

COMMONWEALTH OF PENNSYLVANIA

ABLE-HESS ASSOCIATES, INC. : BEFORE THE BOARD OF CLAIMS
 :
VS. :
 :
COMMONWEALTH OF PENNSYLVANIA, :
STATE SYSTEM OF HIGHER EDUCATION, :
SLIPPERY ROCK UNIVERSITY : DOCKET NO. 3369

FINDINGS OF FACT

1. Plaintiff is Able-Hess Associates, Inc. (Able-Hess@), a corporation registered to do business in Pennsylvania. (Complaint & Answer para. 1)

2. Defendant is Slippery Rock University of Pennsylvania of the State System of Higher Education (ASlippery Rock@), a government agency and instrumentality of the Commonwealth of Pennsylvania. (Complaint & Answer para. 2)

3. The enabling legislation for the State System of Higher Education (AState System@) is found in Act 188 of 1982, *as amended*, 24 P.S. ' 20-2001-A, *et seq.* The University became a part of the State System on July 1, 1983. (Complaint & Answer para. 2)

4. Able-Hess was awarded a general construction contract (the AContract@) by the Commonwealth of Pennsylvania, State System of Higher Education (AState System@) in the amount of \$3,990,000 for the Physical Therapy Building at Slippery Rock University (the AProject@). (P-1). The contract duration was four hundred (400) days (approximately 13 months) from the Notice to Proceed. (Complaint & Answer para. 4 & 6; P-1)

5. Able-Hess, an experienced general contractor, has been in business since 1968 and has had significant public works school experience, having been involved with thirty-seven (37) separate school projects over the past twenty years. (N.T. 6)

6. In the Notice of Award, Able-Hess was expressly directed not to incur any financial commitments, or otherwise proceed in preparation for the Project, until the Notice to Proceed was issued. This admonition was also contained in the Contract. (Ex. P-1 Rider C at p. 2, Ex. P-5)

7. This directive was particularly significant because of the two design/build aspects of the work. In particular, the specifications provided that two portions of the work scope: (1) the deep foundations/auger cast grout piles; and (2) the structural precast concrete were design/build or performance

specifications. (N.T. 16; Ex. P-2, P-3)

8. Mr. Andrew J. Wilson was Slippery Rock's Project Manager on this Project. (N.T. 316)
9. Mr. Wayne Proud was employed by O'Brien Kreitzberg as Site Manager for the Project. He was the on-site overseer for construction activities. (N.T. 437-438)
10. Mr. Christopher Niemann was O'Brien Kreitzberg's Project Manager for the Project. (N.T. 464-465)
11. Mr. Jeffrey Brown was employed by IKM Incorporated as Project Architect for this Project. (N.T. 498)
12. The Contract was approved and dated by university legal counsel on March 8, 2000. (Ex. P-1)
13. The Contract was approved and dated by the Deputy General Counsel on March 19, 2000. (Ex. P-1)
14. The Contract was approved and given an effective date of March 21, 2000 by the Office of Attorney General. (Ex. P-1). Slippery Rock issued its Notice to Proceed on April 7, 2000. (Ex. P-6)
15. At the preconstruction conference, Andy Wilson, the State Systems' primary representative on the Project, advised Able-Hess that they would not hesitate to terminate Able-Hess and contact their bonding company if they did not perform. (N.T. 16-17)
16. When the Notice to Proceed was issued on April 7, 2000 (Ex. P-6) Able-Hess was allowed to begin final subcontract negotiations and commence the design work associated with its two most important subcontractors - Flexicore Systems, Inc. (Flexicore®) for the structural precast concrete and Richard Goettle, Inc. (Goettle®) for the auger cast piles. In addition, because further information on the building loads was required to finalize the pile design, the building design initially had to precede the auger cast pile design work. (N.T. 21)
17. While Able-Hess properly assumed that all of the required data necessary for the design of the structural precast concrete was included within the bid documents, after the Notice to Proceed was issued Able-Hess received a number of Requests for Information (RFIs) from Flexicore soliciting information which Flexicore needed to calculate the actual building loads and prepare its shop drawings. These included RFIs seeking: (a) actual point loads for the proposed HVAC equipment (Ex. P-7); (b) seismic design criteria/earthquake loading data (Ex. P-8); (c) building use category (Ex. P-9); and (d) wind and snow loads (Ex. P-10). Each of these RFIs were legitimate requests for information not found in the plans and specifications (or the BOCA Code)

and at no point did the State System, its Construction Manager (O'Brien Kreitzberg) or the Architect (IKM) contend otherwise (N.T. 38-39). In fact, IKM provided the requested information (Exs. P-7-10).

