

**IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
WESTERN DIVISION**

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ACCURATE AIR, INC.

Claimant,

v.

CLAIM NO. K20130713

STATE OF TENNESSEE,

Defendant

JUDGMENT

I.

INTRODUCTION

Accurate Air, Inc., hereinafter referred to as Claimant, brings this action against the State of Tennessee under Tenn. Code Ann. §9-8-307(a)(1)(L), relating to breach of a written contract.

On December 14, 2010, Claimant entered into a contract¹ with the State of Tennessee through its Board of Regents, hereinafter referred to as TBR, for improvements to Brister Hall at the University of Memphis. Specifically, Claimant contracted to install a variable refrigerant flow HVAC system, hereinafter referred to as a VRF system, in Brister Hall; the contract provided that most of the work would be done at night and on week-ends because the use of Brister Hall, a testing center, could

¹ The amount of the contract, as modified was \$188,045.72, of which the State has paid \$155,795.77. The Claimant has been charged \$29,249.95 in liquidated damages against the contracted amount.

not be disrupted. The contract further provided for “substantial completion” within 150 calendar days.

The contract also contains a provision for liquidated damages of \$250/day if “substantial completion” does not happen within 150 days of the Notice to Proceed, plus whatever extensions granted pursuant to the contract. Claimant now seeks reimbursement of some \$29,249.95 in liquidated damages which the State claims Claimant owed because substantial completion was almost four months late.

II.

SUMMARY OF FACT TESTIMONY

David Thompson, president of Accurate Air, Inc., testified on its behalf. Mr. Thompson explained that a VRF system is a highly efficient air conditioning and heating system which takes heat absorbed from one place “to use it as a heating process on another one. So, you can simultaneously, you can heat and cool a building.” (Tr., Vol. 1, p. 29, lines 21-23) Thompson noted that a VRF system “gives everybody in their own office their own thermostat.” (Tr., Vol. 1, p. 30, lines 1-2)

Thompson testified that in 2011 the equipment used in these systems had to come from overseas, usually Asia. (Tr., Vol. 1, p. 30, lines 22-23) He further testified that he was given the notice to proceed on January 6, 2011. (Tr., Vol. 1, p. 30, line 25-p. 31, line 1) Thompson stated that before they could actually begin work, they had to prepare submittals, “information of what kind of equipment we intend to use.” (Tr., Vol. 1, p. 37, lines 2-3) These “submittals” were given to the engineering firm Allen & Hoshall on January 18, 2011 and approved on February 3, 2011. (Tr., Vol. 1, p. 37, line

23- p. 38, line10) Thompson testified that the engineer from Allen & Hoshall involved in this project was Frank Madlinger. (Tr., Vol. 1, p. 39, lines 17-20)

The March 1st progress meeting minutes indicate that work still hadn't begun because the needed equipment had not yet arrived. Thompson said it took between 43 and 45 days to get it. (Tr., Vol. 1, p. 42, lines 3-11) The March 15th progress meeting minutes state: "Accurate Air received the cassettes from the supplier on Friday. Work began Friday and Saturday. . ." (Tr., Vol. 1, p. 43, lines 9-11) Thompson said work began approximately 70 days after the Notice to Proceed. (Tr., Vol. 1, p. 44, lines 2-3)

Thompson testified that once work began and they opened the ceiling in Brister Hall, "it was much more confined, tight than what we had anticipated." (Tr. Vol. 1, p. 44, lines 9-11) He conceded that "we were given the opportunity to do a site walk-through and look at it." (Tr. Vol. 1, p. 44, lines 12-13) Thompson stated that each day it took between an hour and an hour and a half just to set up to get started working. He indicated they had to put everything back before the beginning of the work day, including putting the acoustical ceiling back in and said his crew was not allowed to store materials in a corner of the room as they normally did. (Tr., Vol. 1, p. 46, line 8- p. 47, line 8) Thompson stated that to keep the facility at this level of order took additional time, sometimes including overtime for his employees. (Tr., Vol. 1, p. 49, lines 1-19)

Thompson testified that when he bid on the Brister Hall project, he budgeted 107 eight-hour workdays. (Tr., Vol. 1, p. 100, lines 14-15) He said it actually took 157 workdays to complete the job. (Tr., Vol. 1, p. 101, line 18)

