

COMMONWEALTH OF PENNSYLVANIA

JAMES JULIAN, INC. for the use and benefit	:	BEFORE THE BOARD OF CLAIMS
of Eagle Traffic Control, Inc.	:	
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF TRANSPORTATION	:	DOCKET NO. 2736

FINDINGS OF FACT

1. James Julian, Inc. (hereinafter referred to as **AJJI@** or the **AClaimant@**) is a Delaware Corporation with its principal place of business located at 405 South DuPont Road, Elsmere, Wilmington, DE 19805. (Complaint & Answer Para. 1)

2. Eagle Traffic Control, Inc. (hereinafter referred to as **AEagle@**) is a Pennsylvania Corporation with its principal place of business located at 3170 Unionville Pike, Hatfield, PA 19440. (Complaint and Answer Para. 2)

3. Commonwealth of Pennsylvania, Department of Transportation (hereinafter referred to as **APaDOT@** or the **ACommonwealth@**) is a duly organized agency of the Commonwealth of Pennsylvania, having its principal office (formerly) located at 555 Walnut Street, Forum Place, Harrisburg, PA 17101-1900. (Complaint and Answer Para. 3)

4. JJI was the general contractor and was awarded PaDOT Contract No. 089040 (the **Aproject@**) concerning road reconstruction of sections 009 and 005 of State Route 11 in PaDOT District 8-0. (Complaint and Answer Para. 6 & 7)

5. Eagle entered into a Subcontract Agreement (the **Asubcontract@**) with JJI to provide various traffic control devices for the project. The date of the subcontract was July 22, 1993 and the subcontract included the requirement to provide 34 G.R.E.A.T. Impact Attenuating Devices, also referred to as **Acz@** attenuators, at a unit price of Eleven Thousand Two Hundred Fifty Dollars (\$11,250.00). (Ex. P-1)

6. On August 6, 1993, Eagle submitted a memo entitled **ALetter of Transmittal@** to JJI indicating that Eagle intended to use either Syro Advanced Dynamic Impact Extension Module (Adiem) attenuators or attenuators manufactured by Energy Absorption, Inc., the G.R.E.A.T. attenuators. (Ex. P-31)

7. The subcontract indicates that Eagle agreed to **Afurnish** all necessary labor, material,

equipment and facilities to perform and complete in place, the following items of the Contractor's Contract with the Owner at the respective unit prices and approximate quantities of work set forth as follows:

<u>ITEM NO.</u>	<u>QUANTITY</u>	<u>DESCRIPTION</u>	<u>UNIT PRICE</u>	<u>TOTAL</u>
0696-0038	2 EA	G.R.E.A.T. temp. Impact Attenuating Device, 6 Bay Installed, no site prep. or crane	\$11,250.00	\$22,500.00
0696-0039	32 EA	G.R.E.A.T. temp. Impact Attenuating Device, 2'6" Installed, no site prep or crane	\$11,250.00	\$360,000.00
0690-0335	12 EA	Sand Barrel Impact, 55 MPH Installed, no crane	\$3,500.00	\$42,000.00
0697-0038	6 EA	Reset G.R.E.A.T. temp. 6 Bay 2'0" Contractor to provide crane	\$450.00	\$2,700.00
0697-0039	33 EA	Reset G.R.E.A.T. temp. 6 Bay 2'6" Contractor to provide crane	\$450.00	\$14,850.00
0697-0335	7 EA	Reset Sand Barrel Impact Attenuating Device, temp. 55 MPH Design, Contractor to provide crane	\$450.00	\$3,150.00
			TOTAL	\$445,200.00

(Ex. P-1, pgs. 1 and 2)

8. The subcontract also states at Article I, subparagraph (c) as follows:

Subcontractor agrees to assume all duties and requirements imposed on the Contractor by the Owner, as pertains to the part of the Contractor's contract which is the subject of this Subcontract. Subcontractor agrees to become fully familiar with the contract plans, specifications and special provisions of the Contract as they relate to the performance of the above described (*sic*) work, and agrees to have a copy of such contract plans, specifications and special provisions at the construction site at all times at the Subcontractor's cost.

(Ex. P-1, pg. 2)

9. On December 15, 1993, JJI sent PaDOT a letter, to the attention of W. Andrew Bitner, P.E., stating that there would be a change to our Source of Suppliers . . . for the G.R.E.A.T. Impact Attenuator. As to Item Nos. 0696-0038 and 0696-0039, JJI stated they would utilize Adiem Attenuators. (Ex. P-8)

10. On December 17, 1993, PaDOT, per Barry G. Hoffman, P.E., sent JJI a response to their December 15, 1993 letter, wherein the Commonwealth advised JJI that the substitution of the Adiem devices was considered a proposed design change. The PaDOT letter of December 17, 1993, further indicated that while the Adiem device manufactured by Syro Steel Company was approved as a barrier terminal, it was not approved as a crash cushion. The Commonwealth's letter stated that cost considerations associated with this change must be addressed. (N.T. 30-32; Ex. P-8)

11. The Commonwealth letter of December 17, 1993, also referenced an earlier-dated strike-off-letter, No. 430-93-112, (*sic*)¹ dated November 3, 1992, wherein PaDOT's Director of Bureau of Design, Fred W. Bowser, P.E., stated that while the Adiem Attenuator had been accepted as a barrier terminal, it was not accepted as a crash cushion and additional tests would be required to qualify that barrier as a crash cushion. (Ex. P-2, P-8)

12. The first witness to testify on behalf of the Claimant was Barry Hoffman, the District Engineer during the course of this particular project. Mr. Hoffman, who was subpoenaed by the Claimant, acknowledged the subcontract agreement between JJI and Eagle applied to the instant project and that the subcontract called for 34 G.R.E.A.T. Attenuators with \$382,500.00 allocated for those impact attenuating devices. (N.T. 16-18; Ex. P-1)

13. Mr. Hoffman acknowledged that Michael M. Ryan, P.E. was, at the time of this project, the Chief Engineer for Highway Administration in PaDOT. In a memo to Mr. Hoffman, dated March 21, 1994, Mr. Ryan references the November 3, 1992, strike-off-letter 430-92-112 and stated: Based on crash test data, the ADIEM was accepted as a concrete barrier terminal in work zones and permanent locations. As we began to use the ADIEM, questions were raised regarding side impacts and the usage interpretation in the FHWA's approval letter. We requested and received clarification from the Washington Office of the FHWA in their letter of February 16, 1994. . . . The FHWA recommends that the ADIEM not be used where possible penetration by high speed, high angle impacts can not (*sic*) be tolerated; i.e. in median locations with opposing and cross traffic where the point of barrier need is restricted within the safety device. Based upon this information, Mr. Hoffman acknowledged that Adiem was an acceptable product