18. While IKM's responses to these RFI's were prompt, the need for this information impacted the formulation of Flexicore's bad calculations, which were requested by Goettle, the auger cast pile subcontractor. In fact, after receipt of this information, Flexicore submitted a revised load table. (Ex. P-7, P-8, P-9, P-10, P-24)

19. Shortly after receipt of the Notice to Proceed, the State System advised Able-Hess that the location of the building footprint was going to shift (14' to the South) to avoid having to reroute an electrical duct bank that was directly under the proposed building location. (N.T. 25-26)

20. Shifting the building eliminated the need to reroute this electrical duct bank. (N.T. 319)

21. When the building was shifted and the duct bank maintained, the planned Multi-Media portion of the building still sat on top of the duct bank and could not be built as planned. Slippery Rock did not rule out a future redesign to preserve some type of Multi-Media Center. (N.T. 319-320; drawing A8.4)

22. In late May, a little over one month after the issuance of the Notice to Proceed, and because of the various requests for additional information by Flexicore (and Goettle), Able-Hess requested a face-to-face meeting between the State System, its design team (IKM and its Structural Engineer, Gensert) Able-Hess and its subcontractors (Flexicore and Goettle) to iron out all of the remaining design details and avoid losing any further time through the exchange of correspondence. (N.T. 52-53)

23. At this structural coordination meeting in IKM's offices on June 5, 2000, Flexicore submitted its revised load calculations. With this information, Goettle advised that it could now begin its pile design. (N.T. 58; Ex. P-24)

24. At this meeting, IKM's Structural Engineer, Gensert, acknowledged that the State System had the design responsibility for a portion of the foundation system, the interface between the auger cast piles and the precast concrete. (N.T. 58). Flexicore also requested additional information on certain structural details and connections where the precast concrete interfaced with other construction elements it did not have design responsibility for. (N.T. 59). The State System answered this final inquiry on June 21, 2000. (N.T. 52-53; Ex. P-15, P-24)

25. While Jeff Brown of IKM initially claimed that all necessary design information was in the plans and specifications or the BOCA Code (N.T. 501-502), he subsequently acknowledged that IKM provided the requested supplemental information to Flexicore on the actual mechanical

loads, seismic design and building use category and that these requests for information were appropriate.

(N.T. 524-528)

26. Able-Hess's Structural Engineering Expert, Mr. Ron Carson, established that the various RFIs issued by Flexicore, including most particularly the seismic design factor, the building use category and the point loads for the HVAC equipment, were reasonable requests for information not contained within the plans and specifications or the BOCA Code. (N.T. 178-182, 185-186, 191-192). Mr. Carson also established that a reasonable period of time for the preparation of the precast concrete design submission was six (6) weeks after receipt of all necessary information. (N.T. 183). This period was not contested by any witness offered by the State System. (N.T. 410, 482-483). Andy Wilson also admitted that a two-week period for Goettle's design submissions was reasonable. (N.T. 410)

27. Slippery Rock was concerned that nothing was occurring on-site (N.T. 334) and issued a first Default Notice to Able-Hess on June 1, 2000. (Ex. P-32)

28. Pursuant to the State System's request, the next day, on June 2, 2000, Able-Hess submitted a proposed Recovery Schedule (Ex. P-33), which was subsequently rejected because it shortened the extended durations requested by the other primes to the durations contained on the Construction Manager's Preliminary Schedule. (N.T. 106; Ex. P-33)

29. Just two weeks after the June 5, 2000, meeting Goettle tendered their final design submissions for the auger cast piles. (N.T. 71; Ex. P-27, P-28). In order to further expedite matters, Goettle also agreed to start its production of piles, at its own risk, during the cure time for the test piles. (N.T. 74-75; Ex. P-29)

30. After approval of Goettle's design submissions, the auger cast pile preconstruction meeting was held on June 28, 2000 (N.T. 77; Ex. P-37). Goettle mobilized the next day and by July 12, 2000, they had completed 49 piles, approximately one-third (1/3) of their work. (N.T. 79; Ex. P-38). According to the schedule in place at that time Goettle only had four or five days of work left to do. (N.T. 114; Ex. P-39)

31. The initial design submissions by Flexicore were subsequently rejected by the Architect on June 30, 2000, because their plank subcontractor, North American PreCast, was not PCI certified, even though North American PreCast was specifically identified as an approved fabricator in the specifications. (N.T. 65-66; Ex. P-3). After this rejection, Flexicore self-performed the plank designs which were given to IKM for review. (N.T. 67-68)

32. While the State System's representative, Andy Wilson, complained about the lack of progress on-site by Able-Hess after the bulk excavation was completed, because the contract documents only permitted Able-Hess to commence final subcontract negotiations and the design process for both the auger cast piles and the structural precast concrete after the issuance of the Notice to Proceed (Ex. P-1, P-5), it should have been apparent to the State System that there would be some period of inactivity on-site

until these significant design submissions were prepared, submitted and approved. (Board Finding)

