EASTERN LAND MANAGEMENT CORPORATION	:	BEFORE THE BOARD OF CLAIMS
VS.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION	:	DOCKET NO. 3391

FINDINGS OF FACT

1. Eastern Land Management (AELM@) is a business with its primary office located at 841 Old National Pike, Brownsville, Pennsylvania, 15417. (Cmpl.)

2. Defendant, the Commonwealth of Pennsylvania, Department of Transportation (ADepartment@) is an agency of the Commonwealth of Pennsylvania with its principal office located in Harrisburg, Pennsylvania, 17120. (Cmpl.)

3. During the Spring of 1999, the Department opened a mowing contract for bids for 86.47 miles of roadway in Washington and Greene counties and designated it as Project 120A78. (P. Ex. 1; N.T. 9)

4. The mowing contract entailed four mowing cycles per year, beginning in the Spring and continuing through the Fall of 1999. (P. Ex. 1; N.T. 75, 111, 142)

5. The Department held no pre-bid conference for the Project. (N.T. 9)

6. Prior to the bidding, ELM viewed the area to be mowed and observed the mow lines made by the prior contractor and calculated the area to be mowed. (N.T. 9-10, 152)

7. On March 29, 1999, ELM bid on the Project but it was not the low bidder and was not selected by the Department. (N.T. 40)

8. On April 22, 1999, the Department awarded the contract on Project 120A78 to the low bidder, but that bidder did not go forward with the mowing contract. (N.T. 40, 138)

9. In May 1999, the Department notified ELM that it had been selected for the contract. ELM accepted the Department=s offer based on ELM=s bid and on May 27, 1999 the contract began. (P. Ex. 1, N.T. 106)

10. The Project consisted of a one-year contract with the opportunity for five renewals of two

years each. (P. Ex. 1, Att. A, p. 6; D. Ex. 4; N.T. 111)

11. The contract included line item measurements and pricing for the mowing of certain primary and secondary roadways, and line item pricing for as directed mowing per lineal mile and as directed mowing per acre. (P. Ex. 1, p. 2)

12. ELM=s bid of $82,533.30 for the mowing included an itemized bid price list that separated its bid for roadway mowing from its bid for Aas directed@ mowing. (P. Ex. 1, p. 2)

13. The contract included several attachments which detailed mowing specifications in the form of drawings. (P. Ex. 1)

14. The contract was on a form prepared by the Department and the Department=s District Roadside Specialist testified that he Astructured@ the contract terms. (P. Ex. 1; N.T. 155-157)

15. In the General Mowing Specifications in Attachment A, to the contract, paragraph I. B. states, AThe maps attached are to be used as a guideline for the locations of areas to be mowed.@ (P. Ex. 1, Att. A, p. 1)

16. In the General Mowing Specifications in Attachment A to the contract, paragraph I. L. states, AThe Department reserves the right to increase or decrease the acreage, roadmiles and/or cycles as financial or climatic conditions require. Any additional mowing will be measured and paid for at the contract unit prices as bid.@ (P. Ex. 1, Att. A, p. 2)

17. In the General Mowing Specifications in Attachment A to the contract, Section VIII provides for AAs Directed Work@ and states, AGeneral Mowing (bid unit acres) and Roadside mowing (bid unit roadmiles) have a contract line item for as directed work. These items have no scheduled mowing cycles and will be utilized by the Department to resolve complaints and/or sight distance problems in a timely manner.@ (P. Ex. 1, Att. A, p. 6)

18. In the Primary Roadway Mowing section in Attachment A to the contract, paragraph I. E. states, ALarge areas of crown vetch are not to be mowed unless directed by the DRS. When directed, this will be done as an integral part of the per mile bid.@ (P. Ex. 1, Att. A, p. 1)

19. In the As Directed Mowing section in Attachment A of the contract, paragraph I. A. states, A This section will be utilized to perform mowing operations other than routine mowing cycles on an as needed basis.@ (P. Ex. 1, Att. A, Part III, p. 1)

