

COMMONWEALTH OF PENNSYLVANIA

JAMES D. MORRISSEY, INC. : BEFORE THE BOARD OF CLAIMS
 :
VS. :
 :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF TRANSPORTATION : DOCKET NO. 3548

FINDINGS OF FACT

1. James D. Morrissey, Inc. (“JDM”), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with offices located at 9119 Frankford Avenue, Philadelphia, Pennsylvania. (Complaint ¶ 1; Answer ¶ 1).

2. The Department of Transportation (“PennDOT” or “Department”) is an agency of the Commonwealth of Pennsylvania, with offices located at 555 Walnut Street, Harrisburg, Pennsylvania. (Complaint ¶ 2; Answer ¶ 2).

3. On August 2, 2000, JDM and PennDOT executed a contract for the sum of \$19,769,213.25 for the construction or improvement of a certain section of state highway in Bucks County, Bristol Borough and Township, Commonwealth of Pennsylvania, State Route 0413, Section 005 (sometimes referred to hereinafter as the “Project” or the “SR413 Project”). (Panel Ex.1-Trial Stipulations; Ex. P-1).¹

4. The contract work generally included new roadway construction and widening, drainage, new electric, sewer and water lines, side road adjustments, and concrete and bituminous paving. (Notes of Testimony (“N.T.”) 11).

5. The contract included drawings prepared by PennDOT’s independent design engineer for this Project, Pickering, Corts & Summerson (“PCS”), including drawings 99A of 143, 100A of 143, 134 of 143, and 12 through 16 of 168 (cross sections). (Ex. P-2).

6. Part of the contract work included work on a ramp identified as the “SR9409” ramp, the subject work of this claim. The SR9409 ramp is a “loop ramp” that carries traffic off of an adjacent road, Route 13, and onto State Route 413. (N.T. 11).

7. This contract work called for the complete reconstruction of this SR9409 ramp, including paving, drainage, lowering of the ramp’s elevation, and the installation of a “Type A concrete barrier.” (N.T. 11-14; Ex. P-2 (drawings 99A of 143, 14 of 168)).

8. A “Type A concrete barrier” is a large barrier requiring the support of a large and deep concrete footer. PennDOT’s contract drawings contained details showing the required size

¹ It was discovered at the hearing that Plaintiff’s Exhibit #1, the contract, was missing page 11. The same page was missing from the copy attached to Plaintiff’s claim. The Department supplied the terms from the missing page as Ex. D-23, 24, 25. (Complaint; N.T. 40; Exs. D-23, 24, 25).

and nature of the concrete footer and the footer's location immediately adjacent to an underground sanitary sewer line. (N.T. 14; Ex. P-1 at 30 (work item 9000-0003), P-2 (drawing 114 of 168)).

9. The contract was amended to include the 1994 edition of PennDOT's Publication 408 Specifications ("408 Specifications" or "Pub. 408/94"). (Joint Ex. 1 at p. 2; Ex. D-26).

10. JDM's field superintendent on the Route 413 Project was Michael Gaughan, who has been employed by JDM for over 15 years. (N.T. 9-10).

11. PennDOT's construction inspection supervisor for the Route 413 Project was Joseph Szucsik, an employee of McTish Kunkel Associates, PennDOT's inspection firm on the Project. Mr. Szucsik had 45 years experience in highway and bridge construction. (N.T. 62-65).

12. Before JDM began work on the SR9409 ramp, Mr. Gaughan had JDM's surveyor, David Hackman, lay out the work that was to be performed so that Mr. Gaughan could determine how the area was to be excavated and what work crews would be needed to complete the work. (N.T. 15).

13. After Mr. Hackman surveyed the SR9409 ramp site, Mr. Gaughan inspected the site to review the work called for in the contract. Mr. Gaughan noticed that the contract required a large cut and excavation to be made in order to lower the ramp to the elevation called for in the contract, an approach Mr. Gaughan did not understand. (N.T. 15-16).

14. Mr. Gaughan then asked Mr. Hackman to survey the SR9409 ramp's existing elevations to determine if, by raising the elevations from those shown in the contract, JDM could still ensure proper drainage but avoid conflicts with an existing underground sanitary sewer line. (N.T. 16-17).

