

COMMONWEALTH OF PENNSYLVANIA

HRI, INCORPORATED	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF TRANSPORTATION	:	DOCKET NO. 1683

FINDINGS OF FACT

1. Plaintiff, HRI, Incorporated (“HRI”), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. (Complaint and Answer, paragraph 1)

2. The Defendant is the Commonwealth of Pennsylvania, Department of Transportation (the “Department”). (Complaint and Answer, paragraph 2)

3. On April 10, 1991, HRI and the Department entered into the Contract identified as CMS No. 092054, State Project No. 8 4027070020920392, Federal Project No. 114-0561-011 (the “Contract”). (Plaintiff’s Exhibit No. 1; Stipulation No. 1; Complaint and Answer, paragraph 4)

4. The Project was identified as the Grazierville Bridge Rehabilitation Project which included the rehabilitation of a simple span steel truss bridge, minor roadway work on State Route 4027, Section 002, and other related work, located in Snyder Township, Blair County, Pennsylvania (the “Project”) (Plaintiff’s Exhibit No. 1; Stipulation No.2; Complaint and Answer, paragraph 4)

5. Sheets 1 through 14 of Structure Drawings S-18120 are a part of the Contract. (Plaintiff’s Exhibit No. 1 and 3; Stipulation No. 4)

6. The General Notes on Sheet 2 of 14 of Structure Drawings S-18120 provide in part as follows:

“Plans for the existing bridge are available at the District Office, District 9-0, at a nominal reproduction cost. Contact District Bridge Engineer for ordering a set. Do not consider any of the data on the existing structure supplied in the original design drawings or made available to you by the Department or its authorized agents as positive representations of any of the conditions that you will encounter in the field”

“There is no expressed or implied agreement that information is correctly shown. The bidder is not to rely on this information, but is to assume the possibility that conditions affecting the cost and/or quantities of work to be performed may differ from those indicated.”

(Plaintiff’s Exhibit No. 1; Stipulation No. 5; Plaintiff’s Exhibit No. 3)

7. The Plans referenced in the General Notes on Sheet 2 of 14 of Structure Drawings S-18120 are Structure Drawings S-952. (Plaintiff’s Exhibit No. 1; Stipulation No. 6; Plaintiff’s Exhibit No. 3)

8. Structure Drawings S-952 are the original construction drawings for the Grazierville Bridge (“original bridge drawings”). (Plaintiff’s Exhibit No. 1; Stipulation No.7; Plaintiff’s Exhibit No. 4)

9. Sheets 1 through 5 of 5 of the original bridge drawings provide in part as follows:

“This sheet is included for the convenience of the Department. The data shown herein is for information only, is not a part of the plans, proposal, or contract, and is not to be considered as a basis for computation for any purpose.”

(Plaintiff’s Exhibit No. 1; Stipulation No. 8; Plaintiff’s Exhibit No. 4)

10. Sheet 2 of 5 of original bridge drawings S-952 provides in part as follows:

“The Bottom Chord Web members and gusset plates below the Concrete floor, Bottom laterals and Hangers shall be encased with 2" of pressure grout. Steel with fabric of No. 3" 12 wires spaced 2" in each direction or No. 10 wires spaced 3" in each direction shall be fastened to 1/4" vertical bars spaced 2.0" o.c. and to structural steel as specified in Form 408.”

“The inside of Bottom Chords of both trusses shall be filled with cinder concrete...

“For the Roadway Truss the space between gusset plates and inside of Web members as far up as to edge of gusset plates shall also be filled with cinder concrete.”