20. The mowing diagrams attached to the contract at pages A-1 and A-2 contain the words, ACrown vetch areas are not to be mowed unless directed by the district roadside specialist.@ (P. Ex. 1, Att. A, pp. A-1 and A-2)

21. The mowing diagram at page A-7 states, ADo not mow areas of crown vetch unless

directed@ and Amaintain grass areas by mowing.@ (P. Ex. 1, Att. A, p. A-7)

22. Three mowing diagrams on pages A-1, A-2 and A-7 state in bolded letters at the bottom of each page, A**MAINTAIN GRASS AREAS BY MOWING.**@ (P. Ex.1, Att. A, pp. A-1, A-2 and A-7)

23. The Department=s District Roadside Specialist (DRS) was the person who managed this contract and dealt with ELM representatives. (P. Ex. 1)

24. Michael Maurer was the District Roadside Specialist from the Department involved with Project 120A78. (N.T. 134)

25. DRS Maurer had worked in vegetation management and highway mowing since 1974, and has been with the Department in the capacity of a District Roadside Specialist since September of 1991 (N.T. 134)

26. ELM took a drive-through tour of the primary and secondary areas to be mowed with the DRS in June 1999 before the first mowing cycle. (N.T. 137-139, 182)

27. ELM observed the mow lines created by the prior contractor and saw that only grass had been mowed, no crown vetch. (N.T. 86, 182)

28. The DRS told plaintiff that it was to maintain all grass areas and that periodic mowing of some crown vetch may be ordered if these areas became overgrown with briars and nuisance weeds. (Ans. to New Matter, para. 13; N.T. 133)

29. ELM had never previously performed a Department roadway mowing contract. (N.T. 85)

30. Since it was ELM=s first roadway mowing contract for the Department, ELM purchased new tractors to perform the contract. (N.T. 85-86)

31. ELM purchased ABelarus@ tractors, which were Russian made. (N.T. 92)

32. As required by the contract, ELM submitted the specifications for the mowing equipment it proposed to purchase for the job to the Department. The Department approved the equipment and ELM purchased it. (P. Ex. 1; N.T. 179-180)

33. ELM commenced the mowing season and mowed only grass during the June, July, and August cycles. (N.T. 108)

34. In October 1999, the DRS changed the language in the Notice to Proceed sent to plaintiff and ordered it to mow 56.46 acres of previously uncut crown vetch located primarily on Routes 40 and 43 and the I-70 interchange. (P. Ex. 3-2; An. to New Matter para. 15; N.T. 75, 108, 140)

35. Plaintiff mowed 56.46 acres of crown vetch in October 1999, but did not complete the work on time. (N.T. 95, 111)

36. The Department estimates that it takes at least one full day of mowing to mow 56.46 acres of crown vetch. (N.T. 155-156, 172)

37. At the end of the first year of the contract, ELM asked for additional compensation for its October mowing of the crown vetch under the Aas directed@ work clause of the contract. (N.T. 137, 147-149)

38. The Department refused ELM=s request for extra compensation for mowing the crown vetch in October 1999. (N.T. 166)

39. The Department was reluctant to renew the contract because of ELM=s failure to complete some of the mowing cycles on time. (N.T. 147, 178-179)

40. On May 1, 2000, the Department renewed the contract for another two year term. (D. Ex. 4; N.T. 145-148)

41. In 2000, the Department issued four Notices to Proceed to ELM and in each Notice the Department ordered ELM to mow 56.46 acres of crown vetch. (P. Ex. 3-3, 3-4, 3-5, 3-6)

42. ELM mowed 56.46 acres of the crown vetch as directed by the DRS during each of the four mowing cycles in 2000. (N.T. 26, 75, 108, 113, 119)

43. On June 28, 2000, ELM asked the Department to compensate it for mowing the crown vetch under the Aas directed@ work portion of the contract. (N.T. 73, 149)

44. On November 17, 2000, ELM made a written request for payment of money for mowing the crown vetch. (D. Ex.1; N.T. 73, 149)

