

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

NORTH AMERICAN MECHANICAL, INC.,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 12-CV-598
)	
WALSH CONSTRUCTION COMPANY II, LLC,)	
)	
Defendant.)	

PLAINTIFF’S PRETRIAL REPORT

Plaintiff North American Mechanical, Inc. (“North American”), submits its Pretrial Report pursuant to this Court’s December 23, 2014 Scheduling Order.

A. Statement of Facts and Theories of Liability

i. Factual Background

This case involves a dispute arising from a hospital construction project in Lake Geneva, Wisconsin (the “Project”). Defendant Walsh Construction Company II, LLC (“Walsh”) agreed to serve as the general contractor to construct the Project for Mercy Health System. The Project included the construction of new, expanded hospital space and the renovation of existing areas within the hospital. Walsh’s personnel acknowledge that the Project was complicated and was performed in a difficult environment and under a very tight construction schedule.

On June 24, 2010, Walsh entered into a subcontract with North American to install the Fuel Oil, HVAC, Mechanical Piping Package, Plumbing and Medical Gas Systems for the Project. The subcontract required Walsh to “supervise and direct the Work, using [Walsh’s] best skill and attention.” Unlike North American, Walsh self-performed no construction work on this

Project. Rather, their primary job as the general contractor was to coordinate, manage, schedule, and supervise the work of other subcontractors, including North American.

North American's subcontract was based on a continuous eighteen-month schedule. North American was on the Project at least 479 calendar days beyond the planned completion date for the Project. Walsh also acknowledges that the Project conditions under which North American worked were different than those planned or contemplated under the subcontract.

The problems on the Project were the direct result of Walsh's failure to perform its obligations as the general contractor in several respects: failing to incorporate the Project design documents into a coordinated building information model (BIM), which was designed as a planning tool to avoid conflicts in the work; failing to schedule, coordinate and sequence the work of the various subcontractors on the project; failing to grant time extensions to North American despite repeated requests to do so; and changing North American's scope of work and Project site conditions without compensation for the changes.

Walsh ignored repeated written correspondence from North American and other subcontractors requesting guidance on when and how to perform necessary work. In addition, Walsh understaffed the project from its inception, placing only three full time personnel on site for this complicated job.

In its defense, Walsh primarily relies on a "no damages for delay" clause in the subcontract. This provision, however, does not prohibit claims for changes to the project site and contract conditions under which North American agreed to work. In fact, additional compensation for changes is specifically contemplated in the subcontract. As such, under the terms of the subcontract, North American is entitled to its claims related to change order work and work performed under changed site and project conditions.

In addition, a general contractor may be liable to its subcontractors where the contractor breaches its project management and supervisory duties. Project mismanagement may manifest itself in variety of ways: abandonment of the project schedule;¹ improper coordination of activities;² directing work to be performed out of sequence;³ stacking of trades;⁴ and hindering access to work areas.⁵ Not only did Walsh breach the subcontract in each of these ways, it did so in spite of North American's routine notifications to Walsh of these problems and warnings of the related cost implications.

Under Wisconsin law, there are three recognized exceptions to "no damages for delay" clauses, including exceptions for delays caused (1) by fraudulent conduct, (2) by reason of orders made in bad faith and to hamper the contractor, and (3) by reason of orders unnecessary in themselves and detrimental to the contractor and which were the result of inexcusable ignorance or incompetence on the part of the party seeking to enforce the clause.⁶ North American notified Walsh on several occasions that its failure to coordinate work and grant time extensions as appropriate and its changing of the site conditions was causing cost overruns for North American; yet Walsh did nothing to correct this or mitigate against these costs or impacts. Instead, Walsh continued to mismanage the Project to the end. These were not conditions outside of Walsh's control; rather they were conditions created and perpetuated by Walsh.

¹ *Natkin & Co. v. George A. Fuller Co*, 347 F. Supp. 17 (W.D. Mo. 1972).

² *John E. Green Plumbing & Heating Co., Inc. v. Turner Constr. Co.*, 742 F.2d 965 (6th Cir. 1984).

³ *Elec. & Missile Facilities, Inc. v. United States*, 416 F.2d 1345, 1359-61 (1969).

⁴ *In re Elec. Machinery Enters., Inc.*, 416 B.R. 801, 852-53 (M.D. Fla. 2009).

⁵ *Bagwell Coatings, Inc. v. Middle South Energy, Inc.*, 797 F.2d 1298 (5th Cir. 1986) .

⁶ *John E. Gregory & Son, Inc. v. A. Guenther & Sons Co., Inc.*, 432 N.W.2d 584, 586 (Wis. 1988) (a "no damage for delay" clause is not enforceable in such cases of abuse as intentional wrongdoing or gross negligence, by the party seeking enforcement).

