COMMONWEALTH OF PENNSYLVANIA

TRI-STATE ASPHALT CORPORATION	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF TRANSPORTATION	:	DOCKET NO. 1498

FINDINGS OF FACT

1. Plaintiff is Tri-State Asphalt Corporation (hereinafter "Tri-State"), a corporation organized and existing under the laws of the State of Ohio with its principal office in Wheeling, West Virginia. (Amended Complaint and Answer, para. 1)

2. Defendant is the Commonwealth of Pennsylvania, Department of Transportation (hereinafter, the "Department"). (Amended Complaint and Answer, para. 2)

3. On or about August 16, 1988, Plaintiff, as prime contractor, entered into a Contract numbered 111219 with Defendant, as owner, for rehabilitation and resurfacing of portions of various state roads in the County of Allegheny, Commonwealth of Pennsylvania, designated as Group 111-88-7124-2, together with related work. (Amended Complaint and Answer, para. 3)

4. The Contract allowed 125 calendar days for performance, with an anticipated Notice to Proceed date of July 25, 1988. (Joint Exhibit 1 at pg. 6, paras. 4 and 75)

5. The anticipated Notice to Proceed date could not be met because Tri-State was late in submitting Contract documents. (D-1)

6. The Department asked Tri-State to agree to a 30-day extension of time for issuance of a Notice to Proceed, and Tri-State did so. (D-1)

7. The Notice to Proceed date was August 29, 1988. (P-1)

8. Ten days after the Notice to Proceed date, on September 8, 1988, C. J. Remmy, a Department Engineer, wrote to Tri-State referring to discussions between the parties and stating that, in accordance with those discussions, a schedule was being developed pursuant to which part of the work under the Contract would be moved into 1989 because of the late Notice to Proceed. Tri-State did not object or respond in any fashion to Remmy's letter. (D-2)

9. In December of 1988, the Department, again through Remmy, forwarded the promised schedule to Tri-State. The schedule showed resumption of work following the Winter shutdown on April 15, 1989, with an additional 109 calendar days after that date - until July 28, 1989 - in which to complete the work. (D-3)

10. Tri-State did not object or respond to Remmy's letter or the revised schedule. (Record)

11. The project as designed was 53,614 feet (10.154 miles) of resurfacing work (prior to the elimination of one of the ten scheduled roadways) that was to be completed in 125 consecutive calendar days, the last thirty of which were merely for testing. (Joint Exhibit 1; D-476 [behind pg. 68 of the Contract]; Joint Exhibit 1, pg. 6; N.T. 35)

12. The bid for this project was $2,057,376.88 or $383.74 per ten feet of roadway. (Joint Exhibit 1; N.T. 35)

13. One of the roadways originally scheduled as part of the project, Wexford Road (S.R. 910) was eliminated from the project prior to construction. (N.T. 30-31)

14. With respect to extensions of time for issuance of a Notice to Proceed, the Publication 408 Specifications, dated 1987 ("Specifications"), which were part of the Contract, provided as follows:

> **103.08 CANCELLATION OF CONTRACT -** The Contract may be canceled by either party if the notice to proceed date is not within 30 days of award of the contract. Extension(s) of the 30-day period will be made only by mutual written consent of the parties to the contract provided such written consent is given prior to the expiration of the 30 - day period. Prices will not be renegotiated. ... .
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> (Joint Exhibit 3 at pgs. 18, 63) (Emphasis Added)

15. The project, pursuant to this Contract, is known as a group job where a number of unrelated individual roadways in a given geographical area are grouped together in a single project for resurfacing. (N.T. 27)

16. The nature of a group job is that the contractor does nothing about the width, depth or location of a roadway. The projects are generally what is known as shoot and chip. There is no adjustment of grade or reconstruction. (N.T. 26, 29)

17. Bids on a group job are low because you are only expected to chip seal, handle a few drainage problems and move on, unlike the far more expensive reconstruction projects. (N.T. 35-36)

18. On a group job, the plans do not provide dimensions or elevations because the work has to conform to existing conditions. (N.T. 135)

19. Charles Remmy, the Department's Assistant Construction Engineer for this project, testified that the attempt with a group job is merely to improve the ride-ability of the existing roadway, not to change the location or size of the existing roadway. (N.T. Remmy Depo. 25)

20. On this project, as shown by the Contract documents, the contractor was supposed to remove just the irregular edge of the pavement and overlay the entire shoulder with ID-2 intermediate course material. (Joint Exhibits 1-2; N.T. 76)

21. There were no individual drawings for this project. The "drawings" consisted of tabulations and "typical" sheets. This is not unusual for a group job since the nature of the work is limited and doesn't require the detail shown in individual drawings. (Joint Exhibit 2; N.T. Remmy Depo. 24-25)

22. The Contract contained two shoulder items - Paved Shoulders, Type 6 (Item No. 0656-0001), and Paved Shoulders, Type 7 (Item No. 0657-0001). (Joint Exhibit 1 at pg. 13)

23. The standard drawing for reconstructed shoulders - RC-25, sheet 2 of 3 - shows grading of the shoulder to a line, with a reference to a drawing note, which provides as follows:

> "5. Grading will be considered incidental to the shoulder pay item. Where there is insufficient graded material from the grading operation to complete this operation, use material meeting the requirements of Sect. 350, Publication 408, which will be paid for as Tons of Selected Borrow Excavation. Where there is an excess of

material from the shoulder excavation or grading operation, remove this material as soon as possible and consider as incidental to the shoulder pay item."