Thompson testified that his work on Brister Hall was stopped from May 10 - 25 because of a brazing issue at the old law school building. (Tr., Vol. 1, p. 53, lines 9-23;

p. 54, lines 11-14) Thompson noted that brazing work and, in fact, the installation of the refrigerant piping, had been completed by June 7, 2011. (Tr., Vol. 1, p. 55, lines 6-11) On that date Claimant was approximately three weeks behind schedule on reaching substantial completion. (Tr., Vol. 1, p. 56, lines 2-8) Thompson enumerated the issues that lead them to be behind, including “the difficulty of working in the confined space” (Tr., Vol. 1, p. 57, line 15), the interruption in brazing for 1-2 weeks (Tr., Vol. 1, p. 57, lines 17-19) and “the difficulty of the installation.” (Tr., Vol. 1, p. 57, lines 19-20)

Thompson testified that the brazing controversy arose out of the fact that, while working on the old law school project, one of his workers “had taken a small, cooper tubing down to a desktop and was brazing it there” (Tr., Vol. 1, p. 113, lines 12-14) instead of leaving it in place and running nitrogen through it as he was doing the brazing. Thompson indicated that “they made it from what I would say is insignificant to a major deal that we talked about, wrote letters about and did all sorts of things for about three weeks.” (Tr., Vol. 1, p. 113, lines 21-25)

Thompson explained, “I have oftentimes taken down small pieces and brazed it at a more acceptable level so I could see it and make sure I had it good. And then I would clean it out, put it back up there, and start the nitrogen back up . . .” (Tr., Vol. 1, p. 115, lines 3-7)

Thompson conceded that some of the delay on the old law school building was caused by his company, and that he tried to remedy the delay as best he could. (Tr., Vol. 1, p. 63, line 24- p. 64, line 7) Thompson said there were also lots of other problems on the old law school project, including “electrical problems that they had to redesign, had to reorder equipment.” (Tr., Vol. 1, p. 119, lines 12-13)

Thompson testified that he pulled his workers off the installation at Brister Hall in order to send them over to the old law school. He said university officials were “trying to get that building ready for a semester.” (Tr., Vol. 1, p. 58, lines 24-25) He noted that the old law school building, unlike Brister Hall, did not have a working air conditioner. (Tr., Vol. 1, p. 59, lines 9-10) Thompson said Pam Cash with the University of Memphis and Al Ross, the TBR representative for the University of Memphis and Mike Starnes, head of maintenance at U of M, were at the meeting when he decided to pull the workers off the Brister Hall project and assign them to the old law school project. (Tr., Vol. 1, p. 59, lines 11-p. 60, line 22) Thompson said he told these folks that he had three to five workers at Brister Hall who were qualified to work on the new system at the law school and that he could move them over to the old law school. He left the meeting believing the old law school was the priority. (Tr., Vol. 1, p. 64, lines 18-21)

Thompson insisted that when he took his men off the Brister Hall project, the benefits of the new VFR system were in place (Tr., Vol. 1, p. 68, lines 9-11) and there were no safety concerns. “It still had its fresh air through either egress into the building.” (Tr., Vol. 1, p. 67, lines 22-23)

When asked about change orders on the Brister Hall project, Thompson testified that the contract time was extended by only five days. (Tr., Vol. 1, p. 71, lines 8-20; Tr. Ex. 3)

Thompson testified that working around the testing center schedule sometimes meant the U of M “could not give us the rooms that we needed to work in.” (Tr., Vol. 1, p. 73, lines 7-8) Thompson also testified that on a least three different occasions, Vickie

Black, manager of the testing center, asked them not to work at Brister Hall at all for a couple of days. (Tr., Vol. 1, p. 73, lines 13-16)

Thompson testified that he has not ever been told that U of M or TBR suffered any damages as the result of his actions. (Tr., Vol. 1, p. 105, lines 18-25) Thompson further testified that the amount of liquidated damages “was established by the University of Memphis or TBR. I had no negotiation about the amount of it.” (Tr., Vol. 1, p. 106, lines 22-24)

On cross-examination, Thompson agreed that the notice to proceed was issued on January 6, 2011 (Tr., Vol. 1, p. 141, lines 22-24) and that the original date for substantial completion was therefore June 4, 2011. (Tr., Vol. 1, p. 141, line 25- p. 142, line 3)