33. When issuing the June 1, 2000, Default Notice, the University requested a detailed recovery schedule by Able-Hess. However, the Project was not behind (N.T. 98) and neither the State System, O'Brien Kreitzberg, nor IKM offered any analysis to establish that the Project was behind. In fact, Able-Hess had only received the initial schedule input from Neuman Plumbing just one week earlier. (N.T. 88-89, 98-99; Ex. P-18)

34. The Default Notice cited insufficient shop drawing submittals relating to the auger cast piles and precast concrete. Just one week earlier, however, Able-Hess had requested a face-to-face meeting with the design team to finally resolve all remaining RFIs by Flexicore and Goettle. This meeting was held on June 5, 2000, just four days after this Default Notice. (N.T. 124; Ex. P-32)

35. The Default Notice also cited Able-Hess' alleged failure to submit a list of subcontractors. However, this list was not due until submission of the first payment application which was not yet due. (N.T. 120-22; Ex. P-32)

36. The final basis for the June 1, 2000, Default Notice was a claimed failure to submit a Schedule of Values. However, Andy Wilson admitted that the Schedule of Values was not required until the submission of Able-Hess' first payment application. (N.T. 403). Moreover, Able-Hess had previously submitted a Schedule of Values which was never approved or rejected by the State System. (N.T. 90, 119; Ex. P-19). Notably, there was no evidence offered by the State System that any other prime contractor had submitted any subcontractor list or Schedule of Values, and no action was taken against any of them. (N.T. 460)

37. Able-Hess responded to the June 1, 2000, Default Notice on June 8, 2000, and justified, in detail, the status of its shop drawing submissions, the project schedule and its other required submissions. In this letter Able-Hess also requested the scheduling of a Dispute Conference under Specification ' 4.3.103 to address this significant issue. (Ex. P-33, P-34)

38. Pursuant to the State System's request, the next day, on June 2, 2000, Able-Hess submitted a proposed Recovery Schedule (Ex. P-33), which was subsequently rejected because it shortened the extended durations requested by the other primes to the durations contained on the Construction Manager's Preliminary Schedule. (N.T. 106; Ex. P-33). Significantly, Mr. Chris Niemann, the Project Manager and the individual in charge of scheduling, admitted that he never analyzed either the timeliness of the input received from the other primes or the extent of the durations they requested, even though he demanded that Able-Hess not shorten those durations. (N.T. 487, 493)

39. On June 8, 2000, Able-Hess resubmitted another recovery schedule, at the Construction Manager's request, in which it reduced only its activity durations. (N.T. 108; Ex. P-35)

40. The specifications only required submission of a bar chart by Able-Hess, not a Critical Path

Method (CPM) Schedule. In addition, Able-Hess's initial schedule to the other primes was to follow the Preliminary Schedule issued by the Construction Manager. (N.T. 80, Ex. D-57 Specification 1320 ' 2.2)

41. The specifications required Able-Hess to furnish each other prime contractor a proposed schedule within fourteen (14) days of the Notice to Proceed. Each other prime was then required to forward its input back to Able-Hess within seven (7) days. Seven days thereafter, Able-Hess was to issue a final approved schedule for signatures. (N.T. 82; Ex. P-1 Rider B at ' 3.8.100)

42. The initial schedule Able-Hess prepared was issued within seven (7) days (instead of 14) and was in accordance with the Construction Manager's Preliminary Schedule (N.T. 86-87) (compare Ex. P-16 with Ex. P-17). However, the other primes did not submit their input, as required, within seven (7) days. Able-Hess did not receive all of this input until May 23, 2000, over one month later than required by specification (N.T. 88-89; Ex. P-18 at p. 3). In fact, Able-Hess submitted a revised schedule on May 17, 2000, before this initial input was received. (N.T. 91-92; Ex. P-19)

43. The input eventually received from the other primes requested durations for their rough-in work significantly in excess of that contained in the Construction Manager's Preliminary Schedule. (N.T. 92-95; Ex. P-21, P-22, P-23; Sadaka Report). They also objected to working simultaneously on different floors, even though the specifications did not prohibit this. (N.T. 96)

44. The Construction Manager never objected to either the delayed submissions or significantly increased durations requested by the other primes. (N.T. 95, 119). In fact, the Construction Manager's lead site representative, Wayne Proud, was completely unaware of the extended durations requested by the other prime contractors. (N.T. 453-454)

45. Jeff Brown of IKM likewise admitted that while he complained to the State System about Able-Hess not submitting a recovery schedule, he was completely unaware of Able-Hess's June 2, 2000 (Ex. P-33), June 8, 2000 (Ex. P-35), and July 6, 2000 (Ex. P-39) recovery schedules that had already been submitted by Able-Hess. (N.T. 532-534)

