

COMMONWEALTH OF PENNSYLVANIA

THOMAS M. DURKIN & SONS, INC. : BEFORE THE BOARD OF CLAIMS
: VS. :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF TRANSPORTATION : DOCKET NO. 1727

FINDINGS OF FACTS

The Parties and their Representatives/Witnesses

1. Plaintiff, Thomas M. Durkin & Sons, Inc. (“Durkin”) is a duly incorporated Pennsylvania Corporation, with a principal office located at 3030 Grant Avenue, Philadelphia, Pennsylvania. (Complaint and Answer, para. 1)
2. Defendant, Commonwealth of Pennsylvania, Department of Transportation (“PaDOT”) is an administrative agency of this Commonwealth. (Complaint and Answer, para. 2)
3. Donald M. Durkin, Jr., was chief estimator and project manager for Durkin during the pre-bid, bidding and construction phases of the I-78, Section 600 Project. (N.T. 22, 120-121)
4. John Donahue was PaDOT’s project engineer and onsite representative assigned to administer the I-78, Section 600 Project. (N.T. 859-860)
5. Andrew Stasek was PaDOT’s Assistant District Construction Engineer assigned to the I-78, Section 600 Project. Mr. Stasek served as Mr. Donahue’s immediate supervisor. (N.T. 358-360)
6. Richard Stinson was PaDOT’s I-78 Construction Coordinator for the I-78, Section 600 Project. Mr. Stinson served as Mr. Stasek’s immediate supervisor. (N.T. 820-821)

The Project

7. On or about April 6, 1987, (emphasis added) Durkin and PaDOT executed Contract No. 053045 for the construction of a certain section of state highway in Lehigh County, City of Allentown, Salisbury Township, and Upper Saucon Township also known as Legislative Route 1045, Section 600, Interstate 78 (“Contract” or “Project”), for the principal sum of \$53,890,182.97. (Exhibit P-1)

8. Interstate 78 is a major east-west roadway and is part of the federal interstate highway system. (N.T. 359, 822)

9. The highway construction Project called for by the Contract was located just south of Allentown, Pennsylvania, in Lehigh County. (N.T. 362; Exhibit P-1)

10. This Project was part of a series of projects designed to complete the construction of Interstate 78 in Pennsylvania. Before this Project began (if one were headed in an easterly direction) I-78 started just east of Fort Indiantown Gap in Lebanon County and ended just west of Allentown in Lehigh County near S.R. 100. After the series of projects were completed, I-78 would connect with the already completed portion of I-78 in the State of New Jersey. (N.T. 12, 359, 822)

11. The Project was to complete the final portion of the larger I-78 Project, by the construction of approximately 17,820 linear feet (3.375 miles) of Interstate highway, including ramps and the reconstruction of portions of Traffic Route 309, with various cement concrete pavements, and reconstruction and rehabilitation of other local roads with various bituminous base courses; lean cement concrete base course; concrete paved shoulders; drainage installations; guide rail; right-of-way fence; concrete barriers, seeding and mulching; planting erosion and sedimentation controls; signing; pavement marking and pavement marking removal; construction of three bridge structures as designed or alternate prestressed concrete or alternate steel bridge structures; design and construction of either Retained Earth; Reinforced Earth, or Doublewall retaining walls; tieback retaining walls; sinkhole stabilization; temporary median crossovers; signalization; steel sign structures; temporary signals, temporary bridge and roadways; pavement patching; and other miscellaneous items of work as indicated on the drawings. (N.T. 11-12; Exhibit P-1)

12. PaDOT advertised the Project for bidding in or about November of 1986. (N.T. 24, 458; Exhibit P-5)

13. Bids for the Project were opened on or about February 19, 1987 (emphasis added). (Complaint and Answer, para. 4)

14. The Contract required all work to be performed within 617 calendar days from PaDOT's issuance of a Notice to Proceed. (N.T. 12; Exhibit P-1)

15. The Contract specified an anticipated notice to proceed date of March 9, 1987; accordingly, the Contract completion date was originally scheduled to be November 14, 1988. (Exhibit P-1, addendum No. 3 and pg. 361; Exhibit D-476 dated 2/4/87)

16. For reasons not attributable to Durkin, the Contract was not formally awarded to Durkin by PaDOT until April 2, 1987. (Complaint and Answer, para. 5)

17. The Contract specifically incorporated the Publication 408 Specifications, dated 1983, as amended ("Publication 408-83"). (Exhibit P-1, pg. 11)

18. The Project was sophisticated and involved a combination of new roadway construction (that is, construction over virgin land where no roads previously existed) and reconstruction of previously existing highways Route 309. (N.T. 25)

19. The design for the I-78 Project that is the subject of this claim involved using a portion of the 309 "footprint," specifically that portion of Route 309 that travels in a north-south direction just to the south of the City of Allentown. (N.T. 361-364)

20. The rest of the Project involved construction of new roadway over virgin land to the east of Route 309. (N.T. 25, 361-364)

21. According to the Project's design, Route 309 was to remain open to traffic throughout the course of construction, albeit reduced from two to one lane of traffic in each direction. (Exhibit P-1)

The Interim Agreement

22. Because it included the Intersection of I-78 with Route 309, this Project was viewed as the "linchpin" of the whole series of projects that were included in the I-78 corridor. This contributed to the pressure to complete this particular Project on schedule. (N.T. 367-368, 822, 825)

23. Immediately after commencement of the Project and continuing until the end of the initial Contract time period, multiple problems arose which delayed the progress of Durkin's work, and for which Durkin intended to make claims against PaDOT. (N.T. 26-30, 367-368, 823-828)

24. Durkin fell behind schedule from the outset of the Project. (N.T. 823-824)

25. Problems occurred with utility relocation, construction of retaining wall number 2 and construction of the "Vera Cruz fill" causing Durkin to fall a year behind schedule. (N.T. 823-824)

26. In order to progress the Project, to resolve certain differences that had arisen, and to ensure that the Project did not fall further behind schedule, Durkin and PaDOT entered into a written Agreement (hereinafter "Agreement"), dated November 10, 1988. (N.T. 26-30, 367-368, 823-828; Exhibit P-2)

27. The Agreement was jointly written by Durkin and PaDOT. (N.T. 826)

28. The Agreement was amended on December 21, 1988 to resolve all claims of Trevoise Construction Company, a subcontractor to Durkin. In exchange for a release of all of Trevoise's claims, PaDOT agreed to increase the general lump sum payment from \$2.1 million to \$2.35 million. (Exhibit P-2, Tab 1 and Tab 2)

29. The relevant features of the Agreement for purposes of this claim are as follows:

- a) The Agreement provided for a one year extension to the Project construction through to November 15, 1989. (Exhibit P-2, paras. 1 and 2, pgs. 1 and 2)
- b) All "claims" which had accrued up through the date of the Agreement were settled for the lump sum payment from PaDOT to Durkin of \$2.35 million. (Exhibit P-2, para. 7D, pg. 9)
- c) A narrative entitled "Work Areas and Item to Complete" prepared by the parties and attached to the Agreement as Exhibit "A" spells out the "mile stone" dates and efforts required by the parties to accomplish the goal of completing the Project in one year. (Exhibit P-2, para. 3)
- d) PaDOT was to develop Traffic Control plans for the implementation of the narrative and to accommodate all work necessary to commence and prosecute the construction of retaining walls 1 and 2. (Exhibit P-2, para. 3)
- e) Retaining walls 1 and 2 were to be built on a force account basis. (Exhibit P-2, para. 6C, pgs. 7 and 8)
- f) PaDOT represented that all work on wall 2 would be completed by May 1, 1989 and further represented that all work on wall 1 would be completed by no later than June 30, 1989. (Exhibit P-2, para. 3A, pg. 4)
- g) Durkin agreed to provide overtime, double and triple shifting, and the addition of extra equipment and manpower, as required and as directed by PaDOT to complete the work at retaining walls 1 and 2. (Exhibit P-2, para. 3A, pg. 4)
- h) Many Contract items were paid at an increased rate. (Exhibit P-2, para. 5, pg. 6)
- I) PaDOT agreed to a lump sum payment of \$150,000 specifically earmarked for extended maintenance and protection of traffic (Contract Item No. 0901-0001). (Exhibit P-2, para. 5B, pg. 6)

