

COMMONWEALTH OF PENNSYLVANIA

GANNETT FLEMING, INC. : BEFORE THE BOARD OF CLAIMS  
 :  
VS. :  
 :  
COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF TRANSPORTATION : DOCKET NO. 1558

---

**FINDINGS OF FACT**

1. Plaintiff, Gannett Fleming, Inc., hereinafter referred to as “Gannett Fleming”, is a Delaware Corporation with its principal place of business located at 207 Senate Avenue, Camp Hill, Pennsylvania, 17011. Gannett Fleming is engaged in the professional practice of consulting engineering. (Complaint and Answer; Stipulation 1)

2. Defendant, Commonwealth of Pennsylvania, Department of Transportation, hereinafter referred to as “the Department” is an executive Department of the Commonwealth of Pennsylvania with principal offices located at the Forum Building, 555 Walnut Street, Harrisburg, Pennsylvania 17120. (Complaint and Answer; Stipulation 2)

3. Gannett Fleming and the Department entered into an Agreement on December 3, 1987, hereinafter referred to as the “Agreement”, wherein Gannett Fleming agreed to perform engineering services, on behalf of the Department, for the preparation of an Environmental Assessment and Preliminary Engineering (Part I) and the Final Design (Part II) of S.R. 6040, Section A04, commonly referred to as the Uniontown Bypass. (N.T. 38; Ex. P-179; Complaint and Answer; Stipulation 3)

4. Prior to entering into the Agreement, on or about 1975, the Department retained the engineering firm of Howard, Needles, Tammen & Bergendoff to prepare a draft final design plan of the Uniontown Bypass Project, however, the Howard Needles plans were not used by the Department at that time. However, 90 to 95% of the right-of-way had been acquired for the project prior to 1987. (N.T. 35; Complaint and Answer)

5. In early 1987, the Department advertised for letters of interest for the Uniontown Bypass Project in the Pennsylvania Bulletin, to which Gannett Fleming submitted a letter, was short listed as one of three firms and was requested to prepare both a cost and technical proposal for the Project. (N.T. 36)

6. In preparing its technical proposal, which is also known as a “scope of work”, Gannett Fleming consulted and relied upon the scope of work for the project that was prepared by the Department. Both parties’ scopes of work were made a part of the Agreement. (N.T. 186)

7. The Department’s scope of work for the Uniontown Bypass Project called for a design update of the plans prepared in 1975. (N.T. 37)

8. The Agreement provided for a total project period of 18 months. Furthermore, Gannett Fleming, in its proposal, indicated that Part I of the Agreement consisting of the Preliminary Design would be complete in 8 months, and Part II of the Agreement, consisting of the Final Design of the project would be completed in 10 months. (N.T. 58, 78-79; Stipulation 6)

9. Gannett Fleming's scope of work stated that Gannett Fleming's proposal assumed that there would be no horizontal nor vertical alignment changes. (N.T. 62)

10. Even though Gannett Fleming (Gary Miller) knew of some design requirement changes between 1975 and 1987, it based its bid on the assumption that it could still use most of the 1975 plans. (N.T. 176)

11. In order to accelerate the Project, the Department designated the Uniontown Bypass Project a FAST Project (Facilitate Acceleration through Special Techniques) and FAST meetings were held throughout the duration of the Project. (N.T. 44; Stipulation 8) (emphasis added)

12. On December 7, 1987, the Department gave Gannett Fleming Notice to Proceed with Part I of the Project. On or about December 16, 1987, the Department changed the Environmental Assessment (EA) originally required to an Environmental Impact Statement (EIS). The Department ultimately issued Supplemental Agreement "A", eight (8) months later, on August 29, 1988, to cover this change in scope. (N.T. 39; Stipulation 4 and 5)

13. While a cultural resources study was performed, some artifacts were discovered in a certain area of the project, thus Supplemental Agreement "B" was entered into on or about April 24, 1989 for Gannett Fleming's subconsultant to perform a phase two archeological study. (N.T. 40; Pltf. Ex. 339)

14. During the course of the EIS, a historic site known as the Barnes Estate was determined to exist within the project area and Gannett Fleming was required to perform additional studies in an attempt to avoid impacting this site. Thus, on or about August 18, 1989, Supplemental Agreement "C" was executed by the parties. (N.T. 40-41; Pltf. Ex. 404)

15. On November 30, 1989, Gannett Fleming received new aerial mapping from the Department which was undigitized. (N.T. 42)

16. On January 10, 1990, Gannett Fleming advised the Department, in writing, that Gannett Fleming had expended 81% of the payroll provided for in the Agreement at that time (Part I). The Department advised Gannett Fleming to continue working on the environmental studies. (N.T. 42)

17. Gannett Fleming was aware that according to Department procedures, a supplemental agreement had to be approved before additional work could start. (N.T. 155)

18. On or about March 22, 1990, Gannett Fleming and the Department entered into Supplemental Agreement "D", which required some additional services and transferred approximately 800 to 1,000 hours of Final Design-Part II into Preliminary Design-Part I of the Agreement. The elements transferred consisted primarily of utility design, drainage and erosion control. (N.T. 43, 154)

19. Gannett Fleming turned in the final EIS on February 12, 1990. (N.T. 154),

20. In March of 1990, the Department was aware that a supplement and additional funding was needed by Gannett Fleming to complete the final design (Part II) of the project as required by the Department. (N.T. 42-44; Stipulation 9).

21. The Department required Gannett Fleming to separate the contract into two different construction contracts, with grading, drainage, structures, side roads and paving placed in one contract, and paving, lighting, signing, signalization, structural noise barrier design, completion of Ramp D and Route 40 in a second contract. The split in the construction contract, required by the Department, resulted in a second major revision to the traffic control concept for the project, special detailing on the plans and specifications to allow bidding of two separate contracts and addition of new construction, tabulation, summary, signing, pavement marking, erosion and sedimentation plan sheets to the bid packages. (N.T. 43; Stipulation 20 and 23)

22. Mr. Maurice A. Wadsworth, who served as Senior Vice President of Gannett Fleming during the design of the Uniontown Bypass project, received a telephone call from the PennDot district engineer in Uniontown, Bill Beaumarriage, in May, 1990. With respect to this call, Mr. Beaumarriage stressed the urgency of Gannett Fleming completing its design of the project in accordance with the accelerated schedule and described how important the project was. Subsequently, Mr. Wadsworth contacted Mr. Miller who described how Gannett Fleming was required to complete the final design of the project in approximately 3 months, not the 10 months originally planned. Mr. Miller also informed Mr. Wadsworth that Gannett Fleming did not have the manpower in the Pittsburgh office alone to do a design task of this magnitude in that time frame. (N.T. 58, 192-200)

23. Therefore, Mr. Wadsworth contacted Mr. Ronald Drnevich, who was the division director of Gannett Fleming, to see if they could devote the resources of Gannett Fleming to the project and to advise him of the magnitude of this project. In response, Mr. Drnevich assured Mr. Wadsworth that he would be able to get more help for Gary Miller on this project. Mr. Wadsworth then attempted to telephone Mr. Beaumarriage to advise him of the status of the matter but could not reach him. Mr. Wadsworth then wrote Mr. Beaumarriage a letter on May 25, 1990, to advise Mr. Beaumarriage that Gannett Fleming would make every effort to complete the job according to schedule and copies of this letter were sent to Mr. Drnevich and Mr. Miller. After sending the letter, Mr. Wadsworth received no communication from Mr. Beaumarriage, although

Mr. Wadsworth had made it clear by sending the May 25, 1990 letter that Gannett Fleming was about to undertake extraordinary measures to complete the design within the Department's schedule. The letter dated May 25, 1990 was introduced previously as Plaintiff's Exhibit 765. (N.T. 192-200)

24. Gannett Fleming was notified that the preliminary engineering plans, also referred to as the Step Nine Plans, were approved when the Department received a record decision for the EIS on May 22, 1990, two and one half years after the notice to proceed with Part I of the Agreement. (N.T. 95; Complaint and Answer) (emphasis added)

25. Notice to Proceed for Part II (Final Design) was issued on May 22, 1990, which was the same date upon which approval of the Environmental Impact Statement was received. (Stipulation 7 and 18)

26. In January, 1990, the Department advised Gannett Fleming that the final design plans (Part II) were to be completed in July of 1990 so that the Department could meet its schedule for construction contract letting and groundbreaking. This design acceleration directed 10 months of work to be completed in 3 months. (N.T. 42; Complaint and Answer; Board Finding)

27. The Department further required Gannett Fleming to meet a bid letting date of September 27, 1990 so that the contract could be awarded and groundbreaking could occur prior to or on November 1, 1990. (Stipulation 19)

28. On June 5, 1990, Gannett Fleming submitted final Right-of-Way plans for the project, which included additional revisions brought about by design changes. (N.T. 47)

29. On June 7, 1990, just 16 days subsequent to the Notice to Proceed for Final Design-Part II, Gannett Fleming submitted a Request for Supplemental Agreement "E"<sup>1</sup> to the Department, requesting additional funds to complete the design of the project. However, the request was not accepted. (N.T. 47-48; Stipulation 10; Pltf. Ex. 791)

30. The June 7, 1990 Request for Supplemental Agreement "E" originally contained estimated manhours for completion of both Contract One, which included all grading, drainage, structures, side roads and paving, and Contract Two, which included all paving, lighting and signing. However, after negotiations between the parties on June 19 and 25, 1990, the Department requested Gannett Fleming to remove the items for Contract Two from the request and to negotiate those items in late 1991. The Contract Two items that were removed from the request are not part of Gannett Fleming's claim against the Department. (N.T. 48-49; Stipulation 11)

---

<sup>1</sup>Note that the Stipulation refers to this request for supplemental agreement as "F". When this Request was submitted, it was referred to as "E". It was denied, but a subsequent request for supplemental agreement unrelated to the final design work was approved as "E". Later submissions of the request for supplemental agreement relating to the final design work were referred to as "F". In any event, the request for supplemental agreement at issue in this case relates to Gannett Fleming's services for final design, which form the basis for the claim.