46. After issuing its June 8, 2000, response, over the next five weeks Able-Hess (and its subcontractors) dutifully proceeded with its shop drawing submittals, finalizing the project schedule and started the auger cast pile work, when it was terminated, without prior notice, on July 12, 2000. (N.T. 129; Ex. P-40). In fact, at the progress meeting on the date of the termination it was agreed by all in attendance that final approval and sign off of the project schedule would be at the next meeting. (N.T. 130, 415-416; Ex. P-50)

47. Able-Hess was never given the Dispute Conference it requested in its June 8, 2000, letter. (N.T. 138)

48. At no point from June 8, 2000 to July 12, 2000 did the State System, its Construction

Manager or the Architect take issue with anything stated in Able-Hess=June 8, 2000, response to the June 1, 2000, Default Notice. (N.T. 133-134)

49. In the July 12, 2000, termination letter the State System articulated the following complaints. First, it contended that Able-Hess= recovery schedule was unrealistic and inaccurate. (Ex. P-40). However, it provided no analysis to support this conclusion and, more significantly, it was referring to an outdated recovery schedule - as Able-Hess=June 8, 2000, recovery schedule had been updated on July 6, 2000. (N.T. 134, 275; Ex. P-39). Second, the State System curiously complained about Able-Hess=lack of mobilization on-site, when Able-Hess had already mobilized, completed the bulk excavation and 49 auger cast piles, one-third (1/3) of this work. (N.T. 135; Ex. P-38). Thirdly, the letter complained about the lack of submittals relating to piling and precast designs, when the auger cast pile submittals had already been made and approved (N.T. 135-136, 377) (Ex. P-27, P-28, P-29) and various submittals relating to the precast concrete had already been submitted to IKM (Ex. P-50 - July 12, 2000, Meeting Minutes). Lastly, the primary basis for the termination was that Able-Hess was behind schedule as of July 12, 2000. However, no witness offered by the State System at the hearing testified that anyone had performed any analysis whatsoever to make this fundamental determination prior to termination. (N.T. 372, 422, 456).

50. Wayne Proud, the lead site representative for the Construction Manager, admitted that he did not even look closely at Able-Hess= July 6, 2000, schedule. (N.T. 460)

51. The termination provision of the contract is contained in Section 13.2.100 of the specifications (Ex. P-1; Rider B at p. 20). It provides, in pertinent part, as follows:

If the Contractor persistently or repeatedly refuses or fails to supply enough properly skilled workmen or proper materials, or persistently disregards law, ordinances, rules, regulations or orders of any public authority having jurisdiction, or fails to proceed as directed by the System, or performs the work unsuitably, or neglects or refuses to remove materials or replace rejected work, or discontinues the prosecution of the work without approval of the System, or otherwise is guilty of a substantial violation of a provision of the Contract Documents, then the System may, without prejudice to any of its other rights or remedies, give the Contractor and its Surety written notice that the Contractor has seven (7) days from the date of the System's notice to cure the default set forth in the notice.

52. Able-Hess did not persistently or repeatedly refuse to supply enough men, fail to proceed as directed by the State System, or otherwise violate any obligations of the contract so as to justify termination by the State System. (Board Finding)

53. No witness offered by the State System testified that he was even consulted on whether or

not Able-Hess should be terminated. (N.T. 456, 478, 514). The author of the initial Default Notice (Ex. P-32) and the termination letter (Ex. P-40), Mr. Revesz, did not testify.

54. Able-Hess was not required to blindly accept and incorporate the extended activity durations requested by the other prime contractors in their schedule submissions, as demanded by the State System. (N.T. 273-274). There was no evidence that the Construction Manager ever objected to these extended durations. (N.T. 284)

55. The extended durations sought by the other prime contractors, which the State System required Able-Hess to include on its schedule, would have extended the project completion date by three months. (N.T. 283)

56. The initial recovery schedule proposed by Able-Hess at the State System's request, in its June 2, 2000 Schedule (Ex. P-33), still provided the other primes with durations greatly in excess of that contained in the Construction Manager's Preliminary Schedule. (N.T. 284-288)

57. The recovery schedule prepared by Mr. Sadaka (dated July 6, 2000) (Ex. P-39), which was the schedule in effect at the time of the July 12, 2000, termination, was fully in accordance with the scheduling specifications (N.T. 275-276) and it contained a completion date within the 400-day contract period, despite all that had transpired on the job up to that point. (N.T. 276)

58. Upon termination of Able-Hess, the surety, St. Paul, assumed its work under a takeover agreement with Slippery Rock. (N.T. 354)

59. St. Paul retained Able-Hess's subcontractors (e.g. Goettle and Flexicore) that had done work already. (N.T. 355)

60. Slippery Rock did not approve any of St. Paul's subcontractors. (N.T. 355). Slippery Rock believed it had no authority over approval of subcontractors once the takeover agreement was signed. (N.T. 420)

