

COMMONWEALTH OF PENNSYLVANIA

CARMEN PALIOTTA, an individual t/d/b/a : BEFORE THE BOARD OF CLAIMS  
CARMEN PALIOTTA CONTRACTING :  
COMPANY :  
 :  
 :  
VS. :  
 :  
COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF TRANSPORTATION : DOCKET NO. 1718

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**FINDINGS OF FACT**

**PARTIES AND THEIR REPRESENTATIVES**

1. Plaintiff is Carmen Paliotta, an individual, trading and doing business as Carmen Paliotta Contracting Company (hereinafter referred to as “Paliotta”). (Complaint and Answer, para. 1)
2. Defendant is the Commonwealth of Pennsylvania, Department of Transportation, an executive agency of the Commonwealth (hereinafter “the Department”). (Complaint and Answer, para. 2)
3. Daniel Foxall was the Department’s Project Engineer for the Project, whose duties included administering the Contract. Mr. Foxall worked on the Project on a full-time basis. (N.T. 692)
4. Russell Tribuzio was Paliotta’s Superintendent on the Project. (N.T. 233)
5. Christopher Payne is an Engineer hired by Paliotta to render opinions about the Project in a report and in testimony before the Board. (N.T. 357-358)
6. Mark Gleason is an Accountant hired by Paliotta to render opinions about the Project in a report and in testimony before the Board. (N.T. 513-514)
7. Carmen Paliotta is the owner of Carmen Paliotta Contracting Company who was primarily responsible for bidding the Project and dealing with contractual issues. He was on the Project site extensively during the early phase of the construction. (N.T. 57-120)

## EVENTS PRIOR TO THE START OF CONSTRUCTION

8. On or about May 23, 1991, the Department issued bid proposal forms for a Contract for the improvement of a section of State Route 30 in Beaver County. (Exhibit P-15)
9. The bid proposal included a schedule prepared by the Department, known as a "D-476" schedule, indicating that the anticipated notice to proceed date for the Project was July 29, 1991, and a work end date of October 28, 1991, with 92 calendar days allowed for construction. (Exhibit P-9; N.T. 57, 60)
10. Paliotta submitted a bid for the Contract on or about June 20, 1991. (Exhibit P-15; N.T. 59-60)
11. All bids for the Contract were opened on June 20, 1991. (Exhibit P-15-16)
12. Paliotta was declared the lowest responsive bidder by the Department in a letter dated June 27, 1991. (Exhibit P-17)
13. Paliotta's bid was \$1,477,738.84; \$12,000.00 lower than West Penn Asphalt, the second bidder. (N.T. 60-61; P-15-16)
14. The General Assembly of the Commonwealth of Pennsylvania failed to pass a budget before the beginning of the July 1, 1991 - June 30, 1992 fiscal year. Consequently, the Department sent Paliotta a letter on July 26, 1991 stating that due to the lack of a state budget, the execution of the Contract and issuance of the notice to proceed may be delayed. The letter asks Paliotta to "concur in extending the time within which the Department must execute the Contract and issue the notice to proceed 30 days after the budget has been signed into law. . . ." (Exhibit P-18)
15. Paliotta signed the July 26, 1991 letter on August 1, 1991. (Exhibit P-18)
16. The General Assembly passed a state budget which was signed into law by Governor Casey on Sunday, August 4, 1991. (N.T. 51)
17. The Contract was awarded to Paliotta on August 7, 1991. The Contract required completion of all work within 92 calendar days. (Exhibit P-20)
18. The Contract was executed by Paliotta on Tuesday, August 13, 1991 and by the Department on Friday, August 23, 1991. (Exhibit P-21)

19. On Friday, August 30, 1991, the Department held the pre-construction conference for the Project. Mr. Paliotta was not given any indication as to why over three weeks passed from the time the Department awarded the Contract to Paliotta and the time the Department held the pre-construction conference. (N.T. 74; Exhibit P-22)

20. At the time Paliotta received notice of Contract award from the Department on August 7, 1991, Paliotta believed that most of the Project could be completed in the 1991 construction season, weather permitting. (N.T. 68, 403)

21. On Wednesday, September 4, 1991, the Department issued a revised schedule stating that the duration of the Project was increased from 92 calendar days to 268 calendar days. The scope of the work did not change. The increased duration of the Project was due to a 167 calendar day winter shutdown between calendar day 46 to calendar day 213. The new end of work date became June 9, 1992. (Exhibit P-24)

22. On Saturday, September 7, 1991, when he received the revised Department schedule, Mr. Paliotta still intended on completing most of the work in the fall of 1991, weather permitting. Specifically, he intended on completing everything except the finish coat of asphalt prior to the end of the 1991 construction season. By constructing the Project in this manner, Paliotta would only need to send a subcontractor back to the Project in the spring of 1992 to complete the finish coat of asphalt. (N.T. 69-70)

23. On Thursday, September 12, 1991, after receiving the revised Department schedule form D-476, Paliotta wrote a letter to the Department requesting that the schedule be revised again to maintain the continuity of widening and drainage which was set forth in the Department's original schedule and which the Department had split between 1991 and 1992 in its revised schedule. (N.T. 91-92; Exhibit P-28)

24. On October 10, 1991, the Department again revised the schedule (D-476) and essentially adopted the schedule revisions suggested by Paliotta on September 12, 1991, which showed the curb and gutter work (Item G07) conducted in a continuous operation starting on May 14, 1992. (Emphasis Added) (N.T. 93; Exhibit P-31)

## **DESCRIPTION OF THE PROJECT**

25. The Project was located in the geographic area of the Department's District 11-0 in Beaver County on State Route (S.R.) 30, Section 25m, 027 and 028 requiring the improvement of 9/10ths of a mile including the intersection of S.R. 30 and S.R. 168. (Exhibit P-21)

26. The Project's principle features included:
- a.) Construction of temporary roads 1 and 2 and diverting traffic from existing S.R. 30 onto the temporary road.
  - b.) Demolish and replace two small bridges that carried S.R. 30 roadway over streams, with box culverts. Box culvert number 1, designated as precast concrete culvert, was located on the western end of the Project. Box culvert number 2, designed as a cast-in-place concrete culvert, was near the eastern end of the Project.
  - c.) Widening of Route 30 throughout the length of the Project, 2 feet left and right and variable.
  - d.) Construction of turning lanes at the intersection of S.R. 30 and S.R. 168 near the eastern end of the Project.
  - e.) Construction of concrete curb gutter at the intersection of Routes 30 and 168.
  - f.) Resurface the entire Project and intersection of S.R. 30 and S.R. 168 with 1 ½ bituminous wearing coarse I.D.-2 (RPS) S.R.L.E. (heavy duty).