15. During this additional survey work, Mr. Hackman determined that the underground sanitary sewer line was closer to the ramp than shown in PennDOT's contract drawings and, in fact, was located directly in the area where the concrete footer would be constructed to support the Type A concrete barrier. (N.T. 17-18).

16. After reviewing the results of the additional survey work, Mr. Gaughan concluded that a change could be made to the construction of the SR9409 ramp. Mr. Gaughan proposed raising the elevation of the SR9409 ramp to a higher level than was shown in the contract drawings to accomplish two purposes: (1) raising the elevation would eliminate the deep cut necessary to lower the ramp's elevation, thereby saving substantial excavation work and cost; and (2) by raising the ramp's elevation, the conflict with the underground sanitary sewer line and the concrete footer used to support the Type A concrete barrier would be avoided because a smaller concrete barrier wall could then be used. This proposal is sometimes referred to hereinafter as "JDM's Proposal." (N.T. 15-20).

17. On January 17, 2002, at the SR9409 ramp site, Mr. Gaughan described and discussed JDM's Proposal for the SR9409 ramp with John Doyne, PennDOT's onsite engineer for the Project, and with Joseph Szucsik, the transportation construction inspection supervisor who represented PennDOT on the Project at the construction site. Mr. Doyne and Mr. Szucsik

agreed that JDM's Proposal would result in less work and substantial savings in comparison to the ramp design in the original contract drawings. (N.T. 19-22, 68-69, 75-76, 84).

18. At this January 17, 2002 meeting at the SR9409 ramp site with Mr. Doyne and Mr. Szucsik, Mr. Gaughen clearly identified these proposed changes to the construction of the SR9409 (i.e. JDM's Proposal) as a "value engineering proposal" and stated JDM's intent to follow-up and submit this proposal in writing for PennDOT's consideration as a value engineering proposal. (N.T. 19-22, 68-69, 75-77, 84-85, 220).

19. During this initial discussion with Mr. Gaughan on January 17, 2002, Mr. Doyne opined that Mr. Gaughan's proposed changes to the SR9409 ramp ("JDM's Proposal") and his intent to submit these ideas as a value engineering proposal was a "good idea." Mr. Szucsik responded that it was an "excellent idea." (N.T. 19-22, 68-69, 75-79).

20. Before Mr. Gaughan's meeting on January 17, 2002 with Mr. Doyne and Mr. Szucsik, no one else had suggested to PennDOT any changes to the SR9409 ramp profile contained in the original contract drawings. (N.T. 23, 69-70).

21. Also at their January 17, 2002 meeting at the SR9409 ramp site, Mr. Doyne mentioned to Mr. Gaughan that JDM's written value engineering proposal would have to be submitted on "prepared forms." Neither Mr. Doyne nor Mr. Szucsik identified a timeframe for submission of such forms however. (N.T. 69-70; Board Finding).

22. The contract provided that PennDOT's 408/94 Specifications and drawings were the governing construction specifications for this project. (Joint Ex. 1 at p. 2).

23. Section 104.04 of the 408 Specifications describes a value engineering proposal as follows:

Value engineering applies to cost reduction proposals that may be initiated, developed, and submitted to the Department for modifying the plans, the specifications, or other contract requirements. This does not apply to a proposal unless it is identified as a value engineering proposal at the time it is submitted.

Value engineering proposals are those which would require a change in the contract and would result in an immediate net savings to the Department. They provide a decrease in the cost of performance, without impairing essential functions and characteristics, such as service life, reliability, economy of operation, ease of maintenance, and safety features.

(Ex. D-26 (Pub. 408/94 § 104.04 at Paragraphs First and Second)).

24. A value engineering proposal on a PennDOT project generally begins with an oral discussion about the proposed change between the contractor and representatives of PennDOT so that the contractor can "feel the Department out" as to whether the Department thinks it is a worthwhile endeavor. If the proposal is determined to be worthwhile, the contractor then goes through the formal process of submitting, in writing, the value engineering proposal with the

backup material specified by Section 104.04. (N.T. 167-68, 220; Ex. D-26 (Pub. 408/94 § 104.04); Board Finding).