(Plaintiff’s Exhibit No. 1; Stipulation No. 9; Plaintiff’s Exhibit No. 4)

11. The Publication 408 Specifications (1990 Edition) is made a part of the Contract by specific reference thereto. (Plaintiff’s Exhibit No. 1; Stipulation No. 10)

12. As part of the work under the Contract, HRI was required to perform Contract Item No. 1018-0050 “Removal of Portion of Existing Bridge” which included the demolition, removal and disposal of a portion of the existing bridge super structure, including the deck, portions or all of the sidewall and the floor beams and stringers, the installation of a new deck, painting, construction of new approaches and the removal of the gunite encasement from the fascia girders as specified by the Contract Plans and Specifications. (Plaintiff’s Exhibit No. 1; Stipulation No. 3; Complaint and Answer, Paragraph 5; N.T. 13, 16-17)

13. The Special Provisions of the Contract entitled “Item 1018-0050 - Removal of Portion of Existing Bridge” provides in part as follows:

In accordance with Section 1018 and as follows:

DESCRIPTION - This work is the removal and satisfactory disposal of the portion of existing bridge superstructure as indicated and as follows:

- (a) Reinforced cement concrete deck slab, curbs, and sidewalk (including any wearing surface) as indicated.
- (b) Steel plate expansion dams at North and South abutments.
- (c) Bridge roadway and side walk steel railings.
- (d) Steel roadway and sidewalk floor systems including floor beams, stringers, connection angles and plates, and sidewalk brackets and stringer.
- (e) Bottom truss chord lateral bracing.
- (f) All concrete and/or gunite encasement of steel truss members.
- (g) Small bars attached to bottom chord of truss (grind weld material smooth).

- (h) Portion of existing R.C.C. backfill and end posts at the north and south abutments as indicated.
- (i) Top portion of northeast wingwall as indicated located at the north abutment.

(Plaintiff's Exhibit No. 1; Stipulation No. 11)

14. The Special Provision of the Contract entitled "Item 1070-0050- Painting Existing Structural Steel Using Inorganic Zinc Coating Systems" provide in part as follows:

Paint expansion dams, truss, bearings, all existing steel truss surfaces that were encased in concrete and/or gunitite, false work supports to remain on structure, and area damaged by welding on false work supports and metal deck form supports in accordance with Section 1060.2.

(Plaintiff's Exhibit No. 1; Stipulation No. 12)

15. The bridge is a simple span truss bridge spanning 228 feet over Conrail railroad tracks with two fascia girders, each 228 feet long, connected by 10 floor beams which in turn support stringer beams which carry the concrete deck. The Grazierville bridge was constructed in the 1930's. HRI purchased and reviewed a set of the "original bridge drawings" (S-952) as provided by the Department. (N.T. 14, 29, 56, 74, 324; P-3, P-4)

16. The fascia girders, bottom truss and chords were constructed of two "C" Channels, connected by solid steel plates which range in length from 2 to 6 spaced intermittently on the top and bottom spanning the 8" opening between the Channels. The fascia girders were 2 feet high by 1 ½ feet wide. (N.T. 106-108; P-4, P-36)

17. When the bridge was built the lower truss members, the fascia girders and gussets plates were encased with gunitite and filled with cinder concrete. (N.T. 16-17; P-4)

18. The interior of the fascia girders was filled with cinder concrete and encased in gunitite that had a wire mesh reinforced mat and completely encircled the girders to protect the steel from the corrosive effects of the gases including sulfuric acid emitted from coal burning steam engines. (N.T. 17, 74-75, 108-109; P-4)

19. Gunitite is a mixture of sand, cement and water and is pressure applied through a hose and nozzle and is known as "pressure grout" in common technology and means the same as gunitite. (N.T. 26, 31, 71, 206-207, 442)

20. The cinder concrete which filled the interior voids of the “C” Channels of the fascia girders and the pocket at joints would be either poured or pumped. (N.T. 31-32; P-4)

21. The gunite encasement and cinder concrete fill served no structural purpose and with the passing of the steam locomotion era they served no useful purpose. (N.T. 203-204, 212-213)

22. In recent years, the concrete and gunite encasement deteriorated and allowed corrosion of the metal truss to occur undetected by the human eye. (Exhibits P-7 and P-8; N.T. 32-35)

23. Removal of the gunite and concrete encasement was required to improve the structural integrity of the bridge. (N.T. 75-76)

24. The “original bridge drawings”, sheet 2, contains a cross-sectional view that depicts the location of the cinder concrete fill and pressure grout surfacing (Gunite) of the bottom chord (fascia girder) and stringers. (N.T. 26, 205; P-4)