Thompson also acknowledged that the agreement between him and the State sets forth liquidated damages in the amount of \$250/day. (Tr., Vol. 1, p. 142, lines 4-6)

Thompson further acknowledged that Claimant’s submittals were delivered to Allen & Hoshall on January 18, 2011 and that these submittals were reviewed and approved by February 3, 2011. (Tr., Vol. 1, p. 147, lines 6-11) Thompson admitted Claimant didn’t order the equipment until 6 days later on February 9, 2011. (Tr., Vol. 1, p. 148, lines 9-10) However, he was not sure how soon after February 3, 2011 he was apprised of the decision to approve the submittals. (Tr., Vol. 1, p.148, line 22- p. 149, line 5)

Thompson stated they started the new system up in Brister Hall on June 20, 2011, and pulled their workers off for the old law school project on June 29. (Tr., Vol. 2,

p. 161, lines 18-20) The workers were gone for approximately 50 days. (Tr., Vol. 2, p. 162, lines 2-3)

Thompson conceded he did not ask for an extension based on how long it took to receive the equipment from overseas. (Tr., Vol. 2, p. 169, lines 13-16)

Thompson conceded that at a progress meeting on April 12, he was reminded Claimant was responsible “for cleaning up and keeping dust to a minimum.” (Tr., Vol. 2, p. 176, lines 1-5) Thompson stated he did not ask for an extension of time based on the time it took to clean up within 21 days of that April 12th meeting. (Tr., Vol. 2, p. 176, lines 10-13) The issue of cleaning came up again at a progress meeting on April 28. Again, Claimant did not seek an extension on this basis within 21 days. (Tr., Vol. 2, p. 177, line 21- p. 178, line 6)

Thompson testified he was three weeks behind on the Brister Hall project when he pulled his workers off the project to work on the old law school. (Tr., Vol. 2, p. 187, lines 16-18) He further testified that in the meeting when he made the decision to pull his workers off the Brister Hall project, the following transpired:

I sat in a meeting and I asked them, I said, where is your priority? They said our priority is over at the old law school. We’re trying to get it up in operation. I said so then I can make the assumption that I need to concentrate over here. They all went around the table and said we do not have this authority. (Tr., Vol. 2, p. 188, lines 10-17. Emphasis added.)

When asked on cross examination about substantial completion, Thompson testified as follows:

Q: And you did not, in fact, reach substantial completion by the due date?

A: Oh, definitely agree.

Q. You did not—

A. We did not. (Tr., Vol. 2, p. 193, lines 19-23)

Thompson testified that Frank Madlinger stated that he could find no basis contractually to give Claimant a time extension. (Tr., Vol. 2, p. 205, lines 21-22)

Thompson testified that the last change order gave a new substantial completion date of June 16, 2011 (Tr., Vol. 2, p. 212, lines 20-25), but that substantial completion was not delivered until October 11, 2011. (Tr., Vol. 2, p. 211, lines 23-25) Thompson acknowledged that liquidated damages were being assessed even before he pulled his workers from Brister Hall. (Tr., Vol. 2, p. 214, lines 11-14)

Allison “Al” Ross, the construction representative for the TBR, testified on behalf of the State of Tennessee. Ross testified that Pam Cash was his immediate supervisor at U of M on the Brister Hall project and Keith Robinson, director of construction, was his immediate supervisor at the TBR. (Tr., Vol. 2, p. 235, lines 14-19) Ross further testified that his job included making sure the project was going smoothly (Tr., Vol. 2, p. 235, lines 24-25) and processing “proposals for change orders or requests for proposals or pay-ups.” (Tr., Vol. 2, p. 236, lines 6-7)

Ross testified that he attended the pre-construction meeting on the Brister Hall project. He said the minutes of that meeting made it clear that “[t]he requests for proposal, RFP, procedure will be used on change orders.” (Tr., Vol. 2, p. 238, lines 11-13) He stated this involved written authorization by the owner, TBR. (Tr., Vol. 2, p. 238, lines 15-18)

Ross further testified regarding the granting of extensions under the contract:

The contract documents state the reasons for granting a time extension. They always require the contractor

to submit a request to the designer for a time extension within 21 days from the occurrence of said reason. (Tr., Vol. 2, p. 238, line 23- p. 239, line 2)