(N.T. 363-365; Exhibit P-21; Exhibit D-2)

27. Construction of box culvert number 1 was to be done in two phases. Phase 1 involved diverting the stream, building a temporary road around the area where the new box culvert was to be placed, and diverting traffic onto the temporary road. Phase 2 involved demolishing the old bridge, placing the new precast box culvert, placing new roadway course (asphalt) on top of the box culvert, taking out the temporary road and diverting the stream through the new box culvert. (Exhibit D-2)

28. Construction of box culvert number 2 was also to be performed in two phases. Phase 1 involved diverting the stream, building a temporary road and diverting traffic onto it, tearing out the old bridge, constructing roughly two-thirds of the new cast-in-place box culvert (the upstream portion), including the upstream wingwalls, placing asphalt on top of it and routing traffic onto it. Phase 2 involved removing the temporary road, constructing the last third of the box culvert (the downstream portion), including wingwalls, and finally diverting the stream back through the now completed box culvert. (N.T. 99-100; Exhibit P-120; Exhibit D-2)

29. The widening of Route 30 required the relocation of overhead utility lines: electric, telephone and television cable. The poles that carried these utilities were in the widening area and ran the length of the Project. New poles were to be relocated outside of the widening area and the overhead lines were then to be placed on them. The old poles could then be removed and the roadway widened. (Exhibit P-21)

30. For the two box culvert areas, the sequence of utility relocation work in the Contract had the electric company, Duquesne Light, after temporary runarounds staked, utility could relocate its facilities in fifteen (15) working days (each utility working day equals two calendar days) or thirty (30) calendar days. Then Bell Telephone moved its lines onto new power poles and finally Star Cable would move onto these new poles. (Exhibit P-21, pg. 36 [000206])

31. For the areas outside box culverts numbers 1 and 2, the sequence of utility relocation work in the Contract required the right-of-way line, fill bench limits and guide rail relocations staked prior to Duquesne Light relocating pole and power lines. Bell Telephone and Star Cable would then move their facilities onto the power poles. (Exhibit P-21; P-36-37 [000206-00020])

32. The traffic control plans in the Contract included the following requirement: "Maintain a minimum of two ten foot wide lanes of unobstructed traffic in each direction during non-working hours." (N.T. 172-185; Exhibit P-21, pg. 52)

33. After the utility poles were relocated, Paliotta could place "fill benches," built-up areas off the edge of the existing roadway, onto which some of the roadway widening and curb gutter would be constructed. (Exhibit P-21)

### **PALIOTTA'S BID**

34. Paliotta relied on the schedule which the Department included in the bid documents in preparing his bid. Specifically, in light of this schedule, Paliotta prepared his bid "to be ready with manpower and equipment to get the job done in 92 days." (N.T. 60; Exhibit P-Demo. 1, P-20; D-476; Bates 00254)

35. Because the Department let the Project for bid as a 92-day job with an anticipated completion day of October 28, 1991, at the time he bid the Project, Paliotta reasonably anticipated that the Project would be completed prior to the end of the 1991 construction season. (P-21, Bates 000254; Exhibit D-476 Schedule)

36. Mr. Paliotta testified that at the time of the bid, he planned to excavate as much as possible away from traffic, put in subbase and install under drain and then slip form the curb gutter except in the driveway areas which required forming up. (N.T. 83-85, 88, 90-91)

37. Paliotta's planned methodology for construction of curb gutters was consistent with the Department plans and specifications upon which Paliotta bid the Project. (N.T. 379-380; Exhibit P-119; D-2)

38. At the time they bid this Project, Paliotta intended to complete as much curb gutter work as soon as possible to take advantage of the fact that a large amount of the curb gutter was not immediately adjacent to the existing roadway so that Paliotta could work away from the road and do as much curb gutter work as possible prior to roadway widening. (N.T. 101, 244-246)

39. Based on the Department's original design, Paliotta's plan to use gabions as shoring for temporary roads 1 and 2 was reasonable. (N.T. 365-366)

### **CONSTRUCTION OF THE PROJECT**

40. Paliotta began its site preparation work on September 9, 1991, which was one week earlier than called by the Department's actual notice to proceed date of September 16, 1991, so that Paliotta could complete the Project as quickly as possible. (N.T. 80-81, 169)

41. As early as September 11, 1991, Paliotta realized that the Project could not be built as planned because there was a problem in the Department's design location of the construction joint at box culvert number 2. It was discovered when the layout was made by Sucevic, Piccolomini and Kuchar Engineering, Inc. (hereinafter "SP & K") as noted in Paliotta's Construction & Maintenance Daily Log (Exhibit P-79, Bates 001131). Specifically, on this date, Paliotta noted that it realized that the Project "could not be built to plan." (N.T. 98, 248-249; Exhibit P-79; Bates 001131)

42. Actual construction of the Project began on the notice to proceed date, September 16, 1991, although Paliotta was able to mobilize its trailers to the site about a week earlier. (N.T. 80-81, 169)

43. As originally designed by the Department, box culvert number 1 was a precast concrete box culvert and box culvert number 2 was a cast-in-place box culvert. (N.T. 57; Exhibit D-2)

44. Before the notice to proceed, Paliotta requested and received permission from the Department to change the design of box culvert number 1 from precast to cast-in-place. (N.T. 57, 149-150; Exhibit P-23)

45. Based on the original design as bid, Paliotta planned to use gabion baskets, filled with stones, as temporary shoring between Phase I construction and the temporary roadways at both box culvert number 1 and 2. (N.T. 101, 242; Exhibit P-27(a))

46. Mr. Tribuzio established that Paliotta used gabion baskets as temporary shoring for box culvert number 1. (N.T. 243)

47. The plans for box culvert number 2, as designed by the Department, specified a construct joint location that would have had the Phase I and Phase 2 construction underneath Route 30. Construction of the box culvert as designed was not feasible since traffic would have been running over the area where the two phases were joined together. (Emphasis Added) (N.T. 98, 240-246; Exhibit P-120)

48. In light of the Department's design defects, Mr. Russell Tribuzio, Paliotta's Site Superintendent proposed several options to correct the design defect with respect to the construction of box culvert number 2. Specifically, Paliotta proposed moving the joint or simply sliding the box down so as to provide room for the construction of temporary roadway number 2. (N.T. 251)

49. The Department rejected Paliotta's proposed solutions and instead switched the phasing for the construction of box culvert number 2. (N.T. 251)

50. The Department resolved its design flaw by changing the phasing of box culvert number 2. Instead of two phases, there were now three. Phase 1 was building the downstream third of the box culvert first, then placing the temporary road on top of it. Phase 2 was diverting traffic onto the temporary road, demolishing the old structure, constructing the upstream two-thirds of the box culvert, and putting the roadway back on top of this portion of the box culvert. Phase 3 was taking out the temporary road and building the two downstream wingwalls A & B. Also, the joint between the upstream portion and the downstream portion was moved slightly downstream. (N.T. 255-258)

51. The downstream wingwalls, A and B were not included in the revised Phase 1 construction because they were not designed to bear the load of live traffic. If wingwalls A and B had been built during revised Phase 1, live traffic would have traveled over them. (N.T. 694)

52. The revised design of box culvert number 2 significantly reduced the available set-back distance at the interface between temporary roadway number 2 and Phase 1 construction of box culvert number 2. This required Paliotta to abandon the as bid gabion shoring method used in his bid. (N.T. 101-102; Exhibit Demo. II; Exhibit P-33)

53. As a result of the Department's modified design, Paliotta was forced to devise a new plan to provide for shoring for temporary road number 2. Paliotta retained the engineering firm of SP & K to determine what type of shoring should be utilized to overcome the Department's design defect. (N.T. 261-263; Exhibit P-30, 32)

54. On direct, Mr. Tribuzio established that the Department in mid-September 1991 ordered Paliotta to stop construction on box culvert number 2. (N.T. 249-250; Exhibit P-79; Bates 1133)