31. Additionally, during the negotiation meetings on June 19 and 25, 1990, Gannett Fleming's request for manhours to complete Contract One was reduced from 16,000 manhours to 9,000 manhours as directed by the Department during negotiation sessions. (N.T. 49)

32. On June 29 1990, Gannett Fleming submitted its revised Request for Supplemental Agreement "E" after the Department requested that Gannett Fleming change the configuration of the request. (N.T. 49; Stipulation 12)

33. The Department's District office submitted a revised supplemental agreement to the Consultant Agreement Section of the Department on July 12, 1990. (Stipulation 27)

34. On July 6, 1990, Gannett Fleming resubmitted the Request for Supplemental Agreement "E" to the Department, which was a final revised scope of work for proposed Supplement "E". (N.T. 49)

35. On July 11, 1990, Gannett Fleming submitted additional right-of-way plans to the Department. (N.T. 50)

36. On July 16, 1990, Gannett Fleming conducted a final design office review. (N.T. 50)

37. On July 18, 1990, Gannett Fleming received a letter from the Department stating that the Request for Supplemental Agreement "E" was denied because the Department determined that the majority of the services claimed had already been completed. (N.T. 49-50; Stipulation 28)

38. On July 19, 1990, approximately 8 weeks after notice to proceed, Gannett Fleming submitted pre-final Plans, Specifications and Estimates (PS&E) to the Department. (N.T. 50)

39. Final PS&E plans for Contract 1 were transmitted to the Department on July 31, 1990, the Bid Package was advertised August 23, 1990 and the Contract was let on October 4, 1990. (Stipulation 21)

40. The July 31, 1990 final submission, which included mylars, occurred approximately 10 weeks after notice to proceed with Part Two-Final Design. (N.T. 50-51)

41. Therefore, Gannett Fleming performed, in approximately ten weeks, design work that the parties had originally contemplated would take ten months. (N.T. 50-51) (emphasis added)

42. On July 31, 1990, Gannett Fleming wrote two letters to the Department in response to the Department's denial of Request for Supplemental letter of July 18, 1990. One letter, addressed to Secretary Yerusalim, advised that Gannett Fleming would be compelled to submit its claim to the Board of Claims. The second letter, addressed to District Engineer William Beaumarriage, stated that Gannett Fleming was at or beyond 95% of their payroll budget, but because the Department wanted this project completed, Gannett Fleming would continue to work on the project. (N.T. 50)

43. Approximately one week after the July 31, 1990 final PS&E submission, tracings with additional comments from the Department's Central Office were returned to Gannett Fleming. (N.T. 51)

44. On or about July 31, 1990, Gannett Fleming sent letters to Mr. William Moyer and Mr. Terrence Connor, notifying these individuals that Gannett Fleming would be processing this claim against the Department. (N.T. 51-52; Pltf. Ex. 857, 957)

45. On or about August 9, 1990, the Department requested that Gannett Fleming survey, reference and flag the entire alignment and stake-out the alignment in 50 foot intervals. (N.T. 52-53)

46. On August 21, 1990, Gannett Fleming submitted to the Central Office the final PS&E submission, along with final mylars, which enabled the Department to begin processing the letting documents. (N.T. 52)

47. The Uniontown Bypass project was advertised for construction bids on August 23, 1990 and the original bid letting date of September 27 was pushed back to October 4, 1990. (N.T. 53)

48. Groundbreaking for the construction of the Uniontown Bypass project occurred on or about October 31, 1990. (N.T. 54)

49. On or about December 20, 1990, Gannett Fleming received approval for a Supplemental Agreement "E"<sup>2</sup>, which provided for Gannett Fleming to perform construction services in relation to the first contract, such as reviewing shop drawings and answering any construction questions when they arise. But this Supplemental "E" did not address acceleration of design costs. (N.T. 54; Pltf. Ex. 1108)

50. On December 20, 1990, Gannett Fleming received a notice to proceed on the construction services provided for in Supplement "E". This was basically the end of the design of the project for the year 1990. (N.T. 55)

51. On February 26, 1991, Gannett Fleming, acting in accordance with Department regulations, submitted a Request for Supplemental Agreement "F" to the Department which requested payment for the actual costs of the additional and accelerated services incurred and performed by Gannett Fleming. The Request included an invoice in the amount of \$793,659.89, which subsequently became Gannett Fleming's claim in this matter. (N.T. 55; Stipulation No. 13)

---

<sup>2</sup> The 12-20-90 Supplemental Agreement "E" is not for the same services as the 7-6-90 Request for Supplemental Agreement "E" mentioned previously. See footnote no. 1

52. The manhours and additional costs and expenses contained in the invoice submitted by Gannett Fleming represent manhours and expenses and costs directly charged to the subject project. The parties agree that the manhours were expended by Gannett Fleming and the costs and expenses were incurred relative to this project. (Stipulation 15)

53. The Department selected the type of contract to be used on this project. (N.T. 272-273)

54. A “cost plus net fee” agreement such as the contract utilized for this project anticipates that the scope of work of the engineer may change and provides a method to compensate the consultant if such a change occurs. (N.T. 273-274)

55. Plaintiff’s Exhibit 1445 provides a summary of the work that was performed by Gannett Fleming outside of the original scope of work for Final Design-Part II. (N.T. 59; Pltf. Ex. 1445)

56. In the Agreement, the original scope of work prepared by the Department, and relied upon by Gannett Fleming in its written scope of work, called for a design update of the 1975 plans. (N.T. 62)

57. Gannett Fleming’s proposal, which is part of the Agreement, assumed no horizontal or vertical alignment changes. However, as a result of requirements of the Department that came about during the development of preliminary engineering and the EIS, Gannett Fleming was directed to address horizontal and vertical design changes for the ramps, mainline alignment and Hopwood Interchange and ramps that tie into Route 40. This was required to reduce the impact to the Barnes Estate that was not contemplated in the original scope of work since the EIS process determined its eligibility for the National Register of Historic Places. (N.T. 62-63) (emphasis added)

58. During the development of the design in late 1989, the Federal Highway Administration (FHWA) issued design criteria that required all arterial classified roadways to have 16’6" vertical clearance under their bridges. However, when the Uniontown Bypass Project was originally designed in the mid-1970’s, the applicable criteria called for a 14’6" vertical clearance. As a result, Gannett Fleming was required to change the profile of the mainline under the bridge carrying Old Route 119 over the expressway. By lowering the mainline grade, the profile of the two ramps in this area also needed to be changed. Also, near the interchange area, there are two bridges that carry Hopwood Fairchance Road and Ramps A and B over the mainline. The mainline grade was required to be lowered to achieve the additional clearance mandated by the new criteria, which in turn, required profile changes to the entire interchange and much of the mainline in this area. (N.T. 63-64)

59. The Department provided Gannett Fleming with new aerial mapping during the preliminary design process. However, it was discovered that because of strip mining that had occurred earlier, the ground contours had changed and the original cross sections could not be

salvaged. Thus, Gannett Fleming was required to expend a significant amount of effort in developing new ground lines, new profiles and new cross sections so that it could provide good earth work quantities. (N.T. 64-65)

60. The original scope of work called for Gannett Fleming to design one bridge, being the Ramp A/B Bridge. However, of the eleven structures involved in the project, Gannett Fleming prepared five and a subconsultant prepared the remaining six. The design of these structures has been paid for. However, under the original scope of work, Gannett Fleming was required during preliminary engineering to study the possibility of constructing a bridge over the Stadium Drive Road or the possibility of relocating Stadium Drive Road. Ultimately, it was determined to leave Stadium Drive Road where it was and design a bridge over Stadium Drive, which was not included in the original scope of work. (N.T. 65-66)

61. In order to reduce the impact to Lick Run, Gannett Fleming changed the original design from a 1,200 to 1,500 foot pipe culvert which would convey Lick Run under the expressway interchange, to a 500 to 600 foot curved box culvert. However, Gannett Fleming was required to design this structure. Also, Gannett Fleming designed an MSE retaining wall in the Lick Run Culvert area which reduced the impact to Lick Run. (N.T. 66)

62. Gannett Fleming was requested by the Department to mitigate the results of a landslide that occurred near the limits of the project. This task was not included in the original scope of work. (N.T. 70)

63. Gannett Fleming, while performing value engineering, determined that the project contained an excessive amount of rock borrow and thus developed a means to reduce the rock borrow quantity by approximately 300,000 yards, which saved the Department approximately \$1 million in construction costs. This method of reducing the rock borrow on the project was developed during the period of August 10 through 21, 1990. (N.T. 53)