45. On March 8, 2001, the Department denied ELM=s request for Aas directed@ compensation for mowing the crown vetch. (N.T. 189)

46. In March 2001, the Department canceled the contract with ELM. (N.T. 54, 145-147, 177)

47. In 2002, the Department solicited new bidders for the roadway mowing job. (N.T. 61-64)

48. The General Mowing Specifications attached to the new bid included some redrafted terms that specified that mowing crown vetch was included in the bid price. (P. Ex. 5, p. 5; N.T. 66-72)

49. The Department provided a pre-bid conference for prospective bidders and a drive-through tour of the areas to be mowed where the bidders were alerted to the necessity of mowing the crown vetch that had been mowed by the plaintiff. (N.T. 185-186)

50. The parties agree that plaintiff was directed by the DRS to mow 56.46 acres of crown vetch during the mowing cycles in October 1999, May 2000, July 2000, August 2000, and October 2000. (P. Ex. 6: N.T. 26, 75-76, 111, 119-127, 137)

51. The parties agree that if the mowing work at issue was covered by the Aas directed@ portion of the contract it was to be paid for at the rate of $25.00 per acre. (N.T. 37-38, 111)

52. If the mowing work at issue was covered by the Aas directed@ portion of the contract, the total amount due to the plaintiff for mowing 56.46 acres of crown vetch five times is $7,057.50. (N.T. 42-45)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the subject matter of this action. 72 P.S. sec. 4651-4.

2. The Board of Claims has jurisdiction over the parties.

3. ELM and the Department entered into a valid contract for mowing services in May 1999.

4. The cardinal rule of construction of contracts is to ascertain the intent of the parties at the time the contract was made and give effect to that intent.

5. If there is no ambiguity in the contract, the parties= intent shall be determined by referring only to the language in the contract.

6. A contract is ambiguous if it is reasonably susceptible to different constructions, is obscure in meaning through indefiniteness of expression, or has a double meaning.

7. The terms of this contract are ambiguous regarding whether and under what circumstances the plaintiff is entitled to extra payment for the mowing of large areas of crown vetch.

8. When a contract is ambiguous, the contract is construed against the scrivener of the contract.

9. The Department prepared this contract and the ambiguity in its language regarding payment for mowing crown vetch is therefore construed against the Department.

10. In order to construe the meaning of a contract containing an ambiguity, a court may examine the circumstances surrounding the contract in order to ascertain the intent of the parties.

11. When the language of a contract is ambiguous or when it is susceptible of two constructions, the interpretation that makes it a fair, customary, and rational agreement is preferred over an interpretation that makes it inequitable, unusual, or such that a reasonable man would not likely enter into it.

12. The Department=s interpretation of the contract, that the DRS could direct plaintiff to mow any amount of crown vetch and that would be included in the bid price, is not fair, or customary or a contract that a reasonable man would enter into.

13. The plaintiff=s interpretation of the contract, that it should be paid at the Aas directed@ rates under the contract for mowing 56.46 acres of crown vetch during five out of eight mowing cycles, is equitable and reasonable.

14. The Department canceled the contract in March 2001.

15. The Department breached the terms of the contract by refusing to pay plaintiff for the Aas directed@ work of mowing 56.46 acres of crown vetch during five mowing cycles in 1999 and 2000.

16. Plaintiff is entitled to payment of damages of $7,057.50 for performing the Aas directed@ mowing services.

17. The statute of limitations is an affirmative defense that must be pleaded by the defendant as new matter.

18. The Department failed to raise the statute of limitations as an affirmative defense or in its preliminary objections and therefore the issue has been waived.

19. Plaintiff=s claim for legal fees and expenses is denied.

20. Plaintiff is awarded interest on the damage award at the rate of six percent (6%) per annum from the date of the termination of the contract, March 8, 2001.

OPINION

A panel hearing of this matter was held on June 11, 2002. The Panel Report has been submitted and reviewed.

