

COMMONWEALTH OF PENNSYLVANIA

FOSTER GRADING COMPANY : BEFORE THE BOARD OF CLAIMS
VS. :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF TRANSPORTATION : DOCKET NO. 1617

FINDINGS OF FACT

1. Plaintiff is Foster Grading Company, a Pennsylvania corporation, doing business as a heavy and highway contractor, and having a place of business at R.D. #1, Box 134, Jackson Center, PA 16133 (“Foster Grading”). (Stipulations, paragraph 1)

2. Defendant is the Department of Transportation, Commonwealth of Pennsylvania, an executive Department of the Commonwealth having its executive offices located at 555 Walnut Street, 9th Floor, Forum Place, Harrisburg, PA 17101 (“Department”). (Stipulations, paragraph 2)

3. Foster Grading and the Department are parties to three (3) separate Contracts for the following Projects (“Projects”):

(a) Contract No. 011080, dated August 20, 1991, a highway construction Contract for the construction of a project located at Crawford County, East Mead and Randolph Townships, S.R. 0027, Section 103; and

(b) Contract No. 012108, dated August 14, 1991, a highway construction Contract for the construction of a project located at Erie County, Fairview and Millcreek Townships and Fairview Borough, S.R. 0020, Section 03M; and

(c) Contract No. 012110, dated August 22, 1991, a highway construction Contract for the construction of a project located at Erie County, City of Erie, S.R. 0005, Section 101.

(Stipulations, paragraph 3)

4. As part of the three Contracts referenced above, Form 408 Specifications (1990 edition) were also incorporated by reference. (Stipulations, paragraph 4)

5. The opening dates of the bids for all three Projects was June 20, 1991. (Stipulations, paragraph 5)

6. At the bid opening, Foster Grading was the apparent lowest responsive and responsible bidder for all three Projects. (Stipulations, paragraph 6)

7. The Bid Proposals for the Projects issued by the Department contained the following anticipated dates of receipt of Notices to Proceed:

| <u>PROJECT</u> | <u>ANTICIPATED NOTICE TO PROCEED DATE</u> | <u>CALENDAR DAYS</u> |
|----------------------------|---|----------------------|
| ERIE COUNTY, S.R. 0005 | August 5, 1991 | 32 |
| ERIE COUNTY, S.R. 0020 | July 22, 1991 | 91 |
| CRAWFORD COUNTY, S.R. 0027 | August 5, 1991 | 30 |

(Stipulations, paragraph 7)

8. Foster based its bids on the three Contracts on the respective “D-476 Schedules” which appear in each Contract. Also, each D-476 schedule contained the following provision: “Work Days Based on 10 Hours/Day.” (N.T. 111-112; P-2A, P-2B, P-26 (final page of each); D-2@63, D-4@35, D-6@30)

9. The Specifications contain the following provision:

When a bid received has been determined by the Secretary to be satisfactory, a contract will be awarded in writing to the lowest responsible bidder within 60 days from the opening date of the bids. Thirty-day extensions of the award date may be made by the mutual written consent of the Engineer and the lowest responsible bidder. The Department will base the award exclusively on the total in the bid schedule and on compliance with all the bidding requirements. No price will be negotiated due to any extension.

(D-8, 1st page §108.02)

10. The Specifications contain the following provision:

The Notice to Proceed will be issued within thirty (30) days after the 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.

(D-9, 2nd page §108.02)

11. The Department awarded the Contracts and issued the Notice to Proceed for each Project, and using calendar days, allowed the anticipated completion date computed as follows:

| <u>PROJECT</u> | <u>CONTRACT AWARD DATE</u> | <u>NOTICE TO PROCEED DATE</u> | <u>ANTICIPATED COMPLETION DATE</u> |
|----------------------------|----------------------------|-------------------------------|------------------------------------|
| ERIE COUNTY, S.R. 0005 | August 7, 1991 | August 26, 1991 | September 27, 1991 |
| ERIE COUNTY, S.R. 0020 | August 5, 1991 | August 16, 1991 | November 15, 1991 |
| CRAWFORD COUNTY, S.R. 0027 | August 8, 1991 | August 21, 1991 | September 20, 1991 |