64. This concept of reducing the rock borrow was approved by the Department on August 10, 1990 and Gannett Fleming incorporated these design changes into the plans from August 10, 1990 to August 21, 1990. (N.T. 70-71)

65. Gannett Fleming was required to plot new ground lines and new templates on the cross sections. Also, as a result of the extensive mining and geotechnical problems in the area, Gannett Fleming was required to perform extensive geotechnical studies which were not included in the original Agreement. Furthermore, these items had to be carried through the final design and the design details required to accommodate the geotechnical criteria required extensive changes on the cross sections and extensive time to develop them on the cross sections. (N.T. 67)

66. Gannett Fleming investigated the impact to wetlands during the environmental process and ultimately prepared a wetland mitigation site as part of the final design. However, the Agreement did not require Gannett Fleming to design a final wetland mitigation site. (N.T. 67-68)

67. Gannett Fleming provided the Department with right-of-way plans in early June. However, subsequent design changes prompted additional right-of-way changes which were not anticipated. There is no right-of-way work called for in the final design of this project, and thus, some of these right-of-way changes are part of Gannett Fleming's claim. (N.T. 68)

68. As part of the environmental studies, Gannett Fleming performed studies to determine the impact of noise on certain residences which lead to the design of a noise barrier. The noise barrier was placed in contract two and is not a part of this claim, but the location and design was performed under part one, and is a part of this claim. As part of its final design efforts, Gannett Fleming was required to design an earth mound in a certain area of the project. However, subsequent to the design of the earth mound, in or about July of 1990, and during final design, some residents near Redstone Furnace Road and Sutton Avenue complained about the visibility of the highway and noise. Thus, the Department asked Gannett Fleming to attempt to make some design changes within the right-of-way which ultimately led to the construction of a 1,200 foot long earth mound. As a result, this required revisions to cross sections, drainage and erosion control. (N.T. 68-69)

69. The Department asked Gannett Fleming to prepare a Critical Path Method (CPM) to aid the contractor. Gannett Fleming spent approximately 40 hours of work on the CPM before the Department requested that Gannett Fleming stop work on the CPM. This work was not included in the original scope of work. (N.T. 69)

70. In the Spring of 1990, the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER") issued extensive changes relating to erosion control which required the development and design of temporary and permanent mitigation and an extensive set of design calculations. Since these requirements were not implemented by the DER until the Spring of 1990, just before the beginning of final design, these changes were not anticipated under the original Agreement prepared in 1987. (N.T. 69-70)

71. The original Agreement required Gannett Fleming to update traffic control plans. However, the design concept subsequently changed from one of allowing traffic to travel on local roads to one of utilizing state highways. This concept change gave Gannett Fleming a smaller area in which to accommodate traffic, but still required studies and development of traffic control not contemplated by the Agreement. (N.T. 70)

72. After the plans were submitted to the Department, Gannett Fleming prepared some preliminary plans for contract two for the purpose of ensuring the compatibility of contract one and contract two. This work was beneficial, since some conflict was discovered between the two contracts. Accordingly, Gannett Fleming provided the Department with line plan changes that were able to be included and incorporated into contract one before the construction of that contract began, as opposed to after construction when the contractor would have been required to request a change and expend additional money. (N.T. 72)

73. As noted previously, Gannett Fleming entered into part three of the Agreement, which required Gannett Fleming to provide answers to construction service questions. Gannett Fleming submitted the plans to the Department and the project was advertised on August 23, 1990. Gannett Fleming then attended a pre-bid meeting and prepared an addendum, which is part of Gannett Fleming's claim. Also, when the contractor started on the project from October through December 20, 1990, questions arose periodically regarding geotechnical issues, wetland issues, right-of-way issues and a view survey. Gannett Fleming responded to these questions. Accordingly, these services are included in Gannett Fleming's claim. (N.T. 71-72)

74. With respect to survey work, in the original scope of work for Part I, both the Department and Gannett Fleming identified the need to locate the references placed in the field during the mid 1970's when the project was originally designed. The Department's original scope of work called for the use of the original alignment as designed in the 1975 survey. However, many of the references and monuments were missing by the time Gannett Fleming came on the project and the alignment had changed in many areas. Therefore, Gannett Fleming did not survey the original alignment, but was required to survey the new alignment. (N.T. 72-73)

75. Gannett Fleming performed additional work in relation to surveys for the project. The only survey work included in Final Design-Part II was to pick up the elevations of certain side roads and areas where roadways touch down. However, in late July or early August of 1990, the Department requested that Gannett Fleming stake out the alignment at 50 foot intervals. This work was not part of the original scope of work. (N.T. 73)

76. Gannett Fleming performed additional out-of-scope survey work in order to complete the design of the project in a proper fashion. This out-of-scope work consisted of an additional 20 days of miscellaneous topographic surveying, core boring stakeout, right-of-way survey, cross sections, and picking up topographical reference points in many areas. (N.T. 73-74)

77. Gannett Fleming proposed a methodology in their scope of work in which they would take the original construction plans, make a photographic copy or mylar of the original plan, and then "ink in" the new changes, and thus utilize a majority of the original plans. (N.T. 74-75)

78. As a result of the significant changes in the scope, character, complexity and conditions of the work on the Uniontown Bypass project, Gannett Fleming experienced a significant increase in the amount of work that it was required to perform. (N.T. 74)

79. Although the original plan set contained 108 drawings for roadway construction plans, Gannett Fleming was only able to utilize 18 of the original drawings, and the total plan set for final design when completed consisted of 172 drawings. Accordingly, Gannett Fleming was required to prepare 154 sheets of additional drawings in order to complete the final design plan. (N.T. 75)

80. Part II of the Agreement did not call for any geotechnical work to be performed. However, Gannett Fleming was required to update the soils profile. The original plan set contained 24 sheets, but Gannett Fleming was required to produce nine additional sheets, for a total plan set of 33 sheets. (N.T. 76)

81. The original scope of work called for an update of the traffic control plans which originally consisted of 5 plan sheets. However, the concept changed and Gannett Fleming was required to produce 36 drawings to depict traffic control. (N.T. 76)

82. The original plan set contained 3 sheets for erosion and sedimentation control. However, due to extensive changes required by the DER in 1990, Gannett Fleming was required to prepare 8 plan sheets and put forth additional effort in paperwork and design development. (N.T. 76)

83. The original scope of work for Final Design-Part II did not require wetland replacement work and the original plan did not contain any plan sheets for wetland replacement. However, Gannett Fleming produce 3 plan sheets related to wetland replacement. (N.T. 76)

84. Although the original plan set did not contain any plans for signing and pavement marking, Gannett Fleming produced seven drawings for signing and pavement marking for the side roads which opened up after the construction of contract one. (N.T. 77)

85. The original scope of work called for Gannett Fleming to design one structure, the Ramp A/B Bridge, and the original design provided 18 drawings for this structure. However, upon completion of the design, Gannett Fleming had designed five structures and prepared a total of 113 drawings for those structures. (N.T. 78)

86. Gannett Fleming experienced a significant change in the duration of the work in Part II of the Agreement. (N.T. 78)

87. Pursuant to the original Agreement, the Department required Gannett Fleming to complete the entire project in an 18 month time period. Accordingly, Gannett Fleming assigned 8 months for the completion of what was originally an environmental assessment and preliminary engineering, and left 10 months for the preparation of design update. (N.T. 78)

88. A delay in the project occurred when the environmental assessment was changed to an Environmental Impact Statement (EIS), Gannett Fleming was given notice to proceed on the EIS in August, 1989 and the record of decision, which approved the EIS, was given on May 22, 1990. Thus, from the beginning of the project on December 7, 1987 until the record of decision on May 22, 1990, a period of 29 months elapsed, which is a very reasonable amount of time to complete an EIS. (N.T. 78-79)

89. If the time schedule for the project would have remained as planned, Gannett Fleming would have been allowed 10 months for final design, and the submission of the final design plans would have been in March of 1991, which is 10 months after the Notice to Proceed of May 22, 1990. However, the Department required that the final design plans be completed earlier and assigned an original target date for a PS&E submission on July 19, 1990. This date would have been eight weeks after the Notice to Proceed. (N.T. 79)

90. Eight weeks was certainly an extraordinarily short, if not impossible, period for completion of a plan set of this magnitude for a \$28,500,000.00 construction project. (N.T. 79)

91. Gannett Fleming made a PS&E submission on July 31, 1990, and subsequently made a final submission of all of the documents to Harrisburg on August 21, 1990, just 13 weeks after the Notice to Proceed. (N.T. 79-80)

92. Gannett Fleming undertook extraordinary measures in order to meet the time frame allowed by the Department. Maurice Wadsworth of Gannett Fleming made available the resources of Gannett Fleming to complete the project on schedule, which included not only the personnel of the Pittsburgh office, but also the resources of Gannett Fleming's Harrisburg and Baltimore offices. (N.T. 80-81)

93. Gary Miller, P.E. of Gannett Fleming, testified that he had people on his staff working 20 to 30 hours of overtime per week, and working six and seven days per week in order to meet the schedule. (N.T. 81)