The claim in this action was filed on April 23, 2001, by plaintiff, Eastern Land Management Corporation (AELM@). Plaintiff demanded judgment against the Commonwealth of Pennsylvania, Department of Transportation (the ADepartment@) for breach of a written contract in the amount of $7, 057.50. On June 8, 2001, the defendant filed preliminary objections which were overruled. On October 31, 2001, the defendant filed an answer and new matter and a period of discovery followed. A panel hearing of the matter was held on June 11, 2002. Plaintiff filed its post-trial brief along with a petition to recover legal fees, expenses and interest charges on July 29, 2002. Defendant filed its post-trial brief and proposed findings of fact and conclusions of law on September 25, 2002. On October 28, 2002 the Panel filed its report and recommendations to the Board.

The parties agree that they executed a valid service contract under which plaintiff ELM would mow certain areas along several highways. The areas to be mowed were generally delineated by the maps attached to the contract. The District Roadside Specialist (ADRS@), an employee of the Department, was to supervise all mowing operations and under the contract he could designate additional areas to be mowed. In this case, after the plaintiff had commenced the mowing cycles and had mowed the same grass areas that had been mowed by the prior contractor, the DRS directed it to mow some additional areas that were covered by crown vetch which is thicker and more difficult to mow than the grass. Plaintiff claims this was

Aas directed@ work under the contract and that it should have been paid an extra $7,057.50. The Department=s position is that the DRS had the right under the contract to expand the areas of mowing and that it does not owe the plaintiff any extra compensation for mowing the crown vetch areas.

The issue to be decided is what does the contract say about payment for mowing crown vetch. If the DRS directs a contractor to mow crown vetch, is that mowing performed as part of the work included in the bid price or is the contractor entitled to be paid an extra amount because it is Aas directed@ work?

In order to resolve this dispute, the Board begins with the cardinal rule of the construction of contracts: ascertain the intent of the parties at the time the contract was made and give effect to that intent. Agrecycle, Inc. v. City of Pittsburgh, 783 A.2d 863 (Cmwlth. Ct 2001); Burns Mfg. Co., Inc. v. Boehm, 467 Pa. 307, 356 A.2d 763 (1976). Generally, this is done by referring to the language of the contract. Heidt v. Aughenbaugh Coal Co., 406 Pa. 188, 176 A.2d 400 (1962). When a written contract is clear and unequivocal, its meaning must be determined by its contents alone. Empire Sanitary Landfill, Inc. v. Riverside School District, 739 A.2d 651 (Cmwlth. Ct. 1999); Department of Transportation v. Manor Mines, Inc., 523 Pa. 112, 565 A.2d 428 (1989).

From the words of the contract in this case, there is no way to tell what interpretation to apply. Nowhere in the contract is the answer to this issue clearly given. Instead, it is necessary to comb through the various sections and find statements that refer to the mowing of grass areas, the mowing of crown vetch, and the provisions for Aas directed@ work and try to read them together.

A contract is ambiguous if it is reasonably susceptible to different constructions, is obscure in its meaning through an indefiniteness of expression, or has a double meaning. Beta Spawn, Inc. v. FFE Transportation Services, Inc., 250 F.3d 218 (3rd Cir. (Pa.) 2001); Dick Enterprises v. Department of

Transportation, 746 A.2d 1164 (Pa. Cmwlth. 2000). An examination of the provisions of four different sections of the contract show that this contract=s terms are not at all clear concerning the payment for mowing crown vetch.

First, the mowing diagrams attached to the contract contain the following statements:

> AMaintain grass areas by mowing.@
> ADo not mow areas of crown vetch unless directed.@
> ACrown vetch areas are not to be mowed unless directed by the roadside specialist.@

Second, in the General Mowing Specifications in Attachment A to the contract, the following statements appear:

> AThe maps are to be used as a guideline for the locations of areas to be mowed.@ (p. 1)
> AThe Department reserves the right to increase or decrease the acreage, roadmiles and/or cycles as financial or climatic conditions require. Any additional mowing will be measured and paid for at the contract unit prices as bid. Any decrease in mowing will be deducted at the contract unit price as bid.@ (p. 2)
> AGeneral mowing (bid unit acres) and Roadside mowing (bid unit roadmiles) have a contract line item for as directed work. These items have no scheduled mowing cycles and will be utilized by the Department to resolve complaints and/or sight distance problems in a timely manner.@ (VII. AAs Directed Work@, p. 6)
> AThe Department reserves the right to include >as directed= work into a normal mowing cycle and/or have >as directed= work started within forty-eight (48) hours of a verbal or written notice to proceed. Contractor to complete >as directed= work according to bid specification for type of mowing required, or as instructed by the District Roadside Specialist.@ (VII. AAs Directed Work,@ p. 6).