25. Mr. Merz, HRI’s expert witness, established that on the as-built drawings Note “Half Cross Section” on sheet 2 of original bridge drawings clearly delineates the inches of pressure grout (Gunite) and the cinder concrete fill of the interior section of the truss member. The 2 inches of pressure grout surfacing is clearly designated as encasing the entire perimeter of the Chord. (Emphasis Added) (N.T. 200-201, 205; P-4)

26. Encasement refers to something that goes around something else, not inside it. (N.T. 21)

27. The term encasement in Item No. 1018-0050 includes only the 2 inches of gunite on the exterior of the fascia girders. (Emphasis Added) (N.T. 21, 204)

28. In Contract Item 1018-0050 Subsection (f) the term concrete and gunite modifies the term encasement. Concrete encasement does not include the fill concrete shown inside the fascia girders. (N.T. 19-21, 204-205, 209-210)

29. The subsection of Specification Section 1018-0050 entitled “Construction” does not address the removal of the fill concrete from inside the fascia girders. (N.T. 22)

30. The Contract drawings do not contain details of the fascia girders nor do they show what is to be done to the fascia girders. (N.T. 20, 199; P-3)

31. Mr. Merz established that the Contract Drawings and Specifications were inadequate to require the concrete fill to be removed from the interior of the fascia girders and it was reasonable for HRI to interpret the Contract Drawings and Specification requiring the removal of the 2" gunite encasement but not the cinder concrete fill from the fascia girders. (Emphasis Added) (N.T. 201, 202, 221)

32. On the original bridge drawings, the term pressure grout is used either with the term encased or the term covered. (N.T. 488)

33. On the original bridge drawings, the term cinder concrete is used only with the term filled. (N.T. 488)

34. The twenty pocket areas, where the fascia girders frame into vertical and other truss members and ten floor beams, were filled with cinder concrete and gunite encased up to the bottom of the deck elevator. (N.T. 98, 115-118, 380, 440, 445; P-4)

35. In order to reinstall the new floor beams required in the Contract, HRI had to remove the fill concrete from the twenty pocket area. The removal of this cinder concrete fill is not a part of this Claim. (Emphasis Added) (N.T. 98-99, 127, 453)

36. The Board finds that the Department's Contract Plans and Specification including Item No. 1018-0050 are inadequate with respect to requiring the removal of cinder concrete fill from the interior of the fascia girders. HRI was not required to contractually remove this cinder concrete fill as part of the original Contract Item # 1018-0050. (Record)

37. HRI purchased a set of as-built plans and knew, or should have known, that the fascia girders were filled with cinder concrete as shown on the as-built drawings S-952. (N.T. 26, 56, 62-63, 200-201, 205; P-1, P-3, P-4; Stipulation #5)

38. At the time of the Project bid, Mr. Au was Vice-President in charge of the structure of HRI. (N.T. 12)

39. Mr. Au estimated the demolition portion of the Project, including Work Item No. 1018-0050. He had never before encountered a fascia girder or steel member filled with concrete as on this Project. (N.T. 12-13, 21, 55)

40. Mr. Au had only limited experience bidding on Contracts involving steel truss bridges (N.T. 10-14, 53-55)

41. Mr. Au undertook at least one and maybe two visits to the Project site prior to bidding. (N.T. 61)

42. During his site visit(s), Mr. Au carefully examined the site viewing it from abutment. He walked under the bridge and viewed the gunite on the floor beams and bottom chords and observed that a “fair amount of it was deteriorated to the state where it was hanging down”. He felt it would come off relatively easily. HRI bid this Item No. 1018-0050 at One Hundred Fifty Thousand Dollars (\$150,000.00) versus Two Hundred Four Seven Hundred Fifty Dollars (\$204,750.00) and Three Hundred Twenty Thousand Three Dollars (\$320,003.00) bid by the other two lowest bidders (N.T. 65-68,108, 276; P-37)