94. Gannett Fleming expended approximately 2,300 or 2,400 manhours of overtime during the twelve week period of final design by employees who were nonexempt and who are paid time-and-a-half for overtime. (N.T. 81)

95. Professionals at Gannett Fleming, who are paid straight-time overtime, expended approximately another 2,300 or 2,400 manhours of overtime during the twelve week final design period in order to meet the schedule. (N.T. 81)

96. Altogether, Gannett Fleming employees expended about 5,000 manhours of overtime during the twelve week final design period in order to meet the schedule. (N.T. 81-82)

97. Gannett Fleming introduced as Plaintiff's Exhibit 7 a graphical depiction of Gannett Fleming's complaint and the claims arising from the out of scope work performed during the acceleration of the project. (N.T. 93; Pltf. Ex. 7)

98. A project of the nature performed by Gannett Fleming, which was a re-design, rather than a design update, would take 12 to 15 months minimum, perhaps up to 18 months, to design under normal procedures. However, Gannett Fleming accomplished this work in 13 weeks, which was a very accelerated time. (N.T. 80; Pltf. Ex. 10)

99. The Board finds that Gannett Fleming was required by the Department to perform a substantial amount of out-of-scope design service and that the Department directed that final plans and specifications be completed in a compressed time schedule and knew or should have known that Gannett Fleming had to accelerate to complete this massive redesign and experienced substantial increases in manhours and expenses. (Record)

100. Mr. Gary Miller testified that Gannett Fleming utilized an accounting system which assigns a "subnumber" to certain design items, so that when a person performs work on that certain item they charge their time to that particular subnumber. Then an average salary figure for a particular subnumber can be used and multiplied by the manhours to arrive at the payroll figure. (N.T. 84)

101. Gannett Fleming incurred \$1,179 in direct legal costs in relation to the defense of a trespass complaint related to its work on the project. The claim was ultimately dismissed. (N.T. 84)

102. Gannett Fleming prorated its direct costs on the basis of the manhours assigned to the project. The total direct cost attributed to this job is \$89,965, some of which can be assigned directly to a particular number, but which, for convenience, was prorated on the basis of the number of manhours. (N.T. 84)

103. Mr. Miller, on direct, testified that Gannett Fleming expended approximately 2,300 hours of premium overtime on the project, which amounts to \$11,300.00. He also testified that its claim for additional safety study, 13(m), was withdrawn. (N.T. 84-85; Ex. P-1558)

104. The parties stipulated that the sub parts of the Plaintiff's claim will be paid by the Department as listed below:

<b>Sub Part Reference</b>	<b>Description of Additional Services Summarized</b>	<b>Stipulated Amount \$</b>
13c	<i>Redesign Lick Hollow Rd, Pine Knob Rd, &amp; Lick Run Channel to reduce steam impact &amp; Right away purchase</i>	4,654
13d	<i>Modify 1975 plans for Main Line (ML) Ramps T &amp; R, Hopwood Fairchance Rd &amp; Ramp AB Bridge profile</i>	41,059
13i	<i>Modify original ML cross-sections due to changes in topography, profile alignment typical sections</i>	115,207
13j	<i>Special plan details for earth berm &amp; structure noise barriers, erosion plans, mine flushing &amp; grouting, benching, etc.</i>	27,769
13k	<i>Recalculation, tabulation &amp; summaries of most original take-off quantities because of numerous changes</i>	19,211
13l	<i>Additional design &amp; detail required by DER's revised, 1990 "Erosion and Sodimentation Pollution Control Program Manual"</i>	43,088
13n	<i>Revisions to the original traffic control plans including field surveys of portions of SR40</i>	30,022
13o	<i>Additional structural analysis and design, stadium bridge, Lick Run culvert, Retaining Wall I, etc.</i>	259,650
13p	<i>Additional geotechnical details &amp; special provision not part of the 1975 plans and specifications.</i>	27,317
13q	<i>Revisions associated with GF's value engineering reduction in rock borrow saving Department</i>	28,683
13s	<i>Design &amp; specifications to remediate landslide that occurred at eastern limits during design</i>	13,739
13w	<i>Update noise barrier design report and final design</i>	11,679
13x	<i>Expenses associated with Criminal Trespass Complaint filed by property owner and dismissed</i>	1,179
13z	<i>Special construction staging detail SR40 required to accommodate storm sewer construction</i>	11,085

**STIPULATED TOTAL = \$634,342.00**

105. The parties stipulated that Gannett Fleming's invoice for work beyond the scope of the Agreement, for work attendant to splitting the construction contract into two contracts, and for work attendant to acceleration of the project totals \$945,650 as set out in Gannett Fleming's Answers to Defendant's Third Set of Interrogatories. The Department paid \$151,990 for final design. Therefore, Gannett Fleming's claim in this matter is \$793,660, exclusive of interest and costs. (Stipulation 32)

106. Based on the above stipulations, the issues remaining for determination by the Board are whether the items set out in Complaint subparagraphs 13 ( a), (b), (e), (f), (g), (h), (r), (t), (u), (aa), (bb), and (cc), constitute work which was within the Scope of Work as defined by the parties' Agreement and Supplements thereto. (N.T. 85; Stipulation 33)

107. On cross, Mr. Miller admitted that the hours claimed for Management and Administration and Meetings and Coordination (13 cc - items nine and ten, 740 hours- \$18,847.00 - Exhibit 1453) are included in Gannett Fleming's estimate of damages due to acceleration. (N.T. 177-179)

108. Gannett Fleming's claim subparagraph 13 (cc) "other additional services required" \$149,307.00 is reduced to \$130,460.00 after eliminating the \$18,847.00 duplicated. (N.T. 177-179; Pltf. Ex. 1453)

109. With respect to Item 13(a), Gannett Fleming incurred a total cost of \$7,117 in developing the plans, profiles and typical sections for that particular element of design. The manhours used for this estimate was based on the number of drawings. The salary costs were based on the average salary costs utilized for highway design, the overhead is 120%, net fee is 10% of payroll plus overhead and the direct cost for this is prorated based on the number of manhours assigned. (N.T. 90-91; Pltf. Ex. 7)

110. Another aspect of Item 13(b) is the development of the preliminary design concept which reduced the limits of the project by 1,200 to 1,500 feet. Accordingly, Gannett Fleming changed Ramp D near Hopwood from a two-lane off ramp to a one-lane off ramp. This allowed Gannett Fleming to shift the alignment of the mainline to the northeast and reduce the impact to Lick Run as required by the Fish and Game Commission. As a result, revisions of the alignment and grade at the mainline were required throughout the eastern 40% of the project, despite the fact that the original Agreement stipulated that there would not be any changes to the horizontal or vertical design. (N.T. 93)

111. The work performed by Gannett Fleming in relation to Item 13(b) was necessary to complete the project and resulted in a cost of \$10,813. (N.T. 94; Pltf. Ex. 7)

112. With respect to Item 13(e), Gannett Fleming discovered that the new mapping provided by the Department was not tied into the original coordinate system, but was tied into a new coordinate system. The new coordinate system required Gannett Fleming to make alignment changes and develop a new roadway center line for the project, which differed from the original 1975 center line and the 1975 right-of-way plans. This required Gannett Fleming to recalculate the horizontal alignment of the mainline on a different coordinate grid. Also, to ensure compatibility

with the right-of-way plans, Gannett Fleming was required to calculate a new right-of-way center line, by conforming the 1975 geometry to the new coordinate system. Gannett Fleming was also required to tie the property corners down to the new construction center line. (N.T. 94-95)

113. The work performed by Gannett Fleming in relation to Item 13(e) was reasonable and necessary and consisted of 288 manhours and a reasonable cost of \$9,853. (N.T. 95; Pltf. Ex. 7)

114. Item 13(f) of Gannett Fleming's claim involved the revision of the geometry of Pine Knob Road and Bennington Road for the purpose of correcting errors in the original geometric design that did not correctly reflect existing field topography. (N.T. 95-96)

115. Gannett Fleming reasonably expended 8 hours and incurred a cost of \$274 in performing the work described in Item 13(f). (N.T. 96; Pltf. Ex. 7)

116. With respect to Item 13(g), in the original scope of work, the Department desired that Gannett Fleming update the drainage plans in accordance with new drainage design criteria developed by the Department during the 1980's. Since the design under the original scope of work required a design update, Gannett Fleming assumed that the drainage design calculations prepared by Howard Needles in the 1975 design would be available to Gannett Fleming. However, the 1975 plans were not made available to Gannett Fleming. Also, the conditions and character of the design changed as a result of the new aerial mapping received in 1989 which contained new ground contours. This dictated the need for a new cross section, new ground lines and the need for a close inspection of the drainage design in order to prevent settled areas from ponding. Essentially, instead of providing an update, Gannett Fleming was required to recalculate all of the drainage design. (N.T. 97-98)

117. The work performed by Gannett Fleming with respect to Item 13(g) was necessary and Gannett Fleming reasonably expended 1,068 manhours and incurred costs of \$37,985. (N.T. 98-99; Pltf. Ex. 7)