(N.T. 83-85; P-31, P-1A, P-1B, P-1C; D-11-15)

12. The Notices to Proceed for the three Contracts were delayed somewhat because the Commonwealth's 1990-1991 fiscal year ended June 30, 1991, and the General Assembly of the Commonwealth did not enact a budget for the Commonwealth government for the 1991-1992 fiscal year, which began on July 1, 1991, until sometime in late July or early August of 1991. (D-8, 1st page § 103.02) (Stipulations, paragraph 8)

13. Foster Grading received three letters, one each for the S.R. 27 Projects, dated July 26, 1991, the S.R. 20 Project, dated July 25, 1991 and S.R. 5. These letters were sent prior to contract award and signed by Fred Bowser. These letters requested Foster Grading to consent to a time extension for execution and issuance of Notice to Proceed to thirty(30) days after the budget is passed. Mr. Hertzog, Foster Grading's President signed a concurrence to the requested time extension and returned them to the Department. (N.T. 5-6; 19-22; P-3A, 3B, 3C)

14. The only statement in the Contracts concerning the “anticipated Notice to Proceed Date” named in the “D-476 Schedule” is the following provision in the Specifications:

The Engineer, in his discretion, may issue a time extension or reduction, in writing, if the anticipated Notice to Proceed Date in the proposal has not been reasonably met. Such time extension may only be made if it is requested by the Contractor within 10 days after the Notice to Proceed is issued and the anticipated Notice to Proceed Date in the proposal has not been reasonably met through no fault of the Contractor.

(D-9, 6th page §108.06)

15. On August 21, 1991, Foster President Herzog wrote a letter pertaining to the S.R. 20 Project to the Department’s District Engineer, directed to the attention of the Department’s Assistant District Engineer for Construction. In the letter, Mr. Herzog requested an extension of time “due to the late Notice to Proceed” and made the following statement:

Even though you have stated that a time extension will be granted due to the late start, you can see that we are really being penalized almost one month in the controlling [sic] operations. (Emphasis added)

(N.T. 106-107; D-20)

16. On September 3, 1991, the Department, through its Assistant District Engineer for Construction, wrote a letter to Foster pertaining to the S.R. 20 Project. In the letter, the Assistant District Engineer for Construction made the following Statement:

The District [i.e., the Department] is willing to grant a time extension to June 8, 1992 to complete the work.

(N.T. 96; D-17)

17. On September 4, 1991, PennDOT Assistant Construction Engineer Haslett, in a telephone conversation informed Foster President Herzog that the Department would be liberal as far as a time extension on the S.R. 20 Project was concerned and may grant an extension to as late as July 8, 1992. (N.T. 139-140; D-24)

18. On August 28, 1991, Foster President Herzog wrote a letter pertaining to S.R. 5 to the Department's District Engineer, directed to the attention of the Department's Assistant District Engineer for Construction. In the letter, Foster requested a time extension due to the late Notice to Proceed and made the following statement:

Even though you have stated that a time extension will be granted due to the late start, you can see that we are really being penalized almost three weeks on the controlling [sic] operations. (Emphasis Added)

(N.T. 107; D-22)

19. On August 28, 1991, Foster President Herzog wrote a letter pertaining to S.R. 27 to the Department's District Engineer, directed to the attention of the Assistant District Engineer for Construction. In the letter, Foster requested a "time extension due to the late Notice to Proceed" and made the following statement:

Even though you have stated that a time extension will be granted due to the late start, you can see that we are really being penalized over two weeks on the controlling [sic] operations. (Emphasis Added)

(N.T. 107; D-21)

20. These letters asked that Foster Grading concur "in extending the time within which the Department must execute the Contract and issue the Notice to Proceed 30 days after a budget has been signed into Law." The letters also further state "Failure to concur may result in non-award of a contract". (N.T. 19-21; P-3A, 3B, 3C)

21. Mr. Roger Herzog, President of Foster Grading Company, signed all three letters and concurred in the extension of time. (N.T. 23; P-1A, P-1B, P-1C)

22. The Contracts for the S.R. 20 Project, the S.R. 5 Project and the S.R. 27 Project all contain a special provision which precludes placement of bituminous wearing surfaces between October 1 and April 1. (N.T. 28-32; P-2A-2C)

