18

The Court of Claims and Referee erred by awarding damages for extended general conditions to J&H Reinforcing and Structural Erectors, Inc. when J&H was actually on the job less time than it expected when [it] bid the job.

Assignment of Error No. 19

The Court of Claims and Referee erred by awarding damages for home office overhead to J&H Reinforcing and Structural Erectors, Inc. when J&H failed to prove any entitlement to such compensation.

Assignment of Error No. 20

The Court of Claims and Referee erred by awarding damages to J&H Reinforcing and Structural Erectors, Inc. when it failed to prove any link between the causal factors and any amount of damages.

Assignment of Error No. 21

The Court of Claims and Referee erred by awarding damages to J&H Reinforcing and Structural Erectors, Inc. when it bid and was awarded the Contract and its labor inefficiency was the cornerstone of its claim.

{¶ 39} On its cross-appeal, J&H asserts the following three assignments of error:

> [1.] The trial court erred in not awarding J&H delay damages for the commonly known early soil delays in view of R.C. 4113.62, the OSFC's superior knowledge and constructive fraud, and the OSFC's abandonment of the Article 8 claims process.
>
> [2.] The trial court erred in reducing J&H's delay damages, including but not limited to, its labor inefficiency losses and extended home office overhead costs that were uncompensated in any change order.
>
> [3.] The trial court erred in allowing recovery on OSFC's counterclaim when OSFC breached the contract first, failed to prove its loss proximately flowed from J&H's work and failed to mitigate damages in any event.

{¶ 40} In addition to the briefs filed by J&H and OSFC, amicus curiae briefs in support of J&H have been filed by Central Ohio Chapter, Associated Builders and Contractors ("ABC"), and American Subcontractors Association and American Subcontractors of Ohio ("ASA").

{¶ 41} In its brief, ABC urges this court to revisit, and ultimately overrule, our decision in *Stanley Miller Constr. Co. v. Ohio School Facilities Comm.*, 10th Dist. No. 10AP-298, 2010-Ohio-6397. In that case, this court rejected the argument that the state's actual knowledge of the facts underlying a contractor's claim excuses the contractor's noncompliance with contractual notice provisions. We stated, "something more than actual notice on the part of the state is required to excuse a contractor from complying with its obligations regarding change-order procedures in public works contracts." *Id.* at ¶ 17. In so concluding, we relied on *Dugan & Meyers Constr. Co. v. Ohio Dept. of Adm. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687. Therein, the Supreme Court of Ohio held:

> [W]e reject [the Contractor's] argument that it was excused from complying with the specific change-order procedure for requesting extensions because the state had actual notice of the need for changes to the deadline, and therefore any failure to comply with procedure was harmless error. The record lacks evidence of either an affirmative or implied waiver by the department or OSU of the change-order procedures contained in the contract. [The Contractor] has not convinced us that its failure to request extensions was harmless to OSU. To the contrary, [the Contractor] agreed that the contract language stated that failure to provide written notice "shall

> constitute a waiver by the Contractor of any claim for extension or for mitigation of Liquidated Damages." The court of appeals correctly concluded that [the Contractor] "has not demonstrated that it was entitled to disregard its obligations under that part of the contract. * * *"

Id. at ¶ 41, quoting *Dugan & Myers Constr. Co. v. Ohio Dept. of Adm. Servs.*, 162 Ohio App.3d 491, 2005-Ohio-3810, ¶40 (10th Dist.).

{¶ 42} ABC contends that *Stanley Miller* should be overruled because it "represents an unwarranted departure from well-established contract law in Ohio." (ABC brief, 3.) In support of this proposition, ABC relies on several cases purportedly permitting actual knowledge by one of the contracting parties to satisfy contractual notice requirements imposed on another contracting party. The vast majority of these cases were decided prior to the Supreme Court of Ohio's decision in *Dugan & Meyers*, the case upon which *Stanley Miller* relied, and were effectively overruled by *Dugan & Meyers*. The cases decided after *Dugan & Meyers* are distinguishable, as they did not involve public works contracts.

{¶ 43} ABC further contends that *Stanley Miller* misconstrued the Supreme Court of Ohio's holding in *Dugan & Meyers*. ABC avers that, contrary to our holding in *Stanley Miller*, the Supreme Court did not foreclose the possibility that proof of actual notice could constitute compliance with a contractual notice provision. According to ABC, the *Dugan & Meyers* court "did not hold as a matter of law that actual notice could not constitute compliance with a contractual notice provision. Rather, the language used by the court suggests that compliance is a factual inquiry." (ABC brief, 12.)

{¶ 44} The *Stanley Miller* court did not misconstrue *Dugan & Meyers*. *Dugan & Meyers* expressly rejected the contractor's argument that it was excused from complying with contractual notice provisions because the state had actual notice of the need for changes. We do not interpret the court's statements regarding whether the state had affirmatively or impliedly waived the contractor's compliance with the specific change-order procedures set forth in the contract and whether the state was prejudiced by the contractor's failure to comply with the contractual notice provisions as suggesting that compliance with contractual notice provisions is a factual inquiry.

{¶ 45} In its brief, ASA challenges the enforceability of the claim notice provisions in the contract. ASA contends that, as the only project owner on public school construction contracts, the OSFC enjoys a monopsony, providing it the power to dictate inefficient, impossible, and unworkable contract terms. ASA maintains that, because contractors on public projects have no opportunity and no ability to negotiate contract terms, such contracts effectively constitute adhesion contracts. Contrary to ASA's assertions, the present case is not one involving an adhesion contract. J&H, a sophisticated business entity, previously had been involved in public school construction projects, had the opportunity to review the contract and be represented by counsel, and there is no evidence of compulsion or duress.

{¶ 46} ASA also challenges the multi-prime contract bidding process utilized in public construction projects in Ohio. ASA maintains that this process results in inherent scheduling conflicts between prime contractors and that, absent proper coordination by the public authority, here the OSFC and its construction manager, damages flow directly to one or more of the prime trades.

{¶ 47} It was within the General Assembly's authority to establish the system governing public school construction projects in Ohio, including the multi-prime contractor bidding process, and we find nothing unconstitutional in that system. Further, J&H, a sophisticated business entity with prior experience in public school construction projects, was undoubtedly familiar with the multi-prime contractor bidding process when it bid on the project. As noted above, J&H had the opportunity to obtain counsel and review the documentation before bidding on the project. We further note that the record contains no evidence that any of the prime contractors involved in the project brought suit against another prime contractor.