118. With respect to Item 13(h), Gannett Fleming submitted the final right-of-way plans to the Department in early June of 1990 and Part II of the Agreement did not contain any right-of-way work. However, subsequent to the submission of the right-of-way plans, Gannett Fleming was asked to make right-of-way modifications in several areas in order to eliminate a right-of-way taking from several homes and to adjust the right-of-way so that PennDot could acquire the right-of-way and proceed to construction. Gannett Fleming was required to incorporate this work into the design after the right-of-way plans had been submitted in June of 1990. (N.T. 99-100)

119. The work performed by Gannett Fleming with respect to Item 13(h) was necessary and Gannett Fleming reasonably expended 241 manhours and incurred costs of \$9,762.00. (N.T. 100; Pltf. Ex. 7)

120. With respect to Item 13(r), during the development of the environmental studies, it was determined that the majority of the water in the various streams located on the project were rather acidic. As a result, the Department requested that Gannett Fleming install surface protection tiles in the bottom of the box culvert on the project. Also, Gannett Fleming was asked to place

baffles in the culvert to slow the flow of the water through the culvert. These items were not included or anticipated in the original contract. Accordingly, Gannett Fleming incurred costs of \$549 in performing this work which was reasonable and necessary. (N.T. 129-130; Pltf. Ex. 7)

121. With respect to Item 13(t), neither Part I, nor Part II, of the Agreement included any effort for final design of wetland mitigation sites. Nonetheless, Gannett Fleming was required to develop wetland mitigation plan essentially twice. Gannett Fleming prepared a wetland mitigation plan during the environmental process which was approved by the resource agencies. However, when the plan was designed and laid the first time, the Department had some other ideas concerning grading and the type and location of plants. Therefore, it was necessary to redesign the plan a second time. (N.T. 101-102)

122. Since Gannett Fleming was required to develop the plan and then modify it, and since the plan was necessary to meet the intent of the permits and the final EIS, the work performed by Gannett Fleming with respect to Item 13(t) was necessary and Gannett Fleming reasonably expended 351 manhours and incurred costs of \$10,563.00. (N.T. 102; Pltf. Ex. 7)

123. Item 13(u) of Gannett Fleming's claim involved surveys including a total re-survey of the mainline and ramp alignment coordination, establishment of angle and distance ties to control points, re-establishment of control points and staking construction baselines of all roadways, approximately 41,000 feet at 50 foot stations. (N.T. 102)

124. Gannett Fleming's efforts to re-establishing the horizontal and vertical controls and benchmarks and staking these points out at 50-foot intervals were extensive due to the fact that the western portion of the project contained many corn fields through which the surveyors had to cut in order to establish visibility to see the control points at 50-foot intervals. Also, the middle part of the project contained heavy brush and other areas of the project were heavily wooded which required Gannett Fleming to purchase a chain saw to cut down trees in order to stake out the alignment at 50-foot intervals. (N.T. 105)

125. With respect to Item 13(u), Gannett Fleming expended 2,895 hours of effort and incurred reasonable and necessary costs of \$73, 095. It should be noted that these costs do not include the work provided for in the original Agreement with respect to picking up the elevations for side roads. (N.T. 107; Pltf. Ex. 7)

126. With respect to Item 13(bb), Gannett Fleming was asked by the Department in July to prepare and develop a CPM Program to be used during construction for the purpose of monitoring the contractor. However, this work was not included in the original scope of work. Gannett Fleming began the CPM process and after working approximately 40 hours on it, was directed to stop work on the CPM. The Department then specified that the contractor would prepare its own CPM. Gannett Fleming reasonably incurred costs of \$1,974. (N.T. 108; Pltf. Ex. 7)

127. Item 13(cc) of Gannett Fleming's claim, the "catch-all" item, is comprised of eleven items of work and the claim for overtime premium. (N.T. 108-109; Pltf. Ex. 1453)

128. With respect to Items 13(cc) 1 through 8 and 11 and 12, the record is replete with documentation that Gannett Fleming was required by the Department to do significant out-of-scope service in design, re-mapping, studies, geotech and traffic areas involving Ramp T, hydraulic and hydraulic reports, splitting project into two contracts, additional utility design, revising 194 pages of the contract specifications, additional signing and pavement markings, adding a new sheet to the soil profile and other design revision to side roads and upgrade of CADD files. Also 2,300 to 2,400 hours of premium overtime was incurred to meet the Department's letting date. (N.T. 81, 108-122, 129)

129. The Board determined, based on the record, that all the subparagraph items listed below was work which was not within the scope of work as defined by the parties' Agreement and supplements and the costs incurred by Gannett Fleming as adjusted by the Board are reasonable as listed below:

**ITEMS AT ISSUE SUMMARY**

Sub Part Reference	Description of Out-of-Scope Services	Claim Amount \$
13a	<i>Redesign of existing SR 40, Ramps A&amp;C to minimize impact on Barnes Estate identified during EIS Part I</i>	7,117
13b	<i>Redesign of ML Sta. 569 to Sta. 590 &amp; Ramp D resulting in a \$1.5 million saving to Department in construction costs</i>	10,813
13e	<i>Department's new mapping required reformatting 1975 coordinates</i>	9,853
13f	<i>Revision to Pine Knob Rd. geometry to correct errors in original geometrics.</i>	274
13g	<i>Contour grading &amp; drainage revisions at Hopwood Interchange, SR 40, Stadium Drive Bridge and separation into two contracts</i>	37,985
13h	<i>Additional studies, field meetings &amp; right-of-way changes to mitigate impact to wells &amp; septic systems at Lick Hollow Rd, Pine Knob Rd &amp; Brownfield Rd.</i>	9,762
13r	<i>Design of surface protection, from mine acid polluted steams, for box culverts at Redstone and Brownfield Creeks</i>	549
13t	<i>Analysis and detailed designs for Wetland Replacement including periodic monitoring of ground water wells</i>	10,563
13u	<i>Providing surveys of MLE ramp alignment and re-establishment of control points not included in original scope of work</i>	73,095
13bb	<i>Development of Critical Path Method (CPM) for Contract I as requested by Department</i>	1,974
13cc	<i>Other additional services required by the multiple changes detailed above and requested by the Department.</i>	130,460

**ADJUSTED TOTAL AT ISSUE = \$292,445**

130. Gannett Fleming's expert witnesses were credible witnesses and their testimony supports the claim amounts set forth above.

131. Summary of Damages:

FF	Stipulation	634,342
FF	Out of Scope Services and acceleration	<u>292,445</u>
	<i>TOTAL ELIGIBLE COST INCURRED</i>	926,787
	Stipulation #32 Payment by Department	<u>151,990</u>
	<i>DAMAGES</i>	774,797

**CONCLUSIONS OF LAW**

1. The Board of Claims has jurisdiction over the parties pursuant to 72 P.S. §4651-4.
2. The Board of Claims has jurisdiction over the subject matter of this claim pursuant to 72 P.S. §4651-4
3. Gannett Fleming and the Department entered into an Agreement on December 3, 1987 wherein Gannett Fleming agreed to perform engineering services, on behalf of the Department, for the preparation of an Environmental Assessment and Preliminary Engineering (Part I) and the Final Design (Part II) of S.R. 6040, Section A04, commonly referred to as the Uniontown Bypass.
4. In preparing its technical proposal, which is also known as a "Scope of Work", Gannett Fleming consulted and relied upon the scope of work for the project that was prepared by the Department. Both parties' Scopes of Work were made a part of the Agreement.
5. The Department's scope of work for the Uniontown Bypass Project called for a design **update** of the plans prepared in 1975.
6. The Agreement provided for a total project period of 18 months. Furthermore, Gannett Fleming, in its proposal, indicated that Part I of the Agreement, consisting of the Preliminary Design, would be completed in 8 months, and Part II of the Agreement, consisting of the Final Design of the project, would be completed in 10 months.
7. The actual work required, and performed, by Gannett Fleming on the Uniontown Bypass Project was more similar to a total re-design of the project, instead of the update of the Howard Needles project plans prepared in 1975 that was originally contemplated by the Agreement.
8. The agreement between Gannett Fleming and the Department contemplated no changes in the horizontal and/or vertical alignments.
9. Any and all work performed by Gannett Fleming, which required changes in the horizontal and/or vertical alignments, was work that was beyond the original scope of services, and thus, Gannett Fleming is entitled to recover additional compensation for this work.

10. As a result of the significant changes in the scope, character, complexity, conditions, and duration of the work on the Uniontown Bypass Project, Gannett Fleming experienced a significant increase in the amount of work that it was required to perform.

11. Gannett Fleming experienced a significant change in the duration of the work in Part I of the Agreement (29 months vs. 8 months).

12. Gannett Fleming devoted the resources of the entire Gannett Fleming organization to the final design of this project in order to meet the accelerated schedule requested by the Department and complete final design in a 13-week time period. As a result, Gannett Fleming incurred substantial costs and was required to expend a significant amount of overtime in completing the final design plans within the deadlines imposed by the Department. Accordingly, Gannett Fleming is entitled to compensation for this extraordinary effort and the costs incurred thereby.

13. Gannett Fleming reasonably expended 2,300 to 2,400 manhours of overtime in completing the Uniontown Bypass Project in an accelerated 13-week time schedule. This extraordinary effort caused Gannett Fleming to incur overtime premium costs which was necessary in order to complete the project within the compressed time frame allowed by the Department. The amount of overtime expended by Gannett Fleming on this project was not anticipated at the beginning of the project, nor was it required of Gannett Fleming in the original contract.