23. Project S.R. 5 Erie County and S.R. 27 Crawford County both had anticipated completion dates earlier than October 1, 1991 and should not have required a time extension. (Record)

24. On September 4, 1991, PennDOT Assistant Construction Engineer Haslett, in a telephone conversation, informed Foster President Herzog that the Department would be liberal as far as a time extension on the S.R. 20 Project was concerned, and may grant an extension to as late as July 8, 1991. (N.T. 139-140; D-24)

25. The S.R. 20 Contract included an item called "cold recycled bituminous base course" Item No. 9341-000. This item did not appear in the S.R. 5 or S.R. 27 contracts. (N.T. 86; D-2, D-4, D-6)

26. The Specifications contain the following provision:

Do not place cold recycled bituminous base course from September 1 to April 15 in District 1-0 [(the area of the Commonwealth in which the three Projects at issue are located)]...

(P-33C, 1st page §341.1)

27. Foster subcontracted the cold recycled bituminous base course item on S.R. 20 to "Swank Associated Companies" ("Swank") (N.T. 86-87)

28. As of Friday, August 23, 1991, Foster was held up on the S.R. 20 Project waiting for Swank to start the cold recycled bituminous base course (N.T. 89; D-16 12th page)

29. On August 30, 1991, Swank notified Foster it would be calibrating its equipment on S.R. 20 on September 5, 1991, and starting work the next day. (N.T. 90; D-16 15th page)

30. Swank's first day of production on S.R. 20 was September 5, 1991. (N.T. 92; D-16 17th page)

31. On September 6 and 7, 1991, there was no work on cold recycled bituminous base course on S.R. 20 because of a Swank equipment breakdown. (N.T. 92-93; D-16 18th page)

32. Cold recycled bituminous base course work on S.R. 20 resumed on September 9, 1991, and took place on September 10, 11 and 12, 1991, when it was completed. (N.T. 93-95, D-16 pages 19 and 20)

33. In its letter to Foster pertaining to S.R. 20 dated September 3, 1991, the Department stated, in pertinent part, as follows:

The following issues are agreed upon:

- The recycling equipment will be calibrated at the project site on September 4, 1991.
- The recycled operation will begin on the morning of September 5, 1991 with work also scheduled for Saturday, September 7, 1991 and a tentative completion on September 10, 1991.

(N.T. 95-96; D-17)

34. The Foster Bituminous Paving Schedule provided as follows with respect to the three Projects at issue:

| <u>JOB NO.</u> | <u>PROJECT</u> | <u>TONS</u> | <u>PROD/ WORKDAY 10 HOUR</u> | <u>WORK DAYS 10 HOUR</u> | <u>START</u> | <u>COMPLETE</u> |
|----------------|-------------------------------|-------------|--------------------------------------|----------------------------------|-------------------|-----------------|
| | | | | | (*4-10 Hour Days) | |
| 91 | Crawford SR27(103) ID-2W | 6346 | 1058 | 6 | 8/8 | 8/15 |
| 91 | Erie SR 5 (101) | 5329 | 1066 | 5 | 8/16 | 8/22 |
| 91 | Erie SR 20 (03M) C.L. Only | 12,400 | 866 | 14 | 9/9 | 9/26 |

| | | | |
|------------------------------------|-------|-------|---|
| Erie SR 20 (03M) (BCBC Only) | 4,400 | 1,100 | 4 |
|------------------------------------|-------|-------|---|

(P-17; D-18)

35. The Foster Bituminous Paving Schedule has asterisks in front of the “START” dates for six of the company’s Projects which are listed. The parenthetical note at the top of the “START COMPLETE” column of the schedule states that the asterisk denotes “4-10 Hr. Days.” No asterisk appears on the schedule before the “START” date for any of the three Projects at issue. (P-17; D-18)

36. Foster acknowledges that it planned, in its bid for the S.R. 20 Project, to work overtime on the cold recycled bituminous base course item. (N.T. 109)

37. In a letter to Foster pertaining to S.R. 20 dated October 4, 1991, the Department’s Assistant District Engineer for Construction stated:

Reference is made to our September 25, 1991 correspondence regarding the placement of bituminous wearing course. In confirmation of a September 27, 1991 telephone conversation between your Mr. Roger Herzog and Mr. T.J. Haslett, P.E., Assistant Construction Engineer, of this office, authorization was granted to place the subject material through October 4, 1991....