43. During the site visit, Mr. Au saw the gunite around the bottom chords and floor beams but did not see the concrete inside the bottom chords or in the pocket areas. (N.T. 65-66)

44. The concrete inside the pocket areas was clearly visible to anyone standing on the concrete deck of the bridge and looking over the side. (N.T. 380-381, 446)

45. The Contract specified that the contractor is not to rely on the “original bridge drawings” for any purpose. (N.T. 493-494)

46. The “original bridge drawings” may not accurately depict the actual condition of the bridge as it currently exists since work may have been performed on the bridge between its construction in the 1930's and the time of the Project. (N.T. 24-25, 491-492)

47. Mr. Au did not rely upon the “original bridge drawings” in bidding the Project. (N.T. 20, 24)

48. During his pre-bid site investigation, Mr. Au did not consider whether anything was inside the fascia girders because the bid documents and Contract did not require the removal of anything inside the girders. (N.T. 70, 101-102)

49. The Notice to Proceed date for this Project was April 20, 1992. On May 22, 1992. HRI notified the Department in writing that removal of the cinder fill concrete from the interior of the fascia girders as directed by the Department, was extra work for which HRI was seeking additional compensation. (N.T. 32, 34, 109, 235; P-6; D-1)

50. By letters dated May 22, 1992, and June 9, 1992, HRI requested the Department to keep force account records for all labor, material and equipment associated with the removal of the fill concrete from the exterior of the fascia girders. (N.T. 33, 35; Plaintiff's Exhibits No. 6 and 9)

51. On May 28, 1992, the Department rejected HRI's assertion that the concrete removal constituted extra work. (N.T. P-36; Exhibit P-8)

52. The Department also offered to HRI an alternative to removing all the concrete in the bottom chords whereby HRI would only remove the top 3 inches of the concrete, but HRI rejected this offer. (N.T. 36-37)

53. HRI encountered difficulty in removing the fill concrete from the interior of the fascia girders, employing various methods, including the use of rivet busters, chipping hammers, Bristar and water blasting. HRI also encountered great difficulty in removing the cinder concrete from the 20 pocket areas. Mr. Replogele testified that HRI had great difficulty with various configurations of bits on jack hammers and so they tested the use of high pressure water blaster. (N.T. 94-95, 109, 453-456, 461)

54. HRI removed the plates from the fascia girders in order to remove the fill concrete from the interior of the girders. (N.T. 114)

55. HRI employed two methods to remove the concrete in pocket areas; jack hammering and water blasting. Mr. Replogele testified that the Department kept force account records for both fascia girder and pack areas since HRI originally indicated pockets were extra work also. (N.T. 453-461)

56. HRI brought Broadbent, Inc. ("Broadbent") on site mainly to water blast the fill concrete from the interior of the fascia girders. (N.T. 41, 94)

57. The waterblaster was primarily used in the pocket areas. (N.T. 456-459)

58. The method used for removing the concrete from the bottom chords was to jackhammer vertical holes in the concrete nearly all the way through to the bottom. Then "Bristar," an expansive material, was poured or placed in the holes. Overnight, cracks developed in the concrete radiating from hole to hole, making it easier to jackhammer the concrete out of the bottom chords. (N.T. 42-44)

59. HRI completely removed and disposed of the fill concrete from the interior of the two fascia girders. (Complaint and Answer, Paragraph 9, N.T. 39)

60. HRI worked overtime in order to complete the Project within the time period specified by the Contract. (N.T. 40)

61. Project Specifications Section 11003(d) states that when extra work is performed, payment is to be made in accordance with force account provisions of the Contract. (Plaintiff's Exhibit No. 1; Stipulation No. 10)

62. Frank Stahl was the Department's Project Engineer and supervised the keeping of force-account records which were generally kept by Mr. Kost, a project inspector, who was on the Project full time. Mr. Stale reviewed force account records daily for completeness and accuracy. (N.T. 504-505)

63. Mr. Stahl testified that HRI knew that the Department was keeping force account records and that he and Mr. Culbertson had many discussions about time and materials being used. (N.T. 505)