(D-11, Sheet 2 of 3)

24. The Contract contained one gutter item - Bituminous Gutter (Item No. 2000-0001). (Joint Exhibit 1 at pg. 14) The Contract special provision for the item describes the work included within the item as follows:

> **DESCRIPTION** - This work is construction of bituminous gutter including all necessary excavation, preparation of foundation, subgrade, furnishing, placing and shaping all necessary backfill and/or backup materials and satisfactory disposal of all unsuitable and surplus material as indicated and directed.
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> (Joint Exhibit 1 at pg. 48) (Emphasis Added)

25. In areas where there was a "fill slope" alongside the roadway - i.e., where the natural terrain sloped down from the roadway and had to be built up, or filled, in order to construct a shoulder or gutter - shoulders were installed. In areas where there was a "cut slope" alongside the roadway - i.e., where the natural terrain sloped up from the roadway and had to be cut away in order to construct a shoulder or gutter - gutters were installed. (N.T. 535-538; D-31)

26. The D-476 project schedule (behind page 68 of the Contract) shows that the curbs and gutters were to take a total of 18 calendar days, from day 32 to 49. The shoulders were to take 13 calendar days, from days 28 to 40. Bituminous pavement was to be completed in 29 days. Thus, the entire work portion of the project, exclusive of testing, was to take 95 days. (Joint Exhibit 1; N.T. 560)

27. The D-476 schedule was revised as follows: Bituminous Pavement showed 29 days in the original D-476 in 1988, and the revision showed an additional 30 days in 1989. Curbs and gutters showed 18 days in 1988 and an additional 18 days in 1989. Shoulder showed 13 days in 1988 and an additional 14 days in 1989. (Joint Exhibit 1; P-5; D-3)

28. In all, the initial revision to the schedule extended the Contract period three and one-half months into 1989 from April 15 to July 28. The time extension granted with the first revision is nearly the entire time again that the project was supposed to last. (P-5; D-3; N.T. 61-62, 295)

29. The Department attempted to explain that this doubling of the schedule was solely the result of the late Notice to Proceed but was unable to explain or calculate how a one month delayed Notice to Proceed could extend the project through three additional calendar months of optimum construction season. (N.T. 62, 549-550)

30. Defendant's Exhibit 25 shows the working day calendar conversion for this project; based on this calendar only 18 working days were lost due to the late notice. (Joint Exhibit 1; D-25; N.T. 561-565)

31. The project included refinishing of the shoulders, including Type 6, Type 7 and gutters. Gutters were placed in all cut slope situations. Shoulders were placed in fill slope. (N.T. 536)

32. The Contract required excavation in connection with the gutters solely to slot out the shoulder to install the bituminous material and removal of natural sloughage. No excavation was required to widen the shoulder for gutter. (N.T. 538-539)

33. The Department's Assistant Construction Engineer agreed that the Department never identified any extensive slope work to be performed in connection with the shoulder and gutter items and, indeed, the typical plan showed an absence of such slope work. (N.T. Remmy Depo. 51)

34. Mr. Remmy agreed that the lump sum prices set forth for the shoulder and gutter items were "totally unreasonable" if the Department actually intended excavation of the adjacent hillside. Moreover, he agreed, the item refers to "incidental excavation" which leads a reasonable bidder to conclude something less than massive hillside excavation necessary to widen the shoulder. (N.T. Remmy Depo. 50)

35. In the unusual situation on a group job where some widening is required, provisions for such widening are found in the tabulation and in the Contract, and there is a bid item for that. No such provisions existed here. (N.T. Remmy Depo. 25-26)

36. The Contract itself contains a description that simply states resurfacing of existing bituminous roadways; it said nothing about widening. The project was bid with no expectation that there would be any widening. (Joint Exhibit 1, pg. 5; N.T. 373-374)

37. Indeed, Mr. Straub, with all of his experience on jobs of this nature, was never involved in any project where a shoulder or a roadway was widened where Class 1 excavation in connection with that widening was not paid for specifically. (N.T. 123-124)

38. The topography did not lend itself to shoulder widening as could be seen by any site investigation. When the work began, according to the Department's Assistant Construction Engineer, there were minimal drainage facilities, some guardrail and little development beyond the edge of the roadway. There were streams within two to three feet of the driving surface of some of the roads. (N.T. Remmy Depo. 19)

39. Because of the existing conditions on most of the roadway, the contractor would have needed to allow for a two-to-one angle of repose to satisfy stability requirements if he were to do any widening - that is, for every foot up, he would have to excavate an additional two feet wide into the slope. Some of the roadways, such as Kittaning Road, had slopes as steep as twenty feet. (N.T. Remmy Depo. 28-30)

40. It was impossible to anticipate excavation of shoulders because there were no cross-sections provided with the Contract. Cross-sections are generally not provided with group jobs because the project doesn't lend itself to performing a quantity of earth work that would justify the cost. (Answer, para. 6C; N.T. Remmy Depo. 20)

41. A contractor is not permitted to go beyond the right-of-way of a project. Without cross-sections on the project showing the contractor where the right-of-way is, no excavation into the slope can be performed. (N.T. 139)

42. Indeed, the typical drawing for bituminous gutter notes: "Note. Confine all work to within the Existing Legal Right-of-Way." (Joint Exhibit 2, Sheet 8 of 46; N.T. 140)