(N.T. 105; D-19)

38. Based on the facts that Foster based its bids on the D-476 Schedules, which provided for 10-hour work days on the three Projects at issue, and that Foster’s own Bituminous Paving Schedule showed 10-hour work days and five-day work weeks for three Projects, Foster planned on working overtime every day on all three Projects, and did not in fact accelerate its operations by working overtime. (Emphasis Added) (N.T. 100-104, 111-112; P-2A, P-2B, P-2C (final page of each), P-17; D-2 at 63, D-4 at 35, D-6 at 30, D-18)

39. Foster spent a total of five work days working on cold recycled bituminous base course of S.R. 20 and was ready to begin that work on August 23, 1991, but did not start until September 5, 1991, because of unavailability of its subcontractor, Swank; Foster therefore did not accelerate that work because of a late Notice to Proceed and, notwithstanding any late Notice to Proceed, could have finished the work before September 1, 1991, as specified, had its subcontractor been available. (Emphasis Added) (N.T. 89-95; D-16 (Diary) 12th page, 15th page, 17th page, 18th page and 19th page)

40. PennDOT offered Foster time extensions because of late Notices to Proceed from the very beginning on all three Projects, and specifically offered Foster a time extension until June 8th of 1992, in writing, on the largest of the three Projects, S.R. 20, before Foster had even begun the cold recycled bituminous base course work on that Project. Foster therefore, never had any reason to accelerate the work, or believe that it had to accelerate its work, on any of the three Projects. (N.T. 96, 106-107, 138-140; D-17, D-20-22, D-24)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the subject matter of this claim.
2. PennDOT and Foster Grading entered into at least three (3) Contracts for construction of highway Projects in 1991, including the S.R. 20 Project, the S.R. 5 Project, and the S.R. 27 Project.
3. The Contracts stated that PennDOT would issue a Notice to Proceed on certain specific dates.
4. The Contracts for these three (3) Projects also required the Notices to Proceed be issued within thirty (30) days after the Department made an award of the Contract.
5. PennDOT issued a Notice to Proceed for each Project within thirty (30) days after it awarded each Contract on each Project.
6. PennDOT did not constructively order Foster to accelerate its operations on the three (3) referenced Projects.
7. Foster did not accelerate its work on any of the three (3) Projects because of late Notices to Proceed.

8. The failure of PennDOT to issue Notices to Proceed on the anticipated dates was not a breach of Contract, but rather this failure provided a possible ground for an extension or reduction of the Contract times.

9. Foster is not entitled to damages or costs for breach of Contract, nor is it entitled to costs and attorneys' fees.

OPINION

This matter was called to hearing before the Central Panel, composed of Richard B. Swartz, Attorney Member, and James B. Wilson, Engineer Member. The Panel Report has been submitted and reviewed.

The first issue to address is whether PennDOT breached the Contracts with Foster by failing to issue the Notices to Proceed in accordance with the Contract Provisions. The bid proposals contained "anticipated Notice to Proceed" dates for each of the three (3) Contracts. Schedule D-476 in each Contract set forth "anticipated Notice to Proceed" dates and the calendar days for the Projects.

As the Defendant points out, the Contract does not contain a statement concerning the "anticipated Notice to Proceed" dates. It is mentioned once in Section 108.6 of the Specifications and states the following:

"The Engineer, in his discretion, may issue a time extension or reduction, in writing, if the anticipated Notice to Proceed Date in the proposal has not been reasonably met. Such time extension may only be made if it is requested by the Contractor within 10 days after the Notice to Proceed is issued and the anticipated Notice to Proceed Date in the proposal has not been reasonably met through no fault of the Contractor."

The Contracts do not require PennDOT to issue the Notice to Proceed on the anticipated Notice to Proceed date. The Contracts require that the Notice to Proceed be issued within thirty (30) days after the award of the Contracts. If the anticipated Notice to Proceed date is not reasonably met, a contractor can then request a time extension or reduction under the Contracts.