- j) All issues related to the construction of the retaining wall at Ramp B were specifically excluded from the Agreement. (Exhibit P-2, para. 11, pg. 10)
- k) PaDOT represented that Durkin would be able to pave the interface area beginning July 1, 1989. (Exhibit P-2, para. 3A, pg. 4)
- l) In the event additional, unforeseen or changed maintenance and protection of traffic is required (i.e., e.g. crossovers, additional barrier, temporary roads or signs, etc.) such extra work shall be paid for on a force account basis. (Exhibit P-2, para. 5B, pg. 7)

30. The terms, conditions or applicable specifications of the Contract were reinstated and otherwise unmodified, except as otherwise expressly set forth in the Agreement. (Exhibit P-2, para. 12, pg. 10)

31. On December 15, 1992, Durkin forwarded a letter to PaDOT identifying 13 claim items. The letter refers to the 13 claims, referenced alphabetically A through M. (Exhibit P-4; N.T. 23)

Claim A - Equipment Age Adjustment

32. Following the Agreement, and pursuant to its terms, PaDOT directed Durkin to perform work on a force account basis. (N.T. 31)

33. The “equipment age adjustment factor” is part of the calculation used to determine the pay rate of equipment that was used to perform extra work payable on a force account basis. (N.T. 371)

34. All the work that is the subject of this equipment age adjustment claim occurred after the interim settlement Agreement from November, 1988 until December, 1989 on force account work. (N.T. 32, 125-126)

35. Durkin was a member of the Associated Pennsylvania Constructors in 1986-87. (N.T. 122)

36. On January 14, 1987, the APC issued a memorandum to its members advising them that age adjusted Blue Book rates would become effective on all contracts awarded after February 21, 1987. (N.T. 122; Exhibit D-1)

37. Durkin received the APC memorandum before it submitted its bid for the Project. (N.T. 122)

38. The Publication 408-83 does not specify that a piece of equipment, for purposes of force account payment, is required to be adjusted in accordance with an “age adjustment factor”, or pursuant to any “age adjustment tables,” but does state “For equipment, either rented or owned. . .rental rate will be determined using the monthly rental rates taken from the current edition. . .” (Publication 408-83, §110.03(d)3)

39. The “age adjustment factor” applied by PaDOT to Durkin’s equipment utilized in the force account work was in response to a strike-off letter issued by Joseph Filippino to all PaDOT District Engineers on or about January 13, 1987. (Exhibit P-6)

40. Durkin first took issue with PaDOT’s application of the age adjustment factor in 1987 before the date of the Agreement. (Exhibit P-7)

41. PaDOT applied an “age adjustment factor” to each of the force account’s equipment costs, resulting in a deduction in the amount paid to Durkin. (N.T. 30-32)

42. For all force account work performed by Durkin following the Agreement until Contract completion, Durkin calculated equipment rates both with (per PaDOT’s directive) and without the age adjustment factors, requesting PaDOT to pay without the age adjustments. The cumulative difference between the equipment force account with age adjustment and without age adjustment is claimed by Durkin to be \$109,025.86. (N.T. 31-32; Exhibit P-8)

43. The “age adjustment tables” referred to in Exhibit P-6 were not part of the terms, conditions or special provisions of the Contract as bid by Durkin. (N.T. 491-492)

44. Durkin is entitled to the \$109,025.86 deducted by PaDOT for an age adjustment factor.

Claim B - Lead Engineer/Master Mechanic

45. Pursuant to the Agreement, all work related to or incidental to the construction of retaining walls 1 and 2 was to be paid on a force account basis. (N.T. 37-38)

46. Durkin is a union contractor signatory to Local Union 542, International Union of Operating Engineers. (N.T. 39-40)

47. Durkin’s labor agreement with Local 542, which was in effect at the time of the Project, required Durkin to employ a lead engineer, also known as a master mechanic, whenever Durkin used ten or more major pieces of equipment on the Project, or whenever Durkin employed seven or more operating engineers on the Project. (N.T. 40-41, 143; Exhibit P-70)

48. Due to the number of operating engineers and pieces of equipment directed and otherwise required by PaDOT for the construction of the retaining walls, Durkin was required to employ a lead engineer on the Project. (N.T. 314)

49. The lead engineer was a certified equipment operator, paid by Durkin at an operator's rate, and had responsibilities which included supervising and assisting in the operation, maintenance and repair of all equipment coming under the jurisdiction of the operating engineers. (N.T. 145, 738; Exhibit P-70)

50. Durkin's claim is for the cost of a "lead engineer" or "master mechanic" employed on the Project during the period of time, post-Agreement, when retaining walls 1 and 2 were being constructed. In addition, Durkin is claiming the cost, calculated under the provisions of Section 110.03(d)3, of a pickup truck used by the lead engineer/master mechanic. The total claim for this item is \$83,973.77. (N.T. 36; Exhibits P-9, P-40, P-41, P-42, P-43, P-44, P-45, P-46, P-48, P-51, P-52, P-53, P-54, P-55, P-57, P-58, P-59, P-60, P-61, P-62)

51. The lead engineer/master mechanic performed the duties of a union steward and a catalyst to the production of the equipment operators. (N.T. 143)

52. Publication 408-83, §110.03(d)1 provides that "wages of forepersons; *equipment operators*; and skilled, semi-skilled and common laborers directly assigned to the specific operation will be reimbursed as direct labor at contract or actual payroll rate of wages per hour and fringe benefits paid, for each hour that such employees are actually engaged in the performance of the authorized work. . . ." (Publication 408-83, §110.03(d)1 (emphasis added))

53. The lead engineer/master mechanic was not a foreman and did not operate equipment or perform any labor in the construction of retaining walls 1 and 2. (N.T. 143-144, 378, 863)

54. The duties of the lead engineer/master mechanic were project-wide, not confined to the work being performed at retaining walls 1 and 2. He drove around and made sure all the operators were doing what they were supposed to do. (N.T. 147, 157, 379, 863)

55. Durkin's bid included projected labor costs for the lead engineer/master mechanic. (N.T. 159)

56. Even though the lead engineer/master mechanic's duties were project-wide, all of his time is being charged to the force account work at retaining walls 1 and 2. (N.T. 159)

57. The bulk of the activities performed during the winter months was at retaining walls 1 and 2. (N.T. 158)

58. During the late Spring and Summer of 1989 there was a lot of other work going on besides the major focus at walls 1 and 2. (N.T. 158)

59. Durkin did not attempt to segregate or divide the cost of the master mechanic between the regular contract work and the force account work during the late Spring and Summer of 1989 when both force account and regular contract work was ongoing. (emphasis added) (N.T. 159)

60. For the winter and early spring the weeks of November 16, 1988 to March 30, 1989 Durkin's documentation indicates that the lead engineer costs were \$27,137.47 and \$22,974.45 for walls 2 and 1, respectively. (N.T. 42; Exhibit P-9)