{¶ 48} Having addressed the issues raised in the amicus curiae briefs, we now consider the parties' assignments of error.

{¶ 49} OSFC's first, second, third and fourth assignments of error are interrelated and, thus, will be considered together. In these assignments of error, OSFC challenges pretrial rulings pertaining to J&H's job-costs reports.

{¶ 50} On October 14, 2011, J&H filed a motion in limine seeking to prevent OSFC from introducing evidence at trial relating to, among other things, J&H's job-costs

reports. J&H argued that these reports did not include all costs associated with the project and, therefore, did not accurately reflect J&H's true profit. J&H feared, based on OSFC's pretrial statement, that OSFC intended to use the inaccurate profit figure in the job-costs reports to argue that J&H did not suffer damage and actually made more profit than was originally bid.

{¶ 51} OSFC opposed J&H's motion in limine, and, on November 1, 2011, filed a combined motion for leave to file a summary judgment motion instanter, motion in limine, and motion to continue the trial. OSFC argued that it was entitled to summary judgment because J&H's failure to provide accurate information upon which the OSFC could evaluate J&H's claim for equitable adjustment constituted a violation of the administrative resolution process detailed in Article 8 of the contract, thereby barring J&H from filing its claims in the Court of Claims pursuant to R.C. 153.12(B). OSFC also argued it was entitled to summary judgment because J&H made a profit on the project and, therefore, suffered no damages. In its motion in limine, OSFC argued that by providing inaccurate job-costs reports, J&H was estopped from presenting any damages evidence, and that, absent damages evidence, J&H's complaint should be dismissed. Finally, OSFC sought a continuance of the trial to allow J&H an opportunity to respond to OSFC's motions.

{¶ 52} By entry filed November 3, 2011, the referee denied both parties' motions without explanation. OSFC renewed its combined motion at the commencement of trial. The referee denied the motion with the proviso that it be revisited "depending on whether the evidence would show there is any prejudice to OSFC." (Tr. 23.)

{¶ 53} Civ.R. 56(A) and (B) provide that, if an action has been set for pretrial or trial, the parties may move for summary judgment only with leave of court. A trial court's decision to grant or deny a motion for leave to file a motion for summary judgment is reviewed for an abuse of discretion constituting prejudicial error. *Cooper v. Valvoline Instant Oil Change,* 10th Dist. No. 07AP-392, 2007-Ohio-5930, ¶ 8. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219 (1983).

{¶ 54} A motion in limine is a procedural vehicle by which the movant requests that the court limit or exclude evidence that the movant believes to be improper and is made in advance of the actual presentation of the evidence to the trier of fact, usually prior to trial. *State v. Johns,* 10th Dist. No. 11AP-203, 2011-Ohio-6823, ¶ 30. Accordingly, because a trial court's decision on a motion in limine is a ruling to admit or exclude evidence, our standard of review is whether the trial court committed an abuse of discretion that amounted to prejudicial error. *Id.*

{¶ 55} A trial court has broad discretion when ruling on a motion for a continuance, and a reviewing court will not reverse a decision to grant or deny a continuance absent an abuse of discretion. *Townsend v. Ohio Dept. of Transp.*, 10th Dist. No. 11AP-672, 2012-Ohio-2945, ¶ 29. In ruling upon a motion for a continuance, the trial court balances its interest in controlling its docket and the public's interest in an efficient dispatch of justice with the possibility of prejudice to the movant. *Id.*

{¶ 56} We find no abuse of discretion in the referee's denial of OSFC's combined motion, as OSFC suffered no prejudice. As noted above, the referee also denied J&H's motion seeking to exclude the admission of its job-costs reports. Thus, the job-costs reports were at issue at trial. Both Don Hadsell, J&H's owner, and David Carothers, J&H's CPA, testified that J&H's job-costs reports did not include all costs associated with the project. In addition, Calvey, J&H's expert, and Kelly Roeschke, OSFC's expert, opined extensively about J&H's job costs, including the job-costs reports, both via testimony and in their expert reports. As the referee noted, the experts' competing testimonies regarding the job-costs reports went to the reliability and credibility of J&H's damages claim. Moreover, OSFC's argument that J&H suffered no damages because it made more profit on the project than it anticipated in its bid is no defense. Finally, we note there was conflicting evidence as to whether J&H made a profit on the project. Although OSFC's evidence established that J&H made a profit, J&H's evidence established otherwise. Carothers testified J&H suffered a net operating loss on the project. For the foregoing reasons, OSFC's first, second, third and fourth assignments of error are overruled.

{¶ 57} Having resolved the arguments as to pretrial issues, we now turn to the remaining issues in the case. To that end, we first address OSFC's tenth assignment of

error, as resolution of this issue bears upon our treatment of OSFC's remaining assignments of error, as well as J&H's first and second assignments of error.

{¶ 58} In its tenth assignment of error, OSFC contends the trial court erroneously interpreted the language of CO 29. The construction and interpretation of written contracts involves issues of law reviewed de novo by appellate courts. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d. 241 (1978), paragraph one of the syllabus. The purpose of contract construction is to realize and give effect to the parties' intent. *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244 (1974), paragraph one of the syllabus. "[T]he intent of the parties to a contract resides in the language they chose to employ in the agreement." *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 635, 638 (1992). When contract terms are clear and unambiguous, courts will not, in effect, create a new contract by finding an intent which is not expressed in the clear language utilized by the parties. *Alexander* at 246.

{¶ 59} CO 29 provides, in pertinent part, under the heading "Description/Justification":

> Additional costs associated with revising the Contract Completion Date to July 15, 2008, which includes General Conditions costs of $73,251.87 and an Overtime Allowance of $40,227.17.
>
> The Overtime Allowance is a Not to Exceed amount for overtime work which shall be pre-approved by Bovis Lend Lease and tracked via Work Orders signed daily.
>
> This Change Order extends the Completion Date for the Project from March 17, 2008, to July 15, 2008. Wheelersburg Local School District Board of Education and The Ohio School Facilities Commission shall not assert, and hereby waive, any claim for liquidated damages as a result of the completion of the K-12 School Project by July 15, 2008.

(Joint Exhibit G-29.)

{¶ 60} CO 29 also includes the following boilerplate language which appeared in all change orders issued on the project:

> 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 to the

> work, including but not limited to, any delays, inefficiencies, disruption or suspension, extended overhead, acceleration, and the cumulative impact of this and other change orders issues [sic] as of this date.