Ross testified that he helped Accurate Air devise a construction schedule on the Brister Hall project, but they fell behind. (Tr., Vol. 2, p. 240, lines 1-7) When asked whether Claimant ever asked for a time extension, Ross replied, "Other than the change orders we processed, no. Not during, not before substantial completion." (Tr., Vol. 2, p. 241, lines 17-19)

Ross testified that Claimant was installing VFR systems at both the old law school and Brister Hall. (Tr., p. 243, lines 4-5) He stated that one time he saw Claimant's technicians at the old law school brazing "without purging the line without nitrogen." (Tr., Vol. 2, p. 243, lines 14-15) Ross explained that purging with nitrogen was especially important with VRF systems to prevent the building up of scales inside the pipes because the systems don't use filters. (Tr., Vol. 2, p. 243, lines 17-24) Ross indicated this was a requirement of the manufacturer. (Tr., Vol. 2, p. 245, lines 4-9) Ross stated he reported this incident to the designer and to the U of M. (Tr., Vol. 2, p. 247, lines 3-4)

Ross testified that both the old law school project and the Brister Hall job were stopped for a time because of the brazing incident at the old law school. (Tr., Vol. 2, p. 260, line 10- p. 261, line 8) However, on redirect he stated the brazing work was not stopped at Brister Hall. (Tr., Vol. 3, p. 268, lines 21-23) Ross stated that when Claimant agreed to extend the Brister Hall warranty by a year, no testing was done related to brazing. (Tr., Vol. 2, p. 262, lines 2-8)

Ross testified that no one told Claimant to pull workers from Brister Hall and put them on the old law school job and that he did not have the authority to do so. (Tr., Vol. 2, p. 249, lines 3-9)

Ross testified Claimant did not complete the Brister Hall job within time provided in the contract. (Tr., Vol. 2, p. 249, lines 14-16)

Frank Madlinger, principal in charge of construction administration at Allen & Hoshall, also testified on behalf of the State of Tennessee. Madlinger testified that he had contract duties for the Brister Hall project. (Tr., Vol. 3, p. 270, lines 14-15) Madlinger stated that he was responsible for ensuring TBR got “the system that we designed and put forth in the bids.” (Tr., Vol. 3, p. 271, lines 5-7)

Madlinger testified that under § 4.2.8 of the contract, he was responsible for reviewing approval of change orders. (Tr., Vol. 3, p. 273, lines 11-13)

Madlinger testified it was his job to determine when substantial completion had been achieved. (Tr., Vol. 3, p. 275, lines 10-13)

Madlinger further testified that the \$250/day in liquidated damages was part of the bid documents. He indicated Claimant never questioned the amount. (Tr., Vol. 3, p. 275, lines 16-21)

When asked how the \$250/day figure was arrived at, Madlinger explained:

[F]or the contract amount that we had less than \$200,000, this would be a typical amount for us. It also is involved how we ascertain that based on the function and use of the space, and if the University had to lose the use of the space.

Now, we felt that those—we felt that the risk in that was fairly low. For the type of work and for the testing that they do and the revenue they gain from the testing center, the amount is somewhat low if they had to completely lose all of that testing facilities. But that’s also why we made written in the contract that these spaces have to

remain open. But we felt the risk was pretty low with the type of systems. (Tr., Vol. 3, p. 276, lines 5-18)

Madlinger further testified that was a pretty standard amount for this type of project. (Tr., Vol. 3, p. 276, lines 19-22) “And try to keep it in \$250 increments, 250, 500 or 1,000. But for this size contract, this is the typical amount we would come up with.” (Tr., Vol. 3, p. 276, lines 22-25)

Madlinger testified that the amount is not negotiated, but is “strictly between the designer and the owner and the user, which would be the University of Memphis, owner being TBR.” (Tr., Vol. 3, p. 277, lines 4-6)

Madlinger testified Claimant did not ask for an extension within 21 days of February 3, 2011, based on the time it took to get their submittals approved. He said he did not believe they ever asked for an extension on that basis. (Tr., Vol. 3, p. 281, lines 4-14)