61. St. Paul is seeking approximately \$73,000 from Able-Hess. This amount represents the amount St. Paul claims it expended above the work it was compensated for. (N.T. 235)

62. Able-Hess was not behind schedule as of July 12, 2000, the date of termination, as confirmed by an analysis of the actual time taken by the replacement contractor to complete the remaining work. (N.T. 301)

63. The State System's termination of Able-Hess based on either its schedule submissions or the status of the Project as of July 12, 2000, was not justified. (N.T. 302)

64. The contract between the parties contain terminations for convenience clauses which provide as follows:

The System may, at any time and for any reason, terminate this Agreement for the convenience of the System. In such case, the Contractor shall be paid (and shall accept payment) for that portion of the entire Contract actually performed to the date of termination, excluding, however, any loss of anticipated profits. Disputes as to the sum payable to the Contractor shall be settled in accordance with the Disputes Article of the Agreement.

P-1 13.1.100.

In the event the System wrongfully terminates the contract, as determined by disputes resolution procedures in the disputes section of the General Conditions, such termination shall be considered termination for convenience. The Contractor shall be paid only for the work completed to the termination date and for the materials delivered to the site that is peculiar to the project, and for other costs incidental to termination to the date of termination.

P-1 13.2.102

65. The termination for convenience clauses are not enforceable in this particular case because of the State Systems= interference. (Board Finding)

66. Able-Hess incurred \$127,671.68 in unreimbursed direct costs prior to the improper termination by the State System, which it is now entitled to recover. (Ex. P-49A)

67. In addition to these direct costs, Able-Hess= surety, St. Paul, has claimed an additional \$73,483.92 from Able-Hess for its excess costs to complete the Project for the State System. (N.T. 147-149, 237) (Compare Ex. P-47 with Ex. P- 48)

68. Able-Hess= lost overhead and profit on this Project as determined by its historic track record of profitability (16%) on projects of comparable size was \$638,400. (B. Sodini Expert Report; Pretrial Statement, Ex. C). This amount includes a lost contribution to overhead of approximately \$205,000. (N.T. 159)

69. Mr. Sodini=s supplemental damage analysis, prepared at the Panel=s request, included all projects for the 5-year period from 1997 through 2001. This analysis yielded an average gross profit of 10% to 12%, (for the unimpacted years of 97--99) as compared with 16% for just the mid-sized projects. (B. Sodini Supplemental Report C1) (N.T. 249)

70. The 10% gross profit margin is the most reasonable to apply to this case as it is based upon Able-Hess=complete files, not just a select few, and is the annual average for the unaffected year closest to the time of this project. (Board Finding)

71. The Board was not provided with additional argument or detail sufficient to cause further adjustment to this 10% lost profit calculation. (Board Finding)

72. The Board finds that Able-Hess is entitled to a 10% lost profit claim of \$399,000, which the Board finds is reasonable. (Board Finding)

73. Interest shall run on the \$399,000 from the date of completion of the Project.

74. Interest shall run on the \$127,671.68 portion of the award from July 12, 2000, the date of termination of Able-Hess.

75. Interest shall run on the \$73,483.92 portion of the award from May 17, 2001, the date of completion of the Project.

76. The total award shall be \$600,155.60 with interest as indicated herein.

CONCLUSIONS OF LAW

1. The Board of Claims has exclusive jurisdiction to hear and determine this matter as a claim against the Commonwealth of Pennsylvania arising from contracts entered into with the Commonwealth. (72 P.S. ' 4651-4)

2. This claim is brought against Slippery Rock University, a University included in the Pennsylvania State System of Higher Education, a governmental agency, an instrumentality of the Commonwealth of Pennsylvania. (24 P.S. ' 20-2001-A, et seq.)

3. The Board has jurisdiction over the parties as well as subject matter jurisdiction asserted by the Plaintiff. (72 P.S. ' 4651-1, et seq.)

4. The State System's July 12, 2000, termination of Able-Hess Associates, Inc. was wrongful, unjustified, and constituted a breach of contract by the State System.

5. As a direct and proximate result of the State System's wrongful termination and breach of contract, Able-Hess incurred unreimbursed direct costs (\$127,671.68), excess costs for completion through its surety, St. Paul, in the amount of (\$73,483.92) for which Able-Hess is entitled to be reimbursed.