55. On Tuesday, October 1, 1991, SP & K submitted, directly to the Department, drawings and calculations showing the use of steel sheet pile shoring to support the temporary road at box culvert number 2 required by the revised phasing of the work. (N.T. 101; Exhibit P-30)

56. The Department approved the steel sheet piling design submitted by SP & K on the next day, Wednesday, October 2, 1991. (Exhibit P-30)

57. When Paliotta laid out temporary road number 2, it would not accommodate the Department's revised design of box culvert number 2. As of Friday, October 4, 1991, there was no solution to the misalignment of temporary road number 2. The Department directed Paliotta to "make it work" which was completed on Tuesday, October 8, 1991. (N.T. 259-260; Exhibit P-72, pg. 3)

58. On September 2, 1992, the Department issued Work Order number 2 to adjust the Contract for the modified temporary road number 2 which required a thicker bituminous base and temporary widening so box culvert number 2 temporary road could be built to handle the traffic through the winter of 1991-1992. (N.T. 263-264, 300; Exhibit P-51)

59. Paliotta seeks \$3,233.66 for the engineering services provided by SP & K relating to the sheet piling design and layout modification at box culvert number 2 because of the Department's design flaw. (Record; Demo. Exhibit 14)

60. The revised phasing of the construction of box culvert number 2 altered the method of stream control because the existing pipe under the parking lot was virtually "plugged solid" and Mill Creek flowed up hill. Mr. Tribuzio established that Paliotta had to use two additional pumps not anticipated at the time of the bid to accommodate a revised stream diversion plan. (N.T. 266-267, 361, 376)

61. The Department recognized that the as designed stream control at box culvert number 2 would not work until the culvert had 5.6 feet of standing water before gravity flow would occur. The Department paid Paliotta \$15,328.65 on a forced account basis to pump for stream control from December 1991 until July 1992. However, the Department did not compensate Paliotta for pumping in October and November 1991. (N.T. 268-269; Exhibit P-60; Bates 3398)

62. As a result of Department design defects, Paliotta was forced to use two additional pumps which were not anticipated at the time of the bid to perform additional pumping from October 1 through December 9 of 1991 for which the Department has not compensated Paliotta for these extra costs. Paliotta claims \$9,390.53 in extra pumping costs. (N.T. 279, 376-379, 530; P-Demo. Exhibit 14)

63. By letter of October 31, 1991, Paliotta notified the Department that the installation of sheet piling in lieu of gabions for shoring has caused them additional expense which can't be finalized until the sheet piling is removed. (N.T. 101; Exhibit P-33)

64. Sheet 7 of 8 of the design drawings for box culvert number 2 shows that the contractor is required to use temporary shoring to retain the temporary road in the area where box culvert number 2 was to be constructed. (Exhibit D-2)

65. Paliotta testified that the shoring he planned to use was gabions in a manner similar to the shoring at box culvert number 1 and that he had to change the type of shoring to sheet piling due to the design modification at box culvert number 2. (N.T. 101, 242)

66. The Board finds that the Department is liable for any additional shoring cost associated with the change from gabions to steel sheet piling. (Board Finding)

67. Wingwalls A and B were the downstream wingwalls at box culvert number 2. (Exhibit D-2, sheet 1 of 8)

68. As designed, the contractor was required to excavate for the wingwalls only once. (N.T. 247-248)

69. As a result of the redesign of box culvert number 2, whereby the two-phase design was changed to a three-phase design, Paliotta was required to excavate in the area of the wingwalls twice. The Board finds that the second excavation for wingwalls A & B is extra work. (N.T. 256-257)

70. As a result of the time-related delays which extended the Project through the 1991-1992 winter, Paliotta was required to incur costs for temporary heat in order to complete the structure concrete work with respect to box culvert number 2 as anticipated on the revised D-476 Schedule issued on October 10, 1991 under operation J-10. (N.T. 277, 405; Exhibit P-31)

71. The Board finds that providing temporary heat was extra work not anticipated at time of bid. (Record)

## **CURB GUTTER CONSTRUCTION**

72. On May 10, 1991, the Department's Director of Design, Fred W. Bower, P.E., stated in a Utility Clearance Assurance Statement that "all necessary arrangements have been made for all known utility relocation work to be under taken and completed for proper coordination with physical construction." (Exhibit P-13)

73. Contrary to the representations made by the Department at the August 30, 1991, preconstruction conference, by the end of November 1991, virtually none of the utility relocation work had taken place. On February 20, 1992, Paliotta sent a letter to the Department indicating that the utility relocation process was still incredibly far behind schedule and that Paliotta may be forced to ask for an extension in Contract time. (N.T. 104-105; Exhibit P-39)

74. Through no fault of the Department, Duquesne Light Company failed to perform its work in a timely manner. Duquesne Light did not perform its work until the Spring of 1992. (N.T. 103-106, 189)

75. Due to the failure of Duquesne Light Company to relocate their facilities throughout the entire Project, Paliotta could not work on permanent widening until May 15, 1992. (N.T. 117; Exhibit P-61)

76. Since the utility poles were not relocated, preventing the roadway widening, Paliotta proposed moving ahead with the construction of the curb gutter behind the existing pole. By doing the excavation, subbase and drainage in the area underneath and one (1) foot on each side of the curb gutter to be installed. (N.T. 81, 83-85, 176, 701); Exhibit Demo. 5)

77. Paliotta testified that he originally bid to do most of the curb gutter, 95% of it, utilizing a slip form subcontractor. Mr. Tribuzio testified that they were looking into slip forming the curb gutter and contacted Highway Paving by phone early in the job and brought slip form subcontractors out to the job in the early Spring of 1992. Mr. Tribuzio on cross admitted that not all the curb gutter could be slip formed early on in the job because of the temporary road. (N.T. 90-93, 270, 307-312)

78. In the Fall of 1991, Paliotta proposed starting the curb gutters in late Fall 1991 and completing it in the Spring of 1992 which was a change from his earlier request for scheduling revision. (N.T. 701; Exhibit P-28)

79. The Department rejected this idea for several reasons. First, by leaving the curb gutter sitting on a pedestal of subbase material, exposed to the elements over the winter, the subbase would become contaminated by dirt, salt and antiskid material and the contaminated subbase would have to be removed and replaced. (N.T. 703, 708-710)

80. Second, the raised curb gutter would trap rainwater, creating large puddles by the side of Routes 30 and 168 which in cold weather would freeze, posing a danger to the traveling public. (N.T. 703, 710-712)

81. Third, in some areas the curb gutter would stick up out of the ground, posing a hazard to the traveling public, in the event a vehicle went outside the travel lanes and struck the curb gutter. Also, the possibility existed that a snowplow could strike the exposed curb gutter, potentially damaging both curb gutter and snowplow. (N.T. 703, 711-712)

82. The Department refused to permit Paliotta to construct the curb gutter using the methodology it proposed to get around the delayed relocation of power poles by Duguesne Light Company. (N.T. 85, 703)

83. After Paliotta substantially completed box culvert number 2, it performed most of the drainage work on the Project, which extended from box culvert number 2 east to the limits of the Project. (Exhibit P-75, 109-113)

84. After the drainage work, several months elapsed until Paliotta commenced work on the widening and concrete curb gutter in May, 1992. (Exhibits P-75, 109-113)

85. Mr. Payne, on direct, established that at the time Paliotta bid the Project, at no point in time would any of the curb gutter construction operations be exposed to winter weather since the anticipated Project completion date was October 28, 1991. (N.T. 404-420)