61. Contract Specification 408-83 Section 110.03(d)7 states work payable on a force account basis ". . .to cover all administration, general superintendent, other overhead. . ., add 25% to the labor cost, the material cost, the equipment cost and when applicable add 2%, to the total force account invoice for subcontract work." Durkin is not entitled to any additional compensation for the lead engineer master mechanic who watched or observed operators doing what they were supposed to do. (emphasis added) (Record)

Claim C - Equipment Standby Costs for Retaining Walls 1 and 2

62. The payment for equipment on stand-by associated with force account work is governed by Publication 408-83, §110.03(d)3 which provides, in pertinent part, "[i]f machinery or equipment is required at the work site, but is not operating, compensation will be at the hourly rental rate, exclusive of operating costs." (Publication 408-83, §110.03(d)3; N.T. 55)

63. Durkin's claim "C" is for the "standby cost" of equipment used to construct retaining walls 1 and 2 which, according to the terms of the Agreement, were to be constructed and paid for on a "force account" basis. (N.T. 57)

64. According to PaDOT's Project Office Manual in effect at the time of the Project, "[i]f a piece of equipment is required to be at the site of the force account work where it is used at periods throughout the day, the hours it is not performing physical work are to be paid as standby." "When standby time is paid, the limit will be a maximum of forty hours per week regardless of the number of hours per day the contractor works." "Day on which the contractor elects not to work, standby time will not be paid." (emphasis added) The total number of operating hours and standby hours or standby hours alone that equipment is compensable in any month is 176 hours. (emphasis added) (N.T. 56-67, 135, 383-384; Exhibit P-10, pgs. 2-5)

65. The standby time Durkin is claiming includes time when no work was being performed on retaining walls 1 and 2, including rain days, weekends and holidays. (N.T. 172-176; Exhibits P-40, P-41, P-42, P-43, P-44, P-47, P-48, P-49, P-50, P-51, P-52, P-53, P-54, P-55, P-56, P-57, P-58, P-59, P-60, P-62)

66. During the force account work for retaining walls 1 and 2, PaDOT monitored activities of Durkin without relinquishing the right to direct the work. (N.T. 165-169; Exhibit P-81)

67. On one occasion PaDOT directed Durkin to bring more equipment onto the Project to expedite the progress of the two retaining walls, but for the most part, PaDOT did not interfere with Durkin's means and methods. (N.T. 516-518, 864)

68. Generally, on a daily basis, the foremen for Durkin and his subcontractors would meet with PaDOT representatives before work got started and discussed what men and equipment were on site and what was being accomplished. PaDOT did not actually direct the work involved in the construction of retaining walls 1 and 2. Rather, PaDOT relied on Durkin to direct its manpower assigned to walls 1 and 2. (N.T. 165, 315-316, 385-386, 864, 902)

69. PaDOT did not give Durkin a list on a daily, weekly or any other periodic basis of the men and equipment required to construct the two retaining walls. (N.T. 165, 863-864)

70. PaDOT did not, at any time, direct Durkin to demobilize any of the equipment which was otherwise required to be available for the retaining wall force account work, but was on standby. (N.T. 316)

71. All of Durkin's daily force account records regarding the quantum of standby time incurred, with regard to the retaining walls 1 and 2 construction, were signed by a PaDOT onsite representative. (N.T. 902)

72. In accordance with the Contract specifications and PaDOT's internal policies, PaDOT maintained the right to adjust manpower and equipment during the retaining wall force account work, including ordering the demobilization of any equipment on standby. (N.T. 902-903; Exhibit P-10)

73. The total amount of standby time costs alleged by Durkin during the retaining walls force account work was \$140,314.61. (Exhibit P-11, P-40, P-62)

74. A portion of the standby time included in claim "C" is for weekends and holidays, when no work was performed at all on retaining walls 1 and 2. (Exhibit P-11, P-40, P-62)

75. A portion of Durkin's claim "C" is for standby time for pieces of equipment where the total number of hours claimed exceeds 176 hours in a month. (Exhibit P-11, P-40, P-62)

76. Subtracting from Claim C the costs Durkin is claiming for standby equipment when no work was being performed (rain days, weekends and holidays), as well as applying the maximum number of claimable hours per month, 176, the cost for equipment on standby calculated under the terms of Section 110.03(d)3 totals \$25,662.40. (emphasis added) (Defendant's Brief, Appendix A)

77. Durkin is entitled to an award of \$25,662.40. (Record)

Claim D - Force Account 159

78. This claim is for standby costs for equipment that performed force account work at retaining wall 2 in the Summer of 1988, before the date of the Agreement. (N.T. 63)

79. In June, 1988, while work on retaining wall 2 was ongoing, the slope above a portion of the wall, at Station 946+50 to 947+50, was found to be unstable. (N.T. 59-61; Exhibits P-13, P-14)

80. Work at this section of the wall was suspended for about 7 weeks until a decision was made as to the method of stabilization of the slope. Durkin claims equipment standby cost in the amount of \$32,110.31. (N.T. 318; Exhibits P-16, P-17)

81. During each day of the work suspension, Durkin presented PaDOT with a daily sheet listing the equipment that was supposedly on standby pending the parties' resolution of how the slope should be stabilized. PaDOT refused to sign these daily sheets. Rather, PaDOT stamped each sheet with the following notation: "PennDOT stamp indicates receipt of information only." (Exhibit P-17)

82. This stamped notation was understood by both PaDOT and Durkin to mean that the number of equipment standby hours was agreed to, but that PaDOT was not acknowledging liability for those hours. (N.T. 237, 390-391, 866-867)

83. John Donohue advised William Gilroy, Durkin's project superintendent, at the time the sheets were submitted to PaDOT, that PaDOT would not pay for the claimed standby time for equipment (emphasis added). The standby equipment hours for force account 159 was a point of contention, i.e., a claim, between Durkin and PaDOT at the time the work was being performed. (N.T. 867)

84. PaDOT directed Durkin to stabilize the area on a force account basis, recognizing it as extra work. (N.T. 59-62, 388; Exhibits P-12, P-13, P-14, P-15)

85. PaDOT paid Durkin for all force account costs incurred in the stabilization work, except the equipment standby costs which Durkin calculates to be \$32,110.31. (N.T. 64; Exhibit P-16)

86. This claim was settled by the November, 1988 Agreement. (N.T. 391, 866)

87. Durkin knew PaDOT would not pay for this standby equipment claim in the Summer of 1988 and this claim was settled by Durkin's signing of the interim Agreement. (Record)

Claim E - Equipment Standby Due to Revised Traffic Control Plans

88. There was a designated interface between the limits of the Section 600 Project and the Section 500 Project for I-78. (N.T. 64-65, 391-392)

89. In the area of the interface, construction responsibility was divided between Durkin, as the Section 600 contractor, and Hull Construction, as the Section 500 contractor. (N.T. 391-392)

90. As designed, Durkin's responsibilities in the interface area included embankment, preparing the subgrade and drainage. Once these operations were complete, Hull was to enter the area and install the sound wall posts and panels. Following the completion of Hull's work, Durkin was to pave the roadway. (N.T. 186-188, 190, 391-392, 869-870)

91. The Section 500 contractor's completion of its work was critical to Durkin's ability to proceed with its work in that the completion of Durkin's work was contingent upon a traffic crossover, designated and otherwise required by PaDOT's traffic control plans for the Project, which placed all traffic from the west bound lanes to the east bound lanes. (N.T. 65-67; Exhibit P-18)

92. Pursuant to the Agreement, PaDOT assumed responsibility for, and otherwise represented, warranted and assured Durkin that the work of the Section 500 contractor would be completed and would not otherwise impact Durkin's work, as of June 30, 1989. (N.T. 392-393; Exhibit P-2, P-4)