64. Mr. Stahl testified that he distinctly remembers that HRI's personnel made photo copies of Department's force account records. (N.T. 506)

65. Mr. Culbertson, denied he ever had the opportunity to see Department force account records, "because they did not give them to us." However, Mr. Culbertson later, near the end of trial, admitted that the HRI Foreman and Department Engineer had discussions from time to time on things that there were never agreements to sign off from one or the other. (N.T. 142-143; 520-521)

66. The Department kept accurate records of the concrete removal from the pocket areas and the bottom chord. (N.T. 459-464, 505-510)

67. Using the force account methodology in Section 110 of the Publication 408 Specifications, HRI's costs to remove the concrete from the bottom chords was Twenty Thousand Five Hundred Seventy-Six Dollars and Thirty-Five Cents (\$20,576.35) as determined by the Department. (Exhibit D-7; N.T. 472-479)

68. HRI and R. J. Wildner Contracting Co., Inc. ("Wildner") entered into a Subcontract whereby Wildner was to perform the blast cleaning and painting of the structural steel for the Project. (N.T. 39; Plaintiff's Exhibit No. 14).

69. Robert J. Wildner is a Project Manager and estimator for Wildner, which is owned by his wife, and he has 27 years of experience in painting for the Project and managed this work on the Project. (N.T. 347)

70. Mr. Wildner performed the estimate for the blast cleaning and painting for the Project and managed this work on the Project. (N.T. 347)

71. Wildner's subcontract did not include the removal of the fill concrete from the interior of the fascia girders nor the cleaning or painting required once the said concrete was removed. (N.T. 48; Plaintiff's Exhibit No. 14)

72. Mr. Wildner performed a pre-bid site investigation and as a result, knew that the fascia girders were filled with concrete. (N.T. 353, 379-382)

73. Mr. Wildner did not include a price in his quote to HRI for blast cleaning and painting the interior of the fascia girders. (N.T. 354)

74. As a result of having to blast clean and paint the interior surfaces of the fascia girders, Wildner was required to work on the Project one additional month from that originally anticipated. (N.T. 364)

75. Although the bulk of its work was performed between the weeks ending September 19th through October 18th, 1992, Wildner performed the entirety of its work over a 10-week period of time, from August 3rd to October 22nd, 1992. (N.T. 364, 415-418, 421-422)

76. Wildner's original estimate to blast clean and paint the interior of the fascia girders was Forty-Seven Thousand Two Hundred Eighty-Seven Dollars and Fifty Cents (\$47,287.50). (N.T. 354-356; Plaintiff's Exhibit No. 23)

77. Wildner's original estimate of \$47,287.50 was calculated by multiplying the actual area of the interior surface of the fascia girders, or 3,250 square feet, times the unit price of \$14.55 per square foot, the unit price used in Wildner's estimate for blast cleaning and painting the exterior surfaces of the steel members. This estimate did not take into account the degree of difficulty involved in this interior work. (N.T. 355-356, 375-376, 392)

78. Wildner removed the existing coating from the old structural steel, collected and disposed of the waste, and applied one primer coat and two finish coats of paint on the structural steel. The new steel came out to the Project with its finish paint coat. Wildner also performed repair work on damaged paint finish of the new steel which he billed to High Steel. (N.T. 348-349, 384-388)

79. The interior surfaces of the fascia girders were more difficult to blast clean and paint, and hence resulted in increased costs from that originally estimated by Wildner because of the more complex structure of the interior of the girders, i.e., the presence of stiffeners and diaphragms, the presence of concrete residue, more complicated rigging was required, the blasters had difficulty accessing the work, and containment was more involved. (N.T. 356-363; Plaintiff's Exhibit No. 24)

80. Because of the nature of the work, it is alleged that it was virtually impossible for Wildner to separate its costs for the interior surfaces of the fascia girders from the rest of its costs. (N.T. 363, 413-414)

81. The physical limitations imposed by the containment system required for in the Contract made it difficult for Wildner to maintain contemporaneous records of the hours required to clean and paint the interior of the fascia girder during the course of the Project. (N.T. 413-414)