Madlinger testified that Claimant did not ever ask for a time extension on the Brister Hall project based on the length of time it took to get the equipment from Asia. (Tr., Vol. 3, p. 284, line 18- p. 285, line 1)

Madlinger testified that the fact that the bulk of the work on the Brister Hall project would be above the ceiling tiles was “inherent in the bid documents.” (Tr., Vol. 3, p. 287, line 4) He further testified that no extension was requested within 21 days of starting the work based on the time it was taking to install the cassettes. (Tr., Vol. 3, p. 287, lines 15-19)

Madlinger testified that Claimant was required to clean up each day both “to leave a clean space for the user” (Tr., Vol. 3, p. 290, line 18) and because of the “sensitive, electronic equipment and computers within the space.” (Tr., Vol. 3, p. 290,

lines 19-20) Madlinger testified that this requirement was included in the project manual. (Tr., Vol. 3, p. 291, lines 3-5) Madlinger said Claimant complained about the amount of time it took them to clean up, but he did not believe Claimant ever asked for additional time based on the amount of time it took them to clean up each day. (Tr., Vol. 3, p. 291, lines 9-20)

Madlinger testified Claimant did asked for a time extension based on the limited night and week-end work, but stated that this was not a permissible basis for an extension under the Brister Hall contract. (Tr., Vol. 3, p. 292, lines 1-7)

Madlinger testified that substantial completion on the Brister Hall project included the following requirements:

All work has to be in. Testing for all of that work has to be in.
Factory start up, all of the equipment has to be in. Operational
and maintenance manuals has to be turned in. Testing balancing
of the system has to be turned in. And all related warranties has
to be turned in . . . (Tr., Vol. 3, p. 294, lines 5-10)

Madlinger noted that although by June the Brister Hall system had been installed and was cooling the building, “test and balance had not been performed on it.” (Tr., Vol. 3, p. 294, lines 21-22) This is done by an independent firm to substantiate that everything is working correctly. (Tr., Vol. 3, p. 294, line 22- p. 295, line 3)

Madlinger also testified that in June the energy-saving “energy recovery unit was not installed and online.” (Tr., Vol. 3, p. 295, lines 8-9) Madlinger said because this unit had not been installed, it was “not providing outside air to the space.” (Tr., Vol. 3, p. 295, lines 24-25) He said this was a violation of “the international building code, local building code and is violation of ASHRAE Guidelines.” (Tr., Vol. 3, p. 296, lines 1-3)

Madlinger also emphasized that substantial completion is important because it “sets the date on the warranty for the work, for all the equipment.” (Tr., Vol. 3, p. 296, lines 4-5)

Madlinger testified that he granted substantial completion on the Brister Hall project on October 11, 2011. (Tr., Vol. 3, p. 297, lines 13-16) He did not recommend approval of time extensions which would have mitigated liquidated damages based on Claimant’s December 7th letter. (Tr., Vol. 3, p. 298, lines 5-20; Tr. Ex. 12) Madlinger said he earlier recommend a 5 day extension making the date due for substantial completion June 16, 2011. (Tr., Vol. 3, p. 299, line 18- p. 300, line 2)

Madlinger stated that Claimant’s letters and emails requesting time extensions all came after the due date for substantial completion. (Tr., Vol. 3, p. 300, lines 20-25)

Madlinger confirmed that because of the bid process, the contractor has no input regarding what is included when the contract is actually written. (Tr., Vol. 3, p. 304, lines 1-4) He further acknowledge that when the Brister Hall bid was submitted to Claimant, the \$250/day liquidated damages provision was already in the contract. (Tr., Vol. 3, p. 306, lines 22- p. 307, line 1)

Madlinger testified U of M never lost use of Brister Hall because of the construction. (Tr., Vol. 3, p. 307, lines 17-19)

Pam Cash, manager of facilities projects at U of M’s main campus, testified on behalf of the State of Tennessee. Cash was the “facilities coordinator for the Tennessee Board of Regents’ projects.” (Tr., Vol. 3, p. 309, lines 22-23) She said the Brister Hall project was one of the smaller ones. (Tr., Vol. 3, p. 310, lines 9-10)

When asked whether she had ever told Claimant where to devote its resources when they fell behind schedule at the old law school and Brister Hall, Cash testified, "I have no authority to tell them where to put resources." (Tr., Vol. 3, p. 313, lines 10-11)