¹Actual strike-off letter by Fred W. Bowser, P.E., dated November 3, 1992, is numbered 430-92-112, rather than 430-93-112.

for use in the project. (N.T. 22, 23; Ex. P-4)

14. Mr. Hoffman also acknowledged that section 107.05 (Federal Aid Provisions) of PaDOT's specifications indicate that: "[w]hen the United States Government pays any portion of the project costs, observe the Federal laws pertaining to the project, as well as the rules and regulations made in accordance with such laws." Mr. Hoffman testified that it was his recollection that the Federal Government paid a portion of the costs of this particular project. (N.T. 24, 25; Ex. P-6)

15. Although he could not identify the document as a Federal Regulation, Mr. Hoffman testified that the exhibit provided to him at trial stated at paragraph Section 635.411 3 (e) (material or product selection) that: "[r]eference in specifications and on plans to single trade name materials will not be approved on Federal-Aid contracts." (N.T. 25, 26; Ex. P-7)

16. On April 12, 1994, PaDOT's Jeff Miller sent a letter to JJI stating that ". . . Adiem units will be permitted for use only in the locations listed on the attachment." The letter was sent on Mr. Hoffman's stationery and the attachment to the letter indicated that Adiem's could be utilized in 37 locations, although G.R.E.A.T. attenuators had to be used in 4 locations. Mr. Hoffman acknowledged that the letter directed to JJI, dated April 12, 1994, sent on Mr. Hoffman's letterhead, although signed by Mr. Jeff Miller, was authorized. The letter also states that the authorization to permit the use of Adiem units in lieu of the G.R.E.A.T. Attenuators is contingent upon submission of a proposed basis of payment for the Adiem units for PaDOT's review and acceptance. (N.T. 34-36; Ex. P-9)

17. Mr. Hoffman also acknowledged that Carl Ulrich sent a letter to JJI, dated May 3, 1994, on Mr. Hoffman's letterhead, which stated that: "The Department has obtained purchase, rental, and installation cost information for both the G.R.E.A.T. (CZ) and ADIEM devices. This cost data documents a substantially lower cost basis for the ADIEM units and this lower cost basis must be reflected in the basis of payment proposed to the Department for these units." (N.T. 37-39; Ex. P-10)

18. Mr. Hoffman stated that PaDOT specifications provide, at 110.02 (d):

The term "significant change" applies only to the following circumstances: [w]hen the work as altered differs materially in kind or nature from that involved or included in the original proposed construction, or [w]hen an item of work is increased to in excess of 125% or decreased to below 75% of the original contract quantity. Any allowance for an increase in quantity applies only to that portion in excess of 125% of the original contract item quantity or, in case of a decrease below 75%, to the actual quantity of work performed.

Mr. Hoffman testified that the specifications also state that in the event the District Engineer and contractor cannot agree on a tentative price for extra work, and if the work is such that force-account records can be kept by the Department, the District Engineer's writing will state that such work is to be paid on a force-

account basis. (N.T. 41-43; Ex. P-12, P-13)

19. A project control meeting (APCM) occurred on June 8, 1994, and at bullet item 9.13, it states: "No Adiem units are to be utilized per Department letter until a cost adjust is negotiated." (N.T. 45; Ex. P-15)

20. Claimant also called Stacy Chatley as a witness. Ms. Chatley was the President and Owner of Eagle Traffic Control, Inc. and was in the business of providing maintenance and protection of traffic to road construction sites, with signs, drums, flashing message boards, arrow panels, impact attenuating devices and end treatments. (N.T. 113)

21. Ms. Chatley testified that in December, 1993, Eagle took Adiems from one project where they were using them in District 5-0 and took them straight to District 8-0 for the instant project. She stated: "We couldn't even unload them off the truck." Ms. Chatley also stated that she made application at the time to use the Adiems but was not permitted to do so by PaDOT. She further stated that Mr. Bitner would not allow the Adiems off the truck and they would not be used in this district." (N.T. 120-122)

22. Despite PaDOT's letter of April 12, 1994, District 8-0 Assistant District Engineer-Construction, W. Andrew Bitner, P.E., did not permit Eagle to unload Adiem attenuators for use on the instant project. The Adiems had been used in District 5-0 and were brought from that District for use on the instant project. (N.T. 120-122; Ex. P-9)

23. On January 9, 1995, a meeting was held with various representatives of the parties in attendance regarding settlement negotiations of the substitution of Adiem barrier terminals for specified G.R.E.A.T. units on S.R. 11 Sections 5 and 9; however, no meeting report was issued regarding the meeting. (N.T. 47, 48; Ex. P-16)

24. On May 19, 1995, Ms. Chatley sent a letter to JJI stating that during the January 13, 1995, meeting between PaDOT, JJI and Eagle, it was agreed that payment for the G.R.E.A.T. Impact Attenuators would be by force-account basis pursuant to Publication 408, Section 110.02 (d) and 110.03 (a). The letter from Eagle was sent to PaDOT by JJI on May 19, 1995 to Mr. Hoffman. (N.T. 49-51; Ex. P-22, P-24)

25. JJI also sent a letter to PaDOT dated June 19, 1995, to Mr. Hoffman, regarding another Eagle letter authored by Stacy J. Chatley and dated June 16, 1995, informing PaDOT that Eagle would be submitting a claim for the temporary G.R.E.A.T. Impact Attenuating devices. In her letter, Ms. Chatley also stated: "An agreement was made in January 1995 that the additional impacts would be paid under force-account basis. (*sic*) less than 75% quantity would be reached, and this was not adhered to." (N.T. 52; Ex. P-25)

26. Mr. Hoffman acknowledged that the contract on this project, both on a quantity basis and on a money level was reduced below 75% of the original amount. He also acknowledged that in such significant change situations, PaDOT regulations call for the application of a force-account pricing when the parties cannot agree upon a changed price. Both parties acknowledge only 18 G.R.E.A.T. Attenuators were provided by Eagle. (N.T. 56, 57, 177)

27. On July 28, 1995, Drew Bitner sent a letter to JJI on Mr. Hoffman's letterhead stating that:

A difference of opinion exists about any understanding with respect to the basis of payment for Great (CZ) unit installations resulting from the January 1995 Meeting held between the Department, James Julian Inc., and Eagle Traffic Control, Inc. No documentation is available to record the meeting discussion or subsequent actions to be taken by either parties. Force account records have not been maintained for the G.R.E.A.T. (CZ) installations and recreation (*sic*) of representative installation costs from Department field and Eagle Traffic accounting records is questionable. The Department did consider if the G.R.E.A.T. (CZ's) supplied cost more than the contract unit price and the need to renegotiate the price since fewer than 75% of the contract bid quantity were installed. The records indicate that the G.R.E.A.T.'s (*sic*) purchased from Eastern Industries by Eagle Traffic Control did not exceed the contract bid price for these units and, therefore, the Department does not believe their (*sic*) is any obligation to adjust the basis of payment for this item of work.