6. Interest on the direct costs of \$127,671.68 shall run from July 12, 2000, the date of termination.
7. Interest on the excess costs of \$73,483.92 shall run from the date of completion, May 17, 2001.
8. As a direct result of the wrongful termination of Able-Hess by the State System, Able-Hess is entitled to \$399,000 in lost profit, which is 10% of the contract.
9. Interest on the \$399,000 shall run from the date of completion of the Project May 17, 2001.
10. The total principal award that Able-Hess is entitled to is \$600,155.60.
11. Parties are to bear their own costs and attorney fees.
12. The specific provisions of Section 13.2.100 qualify the general provisions of Sections 13.1.100 and 13.2.102.
13. The termination for convenience clauses in Section 13.1.100 and 13.2.102 are not enforceable because of the State System's actions in this case which constitute interference with Plaintiff's performance as well as a preceding and essential breach of Defendant's own obligations under the contract.
14. The termination for convenience clauses in Section 13.1.100 and 13.2.102 are not enforceable because the State System's termination of Able-Hess Associates, Inc. was arbitrary.

OPINION

A panel hearing of this matter was held on November 20 and 21, 2002. The Panel Report has been submitted and reviewed.

This matter concerns an alleged improper termination by the Pennsylvania State System of Higher Education of Able-Hess, a general contractor, on a project at Slippery Rock University for the construction of a physical therapy building in the amount of \$3,990,000. Able-Hess was terminated approximately three months into a thirteen month contract.

The Plaintiff's testimony emphasized the considerable behind the scene work, coordinating

subcontractors and design work, preceding construction. The Defendant's testimony pointed to Plaintiff's lack of on-site presence and observable work product at site.

There are three crucial periods of time relative to the contract and activity at issue. The first period is from the date of the contract, March 29, 2000, to April 7, 2000, which was when the Notice to Proceed was issued to all contractors. The second time period begins with the Notice to Proceed April 7, 2000, and ends with the first Notice of Default sent to Able-Hess on June 1, 2000. The third time period begins with the Notice of Default June 1, 2000, and ends with the termination of Able-Hess on July 12, 2000.

In the first time period, very little was being done by Able-Hess in that, by the terms of the contract, Able-Hess was prohibited from establishing formal agreements with subcontractors until a Notice to Proceed was issued.

In the second time period, the Project was in its early stages of intensive design constructions. Plaintiff developed testimony that the pre-cast concrete and piling contractors were unable to proceed smoothly with their work until certain design criteria were established from Defendant=s design team. Though no one contends that Defendant or its agents delayed the transfer of this information, Plaintiff clearly shows that coordination at this phase of the construction project, even with full cooperation, is a time consuming process. There was uncontradicted testimony that a reasonable time period for the development of shop drawings for concrete and auger pilings in this Project was approximately six (6) weeks from the date that all information was received by the production team. Since, by the terms of the contract, Able-Hess was prohibited from contracting with these producers until the Notice to Proceed of April 7, 2000, and assuming that the pre-cast concrete and auger piles could be completed without any further information other than the construction drawings, the earliest possible date for completion of shop drawings would be the end of May. This coincides nearly with the first Notice of Default. It would appear that, in the real world, the expectations of Defendant at this phase were quite unreasonable.

Further, during this time period, the State was making several basic design changes to the building, including relocating the entire footprint some fourteen (14) feet. Though the evidence was conflicting as to the effect of these changes on Able-Hess=progress or lack thereof, these changes are illustrative of the time consuming coordination delays inherent in creating a large building. Despite this, the basic excavation work had been done by the end of the second time period. What was absent were daily work reports from Able-Hess to the construction manager and the lack of a record as to whether other prime contractors were at the building site.

During this second time period Able-Hess was attempting to draft a construction schedule that was

acceptable to the prime contractors and the State. This difficult task was complicated by lack of cooperation from many primes, so that a schedule originally specified by April 21, 2000, did not become final until May 23, 2000. This apparent delay is deceptive, however, in that no other primes could be on-site during this time period in that none of the building had started to rise from the excavations.

As we near the end of this second time period, Able-Hess sees itself as coordinating between the State's design team and their construction contractors in the most intensive design phase of a project that was scheduled to last slightly over a year. Able-Hess hears the interfacing of the different components and feels confident that it is doing what it is supposed to be doing at this phase of the project. The State has a very different perception: it sees neither on-site presence nor work being done, and, due to poor communication from Able-Hess, it hears no reports of progress. The seeds of discord are firmly planted with the April and May rains.

The third time period begins on June 1, 2000, with the State presenting Able-Hess with a Notice of Default. Four items of dissatisfaction are noted. First, no recovery schedule to make up (what the State perceived to be) lost time has been established. Second, shop drawings were still uncompleted. Third, a list of subcontractors and, last, a schedule of values had not been submitted. Able-Hess responded on June 2 and June 8, 2000, as well as throughout the remainder of June, with production schedules that were summarily rejected by the State. The shop drawings, while delayed, were finally ready in late June and were approved at the auger pile preconstruction meeting of June 28, 2000. The list of subcontractors and schedule of values were non-issues, in that the construction contract did not require these until Able-Hess submitted its first payment request, which it never did submit.