(Joint Exhibit G-29.)

{¶ 61} OSFC contends that this boilerplate language means that the sums paid to J&H pursuant to CO 29 were intended as full and complete satisfaction of all claims J&H may have had for additional compensation, including claims arising from the early site delay, the untimely delivery of the AHUs, and delayed electrical/mechanical predecessor activities. We disagree. The express language of CO 29 indicates that it was intended only to compensate J&H for future costs related to general conditions and overtime associated with the contract extension from March 17 to July 15, 2008. As the referee determined, the "Description/Justification" component of CO 29 set forth the relevant "change of work" forming the basis for compensation to J&H and "the phrase 'in connection with this change to the work' operates as an express limitation upon the boilerplate language. In other words, the term 'full and complete satisfaction' used in the boilerplate is limited to the change to the work specified in the 'description/justification.' " (Referee's Decision, 7.) OSFC's construction of CO 29 requires that the two components of the contract be interpreted independently; that is, that the boilerplate "full and complete satisfaction" phrase be given effect without regard to how the "change to the work" is defined elsewhere in the contract. As noted by the referee, such a construction runs afoul of the fundamental principle of contract interpretation that "[i]n determining the parties' intent, a court must read the contract as a whole and give effect, if possible, to every part of the contract." (Referee's Decision, 7, citing *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361-362 (1997).) The tenth assignment of error is thus overruled.

{¶ 62} Having determined that CO 29 does not bar J&H from seeking recovery of costs associated with other project delays and inefficiencies, we now address the parties' arguments concerning whether J&H timely asserted it claims, whether OSFC was contractually obligated to pay such claims, and whether J&H proved the existence and amount of its damages.

{¶ 63} OSFC's fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, and thirteenth assignments of error and J&H's first assignment of error are interrelated, and we will address them together. In its assignments of error, OSFC argues that the trial court erred in finding that J&H timely and properly asserted its delay and inefficiency damages claims occasioned by the late delivery of the AHUs and the post-CO 29 delays by the electrical and mechanical contractors in completing their predecessor activities. OSFC contends that J&H waived its right to an equitable adjustment of the contract as to these claims by failing to comply with the requirements set forth in Articles 4, 6 and 8. J&H argues in response that it complied with these contractual provisions, and, even if it did not strictly comply, OSFC waived strict compliance by its own actions, including its failure to comply with Article 8. In its assignment of error, J&H contends the trial court erred in finding that it did not timely and properly assert its delay and inefficiency damages claim related to the early site soil-stabilization issues. OSFC maintains that the trial court properly denied J&H's claim in that regard.

{¶ 64} Several provisions of the contract are germane to these issues. Article 4 addresses contractor responsibilities. Article 6 pertains to contractor requests for extensions of time. Article 8 describes the dispute resolution procedure.

{¶ 65} As to Article 4, Section 4.1.2 addresses contractor delays attributable to other contractors, and provides that "[t]he sole remedy provided by the School District Board and the Commission for any injury, damage or expense resulting from * * * delay caused by or between Contractors or their agents and employees shall be an extension of time in which to complete the Work." Section 4.1.2.1 provides that, if one contractor delays another contractor's work and damages, injury, or expense result, the responsible contractor "shall be responsible for such damage, injury or expense." Section 4.1.2.2 states that "[t]he intent of [Section] 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 a third party beneficiary of the Contract."

{¶ 66} Regarding Article 6, Section 6.2 pertains to extensions of time. Section 6.2.1 states that, if the contractor is delayed in the progress of its work by any one of the several causes identified in Sections 6.2.1.1, 6.2.1.2, 6.2.1.3, the time for contract completion shall be extended for such reasonable time as the construction manager, the architect, the

school district, and the OSFC determine. Section 6.2.1.1 identifies as causes for extension: suspension of the work for which the contractor is not responsible; abnormal inclement weather conditions; labor disputes; and fire or flood. Section 6.2.1.2 specifies an act of omission of another contractor performing adjoining or contiguous work as a cause for extension. Section 6.2.1.3 identifies as a cause for extension any unforeseeable cause beyond the control and without fault or negligence of the contractor.

{¶ 67} Section 6.4 governs contractor requests for extensions of time. Section 6.4.1 provides:

> 6.4.1 Any request by the Contractor for an extension of time shall be made in writing to the Construction Manager 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 Construction Manager shall constitute a waiver by the Contractor of any claim for extension, damages or mitigation of Liquidated Damages, to the fullest extent permitted by law.

(Joint Exhibit C-35.)

{¶ 68} Further, Section 6.4.2 requires such request to include the following information: the nature of the delay (Section 6.4.2.1); the identification of persons, entities and events responsible for the delay (Section 6.4.2.2); the date (or anticipated date) of commencement of the delay (Section 6.4.2.3); the activities on the construction schedule which may be affected by the delay, or new activities created by the delay and the relationship with existing activities (Section 6.4.2.4); the anticipated duration of the delay (Section 6.4.2.5); the specific number of requested extension days (Section 6.2.4.6); and the recommended action to avoid or minimize any future delay (Section 6.2.4.7).

{¶ 69} Regarding Article 8, Section 8.1.1 sets forth the procedure for requesting an equitable adjustment to the contract and provides:

> Any request for equitable adjustment of Contract shall be made in writing to the Architect, through the Construction Manager, and filed prior to Contract Completion, provided the Contractor notified the Architect, through the Construction Manager, no more than ten (10) days after the initial occurrence of the facts which are the basis of the claim. To the fullest extent permitted by law, failure of the Contractor to timely provide such notice and a contemporaneous statement of damages shall constitute a waiver by the Contractor of any

> claim for additional compensation or for mitigation of Liquidated Damages.

(Joint Exhibit C-42.)

{¶ 70} Further, Section 8.1.2 requires the claim to include the following information: the nature and amount of the claim, which the contractor must certify before a notary to be a fair and accurate assessment of the contractors' damages (Section 8.1.2.1); the identification of the persons, entities, and events responsible for the claim (Section 8.1.2.2); the activities on the construction schedule affected by the claim or new activities created by any delay and the relationship with existing activities (Section 8.1.2.3); the anticipated duration of any delay (Section 8.1.2.4); and the recommendations to prevent any future delay (Section 8.1.2.5). In addition, Section 8.2.2 requires the construction manager to conduct a meeting with the contractor within 30 days after receipt of a claim filed pursuant to Section 8.1.1.