Third, in the section entitled, APrimary Roadway Mowing,@ paragraph 1. E. states:

> ALarge areas of crown vetch are not to be mowed unless directed by the DRS. When directed, this will be done as an integral part of the per mile bid.@

Finally, in Part III of Attachment A, page 1 is a separate sheet entitled AAS DIRECTED MOWING@ within which there is a section entitled ADescription.@ It states:

> AA. This section will be utilized to perform mowing operations other than routine

mowing cycles on an as needed basis.@

AB. The unit for general mowing will be Aacre.@ Minimum call out will be for one acre.
As directed mowing on the primary route system will if possible be incorporated in the general mowing cycle. However, if required the contractor will complete as directed work within forty-eight (48) hours of telephone notification to the contractor or his assigned mowing foreman.@

These statements construed together tell the reader that normally the crown vetch is not to be mowed, but that the DRS can order it mowed at any time. The contract=s statements seem to say that under some conditions mowing crown vetch is considered a minor matter and is included in the contract bid price, but that under other circumstances the contractor is entitled to extra compensation for Aas directed@ work. Criteria for deciding which payment rule to apply are absent from the contract. Also, an ambiguity is created by the use of the word Adirected.@ Sometimes the DRS can Adirect@ the contractor to mow areas and it is Aas directed work@ while other times the word Adirected@ refers to work ordered to be performed by the DRS but included in the bid contract price. Since the contractor, ELM, included in its bid an amount for Aas directed@ work, logically there must be some circumstances under which mowing extra areas come under this payment rate.

One simple approach that courts take to solving a problem of contract ambiguity is to construe any ambiguity against the scrivener of the contract. Hartman v. Baker, 766 A.2d 347(Pa. Super. 2000), reargument denied; appeal denied 564 Pa. 712, 764 A.2d 1070 (2000). Under this rule of Acontra proferentem,@ any ambiguity in the contract=s language is construed against the drafter and in favor of the other party if the latter=s interpretation is reasonable. Sun Co., Inc.(R&M) v. Pennsylvania Turnpike Commission, 708 A.2d 875 (Cmwlth. Ct. 1998). If a contract is susceptible of two logical constructions, the contract must be interpreted against the drafting party, particularly where the contract was prepared by

the defendant and was executed by a plaintiff without the benefit of counsel. Department of Transportation v. Brozzetti, 684 A.2d 658 (Cmwlth. Ct. 1996). Here the contract was on a Department form and the attachments were prepared by the Department. The plaintiff had no role in the preparation of the document and merely filled in his bid numbers in the blanks provided.

Another approach to resolving a contractual ambiguity is to look at the factual context of the contract to decide what the parties intended. Where the intention of the parties is not clearly expressed in the agreement and the words give rise to ambiguity or doubt, a court may resort to an examination of the surrounding circumstances to ascertain the intent of the parties. United Refining Co, v. Jenkins, 410 Pa. 126, 189 A.2d 574 (1963). Preliminary negotiations are merged into a written contract, but they may be resorted to for the purpose of explaining an ambiguity. Shipley v. Pittsburgh & L. E. R. Co., 83 F. Supp. 722 (D. Pa. 1949).

In this case there was no pre-bid conference. Plaintiff received the Department=s request for bids and then toured the areas to be mowed itself. Plaintiff took note of the mow lines from the previous contractor, calculated the size of the areas to be mowed, and submitted its bid based upon the acreage that it had observed. Plaintiff then submitted its bid sheet with one bid item for the acreage it calculated was required to be mowed and a separate bid item for Aas directed@ mowing for any additional Aas directed@ acreage.