43. In many cases the existing shoulder extended beyond the guardrail. Since the guardrail, which wasn't being moved under this project, was already inside the shoulder in many locations, there was no logical reason to extend the shoulder. (N.T. 137-139, 371)

44. The Project Engineer insisted that the shoulders be four feet wide regardless of topography or existing conditions and that the contractor perform this excavation as "incidental" to the gutter and shoulder work. During the construction of the paved shoulder, the contractor was directed to cut back the toe of the hill adjacent to the pavement the maximum four foot width shown in the typical drawings, despite the fact that in group projects, widening is generally extended only to the toe of the existing hill. (N.T. Remmy Depo. 49-52, 78)

45. When the contractor explained to Mr. Remmy that there was a serious risk of extending beyond the right-of-way, or even of creating landslides by cutting into the slope, Michael Graham, the District Plans Engineer, instructed Mr. Remmy and the Project Engineer to not follow the typical drawings which seem to indicate four foot widths, but merely to achieve "whatever width we could reasonably achieve." (N.T. Remmy Depo. 14-15, 31; N.T. 138)

46. Nonetheless, before the requirement was lifted, the contractor was forced to use specialized equipment, gradalls and hydraulic excavators, that were not to be used in the normal grading operation. (N.T. 231-232)

47. In response to the Notice of Final Quantities, which did not contain these additional payments, Tri-State notified the Department that it was not agreeing to the quantities for the shoulder items or for the failure to provide additional compensation for the increased overhead it alleged was caused by the factors leading to the time extensions. (P-18-20)

48. On August 2, 1990, the Department rejected the contractor's claim for the first time and notified the contractor that he had six (6) months within which it file a claim with the Board of Claims. (P-19)

49. Tri-State filed its claim on February 1, 1991, which is within the six (6) month statutory period. (Board Docket)

50. The Project Engineer appeared to be unfamiliar with the continuous nature of a group job. The nature of this project was such that it should have been performed in a continuous, moving operation. The contractor excavates the surface of the shoulders with a notch blade, the BCBC is replaced immediately behind the notch blade excavation and a roller immediately follows allowing immediate reopening each area of roadway. (N.T. 94)

51. It was never anticipated that there would be barrels on the project; barrels are not used on a continuous operation, cones are. The roads were so narrow that the Project Engineer's requirement to use barrels hindered the traffic attempting to pass in each direction. (N.T. 93)

52. The Project Engineer demanded that the contractor stop after each small section, get everybody off the road, park everything over to the side for as much as half an hour at a time, move all of the signs, and then come back and operate on another small section, repeating the process with each section. (N.T. 98)

53. Eventually, the District Office overruled the Project Engineer, but not until there had been a severe impact on the completion of the project. (N.T. 98, 167)

54. Once the District overruled the Project Engineer, the operations went approximately ten to fifteen miles per hour. (N.T. 163)

55. Publication 203, to which the Specifications refer as governing this project, requires that traffic control devices be "clean, legible and operative." The Contract noted that traffic control devices were to be in "like new condition" with reflective sheeting being neither dirty, scratched nor stained. (Joint Exhibit 1, pg. 48, Joint Exhibit 3; Complaint and Answer para. 61)

56. The signs used by Tri-State on this project initially were those that had been used by Burrell Construction Company and were in acceptable condition based on this language and its application on prior Department projects. When those signs were rejected in 1988, Tri-State used its own signs that it had used successfully in Pennsylvania without any difficulty. When those were also rejected by the Project Engineer, Tri-State purchased new signs entirely. (N.T. 54)

57. At one time, the Project Engineer shut down the project when the chip sealer, Winters and Fleming, who had successfully completed many such projects in Pennsylvania, came in with its own signs to do the chip seal work and had its signs rejected by the Project Engineer. (N.T. 267)

58. The Project Engineer forced Tri-State to assign a person full time to wash down the signs all day long to eliminate any dust that had accumulated on them. Other signs had to be replaced continuously since normal wear and tear would cause minor scratches that were intolerable to the Project Engineer. Signs that were completely legible and fully reflective had to be replaced because they weren't "like new" in the opinion of the Project Engineer. Indeed, the same signs that were removed from this project were then used on other Department projects without incident. At no time on this project were there any traffic control signs that were not clean, legible and operative as required by Publication 203. (N.T. 54-56, 58, 60, 376)

59. The Project Engineer had dramatically changed the nature of this project. David Spagnolli, the District Construction Engineer and the Department's only fact witness in this case, testified, this was "essentially a maintenance job for pothole patching, resurfacing routinely put out and that he spent an inordinate amount of time on this group job, than any other group job that he had ever dealt with due to the controversy between Department staff and Tri-State Asphalt." (N.T. 226)

60. The Department engaged in numerous shutdowns of the project, including three major shutdowns and numerous other threats to shutdown the project. (P-11; D-15; N.T. 170)

61. Project shutdowns became the weapon of choice for the Department for every dispute existing, including dirt on the signs. The project was shut down more than once for traffic control signs, including a shutdown in excess of a day in July 1989 until Tri-State agreed to replace the "like new" signs and replace with brand-new signs. (P-4; N.T. 58, 249, 253)

62. Another claimed basis for stopping the work was insufficient depth of the paving material. The existing locations for the project consisted of highly irregular roadways. Looking lengthwise on the roads, deviations of as much as six inches over a twenty-foot length were apparent. The drawings themselves contained no elevations despite these irregularities, as it is not the purpose of a group job to adjust elevations. This irregularity requires the project to be supervised differently than a reconstruction project, because it is impossible to assure that on any particular location there will be an absolute depth. Some of the deflections on the existing road surface were as much as six inches. (N.T. 79, 87)

63. This irregularity prohibits a contractor from building up the shoulder to assure that there is a minimum depth at every location, as doing so can cause the shoulder to be higher than the main line roadway. For this reason, road resurfacing projects typically utilize an "average depth" rather than a minimum depth. This permits the contractor to blend in the imperfections of a road that is severely deflected to provide greater ride-ability and accomplish the intent of the contract. (N.T. 89-90).