93. As of June 30, 1989, for reasons not attributable directly to Durkin, the Section 500 contractor was not prepared for the traffic crossover to occur, as had been represented, warranted and otherwise promised by PaDOT to Durkin. (N.T. 65, 544; Exhibit P-2, pg. 4)

94. Due to problems experienced by the Section 500 contractor, the traffic cross-over did not occur until July 19, 1989. (N.T. 67, 536-538, 543-544)

95. PaDOT was aware that Durkin was on standby, but did not direct Durkin to demobilize its equipment. (N.T. 914; Exhibit P-18)

96. PaDOT has not paid Durkin for *any* of its standby costs related to the delayed traffic crossover, notwithstanding its admission of partial responsibility. (N.T. 71, 398-399)

97. As a result of the delay in effectuating the traffic crossover for 10 of the 18 days, Durkin is entitled to 18 days of equipment standby costs totaling \$119,104.20. (emphasis added) (N.T. 66-67, 914; Exhibits P-18, P-21)

Claim F - Excavation at Retaining Walls 1 and 2

98. The claims pertain to the removal of the old pavement of the four lanes of Route 309 that was between retaining walls 1 and 2. (N.T. 74)

99. Paragraph 6C of the Agreement states that all work “related to or incidental to” wall 1 and 2 would be paid on a force account basis. (Exhibit P-2)

100. A portion of old pavement of Route 309 was used as a staging area for the equipment used to construct walls 1 and 2. Through traffic ran on two 11-foot lanes of old pavement of Route 309 while the walls were being built. (N.T. 883-885)

101. The old pavement of Route 309 could not be excavated until walls 1 and 2 were built. (N.T. 884-885)

102. The excavation of the old pavement of Route 309 was not related or incidental to the construction of walls 1 and 2 and it was not a part of the wall sequencing. (N.T. 416-417, 883)

103. The “wedge” referred to in paragraph 6C of the Agreement does not include the removal of the old 309 pavement. (N.T. 410-417; Exhibit D-17)

104. According to the original design of the Project, which design did not change during the course of the Project, excavation of the pavement of Route 309 was a separate pay item from the construction of the two retaining walls. (N.T. 416-417)

105. PaDOT paid for the excavation of the old pavement of Route 309 at the revised Contract unit price that was agreed to in the Agreement at the revised Class I unit price of \$8.22/cubic yard for 6,323 cubic yards totaling \$51,975.06. (N.T. 680-681)

106. Durkin seeks payment for removal of the old 309 pavement on a force account basis totaling \$98,296.80 minus the amount PaDOT paid as Class I Excavation, \$51,975.06 for a claim of \$46,321.74. (N.T. 74-75, 77-79, 680-681; Exhibit P-22, D-24)

107. Durkin is not entitled to payment for the removal of the old 309 pavement.
(Record)

Claim G - Retaining Wall at Ramp B

108. According to the design of the Project, Durkin was required to construct a combination propriety and tieback retaining wall along Ramp B, an off-ramp from the westbound side of I-78. (Exhibit P-75)

109. Part of the retaining wall was to be constructed as a concrete faced tieback wall, which generally was comprised of poured-in-place concrete with rock bolts extending back into the natural rock. It was designed to accommodate that portion of the Ramp B area that contained natural rock. (N.T. 80-81, 418-419)

110. The remainder of the retaining wall was to be constructed as a proprietary wall, or RECO wall, which was comprised of precast concrete panels with a granular fill and metal stripping to secure the panels in place. It was designed to accommodate that portion of the Ramp B area that was comprised of soil, sand and clay. (N.T. 80-81, 418-419)

111. PaDOT's design plans for the Ramp B construction showed the interface area of the two wall designs precisely at station 29+83.84. (emphasis added) Sheets 1 and 2 of the Ramp B wall drawings state the rock location line was "approximate." (N.T. 81; Exhibit P-75)

112. Sheet 2 of the Ramp B wall drawings stated, "the exact location and orientation of the joint between the wall types is to be determined after the rock surface is exposed during construction." (Exhibit P-75)

113. The plans further anticipated and otherwise represented that the demarcation line between rock and soil would occur at the interface area. (N.T. 81-82; Exhibit P-75)

114. Actual field conditions revealed that the actual rock demarcation line was significantly further west, resulting in significant quantities of rock extending into the area designated on the plans for construction of the proprietary wall in soil, sand and clay, not rock. (N.T. 81-83)

115. In order to construct the wall per PaDOT's design, the rock which extended into the area designated for proprietary wall construction was required to be removed. (N.T. 331, 565-566, 569)

116. The removal of rock in the area designated on the plans as proprietary wall construction was unanticipated by Durkin, and outside of the scope of work designated in the Contract as bid by Durkin. (N.T. 779)

117. After discovering the actual location of the rock/soil demarcation line, Durkin informed PaDOT that the conditions in the field were different than those depicted in the plans, and requested direction on how to proceed. (N.T. 424)

118. PaDOT considered alternate methods of construction as a consequence of discovering the presence of rock in the area designed by PaDOT for proprietary wall construction, but refused to direct Durkin to implement any of the alternate methods. (N.T. 85-87, 572-579)

119. PaDOT directed Durkin to construct the wall as per the design and Durkin complied with this directive. (N.T. 424-425; Exhibit P-24)

120. As a result of PaDOT's directive, Durkin was required to excavate substantial quantities of rock beyond what was anticipated for the construction of the retaining wall at Ramp B. (N.T. 85, 569; Exhibit P-26)

121. PaDOT admitted responsibility for some of the rock excavation, but unilaterally and arbitrarily imposed a "line of responsibility." (N.T. 423-424, 562-563; Exhibit D-7)

122. PaDOT paid Durkin for any class C concrete poured in the area of the tieback portion of the Ramp B wall that was 40 feet east of the precise station 29+83.84 and for any rock excavation on force account basis that occurred 40 feet west of station 29+83.84. (N.T. 422-426, 563; Exhibit D-18)

123. Durkin incurred extra costs as a result of the Ramp B rock removal of \$152,083.29 which remains unpaid by PaDOT. (N.T. 88-89; Exhibit P-26, P-27)

124. PaDOT issued Work Order 56 (D-25) for rock excavation at Ramp B for \$11,188.60. Some duplicate billing occurred between what Durkin claims and what PaDOT has already paid for outside the 40-foot zone. (N.T. 563, 685-686; Exhibit D-25)

125. Durkin is entitled to damages of \$140,894.79 (\$152,083.39-\$11,188.60). (Record)

Claim H - Damaged Gradall

126. During the construction of retaining wall 2, Durkin parked one of its gradalls under an unstable portion of the slope that was above the wall. (N.T. 90-91, 239, 430, 888-889)

127. A portion of the slope failed and some rocks fell over the edge and onto the gradall, damaging it. (N.T. 90-91)

128. Durkin repaired the gradall at a cost of \$4,622.38. (N.T. 90-91; Exhibit P-28)

129. Durkin was aware that the slope above the wall where the gradall was parked had been unstable. (N.T. 239, 430, 888-889)

130. Durkin elected to park the gradall in this area. PaDOT did not direct Durkin to park the gradall in this area. (N.T. 240-241, 888-889)

131. There were other areas nearby where the gradall could have been parked without risk of damage. (N.T. 888-889)

132. The collapse of the rock occurred during the night time while Durkin's equipment was parked at the job site. (N.T. 918)

133. It is Durkin's responsibility to pay for the gradall. (Record)

Claim I - Storm Drainage at Retaining Walls 1 and 2

134. The Contract required the installation of a drainage system in the area adjacent to retaining walls 1 and 2 ("drainage work"). (N.T. 74-76; Exhibit P-1)