86. At the time of the bid, Mr. Payne opined that Paliotta's estimate of constructing 225 feet of curb gutter per day was reasonable and was based on Paliotta's using hand-forming construction methodology. (N.T. 382-383)

87. Based on his review of both Paliotta's and the Department's Project diaries, Payne concluded that as a result of using the methodology required by the Department, Paliotta poured concrete for curb gutter construction on 26 days during the Project. (Emphasis Added) (N.T. 388-390)

88. Simultaneous with curb gutter construction, Paliotta performed the other Contract items of Class I excavation, subbase and base course work involved in the roadway widening. This work, and the curb gutter work, consumed the summer of 1992. (Exhibit P-75, 109, 113)

89. The first day Paliotta began its curb gutter operation was May 14, 1992, when Paliotta placed subbase drains and began constructing the wooden forms for the concrete pours. The last day of work on the curb gutter was August 1, 1992, when Paliotta placed backfill material behind the curb gutter. (N.T. 398; Exhibit P-75, 109, 113; Demo. P-12)

90. The completion of this Project was delayed by the Department design defects, its delayed issuance of Notice to Proceed and the failure of utilities to relocate in a timely fashion as anticipated by the Department at the time of bid. (Record)

91. The Department knew prior to the Notice to Proceed date of September 16, 1991, that the work would require a winter shut down and completion in 1992. The Department knew or should have known that there would be additional compensable cost associated with the revised schedule D-476. (Exhibit P-24, 31, 41-42)

## **DAMAGES**

92. Mr. Gleason was engaged by Paliotta to analyze the claim developed by him and determine what was reasonable and make adjustments. (N.T. 513)

### **A. Cost of Increased Engineering**

93. Mr. Gleason utilized two invoices from SP & K to determine that Paliotta allegedly spent an additional \$3,170.25 based on the Department's design defects. Including the 2% mark-up called for in the Department's Publication 408, Gleason concluded that the total damages Paliotta incurred as a result of the cost of increased engineering was \$3,233.66. (N.T. 519-520, 665-666; Exhibit P-Demo. 14 Tab 1)

94. According to Paliotta, this claim relates to design modifications performed by SP & K related to the shoring required per the design revision at box culvert number 2. (N.T. 101)

95. The documentation Paliotta referenced in support of this claim is found at Exhibit "J" attached to Paliotta's Complaint. This exhibit comprises two SP & K invoices. The first invoice clearly indicates that the work SP & K performed related to the redesign of box culvert number 1, not box culvert number 2. The second invoice relates to sheet pile shoring at box culvert number 2. (N.T. 601-602)

96. On cross, Mr. Gleason admitted that the first invoice indicates that work performed by SP & K related to the redesign of box culvert number 1, not box culvert number 2. (N.T. 602; Complaint Exhibit "J")

97. The only cost documentation produced at trial in support of additional engineering cost was the second SP & K invoice attached to the Complaint as Exhibit "J" which was for \$492.75. (Complaint Exhibit "J")

98. The Board finds that the additional engineering costs, supported by documentation is \$492.75 plus the 2% mark-up (per Pub. 408 Section 110.03(d)4) which is \$502.60. (Emphasis Added) (Record)

### **B. Sheet Pile Shoring At Box Culvert Number 2**

99. Mr. Foxall established that 11 gabion baskets that Paliotta originally planned to use at box culvert number 2 were used and paid for by the Department as shoring after box culvert number 2 was constructed. These temporary gabions were 2 c.y. (cubic yards) each for a total measurement of 22.0 cubic yards (c.y.). (N.T. 700-701; Exhibit D-6; Bates 0001938)

100. On cross, Mr. Paliotta established that for shoring the average price for gabion was \$180.00 to \$200.00 per c.y. Contract price paid Paliotta for gabion used as shoring, Item 0626-0030 was \$200.00 per c.y. So 22 c.y. of gabions is valued at \$4,400.00 (22 X \$200.00). (N.T. 140; Exhibit P-21; Bates 000177)

101. The sheet pile shoring at box culvert number 2 was installed in 1991. Paliotta priced this work using the "force account" method found in Section 110.03(d) of Publication 408 including all percentage mark-ups. Paliotta used 1992 equipment blue book rates, not 1991, which Mr. Gleason testified that the 1991 and 1992 rates are reasonably close. No evidence was presented at trial, to dispute the similarity of 1991 and 1992 equipment rates. (N.T. 607-608)

102. Based on an analysis of increased material, labor, equipment and hauling required to use steel sheet piles for shoring in lieu of gabions at box culvert number 2, Mr. Gleason concluded that the total damages Paliotta incurred was in the amount of \$17,285.11. This amount took into account the salvage value of the sheet piling and a deduction of \$905.00 for an error in equipment used and its associated labor costs. (N.T. 520-529; Exhibit P-Demo. 14 at Tab 2)

103. On cross, Mr. Gleason admitted that the gabions originally intended for use as temporary shoring at box culvert number 2 were in fact used as temporary wingwalls A and B and paid for by the Department. Mr. Gleason never established what Paliotta had put in his lump sum bid for his planned use of gabions for temporary shoring. Nor did Mr. Gleason in his Total Cost Analysis of the extra work for steel sheet shoring give a credit to the Department for the value of the gabions Paliotta testified he planned to use at box culvert number 2. (N.T. 605-607; P-Demo. 14 at Tab 2)

104. The Board finds that the damages for sheet pile shoring should be reduced by \$4,400.00, the Contract value of 22 c.y. of gabion. Therefore, the damages for steel shoring should be \$12,885.11 (\$17,285.11 minus \$4,400.00) (Emphasis Added) (Record)

### **C. Cost of Pumping**

105. The second defect related to the design of the stream control for the construction of box culvert number 23. (N.T. 361)

106. As a result of this design defect, Paliotta was forced to use two additional pumps which were not anticipated at the time it calculated its bid to perform additional pumping from October 1 through December 9 of 1991 for which Paliotta has not been compensated. (N.T. 377, 379)

107. Using an amount which the Department did pay on related pumping, Gleason determined that Paliotta incurred \$9,390.53 in compensable damages related to extra pumping. (Emphasis Added) (N.T. 529-531; Exhibit P-Demo. 14 Tab 3)

### **D. Excavation of Wingwalls A and B**

108. Because of the redesign at box culvert number 2, Paliotta had to excavate twice for wingwalls A and B which the Board finds to be extra work. (N.T. 532)

109. Based on an analysis of increased labor and equipment, and including the percentage mark-ups called for in the Department's Publication 408, Gleason concluded that Paliotta incurred \$1,889.49 in damages relating to the additional excavation for the wingwalls at box culvert number 2. (N.T. 532, 535; Exhibit P-Demo. 9)

### **E. Alleged Disruption of Concrete Crew**

110. This claim is based on a supposed production rate of pouring concrete for the 2,759 linear feet of curb gutter, on the Project, of 225 linear feet per day. (N.T. 382, 536)

111. Mr. Tribuzio established that Paliotta purchased only 300 linear feet (L.F.) of forms for the curb gutter construction. He admitted on cross that the sequence they planned was set 200 L.F. for a pour in the morning. In the afternoon they could set 100 L.F. of forms plus what could be stripped on hot days, from the mornings pour. Mr. Tribuzio, on cross, admitted that 225 L.F. per day when you set 200 L.F. of forms was a speculative number which didn't happen all the time. Depending on condition it could be more or less. A lot of times you got less than 225 L.F. (N.T. 308-309)