64. The inspectors on the project inspect the subbase before the asphalt is placed. The asphalt is then placed and it is checked with a grader and a level with the State's inspector. It is therefore unlikely that the asphalt, under such intense scrutiny, could be of insufficient depth; also Tri-State took cores which showed that the asphalt was not of insufficient depth. (N.T. 111-114)

65. The Department's Assistant Construction Engineer testified that on a group job, the contractor is to follow the existing elevations. Because of irregular configuration on either the roadway or the shoulder, which has an effect on the depth of the material that is put down, the Contract requires an "average pound of application" rather than a specified depth. To determine whether a particular location is acceptable, a single core can not be used, several cores must be taken to ascertain the average. (N.T. Remmy Depo. 96-97)

66. Throughout the project, in meeting minutes, notes and conversations, Tri-State notified the Department that the work it was performing was either extra or additional work and that if the Department did not approve additional payments, there would be a claim filed. (N.T. 392).

67. The change orders issued by the Department only accounted for an increase in the revenue of the project of $62,118.23. These change orders paid for *additional* work, but none of them covered the *extra* work that is the subject of this claim (N.T. 188, 386-388).

68. Except for initial start date, the impact for which the Department granted extensions of time was not the fault of the contractor. (N.T. 286).

69. Historically, Tri-State bid its projects with a 20% markup for profit and overhead. The estimated revenues for this project, the bid, was $2,057,376.88. The bid was apparently reasonable. All of the bidders were within 1 or 2% of each other, and the Department never questioned Tri-State's bid or said it was too low in any area. (N.T. 36, 358-362)

70. The contractor was given an extension of an entire year for a 125 calendar day project. As Mr. Remmy testified, he did not recall any project that he was ever associated with where the contractor was given a one-year extension of time where the extra year on the job was the contractor's fault. As he succinctly noted, "I can't comprehend that ever happening." (N.T. Remmy Depo. 41)

71. The contractor was required to mobilize or demobilize. The mobilization items includes the contractor's field offices, port-o-johns, moving of equipment to the project and subsequent removal, staging the equipment, and backup equipment. All of these costs are a factor of time. It also includes items that cannot be assigned to any particular item such as bond costs. (N.T. Remmy Depo 47; N.T. 189-190)

72. In addition to their own field offices, the contractor had to maintain the state inspector's field offices for an additional year on a project that was only supposed to last 125 days. (N.T. Remmy Depo 47-48, N.T. 191-192)

73. The contractor incurred additional costs for Project Manager Bob Smith, who is not charged to any particular project in the company's books, because he would normally move from project to project and would be absorbed in overhead. Normally, he would come into the project, stage the subcontractors, get them started, take care of quantities and move on to another project. Here, however, the project required Bob Smith to be exclusively on this project for an extra year. (N.T. 191-194, 354)

74. Every day on the project, the contractor recorded what equipment was on the project and what laborers were on the project. Each daily report lists equipment numbers that are keyed to various specific pieces of equipment. (N.T. 235, 312-315)

75. The contractor maintained a Job Cost Variance Report which contained an accumulation of, *inter alia*, all of the entries from the Superintendent's daily reports. It was used to track all of the direct costs on the project, and includes all of the revenues and all of the costs entered as direct costs to the project. The costs recorded in the Job Cost Variance Report are real numbers that are in the company's accounting records and come directly from the project. The revenue numbers are based on actual numbers paid by the Department. The Job Cost Variance Report also contains the accumulation of daily entries for outside invoices such as materials, trucking, taxes and licenses. It is an accumulation of costs for the three years of the project from the three annual Detailed Transaction Reports kept on the project. (P-21A-B-C; D-20; N.T. 215, 398, 400, 404, 406, 412)

76. The Detailed Transaction Reports are lists of every accounting entry, every contemporaneous bookkeeping entry in the company's system. The Job Cost Variance Report is the summary of each of these Detailed Transaction Report entries. The entries in the Detailed Transaction Reports come from the payables system, the payroll system, the equipment system and the billing system. There is no entry on the Detailed Transaction Report for labor that didn't come initially from the Superintendent's daily reports. Similarly, there is no entry for materials in the Detailed Transaction Report that did not come directly from the payables system. (P-21A-B-C; N.T. 406-410, 413-414)

77. The Superintendent's daily reports are admitted into evidence as Defendant's Exhibit 10. These reports are the original entry of data for payroll. From here, the payroll check for the week is written and then entered into the Detailed Transaction Report causing it then to be reflected in the Job Cost Variance Report. The Superintendent's daily reports also show on which contract item a particular piece of equipment was working that day, the hours the equipment was working and the identity of the equipment is listed on the report with name, code and number. (D-10)

78. All entries in the Detailed Transaction Reports come from the payables system. When the invoice gets recorded for payment it is shown in the Detailed Transaction Report and accumulated on the Job Cost Variance Report. (N.T. 414)