{¶ 71} We first consider J&H's claim for additional compensation due to the delay caused by the early site soil-stabilization issues. As noted above, J&H encountered problems with unstable soil conditions immediately after Bovis issued the notice to proceed on October 2, 2006. These conditions delayed J&H's commencement of construction activities into the winter months of late 2006/early 2007.

{¶ 72} On November 5, 2007, Rollins wrote to Palonis requesting an extension of the contract completion date to account for the delay caused by the soil-stabilization issues. The referee found that the November 5, 2007 letter did not satisfy the notice requirements of Section 6.4.1 of the contract, as it was issued well after the ten-day deadline set forth in that provision. The referee found the failure of notice under Section 6.4.1 to be fatal to J&H's claim for an equitable adjustment pursuant to Section 8.1.1. Having so found, the referee concluded that "the Contract shall not be equitably adjusted to account for extra costs incurred by J&H due to the unanticipated soil conditions." (Referee's Decision, 12.)

{¶ 73} J&H contends the referee erred in this regard and advances several supporting arguments. J&H first asserts that, as applied to the soil-stabilization delay issue, Sections 6.4.1 and 8.1.1 are unenforceable pursuant to R.C. 4113.62(C)(1), which provides, in relevant part:

> Any provision of a construction contract * * * that waives or precludes liability for delay during the course of a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, or that waives any other remedy for a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, is void and unenforceable as against public policy.

{¶ 74} J&H maintains that the delay attributed to the soil-stabilization issue was proximately caused by OSFC's "failure to act," in that its bid documents did not properly show the poor soil conditions or include a plan to address them. J&H raised this argument in its objections to the referee's decision, and the trial court rejected it, stating "[t]here is no convincing evidence in this case to support the conclusion that OSFC either knew or should have known about the poor soil conditions prior to the discovery of such conditions at the commencement of the project. Under such circumstances, R.C. 4113.62(C)(1) is not applicable, which means that Articles 6 or 8 of the parties' agreement are valid and enforceable as they pertain to the soil conditions claim." (Judgment Entry, 5.)

{¶ 75} J&H claims that *Sherman R. Smoot Co. of Ohio v. Ohio Dept. of Adm. Serv.*, 136 Ohio App.3d 166 (10th Dist.2000), stands for the proposition that "when a bidder on a public contract encounters differing site conditions * * * the contractor [is] entitled to recover his additional costs, even when the contract contained 'disclaimer' language." (J&H Cross-Appeal Brief, 6.) J&H notes that *Smoot* was decided prior to the enactment of R.C. 4113.62 and contends that "[i]f the contractor in *Smoot* is permitted to recover the differing site conditions * * * certainly entitlement is permitted subsequent to the enactment of R.C. 4113.62." (J&H Cross-Appeal Brief, 6.) J&H's reliance on *Smoot* is misplaced, however. That case involved a claim by a contractor under a site package seeking additional compensation for differing site conditions that necessitated the use of different construction procedures. In contrast, J&H's claim was not made under its site package; rather, it was made under the general trades package and concerns the allocation of damages flowing from delay and inefficiencies in completion of the construction project. Thus, we agree with the trial court that R.C. 4113.62(C)(1) is not

applicable, and Articles 6 and 8 are valid and enforceable as they pertain to J&H's soil-delay claim.

{¶ 76} J&H next contends that, even if it is not entitled to relief under R.C. 4113.62, the referee incorrectly found that it failed to satisfy the notice requirements set forth in Articles 6 and 8. J&H concedes that it encountered the soil problem immediately after OSFC issued the notice to proceed on October 2, 2006. Pursuant to Section 6.4.1, J&H was required to provide written notice of a request for extension of time no more than ten days after the initial occurrence of the condition for which it claimed entitlement to an extension; thus, J&H's notice was due no later than October 12, 2006. J&H further concedes that it did not provide written notice until November 5, 2007, nearly one year after the ten-day deadline imposed by Section 6.4.1.

{¶ 77} OSFC argues that J&H waived its right to its soil-stabilization delay claim by failing to timely request an extension of time pursuant to Section 6.4.1. As set forth above, Section 6.4.1 provides that failure to timely provide written notice of a request for extension of time constitutes a waiver of any claim for extension or damages. OSFC further argues that J&H's failure to provide timely written notice pursuant to Section 6.4.1 constitutes a waiver of its claim for equitable adjustment of the contract as to the soil-stabilization delay pursuant to Article 8 of the contract. As set out above, Section 8.1.1 provides that any request for equitable adjustment of the contract must be preceded by written notice to the construction manager "no more than ten (10) days after the initial occurrence of the facts which are the basis of the claim." As noted above, it is undisputed that J&H did not provide timely written notice of the facts upon which it based its soil-stabilization delay claim.

{¶ 78} J&H contends, however, that, because OSFC had actual knowledge of the soil-stabilization problems and the resulting delay, it was not prejudiced by the lack of timely written notice. J&H's argument is unavailing, however, in light of this court's decision in *Stanley Miller*. As noted above, that case held that "something more than actual notice on the part of the state is required to excuse a contractor from complying with its obligations regarding change-order procedures in public works contracts." *Id.* at ¶ 17, citing *Dugan & Myers.* Pursuant to *Stanley Miller*, even assuming OSFC had actual

notice of the unstable soil conditions, such fact does not excuse J&H from complying with its contratual obligations. J&H's first assignment of error is overruled.

{¶ 79} OSFC's assignments of error challenge the trial court's conclusions with regard to the late delivery of the AHUs and the post-CO 29 delays and inefficiencies. The AHUs were scheduled to be delivered in June or July 2007; they were not delivered until September 26, 2007. On August 28 and November 5, 2007, J&H provided Bovis written notice of its requests for extensions of time related to the late delivery of the AHUs. The referee concluded that these notices satisfied the requirements of Article 6. More specifically, the referee rejected OSFC's contention that the notices were untimely pursuant to Article 6.4.1 because they should have been sent in June or July when the AHUs were scheduled for delivery, stating:

> This argument seems specious in light of the fact that the delays of which J&H complains did not occur on the first day the AHUs were late. Rather, the extra costs accrued over time as J&H gained knowledge that the scheduled work activities on a particular date would be delayed and that out of sequence work would subsequently need to be performed. In fact, the evidence shows that the impact of the AHU delays first occurred in early August 2007, but that J&H did not form a belief that such delays would entitle it to a specific extension until later that month, shortly before Rollins authored his August 28, 2007 letter.