112. The testimony established that had the Department permitted Paliotta to proceed with the curb gutter in the Fall of 1991, Paliotta would have had to saw cut approximately 1100 feet of existing road widening in order to place the subbase and forms at Sta 117 to Sta 120 and Sta 127 to Sta 129 + 50. (N.T. 456, 713-714; Exhibit D-2, sheets 16 and 17)

113. Based on Mr. Payne's opinion and using 225 L.F. as planned production, Mr. Gleason compared the 12.3 days of concrete crew labor which would have been required using Paliotta's planned methodology and compared it to the 26 actual days of concrete crew work which was actually required. (N.T. 535-538; Exhibit P-Demo 12)

114. On cross Mr. Gleason admitted that the hope for production rate of 225 L.F. per day was not supported in any bid documentation that he reviewed. (N.T. 613)

115. Mr. Gleason established that his cost analysis and damage calculations did not take into account the cost of saw cutting the existing pavement, excavating, grading, placing subbase and back filling which would have been required had the Department allowed Paliotta to construct the curb gutters as requested. (N.T. 472-473, 613-614)

116. The cost analysis presented at trial did not establish what all the cost would have been if the Department had allowed Paliotta to build the curb gutter in the fall of 1991. There was no bidding documentation that the hope for 225 L.F. per day was used at the time of bid, no slipform quotes and Mr. Tribuzio could not establish with any degree of certainty that 225 L.F. of curb gutter could be achieved using 300 L.F. of forms. The Board finds that the damages of \$32,949.53 are not supported by any reasonable degree of certainty by the facts presented at trial. (Record)

**F. Cost of Flagmen for Extra Contract Work Time**

117. Based on his review of the Department's original plans, Payne estimated that at least 40% of the curb gutter construction was sufficiently far enough away from the existing roadway such that the use of flagmen for traffic control would not be required. (N.T. 391-392)

118. The Department's design defects with respect to box culvert number 2 also negatively impacted Paliotta's planned use of flagmen for the construction of the curb gutters in that if Phase 1 of box culvert number 2 was constructed as the Department originally planned, Paliotta could have also been working on the curb gutters in that area without any need for flagmen. However, in light of the Department's decision to switch the phasing of the construction of box culvert number 2, Paliotta was unable to work on the curb gutters in that area without using flagmen. (N.T. 273-274)

119. Gleason compared the 33 days where flagmen were required to the conservative estimate of 10 anticipated days of flagmen. This estimate was conservative because Payne estimated that 40% of the curb gutter work could be done without flagmen and the Department estimated only 11 days for completion of all curb gutter work. Based on this comparison and including the mark-up called for in the Department's Publication 408, Gleason concluded that Paliotta incurred \$9,122.62 or \$396.64 per day ( $\$9,122.62 \div 33$ ) in damages relating to this element of its claim. (N.T. 541, 543; Exhibit P-Demo 14 at Tab 7)

120. Paliotta's claim does not take into account the fact that flagmen would also have been required during Paliotta's as-planned curb gutter operation for the days when Paliotta was separately excavating, grading, placing subbase and backfilling for the curb gutter operation. (N.T. 472-473)

121. The record indicates that only 26 days, not 33 days were actually used for curb gutter placement. Therefore, the Board finds that the damages for flagging should be reduced by \$2,776.48 (7 days X \$396.64) to \$6,346.14 ( $\$9,122.62$  minus \$2,776.48). (Emphasis Added) (Record)

### **G. Line Eradication**

122. In this claim Paliotta seeks compensation for removal of temporary pavement markings placed on the Project during the widening and curb gutter operations. (N.T. 393, 475)

123. The vast majority of the line eradication took place between box culvert number 1 and box culvert number 2. The construction of the curb gutter had no impact on the line eradication between box culvert number 1 and box culvert number 2. (N.T. 476)

124. The pavement marking removal at issue was incidental to the lump sum price for maintenance and protection of traffic as required in Section 901 of Publication 408 Specifications. (N.T. 476-477, 716-719)

125. The Department paid a lump sum price for maintenance and protection of traffic and the Board finds that there are no damages for line eradication. (Emphasis Added) (N.T. 722; Exhibit P-65)

### **H. Cost of Maintaining Temporary Heat**

126. As a result of the time-related delays which extended the Project through the 1991-1992 Winter, Paliotta was required to incur costs for temporary heat in order to complete the concrete work with respect to box culvert number 2. (N.T. 405; Exhibit P-31)

127. Based on invoices from Vince's Gas & Welding Supply Co., Inc. and Georgia Wilson & Co., and including the 2% mark-up called for by the Department Publication 408 Section 110.03(d)(4), Gleason opined that Paliotta incurred damages for the cost of maintaining temporary heat in the amount of \$1,618.31. (N.T. 545; Exhibit P-Demo. 14 Tab A)

### **I. Maintenance and Protection of Traffic**

128. The maintenance and protection of traffic item of the Contract was provided by a subcontractor to Paliotta, Marlane Maintenance, Inc. (N.T. 623)

129. Marlane agreed to provide MPT on the Project for the original Contract duration of 92 days. (Demo. Exhibit 14)

130. Marlane actually provided MPT for 368 days. (Demo. Exhibit 14)

131. On November 12, 1996, Marlane liquidated its claim for extra compensation against Paliotta for \$22,958.47. (N.T. 624-630)

132. On cross Mr. Gleason reasoned that this settlement with Marlane represented a payment made by Paliotta to settle a claim but not necessarily the whole cost of extended maintenance and protection of traffic costs. (N.T. 624)

133. On April 6, 1992, the Department agreed to compensate Paliotta on a pro rata basis, in accordance with the terms of the Contract and Publication 408/90 for the Field Office Trailer (Item 0600-0003) and Maintenance and Protection of Traffic (Item 0901-0001). (N.T. 109-110; Exhibit P-42)

134. With respect to the time-related damages which Paliotta incurred regarding the maintenance and protection of traffic, based on the Department's agreement to pay Paliotta "the pro rata price beginning with 26%" Gleason calculated Paliotta's damages as follows:

- a. He took the anticipated 92 calendar days to complete the Project and divided that into the \$15,000 lump sum bid price which Paliotta included in its bid to arrive at a pro rata price of \$163 per day;
- b. Using the Department's determination of 368 actual days to complete the job less the 92 days anticipated, Gleason arrived at 276 additional days, which when multiplied by \$163.00 per day equals \$44,988.00;
- c. Gleason then subtracted the 25% lump sum tolerance pursuant to the Department's letter of April 6, 1992, and

- d. Gleason arrived at a total amount for this element of Paliotta's claim of \$41,238.00

(Exhibit P-42, Exhibit P-Demo 14 at Tab 10)

135. The Board finds that the damages of \$41,238.00 for extended maintenance and protection of traffic is in accordance with Contract specifications. (Emphasis Added) (Record)