79. Rented equipment numbers came from the Detailed Transaction Reports and Job Cost Variance Reports which were entered directly from payables. (N.T. 415)

80. Plaintiff's calculation of damages are unreasonable and in part duplicative. (Board Record)

81. The Department's calculations as contained on Exhibit 33 and 35, which are based upon a 20% mark up, are reasonable. (Board Record)

82. Plaintiff is entitled to an award due to changes in the scope and character of the work for bituminous gutter and paved shoulder in the amount of $33,332.00. (D-33)

83. Plaintiff is entitled to an award of $104,258.00 resulting from the additional project costs due to the extended time periods of the contract. (D-35)

84. Plaintiff is entitled to additional Superintendant's costs of $47,475.82 due to extended duties required because of the extended time periods engraved by the Department. (P- 26; N.T. 448-450)

85. The total award for the Plaintiff is $185,065.82. (Summary of above Findings)

86. The Plaintiff is entitled to interest from August 2, 1990 at the statutory rate of six percent (6%) per annum. (P-19)

CONCLUSIONS OF LAW

1. The Board of Claims has exclusive jurisdiction to hear and determine all claims against the Commonwealth of Pennsylvania arising from contracts entered into with the Commonwealth. (72 P.S. §4651-4)

2. The Board of Claims has jurisdiction to hear and determine Tri-State's claim as its arises out of a contract entered into by Tri-State with the Department and the amount in controversy exceeds $300.00. (72 P.S. §4651-4)

3. The Board has jurisdiction over the parties as well as subject matter jurisdiction asserted by the Plaintiff. (72 P.S. §4651-1, et seq.)

4. Tri-State's Claim was timely asserted as it was filed within six (6) months after it accrued.

5. Each party to a contract has an implied duty to act in good faith and deal fairly with the other party to the contract during the performance and enforcement of the contract.

6. Tri-State incurred additional costs and expenses due to the extension of time by the Department and the Department's actions.

7. Each party to a contract agrees not to prevent or do anything to prevent or impede, the other party from performing, and not to hinder, impede, obstruct or delay a party in performance or in discharge of a contractual obligation and not to make performance more burdensome or injure the other party's right to receive the fruits of the contract.

8. The actions of the Department's Project Engineer were unreasonable and hindered, impeded, obstructed and delayed Tri-State's performance rendering affirmance by Tri-State more costly.

9. The actions of the Department's Project Engineer were a breach of the contractual duties owed to Tri-State.

10. The damages as presented by Tri-State were unreasonable and, at times, duplicate.

11. The damages presented by the Department as summarized in Defendant's Exhibit 33 and 35, which contain a 20% mark-up are reasonable and eliminate any duplicity.

12. Tri-State is entitled to an award of $185,065.82 comprised of $33,332.00 for changes in the scope and character of the work for bituminous gutter and paved shoulder, $104,258.00 for additional project costs and $47,475.82 for additional Superintendent costs.

13. Tri-State is entitled to interest on its award at the statutory rate of six percent (6%) per annum from August 2, 1990.

14. The award made to Tri-State removes all duplicative damages in the Claim of Tri-State.

15. The award made to Tri-State removes all excessiveness from Tri-State's Claim.

16. The award made to Tri-State places Tri-State in the position of being compensated for its performance as though no breaks had occurred and renders the Plaintiff whole.

OPINION

Plaintiff, Tri-State Asphalt Corporation, an asphalt paving contractor brought this action to recover extra costs incurred on a "group job" performed in Allegheny County Pennsylvania in 1988, 1989 and 1990.

A group job is a simple resurfacing project consisting of various roads that, while not necessarily contiguous, are located within the same general geographical area. As a rule, the project involves no altering of the grade, width, depth or location of the various roadways. This provides for a low bid, which in this instance was less than $4.00 per foot of roadway.

There are three separate counts in this action. The first is for the additional project costs resulting from the extended time periods on the project, including mobilization, inspector's field office and traffic control, all contract items, and a years additional salary for the project Superintendent.

The second count is for the extra costs resulting from the changes to the scope and character of the shoulder and gutter work. The Plaintiff contends that interferences from the Project Engineer caused the scope and character of the shoulder items to be significantly changed and the project itself to be altered from a simple 125 calendar day resurfacing project, that was to be completed in one season, to a much more complicated and difficult project that extended into a third season. This extended duration was due partly to the change in the scope of the work and partly to incessant shutdowns ordered by the Project Engineer.

The Department denies all liability to Tri-State contending that the delay, which is the subject of Tri-State's first two counts, is attributable to causes for which the Department is not answerable in damages to Tri-State and that the excavation, which is the subject of Tri-State's third count, was not performed in quantities near as vast as Tri-State would have the Board believe, and was not extra work. Further, the Department contends that if there is liability on its part that the damages claimed by Tri-State are overstated.

The Department correctly states that the following issues must be decided and discussed by the Board:

> A. As a factual matter, what was the cause, or what were the causes, of the delay in the performance of the Project by Tri-State?
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> B. Is the Department legally responsible to compensate Tri-State in damages for the delay in its performance of the Project?
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> C. Did Tri-State in fact perform, as it claims, massive amounts of excavation in connection with the construction of shoulders and gutters on the Project?
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> D. Is the Department contractually obligated to pay additional compensation to Tri-State for any excavation it may have performed in constructing shoulders and gutters on the Project?
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> E. Are the damages claimed by Tri-State reasonable?