14. Gannett Fleming incurred additional costs, and was required to perform additional work and services, as a result of designing the Uniontown Bypass Project in concurrent fashion under an accelerated time schedule.

15. As a result of unanticipated, out-of-scope work and the implementation of a concurrent design procedure to meet the accelerated time schedule, Gannett Fleming was forced to expend a substantial number of manhours to redesign and complete the project within the compressed time schedule allowed by the Department. This caused Gannett Fleming to incur significant costs for which it has not been compensated.

16. As a result of the acceleration of the project and the compressed time schedule imposed on Gannett Fleming, an unusually large number of personnel were required to work on the project in order to complete the design on schedule.

17. As a result of the significant change of scope, complexity, character and conditions of the work, Gannett Fleming was required to expend an additional 22,000 manhours over and above the amount of hours provided for in the original contract.

18. Gannett Fleming provided the Department with a quality set of plans and specifications for the project which enabled the construction of the project to progress smoothly.

19. Gannett Fleming reasonably implemented value engineering concepts which saved the Department a substantial amount of money in construction costs.

20. Pursuant to the contract entered into between the Department and Gannett Fleming, if there is work required that constitutes a change in the scope, complexity, character, conditions, or duration of the work, the contract provides for compensation for the cost of the work, plus the overhead, plus net fee or profit.

21. Pursuant to the contract entered into between the Department and Gannett Fleming, if there is work required that is not a change in the scope, complexity, character, conditions, or duration of the work, but is additional effort, the contract provides for compensation for the cost of the work plus the overhead, but not a net fee or profit.

22. The parties stipulated that subparts of Plaintiff's claim totaling \$643,342 will be paid by the Department.

23. The parties stipulated that Gannett Fleming's invoice for work beyond the scope of the Agreement, for work attendant to splitting the construction contract into two contracts, and for work attendant to acceleration of the project totals \$945,650.00 as set out in Gannett Fleming's Answers to Defendant's Third Set of Interrogatories. The Department paid \$151,990 for final design. Therefore, Gannett Fleming's claim in this matter is \$793,660.00, exclusive of interest and costs.

24. The Board determines, after a hearing on the remaining issues, that the claim items which remained at issue after the parties' stipulation were not within the Scope of Work as defined by the parties' Agreement and Supplements thereto, and that compensation therefore is due Gannett Fleming.

25. The hours claimed by Gannett Fleming for management and administration and meetings and coordinators, items nine and ten in 13(cc), being 740 hours totaling \$18,847.00 are included in Gannett Fleming's damages claimed by acceleration and accordingly, the subparagraph 13(cc) claim of \$149,307.00 must be reduced by \$18,847.00 leaving an adjusted amount claimed of \$130,460.00.

26. The work performed by Gannett Fleming in relation to Complaint Items 13(a), 13(b), 13(e), 13(f), 13(g), 13(h), 13(r), 13(t), 13(u), 13(aa), 13(bb) and 13(cc) as adjusted was reasonable and necessary in order to complete the final design of the project as required by the Department. Furthermore, the hours expended in performing this work were necessary to complete the work required by the Department for the Uniontown Bypass Project within the accelerated work schedule and compressed time frame. Additionally, these manhours were reasonable and necessary considering the amount of changes in the original scope of work that occurred on the project.

27. The following described claim items are found to be due to Gannett Fleming in the amounts indicated:

<b>Sub Part Reference</b>	<b>Description of Out-of-Scope Services</b>	<b>Claim Amount \$</b>
13a	<i>Redesign of existing SR 40, Ramps A&amp;C to minimize impact on Barnes Estate identified during EIS Part I</i>	7,117
13b	<i>Redesign of ML Sta. 569 to Sta. 590 &amp; Ramp D resulting in a \$1.5 million saving to Department in construction costs</i>	10,813
13e	<i>Department's new mapping required reformatting 1975 coordinates</i>	9,853
13f	<i>Revision to Pine Knob Rd. geometry to correct errors in original geometrics.</i>	274
13g	<i>Contour grading &amp; drainage revisions at Hopwood Interchange, SR 40, Stadium Drive Bridge and separation into two contracts</i>	37,985
13h	<i>Additional studies, field meetings &amp; right-of-way changes to mitigate impact to wells &amp; septic systems at Lick Hollow Rd, Pine Knob Rd &amp; Brownfield Rd.</i>	9,762
13r	<i>Design of surface protection, from mine acid polluted steams, for box culverts at Redstone and Brownfield Creeks</i>	549
13t	<i>Analysis and detailed designs for Wetland Replacement including periodic monitoring of ground water wells</i>	10,563
13u	<i>Providing surveys of MLE ramp alignment and re-establishment of control points not included in original scope of work</i>	73,095
13bb	<i>Development of Critical Path Method (CPM) for Contract I as requested by Department</i>	1,974
13cc	<i>Other additional services required by the multiple changes detailed above and requested by the Department.</i>	130,460
<b>AMOUNT DUE</b>		<b>\$292,445</b>

28. A summary of the amounts due Gannett Fleming by the Department are summarized as follows:

Stipulated Amount =	\$634,342.00
Out-of-Scope Services and acceleration =	<u>292,445.00</u>
TOTAL ELIGIBLE COSTS =	926,787.00
Less payment by the Department =	<u>151,990.00</u>
<b>AMOUNT DUE</b>	<b>= \$774,797.00</b>

29. Accordingly, Gannett Fleming is entitled to compensation in the amount of \$774,797.00 based on the terms of the Agreement, the data provided to document the hours expended on the project, the testimony and exhibits admitted at trial, and the stipulations entered into by the parties. The amount of hours expended by Gannett Fleming on the project are not in dispute and are reasonable.

30. Gannett Fleming provided PennDOT with a Request for Supplement on February 26, 1991. Said Request for Supplement sets forth the extra work performed by Gannett Fleming which is the subject of this claim. Additionally, Gannett Fleming included as part of its Request for Supplement an itemized invoice, which set forth the extra costs incurred by Gannett Fleming as a result of the extra work performed on PennDOT's behalf. Accordingly, Gannett Fleming is legally entitled to recover interest on its claim from February 26, 1991, the date on which PennDOT was provided with a detailed accounting of Gannett Fleming's additional costs incurred in performing extra work.

31. Gannett Fleming is entitled to receive interest at the legal rate of six percent (6%) per annum on the amount of \$774,797.00 from February 26, 1991, the date that PennDOT received Gannett Fleming's invoice for the work performed.

### **OPINION**

This claim is based upon certain engineering design services performed by the Plaintiff, Gannett Fleming, Inc. (hereinafter referred to as "Gannett Fleming") for and on behalf of the Defendant, Commonwealth of Pennsylvania, Department of Transportation (hereinafter referred to as "PennDOT") in relation to highway project S.R. 6040 - A04, more commonly referred to as the "Uniontown Bypass Project". The Uniontown Bypass Project involved a roadway that would circumvent the community of Uniontown, and is located in South Union Township, Fayette County, Pennsylvania.

In accordance with the normal PennDOT operating procedures in effect at the time, Gannett Fleming, along with other engineering consultants, submitted a bid and proposal for design services for the Uniontown Bypass Project. Based upon its bid and technical proposal, Gannett Fleming was selected by PennDOT to be the engineering consultant for the Uniontown Bypass Project.

On December 3, 1987, Gannett Fleming and PennDOT entered into an Agreement, designated as PennDOT Agreement No. 121016, wherein Gannett Fleming agreed to provide engineering design services in the form of an Environmental Assessment and Preliminary Engineering Design (Part I), as well as the Final Design (Part II) for the Uniontown Bypass Project.

The Scope of Work for the Final Design portion of the Uniontown Bypass Project, as prepared by PennDOT and relied upon by Gannett Fleming, required an update of existing plans which had previously been prepared in the mid-1970's for this project. Originally, the Agreement provided for compensation in the amount of \$514,895.05 based upon the Scope of Work contained therein. The Agreement further provided for a total design period of eighteen (18) months, including eight (8) months for the environmental and preliminary design phase and ten (10) months for the final design phase of the project.

On or about December 7, 1987, PennDOT provided Gannett Fleming with Notice to Proceed with Part I of the project, which encompassed the environmental assessment and preliminary design portion of the Agreement. However, as Part I of the project progressed, PennDOT notified Gannett Fleming that the Federal Highway Administration would require that an “environmental impact statement” (EIS) be prepared, in distinction to the “environmental assessment” (EA) originally provided for in the Agreement. As a result of the change to an EIS and the related review and approval processes required by various state and federal agencies and the Federal Highway Administration, Part I of the project was not completed until May 22, 1990, approximately two and one half years subsequent to the Notice to Proceed of December 7, 1987. This delay was caused by the encountering of an archeological and a historic site along the proposed route of the project during the EIS, as well as other additional services consisting of, but not limited to, wetlands identification, needs analysis, requirements of various agencies and other various delays not attributable to Gannett Fleming.