### **J. Extended Impact Attenuator Usage**

136. With respect to the time-related damages which Paliotta incurred regarding the impact attenuators, the Department initially took the position that this claim was non-compensable pursuant to the Department Publication 408 Section 696. However, because this section of Publication 408 clearly contemplates the purchasing (as opposed to renting) of impact attenuators, Gleason instead utilized the pro rata price analysis. In light of the fact that the job as bid was anticipated to only take 92 days, Paliotta reasonably made the determination to rent impact attenuators as opposed to purchasing them. Therefore, in Gleason's expert opinion, the appropriate methodology for calculating damages with respect to extended impact attenuator usage was to follow the methodology for the maintenance and protection of traffic, since both relate to rented or subcontracted traffic protection equipment. (N.T. 411, 550, 552-553; Exhibit P-42)

137. The temporary impact attenuators were rented from PennLine, a subcontractor to Paliotta. Paliotta is claiming the pro rata cost of the two attenuators used at box culvert number 2 during the extended period of the Project. (Demo. Exhibit 14)

138. The rental period for the impact attenuators was 92 days, the original duration of the Project. (Demo. Exhibit 14)

139. Paliotta has calculated its damages at \$34,842.86 for the attenuators on the assumption that the attenuators were used on the Project for its full duration, 368 days minus the 92 days. (N.T. 552)

140. The Department records indicate that the impact attenuators at box culvert number 2 were removed from service on June 2, 1992. (N.T. 723, 726; Exhibit D-8-9)

141. After the Project was completed, Penn Line Services, the supplier of the impact attenuators, filed a claim against Paliotta for the extended use of the attenuators for \$15,200.00 There are no provisions in the Specifications to pro rata Item 0696-0038 attenuators. (N.T. 633-634; Exhibit P-42)

142. The Board finds that Paliotta is entitled to the actual additional rentals plus the 10% mark up for delay damages in Section 111.00 of Form 408 Specifications which would be \$16,720.00 (\$15,200.00 X 1.10). (Emphasis Added)

### **K. Extended Site Office Trailer**

143. Paliotta rented two trailers from Doyle Equipment Company for field office and soil trailers and paid Doyle for the duration of the Project the sum of \$9,232.79. (N.T. 555, 635; Exhibit D-3)

144. Mr. Gleason established that cost associated with site office trailers included more than the rental expense and that Paliotta's job cost report indicates costs allocated to this item as \$19,203.39. (N.T. 635-636; Exhibit D-3)

145. The Department agreed to pro rate the lump sum field office contract item 0609-0003 in accordance with the terms of the Contract. Mr. Gleason computed the damages based on Paliotta's bid amount of \$7,500.00 minus fixed costs of \$560.00 to arrive at total variable cost of \$6,940 which he pro rated and deducted the 25% over tolerance to arrive at the damage amount of \$18,945.00 which the Board finds to be due and owing to Paliotta. (Emphasis Added) (N.T. 555-556, 636; Exhibit P-Demo. 14 at Tab 13; Exhibit P-42)

### **L. Extended Small Tools**

146. This claim is for the "carrying cost" of the small tools used on the Project. (N.T. 642)

147. Almost all of the work performed on the Project was original Contract work. Any extra work was paid on a force account basis, which payment included the mark-ups for, inter alia, small tools usage, as provided by Section 110.03(d) of the Publication 408 Specifications. (Exhibit P-46, 50-51, 53, 59-60)

148. There is no evidence that Paliotta had to purchase additional tools for work on other Projects to take the place of the small tools he used for the extended duration of this Project. (N.T. 558-560, 638-642)

149. Paliotta's cost analysis for this claim does not subtract out the work and small tools used by subcontractors. (N.T. 639)

150. The Means average Paliotta uses to calculate this claim is a percentage which ranges from .5% to 2.0% of the Contract amount. Paliotta uses the 2% figure, but there was no reason given why the percentage used should not be some lower figure. (N.T. 639)

151. Paliotta could only estimate the value of the small tools used on this Project. There was no documentary evidence produced which could support the estimated value. (N.T. 640)

152. The Board finds that Paliotta has failed to meet with any degree of certainty the burden of proof for any damages for small tools relating to some actual expenditure. (Record)

### **M. Wage Rate Increases**

153. This claim is for the higher wage rates in effect for Paliotta labor force in 1992, the second calendar year of the Project. (Demo. Exhibit 14)

154. As a result of the Project being extended from 1991 into 1992, Paliotta was forced to pay its union employees higher wages in 1992 than in 1991. (N.T. 415; 560-561)

155. Based on information contained in the certified payroll records of Paliotta, Gleason determined that Paliotta's wage rate increases totaled \$1,386.64. Gleason then added the 40% mark-up called for by the Department Publication 408 to arrive at a total damage amount of \$1,941.30. (Emphasis Added) (N.T. 560-561; Exhibit P-Demo. at Tab 16)

156. Paliotta's damage calculation for this claim includes the 40% mark-up for "force account" work (see Section 110.03(d) of the Publication 408 Specifications), yet the work the labor force was performing was original Contract work, not extra work. (N.T. 643)

157. The Board finds that Paliotta is entitled to the \$1,386.64 in increased labor cost plus the 10% mark-up provided in Section 111 of Publication 408 for total damages of \$1,525.30 (\$1,386.64 X 1.1). (Emphasis Added) (Record)

### **N. Extended Site Superintendent**

158. Russell Tribuzio was Paliotta's Superintendent on the Project. (N.T. 233)

159. The revised D-476 Project Schedule issued by the Department on October 10, 1991 shifted the end date from October 28, 1991 to July 20, 1992 and called for a winter suspension of all operation except structures. (N.T. 275-276, 398-399, 464; Exhibit P-31, Bates 00254, Demo. P-1)

160. With respect to the alleged damages that Paliotta incurred relating to its extended site superintendent, Mr. Gleason determined that the extension of 276 days equates to 9.07 months. Based on Mr. Tribuzio's W-2 wages for 1991 and 1992, Gleason calculated Mr. Tribuzio's average monthly salary to equal \$2,628.74 plus the appropriate benefits and taxes and computed the total amount for extended site superintendent to be \$33,045.28. (N.T. 561-562; Exhibit P-Demo 14 Tab 17)

161. Mr. Gleason establish that Mr. Tribuzio's salary was not a part of G and A and his salary was charged directly to the Project. (N.T. 647)

162. There was no facts presented at trial to indicate that Mr. Tribuzio was not on the Project throughout the entire 368 actual days of duration as claimed. (Record; Exhibit P-Demo 14 Tab 17)

163. The Board finds that Paliotta incurred damages of \$33,045.38 for the extended period of construction for site supervision. (Emphasis Added) (N.T. 561-562; Exhibit P-Demo 14 Tab 17)

### **O. Extended Home Office Overhead**

164. Paliotta uses an "Eichleay formula" calculation to prove its claim for extended home office overhead. (Demo. Exhibit 14)

165. Paliotta could not produce any actual home overhead costs for the specific extended duration of the Project. (Demo. Exhibit 14)

166. Paliotta bid on additional Projects throughout the duration of the Project. (N.T. 195)

167. The total dollar amount of all of the Paliotta's Projects for which Paliotta was prime contractor in 1991 was \$11,575,588.00. In 1992, the amount was \$7,534,373.00. Paliotta's bonding capacity for calendar year 1992 was \$12 million. In 1992 it was also \$12 million. ( N.T. 196; Exhibit D-4)

168. The Board finds that Paliotta is not entitled to any extended home office overhead based on a formula and that Paliotta received compensation for additional overhead expenses through the Contract mark-up applied to the extra work and extension of time damages. (Record)