The Contract allowed 125 calendar days for performance, with an anticipated Notice to Proceed date of July 25, 1988 which could not be met because Tri-State was late in submitting contract documents. The Department asked Tri-State to agree to a 30-day extension of time for issuance of a Notice to Proceed and Tri-State consented, thereby changing the Notice to Proceed date to August 29, 1988.

With respect to extensions of time for issuance of a Notice to Proceed, the Publication 408 Specifications, dated 1987 ("Specification"), which were part of the Contract, provided as follows:

> **"103.08 CANCELLATION OF CONTRACT -** The Contract may be cancelled by either party if the Notice to Proceed date is not within 30 days of award of the contract. Extension(s) of the 30-day period will be made only by mutual written consent of the parties to the contract provided such written consent is given prior to the expiration of the 30 - day period. Prices will not be renegotiated. . . ."
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This contract called for a "group job" which was the type of project that the Department used to do with its own forces, a simple maintenance job to resurface, not reconstruct, the subject roads. For this reason, group jobs do not provide individual drawings, dimensions or elevations. The contractor is supposed to take what is and simply improve the ride-ability.

This Board is of the opinion that the scope of the Contract and delays in work progress were caused by various actions of the Project Engineer. The nature of this project was such that it should have been performed in a continuous, moving operation. The contractor excavates the surface of the shoulders with a notch blade, the pavement is replaced immediately behind the notch blade excavation and a roller immediately follows allowing immediate reopening of each area of roadway. The Project Engineer, however, forced the contractor to stage this project in minute sections, requiring him to stop after each small section, get everybody off of the road, park everything over to the side for as much as a half an hour at a time, move all of the signs, and then come back and

operate on another small section, repeating the process with each section. Eventually, the District Office overruled the Project Engineer, but not until there had been a severe impact on the completion of the project. Once the District overruled the Project Engineer, the project proceeded in a continuous operation as it should have been from the beginning. The operation consisted of breaking through a few inches of old asphalt, making four foot wide paths with a ditcher, placing removed material in a dump truck and placing the asphalt right into the hole. The operations went approximately ten to fifteen miles per hour and would have allowed the project to be completed in the 95 days scheduled for actual work.

Publication 203, which governs this project according to the Contract Specifications, requires that traffic control devices be "clean, legible and operative." The Contract noted that traffic control devices were to be in "like new condition" with reflective sheeting being neither dirty, scratched nor stained. The Contract Specifications, Section 105.03(A), contained the language that the contractor is to perform work *within reasonably close conformity* to the lines, grades, dimensions and indicated details and/or as specified. The Project Engineer forced Tri-State to assign a person full time to wash down the signs all day long to eliminate any dust that had accumulated on them. Other signs had to be replaced continuously since normal wear and tear would cause minor scratches that were intolerable to the Project Engineer. Signs that were completely legible and fully reflective had to be replaced because they weren't "like new" in the opinion of the Project Engineer. Indeed, the same signs that were removed from this project were then used on other Department projects without incident. It is a finding of this Board that the traffic control signs were clean, legible and operative as required by Publication 203. The capricious rejection of these signs became a major nightmare

contributing to the complete alteration of the scope and character of the work on this project and Tri-State was forced to purchase new signs entirely.

Project shutdowns became the weapon of choice for the Department for every dispute, including dirt on the signs. The project was shut down more than once for traffic control signs, including a shutdown in excess of a day in July 1989 until Tri-State agreed to replace the "like new" signs in place with brand new signs.

The site locations for the Project consisted of highly irregular roadways. Looking lengthwise on the roads, deviations of as much as six inches over a twenty foot length were apparent. The drawings themselves contained no elevations despite these irregularities, since it is not the purpose of a group job to adjust elevations. This irregularity requires the Project to be supervised differently than a reconstruction Project, since it is impossible to assure that on any particular location there will be an absolute depth. Some of the deflections on the existing road surface were as much as six inches. The Department's Assistant Construction Engineer testified that on a group job, the contractor is to follow the existing elevations. If there is an irregular configuration on either the roadway or the shoulder, there is an effect on the depth of the material that is put down, which is why the Contract requires an "average pound of application" rather than a specified depth. You cannot tell whether a particular locations acceptable with a single core; you need to take several cores to ascertain the average. Yet, the Project Engineer utilized single cores to ascertain depths at a precise location rather than several cores to arrive at an average depth. This also resulted in delay and unreasonable shutdown of the Project.

The Contract required the refinishing of the shoulders as Type 6 shoulders, Type 7 shoulders and gutters. Gutters were placed in all cut slope situations. Shoulders were placed in fill slope. The

Contract required excavation in connection with the gutters solely to slot out the shoulder to instal the bituminous material and for the removal of natural sloughage. No excavation was required to widen the shoulder for gutters. The Department's Assistant Construction Engineer, Charles Remmy, agreed that the Department never identified any extensive slope work to be performed in connection with the shoulder and gutter items and, indeed, the typical plan showed an absence of such slope work. Mr. Remmy agreed that the lump sum price set forth for the shoulder and gutter items was "totally unreasonable" if the Department actually intended excavation of the adjacent hillside. Moreover, he agreed, the item refers to "incidental excavation" which leads a reasonable bidder to conclude that something less will be required than the massive hillside excavation necessary to widen the shoulder. In the unusual situation on a group job where some widening is required, provisions for such widening are found in the tabulation and in the Contract, and there is a bid item for that. No such provisions existed here. The Contract itself contains a general description of the Project that simply states "resurfacing of existing bituminous roadways;" it says nothing about widening. The Project was bid with no expectation that there would be any widening.