Jeff Haltom, an engineer for the prime contractor on the old law school project, also testified on behalf of Defendant, State of Tennessee. Haltom testified that the contract time on the old law school project was 180 days, with liquidated damages at \$500/day. (Tr., Vol. 3, p. 317, lines 16-23)

When asked whether there was a problem with Claimant's work on the old law school job, Haltom testified that "some University of Memphis maintenance personnel were walking through the building and observed some, a brazing process going on that wasn't in accordance with the manual that the manufacturer publishes." (Tr., Vol. 3, p. 319, lines 3-6)

Haltom said that because they were observed "not nitrogen purging that particular joint" (Tr., Vol. 3, p. 319, line 24- p. 320, line 1), it created doubt about whether Claimant had been purging the other piping, about one-third of which had been installed. (Tr., Vol. 3, p. 320, lines 13-17) Haltom said in response to this, "Basically we stopped work, stopped progress that is, and did a cleanup of existing piping." (Tr., Vol. 3, p. 322, lines 14-15)

Haltom testified that the brazing issue also threatened the warranty on the system. In fact, Haltom said, the warranty was signed by the local representative for Daikin. (Tr., Vol. 3, lines 325, lines 10-11) "My understanding is that Daikin corporate was not responsible. They refused responsibility." (Tr., Vol. 3, p. 325, lines 13-14)

Vickie Black, the testing center manager in 2011, also testified on behalf of the State. She said that when Claimant was working at night, she did not have control over where they worked. (Tr., Vol. 3, p. 336, lines 21-24) She said she did sometimes tell them they couldn't work in a certain area on Saturday when tests were being administered. (Tr., Vol. 3, p. 337, lines 3-9)

Black confirmed that Claimants had to reinstall the ceiling tiles each morning and that they had to remove their equipment each day. (Tr., Vol. 3, p. 339, line 24- p. 340, line 12)

She said that when the cooling system was switched to the new system in June, 2011, it improved the conditions in the testing center. (Tr., Vol. 3, p. 340, line 19- p. 341, line 5)

Keith King, director of project management for TBR, also testified on Defendant's behalf. He testified that "[l]iquidated damages are generally put in the bid documents." (Tr., Vol. 3, p. 350, lines 12-13) King stated:

But the range now is about \$100 to \$1,000. And depending upon the complexity, size, type of project, it could be, in general, it's usually one of four categories: 100, 250, 500 or 1,000 are the kind of categories we look at for those damages. (Tr., Vol. 3, p. 350, lines 20-25)

King went on:

\$100 would be probably for a project that was ADA—or nonintrusive to the campus. \$250 per day would in general be a small project, which this would classify as a small project on our scale.

And the other thing I would say is that the \$250 is very consistent with similar-sized projects we have done in recent days. And we do a lot of projects. So 250 establishes, has been established as a reasonable amount for this size project. (Tr., Vol. 3, p. 351, lines 8-16)

King testified that in addition to TBR, both the designer and the user can have input on amount of liquidated damages. (Tr., Vol. 3, p. 351, line 21- p. 352, line 3) When asked by the Commission to clarify which factors determine the amount of liquidated damages, King testified:

Size, complexity. And you know, it could be unusual things. Just, I'll give you an example, if we were, if we had a dorm . . . and we had 100 students that were counting on a bed in that dorm, there could be liquidated damages if they didn't meet that milestone for those students to be temporary, temporarily housed, because there is nothing—there is no way to put those students up in other housing, a hotel. That is an example.

But there are those cases where we have had extra damages on top of what I would consider standard liquidated damages. Another example might be a football stadium, where the first game you can't play football. What do you do? You have lost revenue. You know, there's those kind of things.

So we look at each one and try to figure out, okay, what is reasonable. And we want to be, we really want to be on the low side. (Tr., Vol. 3, p. 352, lines 6-25)

III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commissioner has thoroughly reviewed the record in this case, including the testimony of the witnesses who appeared at the hearing of this cause, the testimony of those whose depositions were introduced for proof, the arguments of counsel and, indeed, the entire record as a whole. The Commission would note that the testimony of Accurate Air, Inc.'s president, David Thompson, was particularly honest and direct. After carefully weighing the credibility of each of the witnesses, the Commissioner makes the following findings of fact.