135. The drainage work was performed by Durkin's subcontractor, Brian Construction. (N.T. 75-76, 889)

136. In the original design, the drainage is a roadway item, not a part of the retaining walls, which were paid for in lump sums. (N.T. 262, 431-432; Exhibit D-19)

137. As a result of the Agreement, retaining walls 1 and 2 were constructed simultaneously, as opposed to being constructed sequentially as per the original Contract. (N.T. 890)

138. The requirement in the Agreement that retaining walls 1 and 2 would be built simultaneously did not affect Brian's work. (N.T. 889-891)

139. As a result of the changed construction sequence which constricted Brian Construction's work area, Brian Construction incurred additional labor and equipment costs for the placement of the drainage system required by the Contract, which were unanticipated at the time of bid. (N.T. 889-891)

140. As a result, the area in which to perform the drainage work was reduced from 35 feet per the original Contract, to 26 feet per the Agreement. (N.T. 890)

141. The Agreement increased the storm drainage pay items. PaDOT paid Durkin for storm drainage at the escalated contract unit price as provided in the Agreement. (N.T. 244, 432; Exhibit P-2)

142. Durkin has been paid for drainage work in front of the walls 1 and 2 as per the escalated prices set forth in the interim Agreement and is not entitled to any additional compensation. (Record)

Claim J - Temporary Concrete Barrier and Temporary Impact Attenuators

143. Durkin is seeking \$444,583.25, representing the full escalated contract unit price for each linear foot of temporary concrete barrier that was on the Project during the final year of the Project. (N.T. 97)

144. The temporary concrete barrier was brought onto the Project before the date of the Agreement, and had already been paid for by PaDOT at the original contract unit price, \$14.50 per linear foot. (N.T. 287, 580, 835)

145. The original contract unit price of \$14.50 per linear foot paid for providing, installing, maintaining and removing the temporary concrete barrier, as provided in Section 627 of the Publication 408 Specifications. (N.T. 579-581; Exhibit P-1)

146. Durkin's bid included several time related items, including but not limited to temporary concrete barrier, temporary impact attenuators, glare screen and other traffic control devices, which were to be provided for the life of the original Contract as bid by Durkin. (N.T. 98, 101, 466, 854)

147. Durkin's bid prices for the time related items were based upon the original Project duration of 617 calendar days set forth in the Contract. (N.T. 466, 478)

148. The Contract as prepared by PaDOT and as bid by Durkin, did not require Durkin to provide any time related traffic control devices or any maintenance and protection of traffic beyond the anticipated completion date of November 3, 1988. (N.T. 466, 478; Exhibit P-1)

149. In its claim, Durkin is seeking the revised contract unit price of \$15.25 per linear foot for temporary barrier that was already provided and installed, whose removal had already been paid for, and which would only be on the Project for one construction season at a total cost of \$444,583.25 for 29,153 linear feet of barrier. (N.T. 267, 272, 579-581; Exhibit P-4)

150. PaDOT paid the revised unit price of \$15.25 per linear foot for any temporary concrete barrier that was brought onto the Project during the third year of the Project. (N.T. 583, 838)

151. The temporary concrete barrier that was brought onto the job before the date of the Agreement was one element of the traffic control plans applicable to the Project. (N.T. 287)

152. Similar to its claim for temporary concrete barrier, Durkin is seeking the full escalated contract unit price for each temporary impact attenuator of \$15,750.00 that was already on the Project and had already been paid for at the original contract unit price of \$15,000.00 per attenuator. (N.T. 97, 588)

153. The temporary impact attenuators used on the Project were a part of the MPT plans that were in use throughout the duration of the Project, and for which PaDOT paid, pursuant to the Agreement, the lump sum of \$150,000.00 for the continuation of the MPT plans for the third year of the Project. (N.T. 588)

154. The Agreement states at paragraph 5B: “effective November 14, 1988, PennDOT shall pay Durkin for extended maintenance and protection of traffic (Contract Item No. 0901-0001) the additional sum of One Hundred Fifty Thousand Dollars (\$150,000.00). . .Durkin agrees to perform the work required by the items listed above for such times as is required. . .” (Exhibit P-2)

155. PaDOT refused to pay Durkin *any* amount for the twelve temporary impact attenuators referenced above for the extended year of the Project. (N.T. 100)

156. Before it signed the Agreement, Durkin did not communicate with Interstate Safety Services, the subcontractor that provided the temporary concrete barrier, to attempt to ascertain from Interstate the cost for leaving the barrier on the Project for a third construction season. (N.T. 265, 843)

157. Interstate sent Durkin letters beginning in January, 1989, stating that the additional cost for providing barrier on the Project after the expiration date of the original Contract was \$1.00 per linear foot per month. Durkin’s claim J is not priced according to the letters from Interstate. (Exhibits P-33, P-34)

158. Durkin terminated its subcontract with Interstate in August, 1989. (N.T. 274)

159. PaDOT has paid to Durkin the \$150,000.00 lump sum specified in paragraph 5B of the Agreement for extended maintenance and protection of traffic for the one year extended contract time which includes the cost for extended use of a concrete barrier and impact attenuators on site at the time of the Agreement. (N.T. 290, 587, 840)

Claims K & L - Extra Maintenance and Protection of Traffic & Glare Screen

160. Durkin supplied the required devices and requested payment on a force account basis, as provided for in the Agreement. (N.T. 101-103)

161. In claim “K”, Durkin seeks \$160,428.00 for traffic control devices (signs with stands, drums, type “B” and “C” lights and an arrow board) that had been provided during the first and second years of the Project, and which remained on the Project for the third (extended) year. (N.T. 101-102, 894-895)

162. PaDOT paid for these devices pursuant to the lump sum payments in the Agreement: \$150,000.00 specifically for MPT. (N.T. 283-284, 438-440, 583-587, 702-705, 840, 892-895)

163. PaDOT’s MPT plan for the extended year of the Contract required additional traffic control devices for the extended year of the Project, including but not limited to signs, drum, lights, arrow boards and glare screen. (N.T. 101-103; Exhibit P-35)

164. The traffic control devices being claimed were part of the original traffic control plans that were put into effect in the first year of the Project (1987). (N.T. 466-490, 702-705, 833-840, 892-895; Exhibit D-9)

165. Durkin is claiming \$276,022.47 for traffic control devices used during the third year. (N.T. 101-103; Exhibit P-31)

166. PaDOT paid Durkin on a force account basis for traffic control devices that were used in the third year of the Project and were not part of the original traffic control plans. The total of these force account payments was over \$230,000.00. (N.T. 484-490, 702-705, 841, 892-895)

167. In claim "L", Durkin seeks \$115,594.00 for glare screen provided during the third year of the Project. (N.T. 102)

168. PaDOT paid for the glare screen for the third year of the Project by virtue of the lump sum payments in the Agreement: \$150,000.00 specifically for maintenance and protection of traffic. (N.T. 484-490, 702-705, 841, 892-895)

169. The glare screen at issue was originally brought onto the Project in 1987, the first year of the Project, and used as part of the traffic control plans. (N.T. 484-490, 702-705, 841, 892-895)

170. The original, as-designed MPT plans were in use throughout the duration of the Project, from April 1987 through November, 1989. (N.T. 281-288, 438-440, 466-490, 579-589, 698-705, 833-841, 892-895; Exhibit D-9)

171. The Agreement provides with regard to glare screen that PaDOT pay \$2.70 for resetting glare screen for each linear foot of glare screen reset in excess of 10,000 feet. (Exhibit P-2)

172. The 10,000 feet of glare screen referenced in the Agreement was in fact reset by Durkin. In addition, a total of 18,850 feet of glare screen was reset, for which Durkin was paid at the agreed upon price of \$2.70 per linear foot. (N.T. 703-705; Exhibit D-24, P-3)