(Referee's Decision, 12.)

{¶ 80} OSFC contends that the evidence does not support the referee's finding that J&H did not realize it would need a time extension until shortly before its August 28, 2007 letter. We disagree. Rollins testified that the delivery of the AHUs was promised throughout the summer of 2007 and that J&H did not realize the impact of the September delivery of the AHUs until shortly before he sent the August 28, 2007 letter. Rollins stated as much in the letter: "We also reserve the opportunity to revisit the impact of the delayed arrival and installation of the AHUs will have on our contract once this equipment does arrive and is installed." (Plaintiff's Exhibit 102.) Further, Bovis's August 20, 2007 project progress meeting minutes first confirmed that the AHUs would be set in September. This evidence establishes that the August 28, 2007 letter was timely, having been sent within ten days of this confirmation.

{¶ 81} Moreover, we agree with the referee that OSFC waived its right to strict compliance with the notice requirements of Articles 6 and 8 with regard to the AHUs due to its own failure to comply with Article 8. "In short, the court finds that J&H substantially complied with Article 8 both in the submission and substance of its claims for delays and inefficiencies arising from the untimely delivery of the AHUs." (Referee's Decision, 17.)

{¶ 82} We lastly consider issues relating to J&H's post-CO 29 claims. After CO 29 was executed, Rollins notified Palonis in a series of letters written between February and June 2008 that J&H was experiencing delays in performing its work in accordance with Bovis's February 28, 2008 revised schedule due to predecessor activities of electrical and mechanical contractors not being completed. Rollins requested extensions of the contract and associated additional costs. Bovis rejected J&H's requests on grounds that J&H did not comply with Article 6.

{¶ 83} OSFC first contends the referee erred in failing to find that J&H should have pursued the mechanical and electrical contractors, and not OSFC, for the delay and inefficiency damages those contractors caused J&H. OSFC correctly notes that the evidence adduced at trial establishes that J&H never sought compensation from either contractor. Citing contract Sections 4.1.2, 6.2.1., and 6.3.1, OSFC avers that "[w]hen other contractors are to blame, J&H's only recourse was additional time." (OSFC brief, 21.) To be sure, Section 4.1.2 provides that a contractor's only recourse for delay caused by another contractor is an extension of time, and Section 4.1.2.1 states that a contractor causing delay in another contractor's work is responsible for damages resulting from the delay. In addition, Section 6.2.1.2 requires extension of a contract when the contractor is delayed due to an act or omission of any other contractor having a contract for adjoining or contiguous work. Section 6.3.1 provides that any extension of time granted under Section 6.2 is the contractor's sole remedy and the contractor is not entitled to additional compensation for any delay. OSFC contends that "[s]ince the only remedy available was an extension of time and J&H never sought compensation from the responsible contractors or even change orders for the delays it claims were caused by the electrical and mechanical contractors, J&H is entitled to no compensation." (OSFC brief, 22.)

{¶ 84} As the referee noted, Section 6.3.1 does not apply because OSFC did not issue the schedule extension J&H requested. Furthermore, Sections 4.1.2 and 4.1.2.1 apply to limit a contractor's remedies only where a contractor's delay is caused by another contractor. R.C. 4113.62 invalidates contractual provisions that preclude liability for delay when the delay is caused by the owner's act or failure to act. In the present case, the referee found, and we agree, that the primary cause of the delay in J&H's work was caused by Bovis's use of "project override" in the scheduling, which caused the stacking of trades on the project and resulted in the delays and inefficiencies experienced by J&H. The referee, thus, did not err in failing to find that J&H should have pursued the mechanical and electrical contractors, and not OSFC, for its post-CO 29 delay and inefficiency damages.

{¶ 85} OSFC also contends the referee erred in finding that J&H provided the contractually required notice of its post CO-29 claims. In written responses to J&H's numerous letters, Bovis officials averred that J&H's letters did not comply with Article 6 of the contract and eventually directed J&H to cease writing. However, Bovis issued 72-hour notices to several of its other prime contractors, acknowledging receipt of J&H's "notification of delay" and admonishing them that they would be responsible for any impact on J&H arising from work related to their contracts. Further, Bovis officials exchanged in-house e-mails discussing their intention that the 72-hour notices would cast J&H in a bad light with the other contractors. The referee rejected OSFC's contention that J&H's letters were noncompliant with Article 6 and, thus, ineffective in preserving J&H's claims for post-CO 29 delays and inefficiencies. Specifically, the referee found that "the correspondence between and among Bovis employees, demonstrate[s] a lack of good faith and fair dealing by Bovis and OSFC with respect to J&H." (Referee's Decision, 14.) The referee further found that "OSFC's insistence upon strict compliance with Contract notice requirements, was nothing more than a strategy employed by OSFC and Bovis to prevent J&H from filing a claim." (Referee's Decision, 14.) The referee concluded that OSFC's conduct constituted a waiver of strict compliance with the notice requirements.

{¶ 86} We find that J&H provided the contractually required notice. Without informing J&H or the other prime contractors, Bovis manipulated the schedule by employing the "progress override" function, which removed the schedule's critical path

logic ties, preventing J&H from being able to full identify and quantify the impact of the project's delays. Further, we agree with the referee that Bovis's responses to J&H's letters and the communications among Bovis employees demonstrates a lack of good faith and fair dealing, and that insistence upon strict compliance with Article 6 was merely a strategy employed by Bovis and OSFC to prevent J&H from filing a claim.

{¶ 87} Finally, we agree with the referee that OSFC waived its right to strict compliance with the notice requirements of Articles 6 and 8 with regard to the post-CO 29 claims due to its own failure to comply with Article 8. As the referee observed, "it is ironic that OSFC asserts a contract defense based upon the alleged failure of J&H to strictly comply with the requirements of Article 8, when the evidence establishes that OSFC completely failed to comply with the Article 8 meeting requirement and claims process notwithstanding eleven such requests by J&H. In short, the court finds that J&H substantially complied with Article 8 both in the submission and substance of its claims for delays and inefficiencies arising from the untimely delivery of the AHUs and from the 2008 impacts, including the unrealistic and unworkable schedule." (Referee's Decision, 17.)

{¶ 88} For the foregoing reasons, OSFC's fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, and thirteenth assignments of error are overruled.

{¶ 89} Because OSFC's remaining assignments of error and J&H's second assignment of error challenge various aspects of the trial court's damages award on J&H's complaint, we shall address them together.