### **Extended Equipment on the Project**

169. This claim is for the equipment on the Project during the period after the original 92 day duration priced on a "force account" basis. Paliotta is seeking the "standby costs" for all of the heavy equipment used on the Project. (Demo. Exhibit 14)

170. All of the heavy equipment was used to perform original contract work, not "extra work" as defined by the Publication 408 Specifications. (N.T. 657)

171. Paliotta did not have to purchase or rent other equipment to take the place of the equipment on the Project that was in use for longer than Paliotta had originally planned. (N.T. 659)

172. On cross, Mr. Gleason admitted that the \$16,288.42 for a Hydraulic Excavator 905 does not represent Paliotta's actual costs and hours charged including Saturday, Sunday and rain days. (N.T. 658-659; Exhibit P-Demo 14 Tab 19)

173. Paliotta could not provide with any degree of reasonable accuracy what his actual equipment costs were on the Project relating to the extension of the Project into 1992. (Record)

174. The total amount of compensable damages Paliotta has incurred equals \$144,105.86 and are summarized below:

<u>Finding No.</u>	<u>Element</u>	<u>Damage Amount</u>
98	1. Cost of Increased Engineering	\$ 502.60
104	2. Steel Shoring (sheet piling)	\$12,885.11
107	3. Cost of Pumping	\$ 9,390.53
	4. Construct Cribbing for Drainage Line (withdrawn)	\$ 0
109	5. Excavation of wing walls (A & B)	\$ 1,889.46
116	6. Alleged Cost of Disruption of Concrete Crew	\$ 0
121	7. Cost of Flagmen for Extra Contract Time	\$ 6,346.14
125	8. Line Eradication	\$ 0
127	9. Cost of Maintaining Temporary Heat	\$ 1,618.31
135	10. Maintenance & Protection of Traffic	\$41,238.00
142	11. Extended Impact Attenuator Usage	\$16,720.00
	12. Extended Type B Computer Usage (withdrawn)	\$ 0
145	13. Extended Site Office Trailer Expense	\$18,945.00
152	14. Extended Small Tools Entitlement	\$ 0
157	15. Wage Rate Increases	\$ 1,525.30
163	16. Extended Site Superintendent	\$33,045.38
174	17. Extended Home Office Overhead	\$ 0
173	18. Under Absorbed Extended Equipment	\$ 0
	<b>TOTAL:</b>	<b><u>\$144,105.86</u></b>

## CONCLUSIONS OF LAW

1. The Board of Claims retains jurisdiction in this matter as Paliotta's Claim against the Department is a result of a contractual matter between Paliotta and the Department, and the amount in debate exceeds \$300.00. 72 P.S. § 4651-4.
2. Paliotta's claim is timely because it was filed within six months after it accrued in November, 1992. 72 P.S. § 4651-6.
3. Admissible expert testimony was provided by Mr. Payne regarding Paliotta's claim. Mr. Payne testified on the following specific topics: construction estimating, construction management, engineering design, and construction scheduling.
4. Expert testimony on construction claim accounting was provided to the Board by Mr. Gleason.
5. Mr. Payne and Mr. Gleason's opinions were within reasonable appropriate standards.
6. In absence of countervailing expert testimony, the Board should accept as true the expert testimony of Mr. Payne and Mr. Gleason.
7. Compensation is owed to Paliotta for any breach of express or implied contractual obligations.
8. Paliotta is entitled to damages resulting from the Department's defective design. See, eg., Coatsville Contractors & Engineers, Inc. v. Borough of Ridley Park, 506 A.2d 862 (Pa. 1986).
9. Mr. Gleason calculated Paliotta's damages relating to elements 1 through 5 of the claim based on provisions of the Department Publication 408/1990 Section 110.03.
10. The Department owes Paliotta inefficiency damages resulting from its improper interference with Paliotta's selection of means and methods of the curb gutters. Dubrook, Inc. v. Commonwealth of Pa., 1992 WL 695800, No. 1011, at \*29-30 (Pa. Board of Claims, June 16, 1992).
11. Mr. Gleason used a reasonably reliable methodology in determining Paliotta's damages regarding elements 6 through 8 of the claim.

12. Paliotta's ability to complete the Project was delayed by the Department in the following ways:
  - a. Delaying issuance of notice to proceed.
  - b. Designing the Project with multiple defects.
  - c. Failing to have utilities relocated in a timely manner; and
  - d. Refusing to permit the curb gutters to be constructed in the manner initially planned by Paliotta.

(Tr. 401:11-402:24.)

13. The Project could still have been completed by Paliotta in 92 days, when the state budget was passed on August 4, 1991. (Tr. 68:23-69:4; Tr. 402:25-403:12.)
14. The Department's issuing of the notice to proceed on September 16, 1991 rather than in closer proximity to August 4, 1991 caused the delay to the Project.
15. Compensation is owed by the Department to Paliotta for all delays incurred on the Project. See, Commonwealth of Pa. v. General Asphalt Paving Co., 405 A.2d 1138 (Pa. Commw. Ct. 1979) (failure to timely relocate utilities); C.J. Langerfeld & Son, Inc. v. Department of Transportation, 404 A.2d 745 (Pa. Commw. Ct. 1979) (design defect delays).
16. The Department has agreed to remunerate Paliotta for its delay damages on a "pro rata price" basis. (Exhibit P-42; Tr. 631:23-25.)
17. Mr. Gleason utilized the Department's agreed to methodology in determining Paliotta's "pro rata price" damages with respect to elements 9 through 19.
18. Paliotta is not entitled to damages for extended under absorbed home office overhead.
19. Interest at the legal rate of 6% per annum beginning on March 8, 1989 (the initial date of filing claim with the Department) is awarded to Paliotta. Department of Transportation v. Anjo Construction Co., 666 A.2d 753, 760 (Pa. 1995).

### OPINION

The Plaintiff is Carmen Paliotta, doing business as Carmen Paliotta Contracting Company (hereinafter "Paliotta") and engaged in business as a Pennsylvania general contractor. Paliotta brought this action against Defendant, the Commonwealth of Pennsylvania, Department of Transportation (hereinafter "the Department"), for alleged costs resulting from numerous delays and

design flaws during a construction project (hereinafter “the Project”) which Paliotta obtained as low bidder. The question before the Board is whether or not the Department is responsible for delays and design flaws in the Project which caused the Project to be extended from a 92 day, one season project, as originally bid, into a 368 day, two season project and which significantly increased the costs of construction for Paliotta.

**A. Compensation for Expenses Incurred As a Result of The Department’s Design Defects**

Where a specific condition or design which is an essential element of the contract is specified when put up for bid, the low bidder on the contract cannot be forced to swallow the costs of delays resulting from the absence or failure of that element once the contract has been awarded and the contractor is notified to begin work. Coatsville Contractors & Engineers, Inc. v. Borough of Ridley Park, 509 P.A. 553, 506 A.2d 862 (1986). Thus, when the delays suffered by the contractor are a direct result of a deficient element of the contract upon which that contractor relied, expenses incurred as a result of that defect must fall on the Commonwealth. Id. at 560, 506 A.2d at 866.

As a result of the Department’s defective design, Paliotta was required to change the location of the temporary roadway as originally planned and was required to reverse the sequence of work in the two phase construction of Bridge No. 2. Due to these changes, Paliotta was required to use additional steel shoring (sheet piling), was required to engage in unanticipated additional pumping due to inadequate stream control and was required to build temporary wing walls not included in the original plans. In addition, Paliotta was forced to engage the services of a professional engineering consultant to design the sheet piling for this phase of construction.