(N.T. 59-61; Ex. P-27)

28. During cross-examination, Mr. Hoffman stated that he was not aware of any contract modification that was ever issued allowing the contractor to submit an Adiem in lieu of G.R.E.A.T. (CZ) Attenuators. (N.T. 94, 95)

29. Mr. Hoffman also testified that PaDOT controls altering the quantities provided thereby triggering the application of the PaDOT 408 Specifications, and that altering the quantities is not something that the contractor controls. Mr. Hoffman also stated that PaDOT 408 Specifications indicate that the Department reserves the right to make, in writing, at any time during the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project. (N.T. 97, 98; Ex. P-12)

30. Mr. Hoffman had general information, at best, regarding the responsibilities of contractors to first pursue insurance companies with respect to payment for claims of damage done to attenuators. (N.T. 69-75, 101-104; Ex. P-18)

31. Mr. Hoffman, during re-direct examination, acknowledged that Federal Regulations prohibit PaDOT from insisting on proprietary items where an alternative is available; however, Mr. Hoffman stated

that he was aware of several jobs where proprietary items were used on PaDOT jobs. (N.T. 108-110)

32. Ms. Chatley also testified that she was familiar with the different types of impact attenuating devices and at one time G.R.E.A.T. units were the only available unit to use in front of barriers in narrow applications. Ms. Chatley became aware of Syro Industries, who had a new attenuating device to put on the end of barriers, at a trade show and obtained a copy of a memo approving utilization of those attenuating devices by Mr. Bowser as a barrier terminal as of November 3, 1992. (N.T. 114, 115; Ex. P-2)

33. Ms. Chatley testified that she had intended to use Adiem units only as an approved substitute for the G.R.E.A.T. attenuator in certain applications. Ms. Chatley stated that she had, at the time of the contract, both types of attenuating devices. Ms. Chatley further stated that she had CZs or G.R.E.A.T. attenuating devices in her inventory to cover the need for CZs on this project. (N.T. 117-119)

34. Ms. Chatley testified that the cost of a new CZ was over \$14,000.00; however, she bid \$11,250.00 for the CZs because she had CZs in inventory. The retail price for Adiem units was \$9,000.00 and although she also had Adiems in inventory, she intended to purchase Adiems for the project as well. (N.T. 118-120)

35. Ms. Chatley stated that Mr. Bitner was aware of the various documents discussing the propriety of utilizing Adiem units and that she had attended a January, 1995, meeting, wherein Mr. Bitner was present. She indicated that Mr. Bitner, at the January 1995 meeting, seemed unaware of PaDOT's letter and attachment of April 12, 1994. She also stated that when Mr. Bitner was provided with the document he: "Turned all red, walked out of the room with counsel, then came back in and said, 'You know what? We want you to put the G.R.E.A.T.S. in but we'll pay for them force-account.'" (N.T. 126; Ex. P-9)

36. Ms. Chatley denied that Eagle was unable to supply approved products to satisfy the uses called for in the project plan. She also noted that Eagle was never found in default of the subcontract nor was Eagle ever cited by PaDOT or JJI for not being able to perform. (N.T. 127)

37. Ms. Chatley sent a letter to Mr. Bitner dated August 1, 1994, which stated that Mr. Bitner's opinion on the performance of Adiems was "disturbing". Ms. Chatley stated in her letter that if in fact the product was not to be considered for any installation within Mr. Bitner's jurisdiction, she would have to re-evaluate her position in the market, in effect making a decision whether or not to carry the Adiem product in her line. (N.T. 128; Ex. P-32)

38. In a letter dated April 22, 1994, Ms. Chatley wrote JJI's Project Manager, James L. Au, P.E. regarding PaDOT's request for a submission of a proposed basis of payment for the Adiem units for the Department to review. Ms. Chatley noted in her letter that Eagle bid the Adiem units on the initial bid

and never intended to use the G.R.E.A.T. units. She further noted that the competition pricing was \$14,414.00 whereas Eagle's bid was \$11,250.00 representing a savings of \$3,164.00 per unit or \$107,576.00 for 34 units. (N.T. 130, 131; Ex. P-34)

39. On July 11, 1994, JJI sent a letter to Mr. Hoffman, with an enclosure from Ms. Chatley dated July 5, 1994, offering a price reduction of \$500.00 per each Adiem unit placed in service. PaDOT rejected this offer. (N.T. 132, 133; Ex. P-35)

40. On July 20, 1994, Ms. Chatley sent another letter to JJI's Project Manager, Mr. Au, indicating that PaDOT had recognized the Adiem as acceptable for use in 32 locations and that all remaining impact attenuators placed on the project would be Adiems. This letter was transmitted to PaDOT, who was requiring approximately a 45% reduction from the contract bid price for the Adiem units according to the hand-written notes on the bottom of Ms. Chatley's July 20, 1994 letter. (N.T. 134; Ex. P-37)

41. Ms. Chatley stated that Eagle used force-account specifications 110.03 (d) (3) in calculating Eagle's invoice through JJI in the amount of \$382,578.23. Ms. Chatley explained that she took the total equipment costs, plus the 5% overhead for equipment, subtracted what she had been paid and arrived at the \$382,578.23 amount. (N.T. 143-146; Ex. P-13, P-40)

42. Section 408 Specification 110.03 (d) (3) reads in pertinent part as follows:

The daily rental rate for equipment used for maintenance and protection of traffic (signs, flashers, barricades, drums, etc.) on a 24-hour basis will be determined by dividing the monthly rental rate by 22. To the above rates, add the predominant area adjustment percentage for the State as shown on the area adjustment map in the Rental Rate Blue Book for Construction Equipment. . . . For equipment used for maintenance and protection of traffic (signs, flashers, barricades, drums, etc.), with no rate listed in the Rental Rate Blue Book, use a daily rate computed on the basis of 6% of the manufacturer's list price for the sale (new) of this equipment, divided by 22, with no percentage added.

