

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

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

1. 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)

2. 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)

3. Durkin’s claim for standby cost is to be determined by looking to the contract between Durkin and PaDOT, and not by the PaDOT Project Office Manual, since the manual was never made part of the agreement. (Exhibit P-1)

4. 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)

5. 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)

6. 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)

7. 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)

8. 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)

9. 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)

10. 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)

11. 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)

12. 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)

13. 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)

14. In accordance with Section 110.03(d)(3) of PaDOT Publication No. 408-83, which is incorporated into the contract, Durkin is entitled to compensation totaling \$140,314.61. (Exhibit P-1)

15. Durkin is entitled to an award of \$140,314.61. (Record)

CONCLUSIONS OF LAW

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

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

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

3. Plaintiff is entitled to be compensated for all standby time in accordance with the terms of the Contract.

4. Plaintiff is hereby awarded judgment against PaDOT in the amount of \$140,314.61.

OPINION

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). As a result, Durkin is entitled to One Hundred Forty Thousand Three Hundred Fourteen Dollars and Sixty-One Cents (\$140,314.61).

ORDER

AND NOW, this day of , 2000, 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 One Hundred Forty Thousand Three Hundred Fourteen Dollars and Sixty-One Cents (\$140,314.61) 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

July 20, 2000