82. Wildner's total labor cost for blast cleaning and painting work on the Project was Twenty Seven Thousand Seven Hundred Seventy-Two Dollars and Ninety-Four Cents. (\$27,772.94.) (N.T. 357-358, 398; Plaintiff's Exhibit No. 22)

83. The Department kept accurate force account records for the "sand" blasting and painting of the lower chords and pockets. Mr. Replogele the Department's witness of force account records admitted that the split was 25 % to the chord and 75% to pocket. The Department calculated the extra work to cost Five Thousand Seven Hundred Ninety-Eight Dollars and Ten Cents. (\$5,798.10). (N.T. 472-470; D-7)

84. Department records do indicate that the total time Wildner spent painting both pockets and fascia beams was 38 hours and the total sand blasting time for the inside of the fascia and pockets was 72 hours for a total of 110 hours. (N.T. 505-510; Defendant Exhibit D-5)

85. The Board finds that the Department's allocation of \$5,798.10 reflects accurately the additional painting costs incurred by Wildner on the Project. (Emphasis Added) (Record; D-7)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the instant Claim and parties pursuant to **72 Pa.C.S.A. § 4651-4.**

2. HRI, Inc. entered into a valid Contract, on April 10 1991, with the Commonwealth of Pennsylvania, Department of Transportation for the rehabilitation of the Grazierville Bridge, identified as CMS No. 092054, State Project No. 8 4027070020920392, Federal Project No. 114-0561-011, and referred to as the Grazierville Bridge Rehabilitation Project. ("Contract")

3. The Grazierville Bridge Rehabilitation Project Contract is not ambiguous. (Krizovensky v. Krizovensky, 425 Pa. Superior. 204, 212 (1993), appeal denied slip op. 2633 (1994))

4. When contract terms are clear and unambiguous the intent of the parties is to be determined from the express language in the contract writing. (Robert F. Felte, Inc. v. White, 451 Pa. 137 (1973), Marcinak v. Southeastern Green School District, 375 Pa. Super. 486 (1988))

5. Removal of fill concrete from inside the box of the fascia girders is extra work, except such removal in the 20 pocket areas where the fascia girders frame into other truss members and floor beams, which is not extra work. (Contract §§ 104.3, 110.03(c))

6. No breach of Contract occurred when the Department of Transportation required extra work.

7. Extra work is paid on a Force Account basis. (Contract § 110.03(d), Green Constr. Co. v. Pa. Dept. of Transp., 164 Pa. Commw. 566, 577 (1994))

8. The most credible Force Account records were kept by the Department of Transportation. (Contract §§ 110.03(a), 110.03(e))

9. HRI knew that the Department was keeping Force Account Records and checked these records from time to time. The Department of Transportation's Force Account records are presumed accurate unless timely disputed. (Contract § 110.03(e))

OPINION

This matter was called to hearing before the Board of Claims on December 6, 1995. All the evidence has been reviewed and the above facts were found and conclusions of law made. This dispute arose out of HRI, Inc. (hereinafter “HRI”) removal of existing bridge components in the Grazierville Bridge Rehabilitation Project. Specifically, the removal of concrete fill from within the fascia girders and the Department of Transportation’s (hereinafter the “Department”) compensation to HRI for services related thereto. The Board characterizes the Contract and services rendered, then addresses the calculation of compensation due HRI.

The Contract for HRI’s rehabilitation of the Grazierville Bridge was not ambiguous. The Pennsylvania Courts have determined, “[a] contract will be found to be ambiguous:

if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree on the proper construction.

Krizovensky v. Krizovensky, 425 Pa. Superior. 204, 212 (1993), appeal denied slip op. 2633 (1994). The Krizovensky Court added, “[t]o determine whether there is an ambiguity, it is proper for a Court to hear evidence from both parties and then decide whether there are objective indications that the terms of the Contract are subject to differing meanings.” Id.