(Ex. P-13)

43. The following language appears on PCM #35, dated June 28, 1995 at bullet number 34.14:

Julian believes Drew Bitner stated at the second meeting with the attorney's (*sic*) present that the Department would compensate Eagle on a force-account basis for the costs incurred in excess of the Eagle's original bid price. However, Julian has documentation that Eagle is not incurring any additional costs. In addition, Julian believes Eagle would receive less money on a force-account basis where payment would be six (6) percent of the

purchase price plus labor cost. The reset price would remain \$500.00 each.

(Ex. P-26)

44. Ms. Chatley stated that she arrived at the figure \$382,578.23 by utilizing the Section 408 formula and by calculating the number of days at 548 days. She was not aware of any force-account record kept by PaDOT and although she requested them, none were provided. The net amount claimed due takes into account payments by PaDOT totaling \$202,500.00. (N.T. 144-146; Ex. P-40)

45. In doing the Section 408 force account calculation, Ms. Chatley asserted that she took the price of the impact attenuating device plus the spare parts, and I got a daily rate. However, Ms. Chatley was unable to explain the specific calculation she made to arrive at the daily rate of \$56.49 presented in Eagle's force account billing provided as Plaintiff's Exhibit 40. (N.T. 143-146; Ex. P-40)

46. Ms. Chatley asserted that spare parts were needed for the G.R.E.A.T. attenuators provided. (N.T. 143-145)

47. Ms. Chatley testified that Eagle performed repairs to a number of traffic control devices and there was absolutely no problem cited by the parties with respect to the quality of the repairs. While she believed JJI had pursued auto insurance companies, Ms. Chatley had no knowledge as to whether or not JJI collected on such claims. She stated Eagle had requested payment of the invoices, related to the repairs, from PaDOT. She has supplied PaDOT with the appropriate documentation regarding the repairs, but Eagle was never paid. (N.T. 148, 149; Ex. P-17, P-18)

48. Ms. Chatley testified that she resubmitted a request for payment for repairs performed on attenuators to PaDOT, as per their request. (N.T. 148, 149)

49. Under cross-examination, Ms. Chatley acknowledged that she was familiar with PaDOT's bulletins and the fact that a material cannot be used on a project unless it's listed in the bulletin, except perhaps, for new products on an express written provisional basis by PaDOT. (N.T. 152-154)

50. Ms. Chatley also acknowledged that the subcontract Eagle entered into with JJI listed several items to be provided and although G.R.E.A.T. attenuators were listed, Adiems were not listed. (N.T. 155, 156)

51. Ms. Chatley testified that she did not provide either PaDOT or JJI information in writing, prior to the bid, indicating she was utilizing Adiems in lieu of the G.R.E.A.T. attenuators. She also acknowledged that she also did not provide PaDOT with any written statement regarding any proprietary items. (N.T. 157, 160)

52. Ms. Chatley stated under cross-examination that she intended to utilize two to four

G.R.E.A.T. attenuators on the project. (N.T. 162)

53. Ms. Chatley, under cross-examination, also acknowledged that the "Adiem-2" was approved for use and inclusion into Bulletin 15 on June 7, 1996. However, Ms. Chatley contends that the Adiem-1 was approved prior to that date by virtue of PaDOT's letter of April 12, 1994. (N.T. 199-201; Ex. D-2; Ex. P-9)

54. Ms. Chatley agreed that PaDOT had ongoing studies regarding the usage of the Adiem attenuator subsequent to the initiation of the project. (N.T. 203-205; Ex. D-3)

55. Ms. Chatley testified, under cross-examination, that the PaDOT Deputy Secretary for highway administration (Mr. Ryan), in a letter discussing the Adiem as a possible alternate end treatment for concrete median barriers, stated that: "Each District will determine the appropriate uses for the various systems until the guidelines are developed. In cases where a specific system is specified for a job and there is a subsequent substitution with another system, it will be necessary to negotiate price adjustment." (N.T. 205-207; Ex. D-3)

56. Ms. Chatley acknowledged that, with respect to the repair issues, JJI could have been paid by PaDOT for certain repairs and not tendered payment to Eagle. Ms. Chatley also acknowledged that PaDOT had issued a letter to JJI in which the Department directed that they would process a work order for four (4) invoices totaling \$10,769.04 for damage done to attenuators. Eagle was paid that amount pursuant to work order 343. (N.T. 217-220; Ex. D-5)

57. Ms. Chatley stated that Eagle received a copy of a letter signed by Lester Nace on Mr. Hoffman's letterhead, dated February 10, 1998, wherein PaDOT represented their position was as follows: "Eagle could not provide the number of units required within the time frame established by Julian's construction progress. Eagle's inability to provide great CZ's when needed to maintain work zones as required forced Julian to resort to alternative installations, which were paid for by PennDOT." Ms. Chatley did, however, state that she received no notice whatsoever during the course of the project that Eagle was considered in breach of its subcontract. (N.T. 234, 235, 240; Ex. D-7)

58. PaDOT, in its Response to Requests for Admissions, acknowledges at paragraphs 2, 3 and 12, that no document exists that concludes Eagle Traffic Control, Inc., was in breach of its subcontract. (N.T. 240; Ex. P-14)

59. Ms. Chatley, again under cross-examination, candidly acknowledged that Bulletin 15, Publication 35, March, 1993 Edition, at Section 696.2 (Temporary Impact Attenuating Devices) lists the G.R.E.A.T. (CZ) attenuators but does not list the Adiem attenuators. (N.T. 236, 237; Ex. D-8)

60. Ms. Chatley stated that she had reviewed project control meeting minutes produced by PaDOT and that there was no indication in any meeting minute that was produced by PaDOT that Eagle

was unable to produce (attenuators) at any point in time. (N.T. 241; Ex. P-30)

61. The Commonwealth called John L. Cole who was employed by PaDOT from 1960 to 2001. Mr. Cole spent the first 18 years of his career with PaDOT in highway construction supervision and management and spent the next 10 years in the Operations Review Group directly under the Secretary of Transportation. Mr. Cole finished his career at District 8-0 as Assistant Construction Engineer for the District. Mr. Cole was familiar with the performance of PaDOT contract 089040. (N.T. 272, 273)