Plaintiff was not the low bidder and on March 29, 1999, the contract was awarded to another contractor. When that party was unable to perform, the Department notified the plaintiff that it was the successful bidder. In June 1999, before the beginning of the first mowing cycle, the DRS, Mr. Maurer, accompanied plaintiff on a tour of the primary and secondary roadside areas to be mowed. The mowing

lines from the prior contractor were clearly visible and plaintiff again could see how the property had been maintained. Mr. Maurer told the plaintiff that it was to maintain the same grass mowed areas, and also said that periodic mowing of patches of crown vetch may be ordered if patches of these areas became over-run with briars and nuisance weeds. Plaintiff ordered mowing equipment for the job and commenced the mowing season which included four cycles of mowing: June, July, August, and October, 1999.

Plaintiff completed the first three cycles by mowing grass only. In October, the DRS changed the mowing instruction language in the Notice to Proceed sent to plaintiff and instructed plaintiff to mow 56.46 acres of previously uncut crown vetch. The plaintiff, knowing that the contract could last for ten years if regularly renewed by the Department, did the work. But plaintiff had trouble maintaining its equipment and was stretched beyond its capacity to complete the mowing of the thick crown vetch on time. At the end of the first year of the contract, plaintiff had mowed the crown vetch areas once and it then asked for additional compensation under the Aas directed@ work clause. The request was denied. The Department=s position, as stated by Mr. Maurer, was that as the DRS he could order large areas of previously unmowed crown vetch to be mowed under the basic bid price of the contract because these areas were within roadway mowing areas. He maintained in his testimony that even if these areas exceeded 1000 extra acres of crown vetch that plaintiff would not be entitled to extra compensation for this as Aas directed@ work under the contract. (N.T. 164-165)

At the end of 1999, the Department considered whether to renew the contract. It was not satisfied with plaintiff because it had been late completing some of the mowing, but decided to renew anyway. Plaintiff says it did not press its request for extra compensation because it wanted the contract renewed and did not know that the extra mowing would become a regular requirement. In the second year of the

contract, the DRS again required plaintiff in the Notice to Proceed to mow the large areas of crown vetch at each one of the four mowings: May, July, August and October 2000. On June 28, 2000, plaintiff again asked for the mowing of the crown vetch to be considered as Aas directed@ mowing, but the Department refused the request for additional payment. Plaintiff continued to mow the crown vetch areas in order to avoid defaulting on the contract. On November 17, 2000, the plaintiff made a written request for payment. It was denied and on March 8, 2001, the Department canceled the contract.

One interesting circumstance is that the Department then solicited new bidders for the job. It issued new General Mowing Specifications for the contract, redrafting the very terms in dispute here to specifically include the additional crown vetch acreage in the bid price. Further, the prospective contractors were alerted at the pre-bid conference and the drive-through tour to the requirement of mowing the crown vetch acreage. They could see the plaintiff=s mow lines which included the mowed crown vetch. These changes made by the Department seem to be an acknowledgment that there was a contractual ambiguity that caused unfairness in the prior situation that needed to be corrected.

Where the language of a contract is contradictory or ambiguous or where its meaning is doubtful so as to be susceptible of two constructions, a court should prefer the one which makes it fair, customary and one that a prudent man would naturally execute over one that makes it inequitable, unusual, or such as a reasonable man would not likely enter into. Consolidated Tile & Slate Co. v. Fox, 410 Pa. 336, 189 A.2d 228 (1963); Berke v. Bregman, 406 Pa. 142, 176 A.2d 644 (1962); Heidt v. Aughenbaugh Coal Co., supra.