On May 22, 1990, the same day that final approval of the EIS by the Federal Highway Administration was received, PennDOT issued Notice to Proceed with the Final Design phase (Part II) of the project. Gannett Fleming was required to meet an accelerated design schedule which

required it to provide PennDOT with pre-final plans, specifications, and estimates (PS&E) by July 19, 1990. This accelerated schedule was implemented in order to meet a bid letting date of September 27, 1990, so that the contract could be awarded and construction commenced by November 1, 1990. Additionally, PennDOT further required Gannett Fleming to divide the Agreement into two (2) separate contracts, with Contract 1 consisting of grading, drainage, structural design and construction of all side roads; and Contract 2 consisting of paving, lighting, signing, signalization, structural noise barrier design and completion of Ramp D and Route 40.

However, in or about March 1990, it was apparent to both Gannett Fleming and PennDOT that a Supplement to the Agreement, as well as additional funding, was needed in order to complete the Final Design of the project in accordance with PennDOT's requirements. This Supplement Agreement was necessary as a result of significant changes in the scope, character, complexity and duration of the design work that Gannett Fleming had initially agreed to perform. Thereafter, on June 7, 1990, Gannett Fleming submitted a written Request for Supplemental Agreement to PennDOT, which was followed by negotiations between Gannett Fleming and PennDOT's District Office on June 19, 1990. Consequently, Gannett Fleming submitted a revised Request for Supplemental Agreement to PennDOT's District Office on June 29, 1990, and the revised Request was forwarded to PennDOT's Consultant Agreement Section for consideration on July 12, 1990. Subsequently, on or about July 18, 1990, PennDOT denied Gannett Fleming's Request for Supplemental Agreement, although Gannett Fleming was not provided with written notification of said denial.

On February 26, 1991, Gannett Fleming submitted another Request for Supplemental Agreement to PennDOT which requested payment for the actual costs of the additional work and accelerated services performed by Gannett Fleming as evidenced by Gannett Fleming's attached

invoice detailing the costs incurred for the extra work, additional work, and accelerated services. Subsequently, despite PennDOT's acceptance and utilization of the plans, specifications and estimates, as well as other services related to the project, PennDOT denied Gannett Fleming's Request for Supplemental Agreement by letter on May 31, 1991.

Accordingly, Gannett Fleming initiated its claim before this Board, contending it is to be compensated for services performed beyond and out of the scope of work contained in its contract, costs and expenses due to acceleration of the work, at PennDOT's request, additional costs incurred by splitting the original contract into two contracts and interest.

It is well settled law that a contractor who performs work and incurs costs which are beyond the scope of the contract is entitled to additional compensation therefore. Department of Transportation v. Gramar Construction Co., 71 Pa. Cmwlth, 481, 454 A.2d 1205, 1207 (1983), Department of Transportation v. Paoli Construction Co., 35 Pa. Cmwlth. 390, 386 A.2d 173, 175 (1978).

The engineering Agreement (Agreement) dated December 3, 1987, Part A, Section 5 entitled "Change", anticipates that changes in the work required to complete the project may occur. Section 5 also provides for an increase in the amount of fees to be paid to the engineer when changes are required.

More specifically, Part A, Section 5, Paragraph (a) of the Agreement provides that:

"The Department reserves the right to modify, increase or decrease the scope of services and/or work contained herein, and to change the time period provided in the agreement. The Department upon the exercise of this right will negotiate with the engineer and issue a Supplemental Agreement setting forth the change and the increase or decrease in the amount."

Thereafter, Part A, Section 5(b) goes on to provide that the "maximum cost" provided

for in the Agreement “. . . may be adjusted when the Engineer establishes and the Department agrees that there has been or is to be a significant change in the:

1. Scope, complexity or character of the original services to be performed, induced, caused or directed by the Department;
2. Conditions under which the original work was required to be performed, neither foreseen by the parties at the time of the execution of the original Agreement, nor created thereafter by the Engineer;
3. Duration of the work, if the change from the time period specified in the Agreement for completion of the original work was induced, caused or was the result of directions issued by the Department.”

Additionally, Part A, Section 5 (c) states that:

“An appropriate adjustment in the predetermined net fee may be considered. However, there will be no adjustment in the net fee unless the scope, complexity, character, duration or extent of the work are changed substantially from those required under the basic Agreement, induced, caused or was the result of directions issued by the Department.”

Fundamentally, every contract imposes upon the parties a duty of good faith and fair dealing in the performance and enforcement of a contract. Liazis v. Kosta, Inc., \_\_\_ Pa. Super, \_\_\_, 618 A.2d 450, 454 (1992), citing the Restatement (Second) of Contracts §205. The contract language regarding change expressly anticipates that an increase in the amount and the scope of the design work required by the engineer may be necessary. In this event, the contract imposes a duty upon PennDOT to consider and negotiate an appropriate increase in compensation payable to the engineer under the contract. The contract also imposes a duty upon PennDOT to not unreasonably

withhold its consent to an upward adjustment in the amount of compensation payable to the engineer.

In this case, the Scope of Work prepared by PennDOT, and relied upon by Gannett Fleming in formulating its technical proposal and bid for the Final Design (Part II) of the Uniontown Bypass Project, required that the engineer prepare an **update** of the existing plans for the project. The existing plans had been prepared in 1975 by another consultant. However, as Gannett Fleming proceeded with final design, it became apparent that the project would require nearly a total redesign of the existing 1975 plans. Furthermore, PennDOT issued additional design procedures which were beyond the Scope of Work as set forth in the Agreement, the substance of which are set forth at length in Paragraph 13, Subparts (a) through (cc), of Gannett Fleming's Complaint filed in this matter. As a result, Gannett Fleming was required to perform substantial amounts of work not encompassed by the Scope of Work contained in the original Agreement.

Through the uncontradicted testimony of Gannett Fleming's expert witness, as well as several other witnesses, Gannett Fleming established at the hearing that there was a significant and substantial change in the scope, complexity and character of the work originally contracted for. Also, conditions unforeseen by the parties and not caused by Gannett Fleming arose subsequent to the execution of the parties agreement. Furthermore, the duration of the work required under the contract was substantially increased due the changes and unforeseen circumstances, all of which were induced by PennDOT and have caused Gannett Fleming to provide extra work and incur additional costs not anticipated by the scope of the original Agreement. The uncontradicted evidence adduced at the hearing in this matter reveals that PennDOT unreasonably and arbitrarily denied Gannett Fleming's Request for Supplement for the extra work.

The question which remains to be addressed is what damages Gannett Fleming is entitled to recover. The parties have stipulated that Gannett Fleming is entitled to recover for the following sub-parts of its claim as contained in the Complaint for the services rendered, in the indicated amounts:

<b>Sub Part Reference</b>	<b>Description of Additional Services Summarized</b>	<b>Stipulated Amount \$</b>
13c	<i>Redesign Lick Hollow Rd, Pine Knob Rd, &amp; Lick Run Channel to reduce steam impact &amp; Right away purchase</i>	4,654
13d	<i>Modify 1975 plans for Main Line (ML) Ramps T &amp; R, Hopwood Fairchance Rd &amp; Ramp AB Bridge profile</i>	41,059
13i	<i>Modify original ML cross-sections due to changes in topography, profile alignment typical sections</i>	115,207
13j	<i>Special plan details for earth berm &amp; structure noise barriers, erosion plans, mine flushing &amp; grouting, benching, etc.</i>	27,769
13k	<i>Recalculation, tabulation &amp; summaries of most original take-off quantities because of numerous changes</i>	19,211
13l	<i>Additional design &amp; detail required by DER's revised, 1990 "Erosion and Sodimentation Pollution Control Program Manual"</i>	43,088
13n	<i>Revisions to the original traffic control plans including field surveys of portions of SR40</i>	30,022
13o	<i>Additional structural analysis and design, stadium bridge, Lick Run culvert, Retaining Wall 1, etc.</i>	259,650
13p	<i>Additional geotechnical details &amp; special provision not part of the 1975 plans and specifications.</i>	27,317
13q	<i>Revisions associated with GF's value engineering reduction in rock borrow saving Department</i>	28,683
13s	<i>Design &amp; specifications to remediate landslide that occurred at eastern limits during design</i>	13,739
13w	<i>Update noise barrier design report and final design</i>	11,679
13x	<i>Expenses associated with Criminal Trespass Complaint filed by property owner and dismissed</i>	1,179
13z	<i>Special construction staging detail SR40 required to accommodate storm sewer construction</i>	11,085

**STIPULATED TOTAL = \$634,342.00**

Based upon the above-stipulation, it remains for the Board to determine whether Gannett Fleming is entitled to its claim as set forth in its Complaint Subparagraphs (a), (b), (e), (f), (g), (h), (r), (t), (u), (aa), (bb) and (cc). Whether Gannett Fleming is entitled to recover for these items turns on the fact of whether the services performed were within or without the scope of the contract. After hearing all the testimony and reviewing the transcripts, the Board is of the opinion that these services were outside of the contracted services and that Gannett Fleming's claim should be granted.

Acceleration occurs when a contractor speeds up the pace of its work, faster than the rate prescribed in the original contract. Department of Transportation v. Anjo Construction Co., \_\_\_ Pa. Cmwlth. \_\_\_, 666 A.2d 753, 757 (1995). A contractor may recover for the increased costs incurred as a result of accelerating performance, when its own delays in performance are excusable, the contractor was ordered to accelerate and the contractor did so and sustained extra costs. Id. Furthermore, an order to accelerate need not be expressed in a specific command by the government unit, but may be constructive, as when the government unit merely asks the contractor to finish within a certain time frame or when the government unit expresses concern about lagging progress. Id.