62. Mr. Cole testified that JJI complained to PaDOT that they had to re-sequence work because of the lack of production by Eagle. This exchange took place in April of 1995. Mr. Cole stated that the re-sequencing of work was related to the issue of providing attenuators on this job. (N.T. 274, 275)

63. Mr. Cole testified that the subcontract makes no reference to the provision of Adiem attenuators, but rather required G.R.E.A.T. attenuators and that the Department's position was that the Adiems was not an approved product. (N.T. 277, 279)

64. Mr. Cole also testified that he was familiar with the difference between Adiem and CZ attenuators and that CZ units would be placed at the end of a permanent barrier to reduce and diminish the impact load of an errant vehicle so that the occupants would not suffer physical damage on a head-on collision. If hit on the side, the CZ unit would redirect you so that you would not hit the movable (*sic*) object.² Mr. Cole testified that the Adiem is not an attenuator but rather a terminal section that will absorb an impact if its hit head-on, but if it's hit on the side the errant vehicle would go through the product and then hit the immovable object behind or hit on-coming traffic in the opposite direction. (N.T. 282, 283)

65. Mr. Cole testified that PaDOT did not reduce the amount of CZ attenuators provided for in the contract from 34 to 18, although he acknowledged the total number of G.R.E.A.T. attenuators placed by Eagle was in fact only 18.³ He further stated he was required to interpret and/or implement the

²The Board will assume either a transcription error or that Mr. Cole was referring to an *Immovable* object rather than a *Movable* object.

³Eagle's subcontract with JJI clearly calls for the installation of 34 G.R.E.A.T. attenuating devices. Two of the G.R.E.A.T. units were two-foot in width and 32 of the units were two-foot, six-

Department's 408 Specifications and that 75% of 34 attenuators would equal 24 units. Mr. Cole stated that a force-account submission, on the instant case, would require 6 additional CZ units, since 18 were already provided. (N.T. 285, 286, 288, 289; Ex. P-40)

66. Mr. Cole stated he had personal knowledge of the attenuator damages and testified that JJI was given an option as to whether they preferred to be paid for repairs to damaged attenuators by the insurance companies or PaDOT. Mr. Cole stated that JJI sought reimbursement from the insurance companies and were paid for their submission to insurance companies for the damage done to attenuators. Mr. Cole also had a discussion with Ms. Chatley of Eagle regarding the issue and testified that Ms. Chatley stated a preference as well for payment by the insurance companies, claiming they paid faster than PaDOT. (N.T. 291-293)

67. Mr. James Au of JJI sent a letter to Eagle Traffic Control, dated July 26, 1994, which indicated that JJI would A . . gladly accept Adiem units if you can satisfy the departments (*sic*) credit/requirements.@ The letter also contained the following language: ARegarding the changes to the number of units required, as is the case with all contract changes, it was directed by the resident engineer.@ Mr. Cole stated that, in response to Mr. Au's letter of July 26, 1994, it was the position of JJI to blame somebody else Ato be the devil.@ (N.T. 308; Ex. P-43)

68. PaDOT never provided Eagle with any documentation whatsoever alleging that Eagle was in breach of its subcontract. (N.T. 240; Ex. P-14)

69. On January 9, 1995, settlement negotiations were held with various representatives of the parties in attendance regarding the substitution of the Adiem barrier terminals for the G.R.E.A.T. attenuators. At that meeting, Mr. Bitner directed Eagle to utilize only G.R.E.A.T. attenuators but agreed, on behalf of the Commonwealth, to pay for them on a force-account basis. The Board views Ms. Chatley's testimony regarding this meeting as credible. (N.T. 126, 141, 146; Ex. P-16, P-22, P-24)

70. Eagle only supplied 18 of 34 G.R.E.A.T. attenuators as was ultimately confirmed by change orders dated November 1, 1995 and August 9, 1996, directed to JJI by PaDOT. (N.T. 177, 285, 289; Ex. P-28)

71. The original contract, both on a quantity basis and from a monetary stand point, was reduced below 75% of the original amount, in that Eagle only provided 18 G.R.E.A.T. attenuators. (Board

inch in width devices. Change Orders reduced the number of G.R.E.A.T. attenuators by 16. (Ex. P-28)

Finding)

72. The manufacturer's list price for the sale (new) of the G.R.E.A.T. attenuators to be utilized in the Section 408 Specification, 110.03(d)(3) which the Board finds most appropriate is \$14,100.00 per unit. (N.T. 118-120, 129-131; Ex. P-33)

73. Eagle has not established that spare parts were provided for the 18 G.R.E.A.T. attenuators supplied to PaDOT, nor has Eagle established the manufacturer's list price for the spare parts it claims were supplied as part of the force account. (Board Finding)

74. The correct daily rate to be utilized in the force account calculation pursuant to Section 408, 110.03(d)(3) for the 18 G.R.E.A.T. attenuators is \$38.45 (\$14,100 multiplied by .06 and divided by 22). (Board Finding)

75. Eagle established that the correct number of days to be utilized for the force account calculation for the 18 G.R.E.A.T. attenuators pursuant to Section 408, 110.03(d)(3) is 548 days. PaDOT did not keep or provide its own record of days used for these attenuators, nor did it effectively challenge Eagle's 548 day number. (N.T. 145-146; Board Finding)

76. The outstanding amount due Claimant pursuant to force account per Section 408 for the 18 G.R.E.A.T. attenuators is \$195,734.34 (18 G.R.E.A.T. attenuators multiplied by \$38.45/day multiplied by 548 days, plus 5% for overhead and profit, less \$202,500 paid to date). (Board Finding)

77. The exhibits introduced at trial establish a net due Eagle for repair of attenuators, taking into account credits for payments made by PaDOT and credits paid by insurance to JJI, (including the additional sums identified on Plaintiff's Ex. 18) in the amount of \$22,673.71. (N.T. 147-150, 218-220; Ex. P-17, P-18)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the subject matter of this action 72 P.S. ' 4651-4.
2. The Board of Claims has jurisdiction over the parties.
3. James Julian, Inc. had a valid and binding contract with the Commonwealth of Pennsylvania, Department of Transportation and entered a into valid and binding subcontract agreement with Eagle Traffic Control, Inc. regarding road reconstruction of Sections 009 and 005 of State Route 11 in PaDOT District 8-0.
4. Per the subcontract, Eagle agreed to assume all duties and requirements imposed upon JJI

by the Commonwealth.