{¶ 90} OSFC first challenges the award to J&H for increased wage rate. OSFC initially contends J&H waived its claim for increased wage rate because its only notice regarding such a claim was an October 6, 2008 letter from Rollins to Palonis. OSFC asserts that such notice was untimely because both documentary and testimonial evidence established June 1, 2008 as the effective date of the wage increase, and J&H had notice of the June 1, 2008 increase as of May 13, 2008. However, as stated above, we agree with the referee that OSFC waived its right to strict compliance with the notice requirements of Articles 6 and 8 with regard to any post-CO 29 claims due to its own failure to comply with Article 8.

{¶ 91} OSFC also contends that CO 29 covered any wage-rate increase impacts from June 1 through July 15, 2008. As noted above, the express language of CO 29 indicates that it was intended only to compensate J&H for future costs related to extended general conditions and overtime associated with the contract extension from March 17 to July 15, 2008. We agree with the referee that CO 29 was not intended to cover wage-rate increases.

{¶ 92} OSFC next challenges the damage award for idle equipment. The referee determined that J&H was entitled to additional compensation for idle equipment associated with the late delivery of the AHUs. The referee properly rejected OSFC's argument that J&H did not provide timely notice of this claim, having already determined that J&H had timely notified OSFC of its delay claims related to the late delivery of the AHUs and that Article 6 did not require specific notification of either the existence or amount of idle equipment costs associated with the delay.

{¶ 93} OSFC also contests the amount of the idle-equipment award. OSFC maintains that J&H provided no reliable evidence establishing exactly how much of, or for how long, its equipment was idle during the AHU delay period. Citing J&H's poor record-keeping regarding the equipment it maintained on the site and Calvey's failure to point to any specific records documenting the value of J&H's claim, the referee rejected J&H's claim that it was entitled to $271,850.17 for idle equipment. Instead, the referee relied on the testimony of OSFC's expert, Roeschke, who stated that he "could see" (figuratively) J&H's scaffolding and a power lift sitting idly on the site for "a couple extra months" due to the late delivery of the AHUs. (Tr. 1696.) Based upon Roeschke's testimony and Calvey's estimated cost of $600.59 per day for idle equipment, the referee found that J&H had established entitlement of additional compensation for idle equipment for 60 days at the rate of $600.59 per day for a total of $36,035.40. OSFC contends that Roeschke's testimony is too speculative to establish with reasonable certainty that J&H's equipment was idle for 60 days during the AHU delay period.

{¶ 94} "[A] party seeking damages for breach of contract must present sufficient evidence to show entitlement to damages in an amount which can be ascertained with reasonable certainty." *Tri-State Asphalt Corp. v. Ohio Dept. of Transp.*, 10th Dist. No. 94API07-986 (Apr. 11, 1995). "Contract damages must be shown with certainty and not

be left to speculation." *Sampson Sales, Inc. v. Honeywell, Inc.*, 8th Dist. No. 51139 (Dec. 18, 1986).

{¶ 95} Whether J&H's equipment remained on the job site because of OSFC's delay was a question of fact, and such matters are best left to the trier of fact. See *Complete Gen. Const. Co. v. Ohio Dept. of Trans.*, 94 Ohio St.3d. 54, 62 (2002). We presume the referee's findings of fact are correct, as the referee had the opportunity to observe Roeschke and determine his credibility. We, thus, defer to the referee's resolution of this issue.

{¶ 96} OSFC next challenges the award for extended general conditions. At trial, J&H claimed it was entitled to an award for extended general conditions from July 15 through September 29, 2008. The referee found that J&H only was entitled to extended general conditions for the 20-day period between July 15 and August 4, 2008, the date the project was substantially completed and Wheelersburg took occupancy of the building.

{¶ 97} OSFC first asserts J&H waived this claim by failing to provide the contractually required notice. We have previously rejected OSFC's notice argument, and we do so again.

{¶ 98} OSFC further contends that J&H was not entitled to any additional compensation for extended general conditions because it completed the project in less time than it estimated in its bid documents. According to OSFC, in its bid documents, J&H estimated its general conditions at 21 months. Work on the project began on December 26, 2006; 21 months from December 26, 2006 was September 26, 2008. Substantial completion of the project occurred on August 4, 2008, more than one-and-a-half months before any claim for extended general conditions was viable.

{¶ 99} OSFC's argument necessarily requires that the general conditions time period set forth in J&H's bid documents eclipses the time period for completion identified in the contract. Such an argument overlooks Section 6.1.1.1 of the contract, which provides that "the Notice to Proceed shall establish the date for completion of the Work." The notice to proceed indisputably established March 17, 2008 as the project completion date. CO 29 extended the contract completion date to July 15, 2008. The contract and the subsequent change order to the contract (i.e. CO 29) established the contract duration and completion date, not J&H's internal bid documents. Because substantial completion

of the project did not occur until August 4, 2008, J&H was entitled to additional compensation for extended general conditions for the 20-day period between that date and the revised contract completion date of July 15, 2008. The referee did not err in so finding.

{¶ 100} Both OSFC and J&H challenge the damage award for home office overhead. Home office overhead is the most significant of the indirect costs incurred in a construction project. *Complete Gen. Const.* at 57. Indirect costs consist of expenses involved in generally running a project, not attributable to any one project. *Id.* Home office overhead costs "typically include salaries of executive or administrative personnel, general insurance, rent, utilities, telephone, depreciation, professional fees, legal and accounting expenses, advertising, and interest on loans." *Id.*

{¶ 101} As noted by the referee, J&H maintained at trial that it was entitled to additional compensation for 196 days of home office overhead incurred during the extended period of time it was working on the project; 120 days incurred prior to CO 29 and 76 days incurred thereafter. J&H asserted that the daily rate of compensation for the home office overhead should be set at $1,807.44, attested to by Calvey to be derived from the HOOP formula set forth in Ohio Department of Transportation ("ODOT") contracts.

{¶ 102} The referee found that the $73,251.87 agreed to by the parties in CO 29 for the extended general conditions was intended to include and pay for any additional home office overhead incurred through July 15, 2008. The referee further found that J&H was entitled to additional compensation for home office overhead for the 20-day period between July 15 and August 4, 2008, at a daily rate of $610.43, which was calculated by dividing the $73,251.87 compensation of CO 29 by the 120-day contract extension.