The original agreement called for an 18 month period in which Gannett Fleming was to complete the environmental, preliminary design and final design phases of the Agreement. It was estimated by Gannett Fleming that it would take 8 months for the environmental and preliminary design phase, and 10 months to complete the final design phase of the Agreement. However, Gannett Fleming was ultimately required to prepare an "environmental impact statement" (EIS), rather than an "environmental assessment" (EA) as provided for in the original Agreement. Although Gannett Fleming and PennDOT negotiated a Supplement to the Agreement in relation to the EIS, the environmental assessment and preliminary design portion of the project could not be

completed until May 22, 1990, which was 2 ½ years after the original Notice to Proceed of December 7, 1987. Thereafter, PennDOT gave Gannett Fleming Notice to Proceed on the Final Design portion of the Agreement on May 22, 1990, and required that Gannett Fleming meet an accelerated delivery schedule by submitting its pre-final plans, specifications and estimates (PS&E) to PennDOT by July 19, 1990, just 58 days after Notice to Proceed with Final Design, as compared with the 300 plus days originally provided for completion of the final design.

The facts of the instant case are analogous to the Anjo case. Gannett Fleming was not responsible for any delays in the performance of the Uniontown Bypass Project, since delays and/or extended times for performance were the result of factors and occurrences beyond the control of Gannett Fleming. Furthermore, Gannett Fleming was advised by PennDOT that the project schedule was being accelerated and it had only 58 days to prepare final design on this very important, “FAST Project”. Accordingly, Gannett Fleming accelerated its work schedule and expended substantial amounts of overtime, assigned an unusually large number of employees to the project, was forced to implement duplicative methods of performance in order to complete all tasks simultaneously and expend additional time in meetings, management and interoffice coordination.

It is clear that Gannett Fleming was required by PennDOT, both constructively and expressly, to accelerate its work on the Uniontown Bypass Project. Mr. Gary D. Miller of Gannett Fleming testified that because of the fast track nature of the Uniontown Bypass Project and the short period provided for final design, the entire resources of Gannett Fleming were brought to bear on the project, including Gannett Fleming’s three offices in Pittsburgh, Harrisburg and Baltimore. Gannett Fleming also had to assign portions of the work to 12-14 different sections of Gannett Fleming in order to bring to bear the resources and expertise necessary to do the job.

As a result of accelerating its work, Gannett Fleming provided PennDOT with a final (PS&E) package on July 31, 1990, which enabled PennDOT to meet its contract letting deadline on time. Gannett Fleming incurred substantial additional costs as a result of the accelerated work schedule unilaterally imposed by PennDOT, for which PennDOT has refused to compensate Gannett Fleming. Thus, in accordance with the rationale of the Anjo case, Gannett Fleming is entitled to compensation for its increased costs in accelerating performance on the Uniontown Bypass Project.

When one party to a contract introduces disruptive changes to the contract, the changes amount to a breach of contract entitling the disrupted party to damages flowing from that breach. United Engineers & Constructors, Inc. v. Department of General Services, Board of Claims Docket No. 927 (1991).

In this case, the original Agreement entered into between PennDOT and Gannett Fleming on December , 1987 encompassed an environmental assessment, preliminary design and final design of the entire Uniontown Bypass Project. However, at a point late in the design phase, PennDOT decided to divide the Agreement into two separate construction contracts. Pursuant to PennDOT's directions, the Contract was split into Contract One, which consisted of grading, drainage, structural design and construction of all side roads, and Contract Two, which consisted of paving, lighting, signing, signalization, structural noise barrier design, completion of Ramp D and Route 40 and other related work.

As a result of the aforementioned division of the Contract, Gannett Fleming's design efforts were fragmented, complicated and delayed. Gannett Fleming was forced to complete a second major revision to the traffic control concept for the project. Also, special detailing for the plans and specifications was performed in order to allow bidding of two (2) separate contracts, as opposed to one integrated project. Gannett Fleming was further required to add new construction, tabulation, signing, summary, pavement marking, erosion and sedimentation plan sheets to the two

(2) bid packages. Accordingly, the work required to prepare, design and complete two (2) construction contracts added up to considerably more work than would have been required if the Uniontown Bypass Project was completed in a single design phase, as originally provided for in the Contract. Additionally, the costs incurred by Gannett Fleming in designing two (2) separate and smaller construction contracts was more than the costs anticipated with the design of one construction contract, as originally agreed between the parties.

It is evident that PennDOT introduced disruptive changes to the work required under the parties' original Agreement when it chose to separate the Agreement into two (2) contracts. PennDOT chose to divide the Agreement into several parts, a procedure which is not normally practiced by PennDOT, for purposes beneficial to PennDOT. However, PennDOT failed to consider the effects such division of the Agreement would impose upon its design consultant, Gannett Fleming. As a result, Gannett Fleming experienced disruption in its work schedule and incurred additional costs, for which PennDOT is liable.

A review of Gannett Fleming's claim appears to be reasonable and performed to complete the request made by PennDOT. The Board however has found one exception. Items 9 and 10 of subparagraph 13 (cc) in the amount of \$18,847.00 is a duplicated item of damage as it has already been included in the estimate of damages due to acceleration. Accordingly, this amount will be deleted from the 13 (cc) claim, and the amount reduced to \$130,460.00. With this adjustment, the Board is of the opinion that Gannett Fleming is entitled to the out of scope contract services as follows:

## ITEMS AT ISSUE SUMMARY

Sub Part Reference	Description of Out-of-Scope Services	Claim Amount \$
13a	<i>Redesign of existing SR 40, Ramps A&amp;C to minimize impact on Barnes Estate identified during EIS Part in</i>	7,117
13b	<i>Redesign of ML Sta. 569 to Sta. 590 &amp; Ramp D resulting in a \$1.5 million saving to Department in construction costs</i>	10,813
13e	<i>Department's new mapping required reformatting 1975 coordinates</i>	9,853
13f	<i>Revision to Pine Knob Rd. geometry to correct errors in original geometrics.</i>	274
13g	<i>Contour grading &amp; drainage revisions at Hopwood Interchange, SR 40, Stadium Drive Bridge and separation into two contracts</i>	37,985
13h	<i>Additional studies, field meetings &amp; right-of-way changes to mitigate impact to wells &amp; septic systems at Lick Hollow Rd, Pine Knob Rd &amp; Brownfield Rd.</i>	9,762
13r	<i>Design of surface protection, from mine acid polluted steams, for box culverts at Redstone and Brownfield Creeks</i>	549
13t	<i>Analysis and detailed designs for Wetland Replacement including periodic monitoring of ground water wells</i>	10,563
13u	<i>Providing surveys of MLE ramp alignment and re-establishment of control points not included in original scope of work</i>	73,095
13bb	<i>Development of Critical Path Method (CPM) for Contract in as requested by Department</i>	1,974
13cc	<i>Other additional services required by the multiple changes detailed above and requested by the Department.</i>	130,460

**ADJUSTED TOTAL AT ISSUE = \$292,445**

In summary, the damages which Gannett Fleming incurred that are the responsibility of PennDOT are:

Stipulated amount =	\$634,342.00
Out of Scope & acceleration =	<u>292,445.00</u>
Total Eligible Damages=	926,787.00
Less payment by PennDOT=	<u>151,990.00</u>
<b>DAMAGE DUE =</b>	<b>\$774,797.00</b>

Gannett Fleming has raised the question as to what interest it is entitled to and when the interest is imposed on any award entered by this Board. Gannett Fleming provided PennDOT with a Request for Supplement on February 26, 1991. The Request for Supplement set forth the claims for extra work performed which were presented in this case.

The Commonwealth Court clearly instructed this Board that statutory interest of six percent (6%) is due on a Board award from the date when the contract is fully performed and the Commonwealth's duty to pay arises; not from the date the Complaint is filed. Department of Transportation v. Anjo Construction Co., \_\_\_\_\_ Pa. Cmwlth. \_\_\_\_\_, 666 A.2d 753 (1995). Accordingly, interest at the rate of six percent (6%) per annum will be Ordered from February 26, 1991, the date Gannett Fleming presented its Request for Supplement when completing the services requested, upon the award of \$747,797.00.

The demand for expert witness fees and internal costs incurred in the preparation of this case as made by Gannett Fleming is denied. Trial costs are not an item of cost that this Board historically awards. These matters are to be paid by the party incurring them.

**ORDER**

**AND NOW**, this                    day of                    , 1997, judgment is hereby entered in favor of Gannett Fleming, Inc., in the amount of Seven Hundred Forty-Seven Thousand Seven Hundred Ninety-Seven Dollars (\$747,797.00), with interest at the rate of six percent (6%) per annum from February 26, 1991.

Upon receipt of said award, Plaintiff shall forthwith file with the Board of Claims a Praecipe requesting that this matter be marked “closed, discontinued and ended with prejudice”.

Each party to bear its own costs and attorney fees.

BOARD OF CLAIMS

---

David C. Clipper  
Chief Administrative Judge

---

Louis G. O’Brien, P.E.  
Engineer Member

---

James W. Harris  
Citizen Member

Opinion Signed

September 9, 1997