5. The Subcontract required JJI to provide 34 G.R.E.A.T. impact attenuating devices at a unit price of \$11,250.00.

6. Eagle's attempts to substitute ADIEM attenuators for G.R.E.A.T. attenuators on this project was based on application of federal law (CFR 635.411 3 (e)); PaDOT 408 Specification 107.05; a November 3, 1992, letter from PaDOT's then Director of Bureau of Design and later, PaDOT's letter of April 12, 1994 from Jeff Miller (for Barry G. Hoffman, District Engineer). Eagle's requests to substitute ADIEM's for G.R.E.A.T. attenuators did not constitute a breach of Eagle's subcontract agreement.

7. There were numerous communications regarding Eagle's attempts to substitute ADIEM attenuators for G.R.E.A.T. attenuators on this project, which began with its August 6, 1993 memo to JJI and included: the December 15, 1993 JJI letter to Bitner; the April 12, 1994 PaDOT letter from Miller (for Hoffman) to JJI; numerous other communications back and forth with JJI and PaDOT officials; and the January 9, 1995 meeting between PaDOT, JJI and Eagle to resolve the substitution issue. These ongoing communications confirm that PaDOT did not view Eagle's attempts to substitute the ADIEM's as a breach of contract.

8. PaDOT produced no credible evidence that Eagle breached its subcontract by failure to make product available as needed.

9. A January 9, 1995 meeting between PaDOT, JJI, Eagle, and others was held to resolve the issue of substituting the ADIEM attenuators for the G.R.E.A.T. attenuators. At that meeting PaDOT officials rejected use of ADIEM's but agreed, on behalf of PaDOT, to resolve the substitution issue by paying for G.R.E.A.T. attenuators on a force account basis.

10. The original contract, both on a quantity basis and from a monetary stand point, was reduced below 75% of the original amount, in that Eagle only provided 18 G.R.E.A.T. attenuators.

11. Both PaDOT's agreement at the January 9, 1995 meeting referenced in paragraph 9 above and PaDOT 408 Specifications which were in effect at the time of the instant dispute, specifically Section 110.02 (d) and 110.03 (d) (3), dictate the application of force-account payment and the amount to be paid. The Board rejects John L. Cole's interpretation of the Department's 408 Specifications to the effect that only 6 additional G.R.E.A.T. attenuators should be paid for on a force-account submission. The force account formula applies to all 18 G.R.E.A.T. attenuators, the actual amount of work performed below 75% of the original contract quantity.

12. The Board rejects Mr. Bitner's contention in his letter of July 28, 1995, that a difference of opinion exists with respect to the basis of payment for G.R.E.A.T. attenuators. Mr. Bitner acknowledged that force-account records were not maintained for G.R.E.A.T. attenuator installations and that Eagle Traffic

accounting records were questionable, leading the Board to conclude that had PaDOT kept force-account records as promised, Eagle would have been paid on a force-account basis.

13. The Commonwealth provided no credible evidence which challenged Eagle's use of 548 days and 18 G.R.E.A.T. attenuators in Eagle's force account calculation, and these will be accepted as accurate.

14. Eagle did not carry its burden of proof to establish a daily rate for the G.R.E.A.T. attenuators of \$56.49 as claimed in Ex. P-40. The evidence provided establishes a daily rate of \$38.45 for the G.R.E.A.T. attenuators (\$14,100 manufacturers list price multiplied by .06 then divided by 22).

15. PaDOT did not effectively challenge Eagle's claim for repair to damaged attenuators totaling \$52,057.04. Eagle received payment in the amount of \$10,985.72 and further acknowledged JJI received insurance payments totaling \$18,397.61.

16. Although Eagle claims JJI never tendered payment it received from the insurance companies for work done by Eagle to repair damaged attenuators in the amount of \$18,397.61, the Board views that as a contractual issue and/or dispute between Eagle and JJI and will give the Commonwealth a credit in the amount of \$18,397.61, making Eagle's net claim for repaired attenuators \$22,673.71.

17. An award will be entered against PaDOT and in favor of JJI, for the use and benefit of Eagle Traffic Control, Inc. in the amount of \$195,734.34 for payment of outstanding amounts under force account between the parties and \$22,673.71 for repairs to attenuators due to Eagle, making the total award \$218,408.05. Interest will be awarded based upon Claim accrual dates.

OPINION

A panel hearing of this matter was held on November 6 and 7, 2002. The Panel Report was submitted and reviewed.

This action was initiated by the Claimant, James Julian, Inc. (AJJI@), for the use and benefit of Eagle Traffic Control, Inc. (AEagle@) on August 7, 1998. The Claim was filed in the amount of Four Hundred Twenty-Two Thousand Five Hundred Seventy-Eight Dollars and Twenty-Three Cents (\$422,578.23) against the Commonwealth of Pennsylvania, Department of Transportation (APaDOT@ or Athe Commonwealth@). On October 9, 1998, PaDOT filed an Answer and New Matter. Claimants responded to PaDOT's New Matter on November 5, 1998. The parties engaged in discovery until May 29, 2001, when JJI filed a Motion for Partial Summary Judgment and Supporting Memorandum of Law. On July 27, 2001, PaDOT filed a Response to the Motion for Partial Summary Judgment and Supporting Brief. On October 10, 2001, the Board rendered an Opinion denying and dismissing the Motion for Partial Summary Judgment. On September 3, 2002, the Board rendered an Order scheduling the matter for hearing before the Board's panel. As indicated above, on November 6, 2002 and November 7, 2002, the hearing was held before the panel and on January 13, 2003, the Claimants' Proposed Findings of Fact and Conclusions of Law and Supporting Memorandum were filed. On February 12, 2003, PaDOT filed Proposed Findings of Fact, Conclusions of Law and a Supporting Memorandum of Law. On March 25, 2003, the panel report was filed by the panel members.

JJI was awarded PaDOT Contract No. 089040 (the AProject@) as general contractor. The Project concerned road reconstruction of Section 009 and 005 of State Route 11 in PaDOT District 8-0. Eagle entered into a Subcontract Agreement (the ASubcontract@) with JJI to provide various traffic control devices for the Project. This dispute primarily concerns the Subcontract which was dated July 22, 1993. The Subcontract contained a requirement for Eagle to provide 34 G.R.E.A.T. impact attenuating devices, or Acz@ attenuators, at a unit price of Eleven Thousand Two Hundred Fifty Dollars (\$11,250.00).