When contract terms are clear and unambiguous, the intent of the parties is to be determined from the express language in the contract writing. (Robert F. Felte, Inc. v. White, 451 Pa. 137 (1973), Marcinak v. Southeastern Green School District, 375 Pa. Super. 486 (1988))

In the hearing, the Board heard testimony from experts as to differing meanings of the Contract terms at issue. That evidence was not sufficient to avoid the clear, unambiguous, and express terms “[t]he Bottom Chord Web members . . . shall be encased with . . . pressure grout,” and “[t]he inside of Bottom Chords . . . shall be filled with cinder concrete,” from the original bridge drawings, and “[t]his work is the removal . . . as follows: (f) All concrete and/or gunite encasement of steel truss members” from section “Item 1018-0050 - Removal of Portion of Existing Bridge.” Gunite is another word for pressure grout.

The language used in this Contract was simple therefore the Board examines the nature of the language in general. Encase means “to cover completely; enclose.” Webster’s New World Dictionary 460 (2d ed. 1982). Encasement means “to put into a case” Id. Fill means “to put as much as possible into.” Id. at 522.

The truss members are filled with concrete but encased in gunite. In the HRI Contract, “remove . . . [a]ll concrete and/or gunite encasement of steel truss members” obligates HRI to remove the case around the truss members and does not obligate HRI to remove the filling from within the truss members except where necessary to expose the truss members. Therefore, HRI is unambiguously and simply required to remove the gunite encasement from the truss members, is not obligated to remove the

concrete filling from inside the truss members, and is obligated to remove the concrete filling to expose the 20 pocket areas.

When the Department required HRI to remove the concrete filling from inside the framing of the fascia girders in the non-pocket areas, they required HRI to do extra work. Contract Section 104.3 provides: “Extra Work - Anticipate that extra work might be necessary in order to complete the Project as contemplated,” and continues “[c]ompensation will be made as specified in Section 110.03.” Section 110.03(c) defines extra work as “work, having no quantity and/or price included in the Contract, which is determined . . . to be necessary or desirable to complete the Project.” Therefore the Department’s requirement of removal was not a breach of the Contract. It was merely a decision to require extra work because no quantity or price for this work was included in the Contract but the Department determined the work as necessary to complete the Project. This extra work is to be paid as agreed in section 110.03.

Section 110.03(c) provides “all extra work will be paid only as stated in 110.03(a).” Section 110.03(a) explains “if [the parties] cannot agree on a tentative price for the extra work and if the extra work is such that force account records can be kept by the Department, . . . such work is to be paid on a force account basis. (Emphasis added). This provision dictates that where force account records can be kept, it is presumed that the Department will keep the accurate records. This presumption is furthered by Section 110.03(d) which explains:

Records will be kept daily of all labor, equipment and materials used. . . in the disputed work. On each Monday, compare records of the previous week’s work with those kept by the Department and review for accuracy. Report to the District Engineer within ten days of each review all disagreements with such records

Refusal or repeated failure to meet to review the Department's records or to report disagreements with such records will create an irrebuttable presumption in favor of the Department that its records are accurate.

The Board finds that HRI did not meet its burden to rebut the presumption that the Department's Force Account records are inaccurate. Therefore, the Department's Force Account records are deemed accurate to determine compensation due to HRI for the extra work of removing the cement filling from the girders aside from the pocket area removal.

The Board has analyzed the Department's Force Account records and finds that HRI, Inc. is entitled to compensation for the following items:

- A. Concrete removal from bottom chords in the amount of \$20,576.35.
 - B. Blasting and painting of the lower chords in the amount of \$5,798.10
- Total \$26,374.45

ORDER

AND NOW, this _____ day of _____ 1996, it is **ORDERED** and **DECREED** that the Defendant, Commonwealth of Pennsylvania, Department of Transportation is indebted unto the Plaintiff, HRI, Incorporated, in the full and true sum of Twenty-Six Thousand Three Hundred Seventy-Four Dollars and Forty-Five Cents (\$26,374.45) together with interest at the legal rate of 6% per annum from the date the claim was filed on November 6, 1992.

Each party to bear its own costs and attorney's 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
November 27, 1996