{¶ 103} OSFC contends that J&H is not entitled to any damages for home office overhead. OSFC insists that home office overhead may only be calculated using the *Eichleay* formula. The *Eichleay* formula is an equation employed by federal courts in calculating home office overhead attributable to owner-caused delay. *Complete Gen. Constr.* at 57. However, an owner-caused delay in construction does not necessarily lead to an award of damages for home office overhead:

> Before the *Eichleay* formula may be applied, the contractor must demonstrate two important elements in order to establish a prima facie case for the award of damages. First,

> the contractor must demonstrate that it was on "standby." * * * 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.
>
> The second element in a prima facie case is that the contractor must prove that it was unable to take on other work while on standby. * * * That is, the contractor must show that the uncertainty of the duration of the delay made it unable to commit to replacement work on another project. Impracticability, rather than impossibility, of other work is the standard, and the contractor is entitled to damages " '*only* if its inability to take on additional work results from its standby status, *i.e.*, is attributable to the government.' "

(Internal citations omitted.) (Emphasis sic.) Id. at 58-59.

{¶ 104} The Supreme Court continued:

> The *Eichleay* formula goes nowhere without causation. A contractor may recover only if there is an *owner-caused* construction delay. Moreover, the "standby" character of the delay must also be caused by the owner, and must prevent the contractor from finding replacement projects to cover the overhead.

(Emphasis sic.) *Id.* at 60.

{¶ 105} OSFC contends that J&H is not entitled to damages under the *Eichleay* formula because J&H failed to establish a prima facie case for such an award. More particularly, OSFC argues that J&H's evidence established that its work was never suspended and that it was never unable to bid on other projects. OSFC further contends that J&H could not recover under the *Eichleay* formula because the post-CO 29 delays were caused by other prime contractors, not OSFC.

{¶ 106} OSFC's contentions regarding the *Eichleay* formula are unavailing, as use of the *Eichleay* formula is discretionary. In *Complete Gen. Constr.*, the court expressly stated, "[w]e do not find that the *Eichleay* formula is the exclusive manner of determining unabsorbed home office overhead." *Id.* at 55. Indeed, the court held in the syllabus that "[t]he *Eichleay* formula, modified for use in Ohio courts, is *one way* of determining

unabsorbed home office overhead damages in public construction delay cases." (Emphasis added.) *Id.* at syllabus. Pursuant to *Complete Gen. Constr.*, the referee acted within its discretion in applying a formula other than the *Eichleay* formula in calculating home office overhead damages.

{¶ 107} Having dispensed with OSFC's argument, we now address J&H's contentions regarding the home office overhead award. J&H first contends the referee erred in finding that CO 29 covered any additional home office overhead incurred through July 15, 2008. J&H maintains that CO 29's reference to "extended general conditions" includes only field-office overhead, not home office overhead. Addressing this issue, the trial court stated, "[w]hile the court agrees that there is a distinction between field overhead and [home office overhead], the language employed in CO 29 does not make such a distinction." (Judgment Entry, 6.) We agree with the trial court and, thus, conclude that the referee properly determined that CO 29 covered any additional home office overhead incurred through July 15, 2008.

{¶ 108} J&H next contends the referee erred in using the per diem rate of $610.43 in calculating damages for home office overhead incurred between July 15 and August 4, 2008. According to J&H, the referee should have used the per diem rate of $1,807.44 derived from the HOOP formula set forth in ODOT contracts. As noted above, however, *Complete Gen. Constr.* permits a court discretion in calculating damages for home office overhead. We find the referee's use of the per diem rate from CO 29 to be reasonable under the facts of this case.

{¶ 109} Finally, both parties contest the damages award for labor inefficiencies. Both essentially contend the award is against the manifest weight of the evidence.

{¶ 110} Civil judgments that are "supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co,* 54 Ohio St.2d 279 (1978), syllabus. An "appellate court should not substitute its judgment for that of the trial court when there exists * * * competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge." *Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80 (1984); *see also Myers v. Garson,* 66 Ohio St.3d 610 (1993) (reaffirming the reasoning of *Seasons Coal,* and

"hold[ing] that an appellate court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court").

{¶ 111} When considering whether a civil judgment is against the manifest weight of the evidence, an appellate court is guided by a presumption that the findings of the trial court are correct. *Seasons Coal Co.* at 79-80. In *Seasons Coal*, the Supreme Court of Ohio explained:

> The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.

Id. at 80.

{¶ 112} In the present case, both parties presented expert testimony, along with detailed reports prepared by those experts, pertaining to the calculation of damages for labor inefficiencies. Both experts agreed that the "measured mile" analysis is the preferred method of calculating labor inefficiencies, and both employed that method in their calculations. However, the experts offered differing opinions as to the extent and duration of any labor inefficiencies. At trial, the parties thoroughly challenged the calculations and opinions set forth by the experts. The referee, a construction expert appointed by the Supreme Court of Ohio, considered the experts' competing reports and testimony and set forth a detailed and comprehensive analysis of the labor inefficiencies claims. The trial court found the referee's approach to the determination of the extent and duration of labor inefficiencies "reflects careful deliberation based upon all of the relevant evidence," and concluded that the referee's findings "are supported by the greater weight of the evidence." (Judgment Entry, 8.)

{¶ 113} Upon review of the record, we agree with the trial court that competent, credible evidence supported the referee's findings regarding the damage award for labor inefficiencies. This court will not disturb such findings as being against the manifest weight of the evidence.

{¶ 114} For the foregoing reasons, OSFC's fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-first assignments of error, as well as J&H's second assignment of error, are overruled.

{¶ 115} In its third assignment of error, J&H contends the trial court erred in awarding OSFC damages on its counterclaim for breach of contract arising from J&H's defective installation of the through-wall flashing. J&H asserts several sub-arguments under this assignment of error, which we will consider in turn.

{¶ 116} J&H first contends that design deficiencies by TSHD contributed to the problems with the through-wall flashing, and, therefore, J&H should not be held responsible for all costs of the remediation work performed by Edifice. Competent, credible evidence adduced at trial establishes that the water intrusion was caused by the defectively installed through-wall flashing and not by design deficiencies. Seaverson testified that as part of the evaluation process, he reviewed the design plans and determined that they included sufficient detail demonstrating proper through-wall flashing installation to prevent water leakage. Although he acknowledged some design deficiencies with the parapet walls, which could potentially allow water infiltration, he averred that properly installed through-wall flashing would have diverted any water and prevented leakage. Further, the referee determined that, to the extent the remediation work represented an upgrade or enhancement to the original through-wall flashing system, J&H was not obligated to pay for any resulting extra costs.