A. Substantial Completion

The parties are in agreement their contract provides for liquidated damages in the amount of \$250/day. (Tr., Vol. 1, p. 142, lines 4-6) They are also in agreement that the last change order gave a new substantial completion date for the Brister Hall project of June 16, 2011 (Tr., Vol. 2, p. 212, lines 20-25), but that substantial completion was not delivered until October 11, 2011. (Tr., Vol. 2, p. 211, lines 23-25) The parties are also in agreement that the extension of 111 days requested by Claimant was not made until after the substantial completion date already had passed (Tr. Exs., Vol.1, Tr. Ex. 12) and that the extension requests were not made, as the contract requires, in writing with 21 days of the precipitating events.

With regard to substantial completion, Claimant's argument is essentially an equitable one. Claimant avers that, for a variety of reasons, including the amount of time it took to clean up and leave his work space in pristine condition after each day's work, the confined space within which he had to work above the ceiling (smaller than usual on a job like this), the fact that work was limited to nights and week-ends, and the fact that he took his workers off the Brister Hall job to put them on the old law school renovation project, which was a higher priority for the university, it was not possible to complete the job within 150 calendar days and would be inequitable to hold him to the time frame he agreed to. The state counters that the above working conditions were known to Claimant when he submitted his bid and the State cannot and should not be penalized if Claimant underbid the project. The State also insists the university did not have the authority to direct Claimant to move workers off one project and put them on

another and that the delays on the old law school were caused, in part, by an error made by a member of Claimant's crew.

In interpreting a contract under Tennessee law, the Commission's initial inquiry is always to determine whether the contract language at issue is ambiguous. If the language is unambiguous, "then the parties' intent is determined from the four corners of the contract. *See Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596 (Tenn. 1998)." *Ray Bell Const. Co. v. State, Tennessee Dept. of Transp.*, 356 S.W.3d 384, 387 (Tenn. 2011). In the instant case, the contract language regarding extensions of the substantial completion date provides that claims for additional time must be "initiated by written notice" (Tr. Ex. 1, Article 15, § 15.2) and "must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later." *Id.*

Claimant has acknowledged that he did not initiate a claim for additional time in writing within 21 days of recognizing that working in the ceiling above Brister Hall was more difficult than he anticipated or within 21 days of recognizing how long it would take him to clean up each day—or within 21 days of any of the precipitating events. (*See, generally*, Tr., Vol. 2, pp. 168-178) In fact, as has been noted already, no extension of time was sought until the time for substantial completion already had passed.

Claimant argues that as a matter of equity, he should at least receive an extension of time for all or part of the 50 days he pulled his workers off the Brister Hall project and deployed them to work on the old law school project, which all parties

acknowledge was a higher priority for the State of Tennessee since the old law school had no existing HVAC system and its VRF system had to be installed before the building could be used for classes. However, neither U of M nor TBR officials had any authority to direct Claimant to take workers off one project and put them on another. (Tr., Vol. 3, p. 313, lines 10-11) Even Claimant acknowledged that they had no such authority. (Tr., Vol. 2, p. 188, lines 10-17) Claimant apparently took workers off the Brister Hall project and assigned them to the old law school project based not on the language of the contract, but on his desire to help the university and his belief that the parties would sit down and work out a fair solution in the end.

The Commission **FINDS** that Claimant has not proven by a preponderance of the evidence that it is entitled to additional time extensions pursuant to the provisions of its written contract with the State of Tennessee. The Commission further **FINDS** that substantial completion was not achieved until October 11, 2011.

B. Enforceability of Liquidated Damages Provision

As explained by the Tennessee Supreme Court in *Guiliano v. Cleo Inc.*, 995 S.W.2d 88 (Tenn. 1999), Tennessee takes a “prospective approach” when deciding whether or not to enforce the liquidated damages provision of a contract, an approach which focuses not on actual damages suffered as a result of a breach of contract, but “on the estimation of potential damages and the circumstances that existed at the time of contract formation.” *Id.* at 98-99. As noted by the 6th Circuit in *U. S. v. Ponnappula*, 246 F.3d 546, 583 (6th Cir. 2001), under *Guiliano*, “the amount of actual damages at the time of breach is of little or no relevance to whether the clause is an impermissible penalty. (citation omitted).” Thus, under this prospective approach, the sum included for

liquidated damages must be a reasonable estimation, determined when the parties entered into the contract, of potential damages. *Guiliano*, 995 S.W.2d at 101. In the case at bar, the language of the contract itself, addresses this issue directly. Specifically, § 9.12.1 of the document entitled *Agreement Between Owner and Contractor* reads as follows:

Time being of the essence, Contractor further agrees to accept conditions for liquidated damages set forth in Contract Documents for each calendar day in excess of allotted time for Substantial Completion or approved extension thereof, parties agreeing that the amount of damages resulting from delay would be uncertain and difficult to prove, and further agreeing that such liquidated damages set for in the Owner-Contractor Agreement **are a reasonable estimate of those damages which could result from delay.** (Emphasis added.)

As the Tennessee Supreme Court has emphasized, the first rule of contract construction in Tennessee is to look at the language of the contract itself. “If the contract language is unambiguous, then the parties' intent is determined from the four corners of the contract. See *Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d592, 596 (Tenn. 1998).” *Ray Bell Const. Co., Inc. v. State, Tenn. Dept. of Transp.*, 356 S.W.3d 384, 387 (Tenn. 2011) Although the Commission believes the above liquidated damages language is likely boilerplate language included in all or most TBR contracts, it is not ambiguous. In this case, Claimant signed this agreement acknowledging that the liquidated damages provision was a reasonable estimate of potential damages.

TBR officials testified that the amounts of the liquidated damages provisions included in their contracts is determined mainly by the size of the contract itself coupled with an evaluation of the cost to the university if the use of the space is lost as a result

of delay. When asked how the \$250/day figure was arrived at, Frank Madlinger explained:

[F]or the contract amount that we had less than \$200,000, this would be a typical amount for us. It also is involved how we ascertain that based on the function and use of the space, and if the university had to lose the use of the space.

Now, we felt that those—we felt that the risk in that was fairly low. For the type of work and for the testing they do and the revenue they gain from the testing center, the amount is somewhat low if they had to completely lose all of that testing facilities. But that's why we made written in the contract that these spaces have to remain open. But we felt the risk was pretty low with the type of systems. (Tr., Vol. 3, p. 276, lines 5-18)

Similarly, when asked about the factors used in determine the amount of liquidated damages, Keith King, director of project management for TBR, testified:

Size, complexity. And you know, it could be unusual things. Just, I'll give you an example, if we were, if we had a dorm . . . and we had 100 students that were counting on a bed in that dorm, there could be liquidated damages if they didn't meet that milestone for those students to be temporary, temporarily housed, because there is nothing—there is no way to put those students up in other housing, a hotel. That is an example.

But there are those cases where we have had extra damages on top of what I would consider standard liquidated damages. Another example might be a football stadium, where the first game you can't play football. What do you do? You have lost revenue. You know, there's those kind of things.

So we look at each one and try to figure out, okay, what is reasonable. And we want to be, we really want to be on the low side. (Tr., Vol. 3, p. 352, lines 6-25)

Witnesses for the State, particularly, Mr. King, seemed to imply that the State has “standard liquidated damages” amounts based on the size of the contract, which they then adjust if they anticipate additional expenses or lost revenue. The State's witnesses

did not address directly why the size of the contract is a reasonable basis for setting liquidated damages (such as, perhaps, that the costs of administering a contract are determined in large part by its size). Defendant did offer testimony regarding the function and use of the space at Brister Hall as a factor, suggesting that TBR officials did not believe increasing the liquidated damages rate over the “standard amount” was reasonable in this case.

In light of the specific and unambiguous language in the contract, along with the testimony of Defendant’s witnesses at the trial of this cause, the Commission **FINDS** that the liquidated damages provision was a reasonable estimate of the damages to be incurred by Defendant in case of a delay in substantial completion of the Brister Hall project.

III.

CONCLUSION

For the foregoing reasons, Claimant’s claim must be **DISMISSED**.

Costs of this cause are taxed pursuant to TCA §9-8-307 (d).

IT IS SO ORDERED.



**NANCY C. MILLER-HERRON
COMMISSIONER**

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has this date been forwarded by first class postage to:

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On this the 29th day of September, 2014



PAULA SWANSON, Clerk
Tennessee Claims Commission