173. Claims "K" and "L" are based on invoices sent to Durkin from Protection Services, Inc., the supplier of the maintenance and protection of traffic devices and the glare screen. (N.T. 102; Exhibit P-35)

174. Subsequent to the conclusion of the Project, Protection Services sued Durkin in the Court of Common Pleas of Lehigh County. (N.T. 289, 702-705)

175. Durkin settled Protection Services' suit for \$205,000.00. (N.T. 289, 702-705; Exhibit P-2, D-10, D-24)

176. PaDOT paid Durkin, over the course of the Project, in excess of \$1.6 million for traffic control. (N.T. 589)

Claim M - Concrete Shoulder at Retaining Walls 1 and 2

177. The Contract required type one shoulder (concrete) to be installed adjacent to the roadway of I-78. (N.T. 442; Exhibit P-3, pg. 7)

178. The concrete shoulder in question is in front of the reinforced earth portions of retaining walls 1 and 2. (N.T. 108, 895-897)

179. This shoulder work was originally designated as bid item 0658-0002 with an as bid unit price of \$22.00/s.y. (N.T. 554; Exhibit P-1)

180. The work involved in constructing these shoulders was originally supposed to be done by Durkin's paving subcontractor, Chapin & Chapin. (N.T. 109)

181. The retaining walls, both the reinforced earth portions and the tieback portions, were built by a different subcontractor to Durkin, Trevoise Construction Company. (N.T. 109, 452, 895-897)

182. As part of the reinforced earth portion of the retaining walls, Trevoise was required to construct a cast-in-place concrete parapet. (N.T. 301, 452, 895)

183. Trevoise requested that PaDOT change the design of the concrete parapet from cast-in-place to precast, thus saving Trevoise considerable time and money. (N.T. 301, 452, 895)

184. PaDOT agreed to Trevoise's request on condition that Trevoise construct the concrete shoulder in front of the parapet at the original contract unit price of \$22.00 per square yard. (N.T. 301, 452, 896)

185. Trevoise, a Durkin subcontractor, placed 2,075.36 s.y. of type-one shoulder on the Project pursuant to item 2905-3002. (N.T. 896-897; Exhibit D-22)

186. PaDOT, pursuant to a purported side-agreement with Trevoise, paid Durkin for the 2,075.36 s.y. at the original unit price of \$22.00 for item 0658-0002, rather than at the revised contract price of \$32.37/s.y. for item 2905-3002. (N.T. 558, 895-896, 900-901)

187. PaDOT made the side agreement with Trevoise without ever notifying Durkin and without Durkin's input and approval. (N.T. 900)

188. Trevose agreed to PaDOT's proposal, and duly placed 2075.36 s.y. of type one concrete shoulder in front of the reinforced earth portions of retaining walls 1 and 2, for which PaDOT paid Durkin, Trevose's general contractor, the sum of \$45,657.92. (N.T. 896-897; Exhibit D-22)

189. Without the agreement with Trevose, PaDOT would have paid Durkin at the revised unit price of \$32.37. (N.T. 900-901)

190. PaDOT had no agreement with Durkin to revise the prices designated in the Contract for the type-one shoulder work at retaining walls 1 and 2. (N.T. 901)

191. The difference between the amount paid by PaDOT for the Trevose work under the original Contract price and the amount for the work calculated at the revised Contract price is \$21,521.48 (2,075.36 s.y. x [\$32.37/s.y. - \$22.00/s.y.]) to which Durkin is entitled.

192. Summary of damages:

Claim A	Equipment Age Adjustment	\$109,025.86	FF 44
Claim B	Lead Engineer/Master Mechanic	0.00	FF 61
Claim C	Equipment Standby Cost for Retaining Walls 1 and 2	25,662.40	FF 77
Claim D	Force Account 159	0.00	FF 87
Claim E	Equipment Standby Due to Revised Traffic Control Plans	119,104.20	FF 97
Claim F	Excavation at Retaining Walls 1 and 2	0.00	FF 107
Claim G	Retaining Wall at Ramp B	140,894.79	FF 125
Claim H	Damage Gradall	0.00	FF 133
Claim I	Storm Drainage at Retaining Walls 1 and 2	0.00	FF 142
Claim J	Temporary Concrete Barrier and Temporary Impact Attenuators	0.00	FF 159
Claims K & L	Extra MPT and Glare Screen	0.00	FF 172 & 176
Claim M	Concrete Shoulder at Retaining Walls 1 and 2	<u>21,521.48</u>	FF 191
	Total	\$416,208.73	

CONCLUSIONS OF LAW

1. The Pennsylvania Board of Claims has jurisdiction over all contract claims arising against the Commonwealth of Pennsylvania under 72 P.S. §4651-4.
2. Plaintiff and the Pennsylvania Department of Transportation entered into a written Contract on or about April 6, 1987, for the construction of a section of state highway in Lehigh County, Pennsylvania, for the sum of \$53,890,182.97 (“Contract”).
3. The Contract (No. 053045) contained language requiring that all work be performed within 617 days of PaDOT’s issuance of a notice to proceed.
4. On November 10, 1988, Plaintiff and PaDOT entered into a written agreement that resolved certain differences that developed between the parties and insured that the Project did not fall further behind (“Agreement”).
5. On December 21, 1988, the Agreement to Amend the November 10, 1988 Agreement was entered into which resolved all claims of Trevoise Construction Company, a subcontractor to Durkin (“Agreement”).
6. PaDOT agreed to pay 2.35 million for release of all claims against it, including Trevoise.
7. The original Agreement between the parties remained in full force and effect, except to the extent that it was modified by the interim Agreement and its amendment.

Claim A - Equipment Age Adjustment

8. PaDOT directed Plaintiff to perform work on a force account basis after the Agreement was entered into.
9. Durkin performed the work in accordance with the terms, conditions, and special provisions in the Contract.
10. Plaintiff is hereby awarded judgment against PaDOT in the amount of \$109,025.86.

Claim B - Lead Engineer/Master Mechanic

11. The original Contract includes labor costs for the lead engineer/master mechanic.

12. The lead engineer/master mechanic on the Project performed work that was included in the original Contract.

13. Plaintiff is not entitled to any additional compensation for the lead engineer/mechanic since all work performed was as contemplated by the Contract.

Claim C - Equipment Standby Costs for Retaining Walls 1 and 2

14. PaDOT failed to adjust manpower and equipment during the retaining wall force account work as outlined in the Contract.

15. PaDOT did not relinquish the right to direct the work for retaining walls 1 and 2.

16. Plaintiff is entitled to be compensated for all standby time in accordance with the terms of the Contract except for that time during which work was not contemplated.

17. Plaintiff is hereby awarded judgment against PaDOT in the amount of \$25,662.40.

Claim D - Force Account 159

18. The Agreement covered all claims between the parties that arose prior to the execution of the Agreement.

19. The standby time reimbursement claim by Plaintiff arose prior to the execution of the Agreement and was settled by the Agreement.

20. Plaintiff is not entitled to any compensation for this claim.

Claim E - Equipment Standby Due to Revised Traffic Control Plans

21. Plaintiff is not responsible for the delays in work associated with the Section 500 Contractor.

22. PaDOT had the authority to inform Plaintiff to demobilize its equipment due to the delay but did not do so.

23. The Contract required that traffic cross over occurred prior to Plaintiff commencing its work.

24. Plaintiff is entitled to 18 days of equipment standby costs that occurred prior to the traffic crossover.

25. Plaintiff is hereby awarded judgment against PaDOT in the amount of \$119,104.20.

Claim F - Excavation at Retaining Walls 1 and 2

26. PaDOT was to pay Plaintiff on a force account basis for all work “related to or incidental to “Walls 1 and 2.”

27. Excavation of the old pavement of Route 309 was not related to or incidental to the construction of walls 1 and 2.

28. Plaintiff is not entitled to compensation for this claim.

Claim G - Retaining Wall at Ramp B

29. The work done by Plaintiff to construct a proprietary wall at Ramp B was not contemplated in the Contract or Agreement between the parties.