The Department's Project Engineer demanded that the contractor provide four foot wide shoulders, even if this meant cutting into steep rock slopes alongside the roadway. During the construction of the paved shoulder, the contractor was directed to cut back the toe of the hill adjacent to the pavement the maximum four foot width shown in the typical drawings, despite the fact that in group Projects widening is generally extended only to the toe of the existing hill. When the contractor explained to Mr. Remmy that there was a serious risk of extending beyond the right-of-way, or even of creating landslides by cutting into the slope, Michael Graham, the District Plans Engineer, instructed Mr. Remmy and the Project Engineer not to follow the typical drawings which

seemed to indicate four foot widths, but merely to achieve whatever width that could reasonably be achieved.

However, before the requirement was lifted, the contractor was forced to use specialized equipment that was not to be used in the normal grading operation, including gradalls and a hydraulic excavator.

These changes to the design altered the scope and character of the work, for which the Department has refused to compensate the contractor. Where the owner forces a contractor into more costly operations, the owner must respond in damages for the resulting additional outlays as a contractor who performs work beyond the scope of his contract is entitled to additional compensation. *Comm. Dept. Of Transp. v. Gramar Const. Co.*, 71 Pa. Cmwlth 481, 454 A.2d 1205 (1983).

By being forced to do excavation work on a resurfacing Project, by being forced to alter the methodology of the work to isolated work areas rather than the continuous operation inherent in work of this nature, by being forced to alter the traffic control operations and signs beyond the scope of the contract, and by being subjected to unwarranted inspection throughout this Project caused a one season maintenance Project to be extended through a second season and into a third season and the contractor was forced to perform services above and beyond that which were called for in the Contract.

The D-476 Project schedule (behind page 68 of the Contract) shows that the curbs and gutters were to take a total of 18 calendar days, from day 32 to 49. The shoulders were to take thirteen calendar days, from days 28 to 40. Bituminous pavement was to be completed on day 31. The entire

Project therefore could have been completed in 1988, even with the late Notice to Proceed. The entire work portion of the Project, exclusive of testing, was to take 95 calendar days.

The impact of the changes, changed conditions and revisions to the methodology permitted in the Contract is evident by the Department's revisions to the schedule. The revision of the schedule to bring the Project into 1989 showed 109 days of work to be performed in 1989. The original D-476 showed a total of 125 calendar days including 30 days of testing. Thus, the Department provided for a reduction of only a net 16 calendar days for all of the work performed and completed in 1988. The extent to which the Project was altered was even more evident in the individual items set forth in D-476. The bituminous pavement showed 29 days in the original D-476 in 1988, and the revision showed an additional 30 days in 1989. Curbs and gutters showed 18 days in 1988 and an additional 18 days in 1989. Shoulder showed 13 days in 1988 and an additional 14 days in 1989, beginning in June, in virtually the same seasonal weather conditions.

In all, the initial revision to the schedule extended the Contract period three and one-half months into 1989 from April 15 to July 28. The time extension granted with the first revision is nearly the entire time again that the Project was supposed to last.

Though the Department attempted to explain that this lengthy extension was necessary because of the October cutoff for seal coat work, the calculations did not support this. Defendant's Exhibit 25 provided the working day/calendar day conversion for this Project. Based on this conversion calendar, only 18 working days were lost due to the late Notice to Proceed, which does not justify, on its own, an extension to July 1989. The seal coat is part of the bituminous pavement work, which in its entirety was to take only 30 calendar days, and could have been completed by the end of September even under the late Notice to Proceed.

Regardless of the basis of the original extension to July 1989, the Project was extended again to October 31, 1989.

Essentially, the contractor was given an extension of an entire year for a 125 calendar day Project. As Mr. Remmy testified, he did not recall any Project that he was ever associated with where the contractor was given a one-year extension of time where the extra year on the job was the contractor's fault. As he succiently noted, " I can't comprehend that ever happening."

Here, the Project Engineer actively interfered with virtually every aspect of the work, substituting his own value judgments for the Contract language and historical requirements on group jobs. That interference, including multiple job shutdowns, is the basis for the time extensions. It is the cause of the increased costs to do the work and is the reason for the damages sought by the contractor in this case.

Each party to a contract agrees not to prevent or do anything to prevent or impede, the other party from performing, and not to hinder, impede, obstruct or delay a party in performance or in discharge of a contractual obligation and not to make performance more burdensome. *Bushkill-Lower Lehigh Joint Sewer Authority vs. Comm. Dept. Of Environmental Resources*, Board of Claims, Docket No. 745 (1984)

Each party to a contract has an implied duty to act in good faith and deal fairly with the other party to the contract during the performance and enforcement of the contract. *James D. Morrissey, Inc. v. Comm. Dept. Of Transportation*, Board of Claims Docket No. 996 (1990).

These principles have been recognized by our Pennsylvania courts. In *Liazas v. Kosta, Inc.*, 421 Pa. Super 502, 618 A.2d 450, 454 (1992), the Superior Court held that fundamentally, every contract imposes upon the parties a duty of good faith and fair dealing in the performance and

enforcement of the contract. In interpreting this requirement, the Pennsylvania Superior Court held that the law implies an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do to carry out the contract **and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract.** *Daniel B. Van Campen Corp. v. Building and Const. Trades Council of Philadelphia and Vicinity*, 202 Pa. Super 118, 195 A.2d 134 (1963).