During this time period, it became increasingly apparent to Able-Hess that the dissatisfaction of the

State was something more than the normal anxiety of a client. In response, Able-Hess, as it was entitled to under the construction contract, requested a dispute conference to iron out the difficulties that existed between the parties. It is instructive to note that Able-Hess was never granted that conference.

Despite the growing distrust between the State and Able-Hess, there is no doubt that work was being done during the third time period in that the shop drawings were completed, the basic excavation was completed, and the contractor for the auger pilings was on-site and had completed 49 production piles, which was 1/3 of its work. The scene at the end of this time is one where Able-Hess is finally producing observable work, but the State is convinced that the Project is still irreparably behind.

The third time period ends with the State terminating the Able-Hess contract, citing four reasons: lack of an appropriate recovery schedule; lack of mobilization; lack of design submittals; and a general delay in construction. The termination of the contract resulted in the surety, St. Paul Insurance, under the terms of its bond provisions, taking over the Project, hiring another general contractor, and completing the Project. The results of this to Able-Hess were disastrous.

The issue of whether an appropriate recovery schedule was in place as of the date of termination was refuted by the testimony of Plaintiff's expert witness, Michael Sadaka. Mr. Sadaka was brought on board by Able-Hess in late June to produce a recovery schedule all parties could live with. After several failed attempts, he submitted a schedule on July 6, 2000, that was evidently satisfactory in that the subsequent general contractor hired by St. Paul used it to complete the Project on time. However, this schedule was never formally accepted by the State, and six (6) days later Able-Hess was terminated. It would appear that the State never reviewed the schedule submitted July 6, 2000. It seems more probable that Able-Hess's fate was sealed long before the termination date.

The State also claimed that Able-Hess had failed to mobilize and failed to submit design proposals for the pre-cast concrete and the auger piles. Yet on the date of termination, not only had the auger piles design been submitted and approved, but approximately one third of the piling had already been placed. Again, the State's justifications seem outdated as of the date of termination.

However, the real irony of the termination notice is that not one of the State witnesses, even two years later, can ever recall that as of the date of the termination that anyone had ever performed an analysis as to whether the Project was even behind schedule at that point. If the purpose of the termination was to hire another general contractor to insure timely completion, shouldn't someone be able to testify how and why the Project was irreparably behind? This Board's Panel was impressed by Plaintiff's testimony that, sometime after mid-June, no matter what work was done, what design submissions were made, or what recovery schedules were submitted, the State had lost faith in Able-Hess and decided to fire them. What the State never brought into evidence was why. Other than the inability to see the building begin to rise, phoenix-like, it felt justified in firing an experienced general contractor three months into a thirteen month project. This Board's Panel was firmly convinced that the termination of Able-Hess was premature, arbitrary and motivated for reasons other than those developed at the hearing and was unjustified and did not fall within Section 13.2.100 of the contract specifications.

Having concluded that Able-Hess was wrongfully terminated, the issue turns to damages. The State System argues that the termination of Able-Hess is a convenience termination and the contract terms govern the damages that may be awarded.

The contract between the parties provides:

The System may, at any time and for any reason, terminate this Agreement for the convenience of the System. In such case, the Contractor shall be paid (and shall accept payment) for that portion of the entire Contract actually performed to the date of termination, excluding, however, any loss of anticipated profits. Disputes as to the sum payable to the Contractor shall be settled in accordance with the Disputes Article of the Agreement.

P-1 13.1.100.

In the event the System wrongfully terminates the contract, as determined by disputes resolution procedures in the disputes section of the General Conditions, such termination shall be considered termination for convenience. The Contractor shall be paid only for the work completed to the termination date and for the materials delivered to the site that is peculiar to the project, and for other costs incidental to termination to the date of termination.

P-1 13.2.102.

Able-Hess argues that the above provisions are unenforceable exculpatory provisions improperly attempting to shift to Able-Hess the risk of a wrongful termination of contract by the State System.

The significance of these clauses is that, if they are applicable, Able-Hess would be entitled only to payment for work completed, for materials delivered and for other costs incidental to the Project. If the provisions are not applicable Able-Hess would also be entitled to loss of profit and overhead.