The circumstances surrounding the contract all seem to indicate that plaintiff=s interpretation is the more reasonable one. When plaintiff toured the areas to be mowed, he saw that no areas of crown vetch

had been mowed by the prior contractor. Clearly, the Department wanted the option of being able to make minor additions and deletions to the mowing pattern without having to have to pay additional money and that is why the contract included the language that authorized the DRS to designate or delete specific areas to be mowed. However, the mere existence of the Aas directed@ clause also indicates that at some point extra mowing directed by the DRS would be substantial enough to be paid for under Aas directed@ work. The question then is how much extra had to be demanded by the DRS before additional compensation would be paid. The written contract is silent, but it seems reasonable to decide that 56.46 acres of mowing of the tough crown vetch, adding a full extra day of work to the mowing cycle to complete, would be enough. It also seems reasonable to decide that having to mow the crown vetch in five out of eight of the mowing cycles is more than a minor change in the work bid under the contract.

The Board finds that the regular, continued mowing of 56.46 acres of crown vetch was not included in plaintiff=s bid price for Primary Roadway Mowing. In its bid, the cost for such service is found under Aas directed@ mowing and is $25 per acre. Five mowings of the 56.46 acres of crown vetch at $1,411.50 for each mowing comes to a total of $7,057.50. The amount of acreage mowed and the computation of this amount of compensation is not in dispute by the parties, only whether the mowing was extra work to be compensated at the Aas directed@ rate. A reasonable contractor would believe that the mow lines evident at the time of the site inspection defined the scope of the work required, with the exception of Aas directed@ mowing. A reasonable contractor would read the contract to require it to mow minor amounts of crown vetch that was Adirected@ by the DRS as part of the bid price of the contract, but not an amount that would add an extra day of labor to the mowing cycle.

The Board finds that the Department=s interpretation of the contract terms to mean that the plaintiff must mow all areas covered with crown vetch when ordered by the DRS (even if it covers 1000 acres) without any extra compensation is not reasonable or within the contemplation of the parties at the time the contract was made. There would be no purpose for including any bid for Aas directed@ work if the Department=s interpretation of the contract were correct. The Board concludes that plaintiff is entitled to reimbursement for the claimed amount of Seven Thousand Fifty-Seven Dollars and Fifty Cents ($7,057.50).

In its post-hearing brief, the Department raised the issue of whether the claim was filed within the six month statute of limitations applicable to actions before the Board. 72 P.S. sec. 4651-6. No mention was made of this contention at the hearing on June 11, 2002. The statute of limitations is an affirmative defense which must be pleaded by the defendant as new matter. Pa.R.C.P. 1030. In this case, the Department failed to include any reference whatsoever to this issue in its answer and new matter pleading or in its preliminary objections. Since it does not appear that this affirmative defense has been pleaded or ever properly raised, the Department has waived it. Pa.R.C.P. 1032 (a). The defense will be denied on that basis.

Finally, the Board will address plaintiff=s petition for legal fees, expenses and interest. The petition will be denied to the extent it seeks legal fees and costs because, absent compelling circumstances or explicit provisions in the contract, the Board generally follows the AAmerican Rule@ requiring parties to pay for their own expenses and counsel fees. Interest will be awarded on the judgment in the amount of six percent (6%) per annum from the date of the termination of the contract, March 8, 2001.

ORDER

AND NOW, this 22nd day of April, 2003, after hearing, **IT IS ORDERED** and **DECREED** that judgment be entered in favor of the plaintiff, Eastern Land Management Corporation, and against defendant, Commonwealth of Pennsylvania, Department of Transportation, in the sum of Seven Thousand Fifty-Seven Dollars and Fifty Cents ($7,057.50) with interest thereon at the legal rate of six percent (6%) per annum from March 8, 2001.

FURTHER, IT IS ORDERED that plaintiff=s petition for attorney=s fees and costs is **DENIED**. Each party shall bear its own costs and attorney=s fees.

Upon receipt by plaintiff of said award, plaintiff shall forthwith file a praecipe to mark the case settled and ended with prejudice with the Board.

BOARD OF CLAIMS

Jeffrey F. Smith
Chief Administrative Judge

Ronald L. Soder, P.E.
Engineer Member

Opinion Signed

John R. McCarty
Citizen Member

Opinion Signed