Thus, reasonableness, fairness, good faith and cooperation are inherent duties of any party to a contract. Yet, those duties were breached by the Department acting through its Project Engineer.

Though the Department argues that it is not responsible for damages for a "delay" claim, and seeks to interpose Section 111 of the Specifications to avoid liability for the extended overhead, the Department can not absolve its own active interference with exculpatory language.

This is a case of in-the-field redesigning of the requirements of the Project. This is a case of remaking the scope and character of the work during construction. This is a case of active interference by the Department itself, principally through its field supervisors and inspectors. Any limitation on damages for delay will not be upheld where the delay is the fault of an active and unnecessary interference with the performance of the work. *Coatesville Contractors and Engineers, Inc. v. Borough of Ridley Park*, 509 Pa. 553, 506 A.2d 862 (1986).

It is this active interference by the Department that brings about a breach of the Contract between the parties. As in any breach of contract action, the measure of damages is the amount necessary to place Plaintiff in the position he would have been in had there been no breach. *Comm. Dept. Of Transportation vs. Brozzetti*, 684 A.2d 658 (1996).

Had there been no breach, the contractor would have completed this Project in 95 calendar days (30 days of the 125 was set aside for testing at the conclusion of the work). Equipment would have been on the Project for only one season. Labor that was on the Project for two seasons and a part of a third would have been on the Project for the working day equivalent of only 95 calendar days. The inspector's field office and the utilities that go with it would have been on the Project for only one season and those devices would have been the ones already in the contractor's possession. The contractor's owner would have been able to focus on obtaining other work or expediting other ongoing Projects. The Project superintendent would not have been confined to this one Project. The shoulder and gutter work would have been completed in a continuous operation with equipment not designed for excavation work. Accordingly, damages must be awarded to compensate the Plaintiff as if there had been no breach, but the Plaintiff is not entitled to a windfall or a double recovery of any item of damage.

Every day on the Project, the contractor recorded what equipment was on the Project and what labor was on the Project, identifying the specific pieces of equipment, the specific laborers and the specific items of work to which they were assigned that day. Each daily report lists equipment numbers that are keyed to various specific pieces of equipment. The superintendent's daily reports also show on which contract item a particular piece of equipment was working that day, the hours the equipment was working and the identity of the equipment. The equipment is listed on the report with name, code and number. The daily reports also show the rate and time for the laborers.

The contractor maintained a Job Cost Variance Report which contained, *inter alia*, an accumulation of all of the entries from the superintendent's daily reports. It was used to track all of the direct costs on the Project, and includes all of the revenues and all of the costs entered as direct

costs to the Project. The costs recorded in the Job Cost Variance Report are real numbers that are in the company's accounting records and come directly from the Project. The revenue numbers are based on actual numbers paid by the Department. The Job Cost Variance Report also contains the accumulation of daily entries for outside invoices such as materials, trucking, taxes and licenses.

This information was the information used by both the Plaintiff and Defendant in presenting their damages. The method used by each party however was different. Tri-State applied its costs with a 20% mark up that applied the full amount and blue book rates to arrive at its cost overrun claim. To complete its claim Tri-State applied the Eichleay calculations to determine its overhead, added its superintendent cost and a total claim. The Department argues that this method of calculation goes beyond rendering Tri-State whole. This Board argees. In the opinion of this Board the method used by Tri-State is unreasonable and in fact, permits duplicate recovery by using the Eichleay method of calculation.

This Board does not favor the Eichleay method of calculation because of its nature to permit recovery beyond making the contractor whole and duplicating damages at times. The record and exhibits in this case permit a calculation of damage that renders Tri-State whole. The Department's damage expert, in the opinion of this Board reasonably, adequately and fairly summarized the cost overrun damages and extra work damage in Defendant's Exhibit 33 and 35 which contain a 20% mark up and eliminated any duplicity. Also, Tri-State should recover its cost for the additional time its superintendent had to be on the Project site.

Accordingly, an award of $185,065.82 comprised of $33,332.00 for extra work in the changes of the scope and character of the work for bituminous gutter and paved shoulder, $104,258.00 for additional Project overrun costs and $47,475.82 for additional superintendent cost.

The award shall bear interest at the statutory rate of six percent (6%) per annum from August 2, 1990, the date the Department rejected Plaintiff's claim and advised Plaintiff to file a Claim with the Board of Claims.

On rendering this award, the Plaintiff has been placed in a position it would have been had a breach of contract not occurred and has been fairly compensated without double recovery or excessiveness.

ORDER

AND NOW, this 29th day of September, 1999, an award is entered in favor of the Plaintiff, Tri-State Asphalt Corporation and against the Defendant, Commonwealth of Pennsylvania, Department of Transportation in the amount of One Hundred Eighty-Five Thousand Sixty-Five Dollars and Eighty-Two Cents ($185,065.82) with interest at the legal rate of six percent (6%) per annum from August 2, 1990, the date the Department rejected Plaintiff's claim and advised Plaintiff to file a Claim with the Board of Claims.

Each party to bear their own costs and attorneys' fees.

BOARD OF CLAIMS

_____
David C. Clipper
Chief Administrative Judge

_____
Louis G. O'Brien
Engineer Member

_____
James W. Harris
Citizen Member