30. All of the work was done at the direction of PaDOT.

31. Plaintiff is entitled to damages of \$140,894.79 for the work it performed for excavation at Ramp B that was done at the direction of PaDOT and was not contemplated by the Contract or Agreement.

32. Plaintiff is hereby awarded judgment against PaDOT in the amount of \$140,894.79.

Claim H - Damaged Gradall

33. Plaintiff is fully responsible for damage to its gradall that occurred during the night while work was being done on retaining wall 2.

34. Plaintiff is not entitled to any compensation as a result of this claim.

Claim I - Storm Drainage at Retaining Walls 1 and 2

35. The Agreement provides for payment to Plaintiff for drainage work in front of the walls 1 and 2.

36. Plaintiff has been paid for all drainage work in front of walls 1 and 2 pursuant to the terms of the Agreement.

37. All of the work performed by Plaintiff was within the parameters of the Agreement.

38. Plaintiff is not entitled to any compensation as a result of this claim.

Claim J - Temporary Concrete Barrier and Temporary Impact Attenuators

39. The Agreement requires PaDOT to pay Plaintiff the sum of \$150,000.00 for extended maintenance and protection of traffic which includes the cost for extended use of a concrete barrier and impact attenuates.

40. The Agreement settled all outstanding legal issues that existed prior to its execution.

41. This claim involves a dispute that arose prior to the execution of the Agreement and was settled by the Agreement.

42. Plaintiff is not entitled to any compensation as a result of this claim.

Claims K and L - Extra Maintenance and Protection of Traffic and Glare Screen

43. The Agreement requires PaDOT to pay Plaintiff on a force account basis for traffic control devices.

44. PaDOT paid Plaintiff pursuant to the terms of the Agreement.

45. The Agreement specifically covered the payments that were to be made to Durkin pursuant to Claim "K".

46. Plaintiff is not entitled to any compensation as a result of this claim.

47. Payment of the costs for the glare screen was made pursuant to the Agreement.

48. The Agreement settled all outstanding issues between the parties, including payment for the glare screen.

49. Plaintiff is not entitled to any compensation as a result of this Claim.

Claim M - Concrete Shoulder at Retaining Walls 1 and 2

50. PaDOT had an agreement with Trevoise, a subcontractor of Durkin, to construct a cast-in-place concrete parapet.

51. The agreement was made without the knowledge and consent of Durkin and reduced the unit price for the work from \$32.37/s.y. to \$22.00/s.y.

52. Durkin had no agreement with PaDOT permitting PaDOT to revise the prices designated in the Contract for the type-one shoulder work at Retaining Walls 1 and 2.

53. Durkin is entitled to the difference between the amount paid to Trevoise and the amount required to be paid under the terms of the original Contract of \$21,521.48.

54. The Board's Findings of Fact are supported by substantial relevant, evidence such as a reasonable mind might accept as adequate to support its Conclusions of Law.

OPINION

This case comes before the Board of Claims based upon the Plaintiff's, Thomas M. Durkin and Sons, Inc. (hereinafter "Durkin") Complaint seeking compensation from Defendant, Commonwealth of Pennsylvania, Department of Transportation (hereinafter "PaDOT") for work done by Durkin pursuant to a Contract and interim Agreement entered into with PaDOT. The work was done on the Project known as I-78, Section 600. The Project was to complete the final portion of the I-78 highway, by the construction of 17,820 linear feet (3.375 miles) of interstate highway. Durkin has made a total of thirteen (13) claims against PaDOT and is seeking in excess of 1.5 million dollars.

Contract No. 053045 was executed between the parties on April 6, 1987, for the sum of Fifty-Three Million Eight Hundred Ninety Thousand One Hundred Eighty-Two Dollars and Ninety-Seven Cents (\$53,890,182.97). The Contract required all work to be performed within 617 calendar days from PaDOT issuing a Notice to Proceed. However, the Contract was not awarded to Durkin until after the Notice to Proceed date listed in the Contract and Durkin immediately fell behind on the Project. Multiple problems arose that delayed the progress of Durkin's work, and

Durkin intended to make claims against PaDOT for these delays. In order to move the Project forward, the parties entered into an Agreement, dated November 10, 1988, to resolve all of the differences that existed between them at that time, except all issues related to the construction of the retaining wall at Ramp B were specifically excluded from the Agreement.

Durkin proceeded with the work and completed the Project. However, Durkin was still not satisfied that it was being paid appropriately and on December 15, 1992, forwarded to PaDOT a letter identifying thirteen (13) claims. Specifically, the claims are that PaDOT improperly and without a contractual basis adjusted all equipment costs submitted on force account basis to account for an “age adjustment factor” (Claim “A”); PaDOT refused to make payments for lead engineer costs which accounted for part of Durkin’s direct labor force in performing certain force account work on the Project (Claim “B”); and PaDOT refused to pay Durkin for equipment standby costs which resulted from PaDOT’s directives to perform work on a force account basis (Claims “C” and “D”). Disagreements also occurred as to the manner and method of payment which PaDOT was obligated to make Durkin pursuant to the terms of the Agreement, particularly the excavation cost (Claim “F”), storm drainage work (Claim “I”), and the providing of maintenance and protection of traffic control devices during the extended year of the Agreement (Claims “J”, “K”, and “L”). Lastly, Durkin claims it suffered additional costs from PaDOT’s failure to coordinate the Section 500 Project contractor with Durkin’s work (Claim “E”); from misrepresentations in PaDOT’s design of the Ramp B retaining wall (Claim “G”), and from a slope stability design problem resulting in damage to a piece of Durkin’s equipment. (Claim “H”).

The Complaint was filed by Durkin on June 16, 1993. After a lengthy discovery period that involved the filing of several pre-trial motions, hearings were held before the

Board from January 12, 1998, through January 21, 1998, with six (6) days of testimony. Post-trial submissions were completed by both parties on June 26, 1998, and the matter is now before the Board for disposition.

Claim “A” by Durkin is for One Hundred Nine Thousand Twenty-Five Dollars and Eighty-Six Cents (\$109,025.86) and deals with the amount of money PaDOT subtracted for an equipment age adjustment factor. PaDOT applied the “age adjustment factor” to each of the force account’s equipment costs for work done from November, 1988, until December, 1989. The work was done after the interim Agreement was signed. The age adjustment factor was not part of the original Contract terms between the parties; nor was it included in the interim Agreement. As a result, it is a condition that Durkin never agreed to and Durkin is entitled to be compensated in the amount deducted.

Claim “B” by Durkin is for Eighty-Three Thousand Nine Hundred Seventy-Three Dollars and Seventy-Seven Cents (\$83,973.77) and deals with lead engineer/master mechanic costs during the period of time that retaining walls 1 and 2 were being constructed. This was after the interim Agreement had been signed. The lead engineer/master mechanic drove around the Project and made sure all the operators were doing what they were suppose to do. His work was not restricted to retaining walls 1 and 2. Durkin’s bid did include projected labor costs for the lead engineer/master mechanic. Furthermore, at the hearing, Durkin was unable to segregate the cost of the lead engineer doing regular contract work and force account work. As a result, Durkin is not entitled to any additional compensation for this claim.