Walsh materially breached its subcontract with North American in several respects: (a) by failing to schedule, coordinate, and manage work on the project; (b) by changing North American's scope of work and by changing the project site conditions without compensating North American for these changes as required under the subcontract; and (c) by failing to grant time extensions and change order requests submitted by North American. As a consequence of Walsh's contract breaches, North American incurred additional labor and material costs.

ii. North American's Damages From Walsh's Breaches Of Contract

Based on Walsh's breaches of the subcontract North American incurred damages. North American's damages can be classified as follows:

Changed Work	
BIM Costs	\$ 708,520.35
Change Order #43	\$ 28,039.00
Cost Tracker Value through Change Order #43 without BIM Costs	\$ 3,198.62
Claimed Costs Rejected by Walsh	\$ 43,889.32

Additional Labor Costs	
NAMI's Expert performed three different analyses of this portion of NAMI's claim. The identity and cost total of each analysis is listed below.	
1) MODIFIED TOTAL COST = Overage of 24,404 labor hours at NAMI's \$71.60 labor rate	\$ 1,747,326.40
*With 15% OH/P (\$262,098.96)	\$ 2,009,425.36
2) MEASURED MILE (68% inefficiency) = Overage of 22,356 labor hours at NAMI's \$71.60 labor rate	\$ 1,600,689.60
*With 15% OH/P (\$240,103.44)	\$ 1,840,793.04
3) MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA FACTORS (70% inefficiency) = Overage of 23,014 hours at NAMI's \$71.60 labor rate	\$ 1,647,802.40
*With 15% OH/P (\$247,170.36)	\$ 1,894,972.76

*Pursuant to the change order rates utilized by NAMI during the project, NAMI maintains that it is entitled to an additional 15% of the claim value for overhead and profit.

Unpaid Contract Balance	
Change Order #42 Billed 11/18/2013	\$ 28,904.00
Short Paid on Other Payment Applications	\$ 5,119.90
Retainage Billed 8/2/2013	\$ 243,601.10

Additional General Conditions	
Additional General Conditions	\$ 201,549.52

Interest	
Interest on Retainage through 5/1/2015	\$ 55,541.05
Interest on Overdue Changed Work, excluding Rejected Work, through 5/1/2015	\$ 373,671.00
Interest on Rejected Work through 5/1/2015	\$ 21,223.51

B. Issues for Trial

1. Whether Walsh breached its contractual obligations to North American by failing to pay for additional and changed work on the Mercy Walworth Project, thus entitling North American to damages.

2. Whether Walsh breached its contractual obligations to North American to manage, supervise, and coordinate subcontractors and work activities on the Mercy Walworth Project in a manner so as not to interfere with and change North American's subcontract performance, thus entitling to North American to damages.

3. Whether Walsh's conduct, actions and inaction on the Mercy Walworth Project resulted in Project delays and disruptions, thus entitling North American to damages, including extended and additional project costs.

4. Whether Walsh breached its contractual obligations to North American by failing and refusing to tender payment for the remaining Subcontract balance, inclusive of retainage.

C. Names and Addresses of Witnesses Expected to Testify

1. Steve Ross
4401 State Road 19
Windsor, WI 53598
2. Kevin Masterson
4401 State Road 19
Windsor, WI 53598
3. Mark Giese
4401 State Road 19
Windsor, WI 53598
4. Bill Arthur
4401 State Road 19
Windsor, WI 53598
5. Ryan Radewan
4401 State Road 19
Windsor, WI 53598
6. Myleen Passani
4401 State Road 19
Windsor, WI 53598

The following witnesses may be called by North American. Irrespective of North American's election, these witnesses will be available to be called by Walsh without the necessity of a subpoena pursuant to agreement between counsel.

7. Melody Doyle
4401 State Road 19
Windsor, WI 53598
8. Randy Schaub
4401 State Road 19
Windsor, WI 53598

North American reserves the right to call as witnesses at trial of this action any persons listed by Walsh on its witness list. North American further reserves the right to amend or supplement this list or call rebuttal witnesses as may be necessary.

D. Expert Witnesses

1. John R. Spittler, PE
Spittler Strategic Services
P.O. Box 7595
Ann Arbor, Michigan 48107

A copy of Mr. Spittler's CV is attached hereto.

E. Exhibits

Pursuant to Paragraph 1(c) of the Scheduling Order, North American's list of exhibits is attached hereto as Exhibit A. North American reserves the right to offer any exhibits listed by Walsh in its pretrial report. North American also reserves the right to amend this list based on the evidence presented by Walsh at trial.

F. Depositions to be Read Into the Record if Witnesses are Unavailable

1. Aaron Bossow – selected excerpts (taken April 1, 2014)
2. Jeffrey Spiller – selected excerpts (taken January 31, 2014)
3. Ryan Mack – selected excerpts (taken March 24, 2014)
4. Steve Cook – selected excerpts (taken March 25, 2014)
5. 30(b)(6) Deposition of Walsh Construction Company, II – selected excerpts (through designated witnesses Jeffrey Spiller and Steven Cook on May 9, 2014 and Aaron Bossow on May 30, 2014)
6. Richard Ott, PE – selected excerpts (taken April 15, 2014)

North American reserves the right to use deposition transcripts for impeachment purposes as necessary at trial.

G. Estimate of Time Needed to Try Case

North American estimates that approximately five (5) days will be required for the trial.

H. Proposed Findings of Fact and Conclusions of Law.

Pursuant to Paragraph 1(a) of the Scheduling Order, North American's proposed findings of fact and conclusions of law will be submitted after the trial is completed.

Respectfully submitted this 20th day of April, 2015.

/s/ Garrett E. Miller

Eric L. Nelson

Garrett E. Miller

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