The Board does not find a contractual responsibility for PennDOT to issue the Notice to Proceed on the anticipated Notice to Proceed date. Therefore, the Board finds that PennDOT did not breach its Contract with the Plaintiff.

The second issue is whether Foster was required to accelerate its work on these three (3) Projects as a result of the late Notice to Proceed. The Plaintiff is claiming acceleration costs on these three (3) Projects based on overtime pay. Acceleration costs are recoverable by a contractor when:

"Acceleration occurs when a contractor speeds up the pace of its work, faster than the rate prescribed in the original contract. A contractor may recover for the increased costs incurred as a result of accelerating performance, when (1) its own delays in performance are excusable, (2) the contractor was ordered to accelerate, and (3) the contractor did so and sustained extra costs. ...An order to accelerate need not be expressed as a specific command by the government unit, but may be constructive. ...A constructive acceleration order may exist, when the government order may exist, when the government unit merely asks the contractor to accelerate or when the government expresses concern about lagging progress. ...Whether a constructive acceleration order was given to a contractor is a question of law."

Department of Transportation v. Anjo Construction Company, 666 A.2d 753 (Pa. Cmwlth. 1995)(citations omitted).

The dates regarding all three (3) Projects are clear. The work on the S.R. 5 and S.R. 27 Projects was completed before the October bituminous wearing course deadline. The Board finds that the Plaintiff had a sufficient period of time from the Notice to Proceed date of August 26th and August 21st, respectively, to complete these Projects. PennDOT offered the Plaintiff a time extension if it was needed as a result of the late Notice to Proceed date. The Plaintiff did not request such an extension. The facts also indicate that "harsh weather" did not effect or interfere with the Plaintiff's work on these two (2) Projects.

The S.R. 20 Project was a ninety-one (91) day Project. The anticipated Notice to Proceed date was July 22, 1991; however, the actual Notice to Proceed was not issued until August 16, 1991. As the Defendant points out in its brief, this resulting delay took twenty-five (25) days of contract time before the October 1st bituminous wearing course deadline and the September 1st cold recycled bituminous base course deadline.

On September 3, 1991, the facts show that PennDOT offered the Plaintiff a written time extension until June 8, 1992. The next day Mr. Haslett, a PennDOT employee, verbally offered the Plaintiff an extension until July 8, 1992. The Plaintiff chose to complete this Project in 1991. Based on this, PennDOT extended the Contract deadline until December 3, 1991, and thereby extended the cold recycled bituminous base course and bituminous wearing course deadlines.

Furthermore, the facts of this case show that the Plaintiff intended to work overtime on these three (3) Projects. The Plaintiff's own paving schedules indicate that it intended to work overtime on these projects before the issue of acceleration arose. The Plaintiff's bids and the testimony of Mr. Herzog indicate that the Plaintiff planned on working ten (10) hour days. The Board finds no evidence that the Plaintiff was required to work overtime as a result of the late Notices to Proceed. On the S.R. 5 and S.R. 27 Projects, the Plaintiff was offered extensions, but turned them down. There was also no evidence of harsh weather interfering with the completion of these Projects. As for the S.R. 20 Project, the Plaintiff was granted a generous extension until June of 1992, but turned it down. The Plaintiff accepted an extension until December of 1991.

In addition, the Board finds that the Plaintiff did not suffer damages from bad weather as a result of the late Notices to Proceed. As we have stated, the S.R. 5 and S.R. 27 Projects were not effected by bad weather. On the S.R. 20 Project, the Plaintiff was offered an extension of time to complete the Project, but opted for a shorter period. It cannot now come forward and claim that it was damaged by its own refusal to take a generous extension of time.

Based on the foregoing, the Board finds that the Defendant did not breach its Contract with the Plaintiff, and therefore, the Plaintiff is not entitled to attorneys' fees, costs or interest in this matter.

ORDER

AND NOW, this 17th day of July , 1997, the Board finds in favor of the Defendant, Commonwealth of Pennsylvania, Department of Transportation, and against the Plaintiff, Foster Grading Company.

It is hereby **ORDERED** that the costs and attorney's fees incurred by the respective parties will be paid by the respective parties.

BOARD OF CLAIMS

David C. Clipper
Chief Administrative Judge

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

Opinion Signed James W. Harris
Citizen Member