Claim “C” by Durkin is for the “standby cost” of equipment used to construct walls 1 and 2 which were to be paid for on a “force account” basis. The total amount of standby time

costs alleged by Durkin during the retaining wall force account work was One Hundred Forty Thousand Three Hundred Fourteen Dollars and Sixty-One Cents (\$140,314.61). According to the PaDOT Project Office Manual, which was in effect at the time the Contract was signed, the total number of operating hours that standby equipment is compensable in any month is 176 hours. PaDOT maintained the right to adjust manpower and equipment during the retaining wall force account work, including the ordering of the demobilization of any equipment on standby, but never did so. As a result, Durkin is entitled to Twenty-Five Thousand Six Hundred Sixty-Two Dollars and Forty Cents (\$25,662.40). It is not entitled to the full amount of the claim because of the Project Office Manual guidelines. Also, a portion of the standby time included is for weekends and holidays, when no work was performed.

Claim "D" by Durkin is for standby costs for equipment that performed force account work at retaining wall 2 in the Summer of 1988, prior to the date of the Agreement. Work at this section was suspended for 7 weeks until a decision was made concerning the method of stabilization of the slope. Durkin claims standby costs in the amount of Thirty-Two Thousand One Hundred Ten Dollars and Thirty-One Cents (\$32,110.31). PaDOT informed Durkin it would not pay for the extra costs. Moreover, this claim was settled by the November, 1988, Agreement, which by its language settled all outstanding claims at that time. Durkin is not entitled to compensation on this claim.

Claim "E" by Durkin is for standby time due to revised traffic control plans. In accordance with the Agreement, PaDOT assumed responsibility for, and otherwise represented, warranted, and assured Durkin that the work of the Section 500 contractor would be completed and would not otherwise impact Durkin's work, as of June 30, 1989. However, as of June 30, 1989, for

reasons beyond Durkin's control, the traffic crossover had not occurred and Durkin could not commence work. PaDOT never directed Durkin to demobilize its equipment, and the crossover did not occur until July 19, 1989. As a result of the delay, Durkin is entitled to eighteen (18) days of equipment standby costs totaling One Hundred Nineteen Thousand One Hundred Four Dollars and Twenty Cents (\$119,104.20).

Claim "F" by Durkin pertains to the removal of the old pavement of the four lanes of Route 309 that was between retaining walls 1 and 2. Paragraph 6C of the Agreement stated that all work "related to or incidental to" wall 1 and 2 would be paid on a force account basis. Removal of the old pavement was not related to or incidental to the construction of walls 1 and 2. Excavation of the pavement was a separate pay item from the construction of the two retaining walls, and PaDOT paid for the excavation at the revised contract unit price that was agreed to in the Agreement. Consequently, Durkin is not entitled to payment for the removal of the old 309 pavement.

Claim "G" by Durkin is for extra costs in the amount of One Hundred Fifty-Two Thousand Eighty-Three Dollars and Twenty-Nine Cents (\$152,083.29) that were sustained as a result of unanticipated rock removal at Ramp B. After performing some initial tests, Durkin informed PaDOT that the conditions in the field were not the same as depicted in the plans, and that some additional rock removal was necessary. PaDOT directed Durkin to proceed in accordance with the plans and Durkin complied. PaDOT did not pay Durkin for any of the extra rock removal, even though PaDOT admitted responsibility for some of the rock excavation. Some duplicate billing occurred; as a result, Durkin is entitled to damages in the amount of One Hundred Forty Thousand Eight Hundred Ninety-Four Dollars and Seventy-Nine Cents (\$140,894.79).

Claim "H" by Durkin is for Four Thousand Six Hundred Twenty-Two Dollars and Thirty-Eight Cents (\$4,622.38) and represents the cost to fix a damaged gradall. Durkin is not entitled to compensation for this claim since Durkin assumed responsibility for the damage by parking the gradall in an area where it knew the slope at retaining wall 2 to be unstable. A portion of the slope failed and some rocks damaged the gradall.

Claim "I" by Durkin is for drainage work done at retaining walls 1 and 2 by its subcontractor, Brian Construction. The total amount of the claim is One Hundred Four Thousand Three Hundred Ninety-Two Dollars and One Cent (\$104,392.01). As a result of a changed construction sequence, Brian Construction incurred additional labor and equipment costs for the placement of the system, which were unanticipated at the time of the bid. However, the Agreement increased the storm drainage pay items, and PaDOT paid Durkin for these items at the escalated price in the Agreement. Durkin is not entitled to compensation for this claim.

Claim "J" is for Four Hundred Forty-Four Thousand Five Hundred Eight-Three Dollars and Twenty-Five Cents (\$444,583.25), and represents the full escalated contract unit price for each linear foot of temporary concrete barrier that was on the Project during the final year of the Project. It also represents the full escalated contract unit price for each temporary impact attenuators of Seventeen Thousand Seven Hundred Fifty Dollars (\$17,750.00). The temporary concrete barrier was brought onto the job before the date of the Agreement. Likewise, the impact attenuators were brought onto the Project prior to the Agreement. The Agreement states that "effective November 14, 1988, PaDOT shall pay Durkin for extended maintenance and protection of traffic . . . the sum of \$150,000." The sum of One Hundred Fifty Thousand Dollars (\$150,000.00) was paid to Durkin. It is not entitled to more compensation.

Claims “K” and “L” by Durkin are for extra maintenance and protection of traffic and the use of a glare screen. In Claim “K” Durkin seeks One Hundred Sixty-Thousand Four Hundred Twenty-Eight Dollars (\$160,428.00) for traffic control devices that had been provided during the first and second years of the Project, and which remained on the Project for the third year. In Claim “L”, Durkin seeks One Hundred Fifteen Thousand Five Hundred Ninety Four Dollars (\$115,594.00) for glare screen provided during the third year of the Project. These claims are based upon invoices sent to Durkin from a subcontractor, Protection Services, Inc., the supplier of the maintenance and protection devices. Both of these claims were settled by the Agreement that was signed between the parties. Specifically, PaDOT paid pursuant to the Agreement the sum of \$150,000.00 for maintenance and protection of traffic. All told, PaDOT paid Durkin over the course of the Project in excess of \$1.6 million for traffic control, including the amount paid for these items. Durkin is not entitled to any compensation for this claim.

Claim “M” by Durkin is for Twenty-One Thousand Five Hundred Twenty-One Dollars and Forty-Eight Cents (\$21,521.48) and involves work done on the concrete shoulder at retaining walls 1 and 2. PaDOT made a third-party agreement with Trevose, a subcontractor, to reduce the amount paid for the work to the original unit price of \$22.00 per square yard rather than at the revised contract price of \$32.37 per square yard. This agreement was made without the approval and input of Durkin. PaDOT had no agreement with Durkin to revise the prices designated in the Contract for the work requested at retaining walls 1 and 2. Consequently, Durkin is entitled to compensation in the amount of Twenty-One Thousand Five Hundred Twenty-One Dollars and Forty-Eight Cents (\$21,521.48), representing the difference between the amount paid by PaDOT and the original contract price.

ORDER

AND NOW, this day of , 1999, after hearing and review of Briefs, it is hereby **ORDERED** and **DECREED** that judgement be entered against Defendant, Commonwealth of Pennsylvania, Department of Transportation, and in favor of Plaintiff, Thomas M. Durkin and Sons, Inc. in the amount of Four Hundred Sixteen Thousand Two Hundred Eight Dollars and Seventy-Three Cents (\$416,208.73) plus costs and interest at the legal rate of six percent (6%) per annum from June 16, 1993, the date the Complaint was filed.

Upon receipt of said award, Plaintiff shall forthwith file with the Board a Praeceptum requesting the case be marked "closed, discontinued and ended with prejudice".

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

Opinion Signed

James W. Harris
Citizen Member

March 4, 1999