The entire dispute stems from Eagle's desire to substitute attenuators produced by Syro Steel Company (ASyro®), also known as Advanced Dynamic Impact Extension Module (AAdiem®), in place of the G.R.E.A.T., or Acz® attenuators. On August 6, 1993, Eagle submitted a memo entitled Aletter of transmittal® to JJI indicating that Eagle intended to use either the Adiem attenuators or the G.R.E.A.T. attenuators. Pursuant to the Subcontract, Eagle was to provide 34 G.R.E.A.T. attenuating devices and there is no question that Eagle, as the Subcontractor, agreed to assume all of the duties and requirements imposed by the contract on JJI.

On December 15, 1993, JJI sent to PaDOT a letter to the attention of W. Andrew Bitner, P.E., stating there would be a Achange to our Source of Suppliers . . . for the G.R.E.A.T. Impact Attenuator.® As to contract item numbers 0696-0038 and 0696-0039, JJI stated it would utilize the Adiem attenuators. On December 17, 1993, PaDOT, per Barry G. Hoffman, P.E. sent JJI a response to their December 15, 1993 letter, wherein the Commonwealth advised JJI that the substitution of the Adiem devices was considered a proposed Adesign change.® PaDOT's letter of December 17, 1993, further indicated that the Adiem device manufactured by Syro, although approved as a barrier terminal, was not approved as a crash cushion. The Commonwealth's letter further stated that Acost considerations associated with this change must be addressed.® And so the dispute began.

There is no question Eagle had legitimate reasons for believing that the substitution of the Adiem attenuators would be acceptable to the Commonwealth. The project was one receiving federal funding and the federal limitation on requiring specific trade name materials made it reasonable for Eagle to question whether it could substitute ADIEM's for the G.R.E.A.T. attenuators identified in the contract. Eagle's President and Owner, Stacey Chatley, testified that she had taken the Adiem attenuators from one PaDOT

project (District 5-0), where the ADIEMs had been accepted for use. Furthermore, Ms. Chatley was aware of a "strike-off" letter, number 43092-112, dated November 3, 1992, wherein PaDOT's Director of Bureau of Design, Fred W. Bowser, P.E. stated that the Adiem attenuator had been accepted as a barrier terminal.

The ability to substitute ADIEMs for G.R.E.A.T. attenuators however was not clear cut for all uses. Mr. Bowser also noted in his November 3, 1992, memo that the Adiem attenuator was not accepted as a crash cushion and additional tests would be required to qualify that barrier as a crash cushion. Moreover, Mr. Bitner would not permit Eagle to unload the ADIEMs off the truck in District 8-0. Given the Commonwealth's letter of December 17, 1993, asserting the ADIEMs to be a design change, and the parties' failure to adequately agree on cost considerations, one would think Eagle's claim would end there. However, the parties are in complete agreement that Eagle was never advised in writing or otherwise that it was in default of the Subcontract agreement during the project. Instead, the Commonwealth argued with Eagle about the price of the Adiem attenuator substitution, ultimately insisting on utilization of the G.R.E.A.T. attenuators.

The parties now dispute how payment for the 18 attenuators that were placed by Eagle should be tendered. Unfortunately for the Commonwealth, their complaints regarding Eagle's ability to perform were "too little and too late" to be convincing, particularly in light of the testimony surrounding the January 9, 1995, settlement conference which was held between the parties. In addition, the documents authored by PaDOT, which specifically permitted the use of Adiem attenuators in a great number of locations, does not bode well for PaDOT. Where one party to a contract is the cause of another's failure to perform, it cannot assert the failure against the other. Com. Dept. of Property and Supplies v. Berger, 11 Pa. Cmwlth. 332,

312 A.2d 100 (1973).

The first witness to testify for the Claimant was Barry Hoffman, the District Engineer during the course of this particular Project. Mr. Hoffman, who was subpoenaed by the Claimant, acknowledged that the Subcontract between JJI and Eagle called for 34 G.R.E.A.T. attenuators with \$382,500.00 allocated for those impact attenuating devices. Mr. Hoffman also acknowledged that the Adiem was an acceptable product for use in the Project, but not in all applications. The fact that the Adiem was not recommended by the FHWA where possible penetration by high speed, high angle impacts could not be tolerated was set forth in a letter from Michael M. Ryan, P.E., the Chief Engineer for Highway Administration of PaDOT, to Mr. Hoffman dated March 21, 1994.

In a letter the Board views as significant to the Claimants' case, PaDOT's Jeff Miller, on Mr. Hoffman's letterhead, sent a letter to JJI dated April 12, 1994. In that letter, Mr. Miller indicates that ADIEM units will be permitted for use only in certain locations, which were specifically listed in an attachment to the letter; however, the attachment indicates that Adiems could be used in 37 locations. The attachment required G.R.E.A.T. attenuators be utilized in 4 locations. Ms. Chatley's testimony regarding this letter was enlightening. Ms. Chatley stated that she attended a January, 1995, meeting wherein Mr. Bitner was present.⁴ She indicated that Mr. Bitner seemed unaware of PaDOT's letter and attachment of April 12, 1994, and that when he was provided with the document he: "[t]urned all red, walked out of the room with counsel, then came back in and said, >You know what? We want you to put the G.R.E.A.T.s in but we'll pay for them force-account=."

⁴Although the meeting may have involved some settlement dialog, the Commonwealth tendered no objection regarding this testimony. (N.T. 125, 126)

The Board views both the existence of the April 12, 1994 letter and Ms. Chatley's explanation of Mr. Bitner's response when he apparently saw the letter for the first time at a settlement meeting, quite compelling. As the fact finder, this Board has to judge the credibility of the witnesses and weigh their testimony. Miller v. C.P. Centers, Inc. 344 Pa. Super. 623, 483 A.2d 912 (1984); Kaplan v. Redevelopment Authority of City of Philadelphia, 44 Pa. Cmwlth. 149, 403 A.2d 201 (1979). In the instant case, to the extent there is a "difference of opinion" as to what occurred at the January, 1995 meeting, we accept Ms. Chatley's version as more credible.