The rule in Pennsylvania is that exculpatory provisions in a contract cannot be raised as a defense where (1) there is an affirmative or positive interference by the owner with the contractor's work or (2) there is a failure on the part of the owner to act in some essential matter necessary to the prosecution of the work. Gasparini Excavating Co. v. Pennsylvania Turnpike Commission, 409 Pa. 465, 187 A.2d 157 (1963). In these cases the provisions are unenforceable. Coatesville Contractors v. Borough of Ridley, 509 Pa. 553, 506 A.2d 862 (1986), Com. State Highway & Bridge v. Gen. Asphalt Paving, 46 Pa. Cmwlth. 114, 405 A.2d 1138 (1979)

Here, Slippery Rock moved the building, provided inadequate information needed to prepare building load calculations and shop drawings, improperly identified North American Pre Cast as an approved fabricator in the specifications, failed to hold other primes to scheduling submission deadlines, failed to acknowledge and respond to revised scheduling submissions, and failed to respond to a request for a dispute conference. These actions and failures alone are ample instances of interference to preclude Slippery Rock's use of the exculpatory termination provisions. However the interference did not stop there. Slippery Rock then removed Able-Hess from the job by way of a termination notice that makes it obvious that termination was not sought for convenience under the two convenience clause provisions but was sought under the more specific provisions of Section 13.2.100. This required the State System to present evidence to justify its premature termination. Com. Dept. of Transp. v. Brozzetti, 684 A.2d 658 (Pa. Cmwlth. 1996). As discussed earlier in this opinion, this Board agrees with the panel recommendation that the State System fell short in this burden and that the activity of the State System breached the contract between the parties. This Board can envision no worse an interference with a contractor's work than being kicked-off the job by a wrongful termination. As such, the termination for convenience clauses contained in the instant provisions can not be used as a defense to Plaintiff's claims.

This holding is also consistent with hornbook contract principles that a party who first commits an essential breach of a contract may not then rely on the contract for protection. As stated in Corbin, AA party who has reserved a power of termination loses that power if he himself commits such a breach as goes to the essence and discharges the other party. A subsequent notice of termination has no effect upon the other party's right to full damages for the existing total breach. @ Corbin on Contracts, Interim Ed., Vol. 13, ' 1266 (p 147). See also, Williston on Contracts, 4th Ed., Vol. 23, ' 63.8 (p 453-4). We find that

Slippery Rock's actions here constituted a total breach such that the termination provisions are unenforceable. See e.g., Camenisch v. Allen, 158 Pa. Super. 174, 44 A.2d 309, 310 (1945).

The federal courts, although differing in opinion as to when a contract can be terminated for convenience are in accord that a contract termination for convenience is not available when such termination is tainted by bad faith or abuse of discretion and that the factors to look at for abuse of discretion are: (1) procurement officials bad faith, (2) the reasonableness of the decision, (3) the amount of discretion delegated to the procurement official and (4) violation of applicable statute or regulation. Krygoski Const. Co., Inc. v. U.S., 94 F.3d 1537 (Fed. Cir. 1996). Applying that standard here would also lead this Board to hold that the termination for convenience clauses, in this case, can not be invoked. Based upon the analysis set forth earlier in this Opinion, this Board has no difficulty finding that Able-Hess' contract termination was arbitrary and that the convenience termination clauses can not be utilized in this particular case.

Having decided that these termination for convenience provisions can not be asserted as a defense, we must move now to the damages asserted by Able-Hess. Able-Hess claims damages in three areas.

First, the uncontested evidence established that Able-Hess' direct costs as of termination were \$127,671.68. This Board finds that they are clearly entitled to recover this amount.

Second, St. Paul Insurance, the surety that completed the project when Able-Hess was fired, is holding Able-Hess corporately, and Ray Hess individually, liable for the sum of \$73,483.92. This is the excess cost that St. Paul paid the successor contractors to complete this Project. This cost is directly attributable to the actions of the State System in its wrongful termination. Accordingly, this Board finds that

Able-Hess is clearly entitled to this amount.

It is the third element of damages claimed by Able-Hess for lost overhead and profits that this Board has difficulty with. The claimed amount of \$638,400 represents what Able-Hess alleges to be a typical profit margin of 16% on this type project. At the Board's Hearing Panel request, as the 16% was based on comparable size projects, Able-Hess was requested to analyze all projects from 1997 through 2001. That analysis yielded an average gross profit of 10% to 12%. Accordingly, using the 10% figure, which seems reasonable to this Board, the gross profit would be \$399,000. This Board was not presented with additional argument or details sufficient to cause any further adjustment to this lost profit calculation. Accordingly, this Board finds that the amount of \$399,000 is a reasonable lost profit and will award such.

Therefore, a total award of \$600,155.60 will be made, with interest at the statutory rate from the dates as set forth in this Board's Findings and Order.

ORDER

AND NOW, this 27th day of October, 2003, the Board of Claims hereby finds in favor of the Plaintiff, Able-Hess Associates, Inc. and against the Defendant, Commonwealth of Pennsylvania, State System of Higher Education, Slippery Rock University, in an amount of \$600,155.60, with interest at the statutory rate as follows:

upon \$127,671.68 from July 12, 2000
upon \$73,483.92 from May 17, 2001
upon \$399,000.00 from May 17, 2001

BOARD OF CLAIMS

Jeffrey F. Smith
Chief Administrative Judge

Ronald L. Soder, P.E.
Engineer Member

John R. McCarty
Citizen Member

Opinion Signed