{¶ 117} J&H next contends OSFC failed to prove that the need to replace the through-wall flashing proximately resulted from J&H's defective work. Competent, credible evidence adduced at trial establishes that the water intrusion was caused by the defectively installed through-wall flashing. Both StructureTec's Seaverson and Edifice's Hall attributed the water leakage to construction-related defects in the installation of the through-wall flashing throughout the building. In addition, J&H pieces together snippets of the referee's decision to contend that the referee did not find that the water leaks were due solely to J&H's workmanship. J&H quotes the referee's recitation of Seaverson's testimony that movement of the parapet walls could have caused the water intrusion and connects that averment to the referee's later statement that "the fact remains that J&H failed to install the flashing system in a workmanlike manner regardless of the cause of the leaks." (Referee's Decision, 33-34.)

{¶ 118} We note that Seaverson averred that properly installed through-wall flashing would have diverted water intrusion resulting from problems with the parapet

walls and prevented water leakage. Moreover, J&H fails to acknowledge the referee's specific finding that "the weight of the evidence convinces the court that J&H did not install the specified flashing in a workmanlike manner. Thus, the only reasonable conclusion to be drawn from the evidence is that J&H breached the Contract with OSFC and that OSFC is entitled to damages." (Referee's Decision, 33.)

{¶ 119} Next, J&H argues that OSFC breached its duty to mitigate its damages by denying J&H the opportunity to replace 270 linear feet of flashing at its own cost and by rejecting J&H's offer to replace the entire through-wall flashing package at additional cost. J&H contends the obligation to mitigate included OSFC's contractual and statutory obligation to provide J&H a reasonable opportunity to cure any defects in the work.

{¶ 120} The referee concluded, and we agree, that OSFC did not unfairly deny J&H the opportunity to repair the through-wall flashing. In particular, the referee noted that J&H was notified of the problems with the through-wall flashing but was unsuccessful in its repair efforts, that J&H consistently maintained that the leaks resulted from inadequate design and accepted responsibility to replace only 270 linear feet of the through-wall flashing without further compensation, and that OSFC legitimately rejected this solution because the destructive testing demonstrated that the through-wall flashing was defectively installed throughout the building.

{¶ 121} J&H next contends that OSFC failed to comply with the formal notice to cure required under R.C. 153.17 and Section 5.3 of the contract and that such failure mandates denial of recovery on the counterclaim. We find no merit to J&H's contention.

{¶ 122} R.C. 153.17 provides, in relevant part:

> (A) When in the opinion of the owner referred to in section 153.01 of the Revised Code, the work under any contract made under any law of the state is neglected by the contractor or such work is not prosecuted with the diligence and force specified or intended in the contract, such owner may make requisition upon the contractor for such additional specific force or materials to be brought into the work under such contract or to remove improper materials from the grounds as in their judgment the contract and its faithful fulfillment requires.
>
> Not less than five days' notice in writing of such action shall be served upon the contractor or the contractor's agent in charge of the work. If the contractor fails to comply with such

> requisition within fifteen days, such owner with the written consent of the Ohio facilities construction commission, may employ upon the work the additional force, or supply the special materials or such part of either as is considered proper, and may remove improper materials from the grounds.
>
> (B) When the original contractor has defaulted on a contract and the surety has declined to take over the project, the owner may contract with one or more takeover contractors to complete work that was not finished because of the default of the original contractor. The owner may enter into a contract with a takeover contractor without competitive bidding or controlling board approval. * * *

{¶ 123} Section 5.3 of the contract addresses "Right to Prosecute Work and Backcharge Contractor" and provides, in pertinent part:

> 5.3.1 If the Contractor provides Defective Work or fails or neglects to prosecute the Work with the necessary diligence so as to complete the Work within the time specified in the Contract Documents or any portion of the Work by the applicable milestone date as set forth in the Construction Schedule, the Construction Manager shall notify the Contractor in writing of such Defective Work, failure, or neglect.
>
> 5.3.2 If the Contractor fails or refused to cure such Defective Work or its failure or neglect to timely prosecute the Work within three (3) working days after receipt of the written notice, the Construction Manager and the Architect shall recommend enforcement of the Contract to the School District Board and the Commission pursuant to paragraphs GC 3.1.2, 3.2.1.5, 4.2.5 and 4.2.6. Without prejudice to any other remedy the School District Board of Commission may have, the School District Board or Commission, or both may employ upon the Work the additional force, or supply the materials or such part of either as is appropriate, to correct the deficiency in the Contractor's Work, as determined by the School District Board and the Commission.

(Joint Exhibit C-32.)

{¶ 124} J&H contends that OSFC took action to engage another contractor without providing the written notice required by R.C. 153.17(A) and Section 5.3 of the contract. The evidence does not support J&H's argument. OSFC sent several written warranty

notifications to J&H between July 2009 and February 2011, prior to submitting the remediation contract out for public bid. Edifice did not execute the remediation contract until May 10, 2011. We thus find J&H's contention without merit.

{¶ 125} Finally, J&H argues the referee erred in allowing recovery on the OSFC counterclaim when OSFC breached the contract first. We note initially that J&H did not raise this argument in its post-trial brief, and the referee did not address it. J&H did, however, assert the argument in its objections to the referee's decision.

{¶ 126} J&H cites several cases for the proposition that, under the doctrine of "first breach," an initial material breach of contract discharges the injured party from any further contractual duty. J&H contends that, because OSFC first breached the contract via Bovis's scheduling flaws and bad-faith conduct, OSFC cannot hold J&H liable for a failure to install through-wall flashing within contractual specifications. However, once a party substantially performs its obligations under the contract, that party's breach of a term of the contract will not relieve the other party's performance obligation. *Fitzpatrick v. Yeauger,* 4th Dist. No. 97CA35 (July 9, 1998). In the present case, OSFC had substantially performed its obligations under the contract at the time of its breach; accordingly, J&H was not relieved from its obligation to install the through-wall flashing within contractual specifications. J&H's argument is thus without merit.

{¶ 127} For the foregoing reasons, J&H's third assignment of error is overruled.

{¶ 128} Having overruled all 21 of OSFC's assignments of error and J&H's three assignments of error, we hereby affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

TYACK and BROWN, JJ., concur.

McCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).

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