Paliotta, as a general contractor submitting a bid for the Project, was required to rely on the Department's design for the construction as an essential element necessary to form the basis for the bid. The Department is legally obligated to compensate Paliotta for additional expenses resulting from design defects that were solely the fault of the Department. The Department did not cure defects in its design so that Paliotta was required to provide its own additional engineering at private cost. Were this known at the time of bidding, it is almost certain that the bids of all original contractors involved in the initial bidding process would have been increased.

The Board accordingly awards Paliotta damages in the amounts of \$502.60 for the cost of increased engineering consultation, \$12,885.11 for the cost of additional and unanticipated steel shoring and \$9,390.53 for the cost of unanticipated pumping for stream control.

**B. Liability for Interference With The Means and Methods of Construction**

A contractor is entitled to compensation where an owner engages in conduct that actively or positively interferes with the contractor's ability to perform within the terms of his contract. Dubrook, Inc. v. Commonwealth of Pa., No. 1011, 1992 WL 695800, at \*23 (Pa. Bd. Claims June 16, 1992). Active interference includes not only delays which interfere with the commencement of the project, but also "any interference where it is plain that the owner is disregarding the legitimate interests of the contractor in performing the contract according to a reasonable plan." Id. at \*24.

Paliotta has demonstrated that, at the time of its bid for the contract, it intended to construct the roadway in three separate phases. The first phase was to involve excavation and placement of base course and construction of the curb gutters only along the curb line. The second phase was to include excavation, placement of base course and pavement construction in the area between the

existing roadway and the new curb gutter. The third phase was to have involved placement of the bituminous base course and wearing surface. These phases were designed to minimize traffic control measures and interference with each subsequent stage of operations. Instead, however, the Department required Paliotta to construct the base across the entire width of the widening area in one phase. Paliotta was forced to hire additional flagmen for curb and gutter work due to increased traffic control requirements.

There was insufficient evidence, however, to support to a reasonable degree of certainty that Paliotta's original plan for the curb gutter construction could have been achieved at the initial desired rate using the planned equipment. Thus, Paliotta is not entitled to compensation for disruption of its concrete crew. Paliotta also claims compensation for the cost of removing temporary pavement markings placed on the Project during the curb gutter and widening operations. There is similarly insufficient evidence to support an award of damages for this claim. It is clear that the Department paid a lump sum price for maintenance and protection of traffic which included any necessary line eradication. In addition, the majority of line eradication took place between box culvert 1 and box culvert 2 and was not affected by the curb gutter construction between these culverts.

Accordingly, Paliotta is entitled to compensation from the Department for interference with Paliotta's means and methods of construction only to the extent of extra costs for additional flagmen for a period of 26 days in the amount of \$6,346.14.

### **C. Compensation For Losses Incurred As a Result of Delay**

A contractor is entitled to "damages for the net amount of losses caused and gains prevented by the breach to the extent that the evidence affords a sufficient basis for estimating that amount with

reasonable certainty. Department of Transportation v. Herbert R. Imbt, Inc., 157 Pa. Cmwlth. 573, 579, 630 A.2d 550, 552-53 (1993). Where delays are caused by the Commonwealth's failure to obtain a timely permit and necessary design changes, the contractor has been denied access to the job site and the Commonwealth is liable for any damages resulting from the delays. C.J. Langenfelder & Son, Inc. v. Commonwealth of Pa., 44 Pa. Cmwlth. 585, 596, 404 A.2d 745, 751 (1979). Interest at the legal rate of 6% per annum is awarded from the date the contractor's claim was filed with the Board of Claims on March 8, 1989.

The Department caused delays with significant detrimental financial impact to Paliotta due to its failure to issue a timely notice to proceed. The Project was up for bid based on a one season, 92 day construction schedule. The Department, however, did not obtain budget approval from the General Assembly prior to the bidding process. Accordingly, the Department's delay in issuing a notice to proceed resulted in the Project's extension into a two season, 368 day construction schedule. Additionally, there were delays resulting in increased cost due to the necessary redesign of the Project as a result of the Department's design defects and delays resulting from the Department's failure to effectively coordinate utility relocation.

The delays caused by the Department resulted in several additional expenses for which Paliotta is entitled to reimbursement. First, due to the extension of the project through the 1991-1992 winter season, Paliotta was forced to incur temporary heating costs in order to permit Paliotta to properly complete the concrete work involved in the construction of box culvert number 2. Secondly, under the terms of the contract, Paliotta was to provide maintenance and protection of traffic through the services of Marlane Maintenance, Inc., acting as a subcontractor. The maintenance and protection

contract with Marlane specified work for a total of 92 days, per the original contract on which Paliotta bid. Due to the extension of the Project resulting from time related delays, however, Paliotta was forced to compensate Marlane for 368 days of maintenance and protection. Fourth, Paliotta made the decision to rent impact attenuators based on the initial Project length of 92 days. Due to time related delays caused by the Department, Paliotta was forced to expend additional rent monies to continue renting impact attenuators until their removal from box culvert number 2 on June 2, 1992. Finally, time related delays, also resulted in lost compensation due to higher wage rate increases as of the 1992 year and required Paliotta to compensate the site superintendent for an extended period of 276 days.

The Board must deny compensation for Paliotta's claim against the Department for carrying costs of small tools used on the Project. Paliotta has failed to show to a sufficient degree of certainty the value of small tools used on the Project and could provide no documentary evidence. The Board also finds that Paliotta's claims for compensation for extended home office overhead and under absorbed extended equipment are similarly without merit. Paliotta was unable to provide any actual home overhead costs for the specific extended duration of the project. Nor could Paliotta provide sufficient evidence of actual equipment costs associated with the extension of the Project.

Accordingly, the Board awards compensation for Paliotta in the amounts of \$502.60 for increased engineering costs, \$12,885.11 for steel shoring, \$9,390.53 for additional pumping, \$1,889.46 for excavating twice at wing walls A and B, \$6,346.14 in additional flagmen expense, \$1,618.31 for the cost of maintaining temporary heat, \$41,238.00 for extended maintenance and protection of traffic, \$16,720.00 for extended impact attenuator usage, \$18,945.00 for extended site

office trailer expenses, \$1,525.30 for wage rate increases and \$33,045.38 for extended site superintendent compensation. Paliotta is also entitled to interest at the legal rate of 6% per annum from March 8, 1989, the date on which Paliotta's claim was filed with the Board of Claims.

The total sum awarded to Paliotta by the Board is \$144,105.86 for damages caused by delays attributable to design defects and delay in notice to continue work by the Department.

**ORDER**

**AND NOW** this                      day of January, 1999, the Board finds in favor of the Plaintiff, Carmen Paliotta, an individual doing business as Carmen Paliotta Contracting Company, and against the Defendant, the Commonwealth of Pennsylvania, Department of Transportation, in the amount of One Hundred Forty-Four Thousand One Hundred Five and Eighty-Six Cents (\$144,105.86) with six (6%) percent interest from March 8, 1989, the date of commencement of this action as filed with the Board of Claims.

Upon receipt of said award, Plaintiff shall forthwith file with the Board of Claims, a Praecipe requesting that the case 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  
January 27, 1999