Other actions lend credence to Ms. Chatley's contention that an agreement to pay Eagle on a force-account basis for the G.R.E.A.T. attenuators was reached between the parties on January 9, 1995. Ms. Chatley sent a letter to JJI stating as much on May 19, 1995. JJI forwarded the letter from Eagle to PaDOT's Mr. Hoffman on that same date. Although at trial, Mr. Hoffman acknowledged that the Project was reduced below 75% of the original amount both "on a money level" and on a quantity basis, the Commonwealth felt "a difference of opinion" existed as to any understanding with respect to the basis for payment of the G.R.E.A.T. attenuator installations by Eagle. Conveniently, the Commonwealth purposely chose not to record any minutes from the January 9, 1995, meeting seemingly on advice of PaDOT counsel (Ex. P-16); chose not to keep any force-account records and offered no testimony from anyone present at the January 9, 1995, meeting to contradict Ms. Chatley. These actions strengthen Ms. Chatley's credibility on these issues while undermining PaDOT's. In short, the Board views such factors as convincing proof that PaDOT is attempting to avoid its obligation of payment via force account for the 18 G.R.E.A.T. attenuators as agreed upon by the Commonwealth at the January 1995 meeting. The Board views with equal skepticism the Commonwealth's attempt, after the fact, to blame the dispute on Eagle's alleged

inability to provide attenuator units when needed on the job.

The parties readily agree that only 18 G.R.E.A.T. attenuators were ultimately placed by Eagle. While the Commonwealth attempted to deny ever agreeing to pay for Eagle's placement of the 18 G.R.E.A.T. attenuators on a force-account basis, PaDOT's 408 Specifications also tell a different story. The 408 Specifications promulgated by PaDOT, at Section 110.02 (d):

The term "significant change" applies only to the following circumstances: [w]hen the work as altered differs materially in kind or nature from that involved or included in the original proposed construction, or [w]hen an item of work is increased to in excess of 125% or decreased to below 75% of the original contract quantity. Any allowance for an increase in quantity applies only to that portion in excess of 125% of the original contract item quantity or, in case of a decrease below 75%, to the actual quantity of work performed.

Section 110.03 (d) (3) of the PaDOT 408 Specification reads as follows:

The daily rental rate for equipment used for maintenance and protection of traffic (signs, flashers, barricades, drums, etc.) on a 24-hour basis will be determined by dividing the monthly rental rate by 22. To the above rates, add the predominant area adjustment percentage for the State as shown on the area adjustment map in the Rental Rate Blue Book for Construction Equipment. . . . For equipment used for maintenance and protection of traffic (signs, flashers, barricades, drums, etc.), with no rate listed in the Rental Rate Blue Book, use a daily rate computed on the basis of 6% of the manufacturer's list price for the sale (new) of this equipment, divided by 22, with no percentage added.

Although the Commonwealth could have gone to great lengths to challenge Ms. Chatley's calculations of damages, pursuant to the above-quoted sections of the PaDOT 408 Specifications, in reality PaDOT did not wage much of a challenge. The Commonwealth introduced John L. Cole, who was employed by PaDOT from 1960 to 2001. Although Mr. Cole's credentials were impressive, his interpretation of the 408 Specifications was unpersuasive. Mr. Cole opined that since the original contract required the placement of 34 attenuators, 75% of 34 was equal to 24 units. Under Mr. Cole's analysis, since Eagle

placed 18 units, they could be paid for only an additional 6 units on a force-account submission. This analysis flies in the face of both the testimony elicited at trial and the clear language of the 408 Specifications, which requires the Board to apply the force account allowance to the actual amount of work performed below the 75% of the original contract quantity.

While PaDOT did not persuade this Board as to its interpretation of the 408 Specifications or effectively challenge Eagle's assertion that the 18 attenuator units were in place for 548 days, Eagle itself did not establish the accuracy of the daily rate utilized in its force account calculations. Specifically, Eagle was unable to explain how it arrived at \$56.49 per day for these attenuators. Instead it provided evidence of the manufacturer's list price for the G.R.E.A.T. attenuators of \$14,100 per unit, which produces a daily rate of \$38.45. Although Eagle asserted that spare parts were also needed, it failed to establish that such parts were provided with any of the 18 G.R.E.A.T. attenuator units. Additionally it did not establish the cost of these parts. This lack of proof along with Eagle's inability to explain how it arrived at its daily rate persuades the Board that application of the formula to the credible evidence provided results in a daily rate for the G.R.E.A.T. attenuators provided of \$38.45.

PaDOT's defense of Eagle's claim for repair work performed on damaged attenuators was also implausible. Ms. Chatley at one point testified that Eagle had been paid \$10,769.04 for damage done to attenuators, although her exhibits establish the payment amount of \$10,985.72. The exhibits introduced at trial indicate, after taking into account credits PaDOT should receive for insurance proceeds paid to JJI, a total outstanding due Eagle for repair work in the amount of \$22,673.71.⁵ Again, the Commonwealth did

⁵While the claim accrual date was obvious as to Eagle's attenuator claim, the date of the claim for the repair of damaged attenuators was not concisely established. (N.T. 72, 148, 149; Ex. P-17, P-

little to challenge Ms. Chatley's calculations, and Ms. Chatley established that she complied with the Commonwealth's requests regarding documenting the claim for repairs. The Claimant does not have to prove its claim with mathematical certainty, but rather the loss claimed has to be substantiated by reliable evidence. Acchione & Canuso, Inc. v. Com. Dept. of Transp., 501 Pa. 337, 461 A.2d 765 (1983); Larry Armbruster & Sons, Inc. v. Public School Bldg. Authority, 95 Pa. Cmwlth. 310, 505 A.2d 395 (1986). In the case before this Board, we believe the Claimant adequately proved its claim for \$218,408.05, comprised of \$195,734.34 outstanding on force account for the 18 G.R.E.A.T. attenuators and \$22,673.71 outstanding for attenuator repair.

An appropriate Order will be entered.

ORDER

AND NOW, this 1st day of December, 2003, it is hereby **ORDERED** that an award be entered in favor of the Claimant, James Julian, Inc., for the use and benefit of Eagle Traffic Control, Inc., and against the Commonwealth of Pennsylvania, Department of Transportation, in the amount of Two Hundred Eighteen Thousand Four Hundred Eight Dollars and Five Cents (\$218,408.05). Interest on the Claim is hereby awarded in the amount of six percent (6%) from the date the Claims accrued. The Board views the repair Claim (\$22,673.71), as having accrued as of the date of the filing of the Claim, i.e. August 7, 1998. The Board views the attenuator Claim (\$195,734.34) as accruing on January 30, 1997, per the Claimant's

billing.

Each party to bear its own costs.

BOARD OF CLAIMS

Jeffrey F. Smith
Chief Administrative Judge

Ronald L. Soder, P.E.
Engineer Member

John R. McCarty
Citizen Member

Opinion Signed