25. Section 104.04 of the 408 Specifications does not specify any particular form of written proposal but does state that the contractor must submit the following seven items of additional information, at a minimum, with such proposal:

- a description of the difference between the existing contract requirements and the proposal change, with the comparative advantages and disadvantages of each;
- an itemized list of the contract requirements which are to be changed if the proposal is adopted, with a recommendation for making each change;
- a detailed estimate of the reduction in construction costs that will result from the adoption of the proposal;
- a prediction of any effects the proposed change will have on other Department costs, such as costs of maintenance and operation;
- a statement of the deadline for issuing a change order adopting the proposed change, to obtain the maximum cost reduction during the remainder of the contract, noting any effect on the contract completion time or delivery schedule;
- the dates of any previous or concurrent submissions of the same proposal and any previous actions by the Department; and
- the contract items of work affected by the proposed change, including any quantity changes.

(Ex. D-27 (Pub. 408/94 § 104.04 at Paragraph Third); Board Finding).

26. Section 104.04 of the 408 Specifications does not contain a specific time limit within which a contractor must submit its written proposal with the specified backup material supporting the value engineering proposal. The only time limitation stated is that this material must be submitted so as to allow “enough time for Department investigation and implementation without interference with project schedules. . . .” (N.T. 169-70; Ex. D-26 (Pub. 408/94 § 104.04 at Paragraph Third); Board Finding).

27. The period of time that passes between the initial discussion regarding a value engineering proposal and the written submission of same with the backup materials specified in Section 104.04 (Third Paragraph) varies depending on the complexity of the engineering issues involved in the proposed change. (N.T. 116, 169; Board Finding).

28. William Greer, a vice president of JDM who helped put the contract bid together and managed the Project, was responsible for, and pursued production of, the paperwork needed for JDM’s written value engineering proposal. (N.T. 23, 90-119).

29. Mr. Greer had previous experience with developing and submitting value engineering proposals on PennDOT projects, and he was familiar with the requirements of submitting such a proposal. (N.T. 99-100, 115-16).

30. Sometime shortly after Mr. Gaughan’s January 17, 2002 meeting with Mr. Doyne and Mr. Szucsik about the proposed changes to the SR9409 ramp, JDM asked Mr. Greer (who in

addition to being a vice president was also a licensed professional engineer) to go to the Project site and discuss the proposed changes with Mr. Gaughan. (N.T. 90-91, 93-95; F.O.F. 28).

31. Mr. Greer went to the Project site and evaluated Mr. Gaughen's proposed changes to the SR9409 ramp. He concluded that these changes to the SR9409 ramp (i.e. JDM's Proposal) would result in substantial time and cost savings for this ramp work. He particularly noted that the changes would avoid a conflict between the footer excavation and the location of the underground sanitary sewer line. (N.T. 94-95).

32. After reviewing the proposed changes to the SR9409 ramp, Mr. Greer determined that JDM would have to consult with an outside engineering firm to confirm whether a retaining wall included in the original plans could be eliminated or modified as part of the profile changes for the SR9409 ramp. Mr. Greer began to work on the written backup material for JDM's Proposal and contacted the engineering firm of Ertweiler and Walter which he planned to use for this consultation. (N.T. 77-79, 95-96, 122-23).

33. Mr. Greer, who had successfully prepared and submitted value engineering proposals for JDM before and after the time of this Project, testified that three months was a reasonable time period for preparing the written value engineering proposal with the required backup materials that JDM proposed for the re-design of the SR9409 ramp. He further testified that submission of the additional information specified by Section 104.04 (Third Paragraph) by April 30, 2002 would not have impacted the Project schedule. (N.T. 103-04, 116-17).

34. On February 13, 2002, representatives of JDM, PennDOT and PCS (PennDOT's engineering/design firm for the project), attended Project Control Meeting #33, held at the PennDOT field office. Among others, the meeting was attended by JDM's Michael Gaughan, Joseph Szucsik of McTish Kunkel Associates, John Doyne and Brian Early of PennDOT and Wim Lindeboom of PCS. (Ex. P-4).

35. At the February 13, 2002 meeting, JDM representatives noted, based on Mr. Hackman's site survey, that the sanitary sewer line was not in the location depicted in the PennDOT contract drawings and that it was actually located within the footer excavation for the Type A concrete barrier called for by the original plans and drawings. JDM representatives also proposed modifying (raising) the SR9409 ramp's "infield profiles" at this meeting. The minutes also note that JDM had also raised the possibility of combining construction stages on this ramp (a suggestion which would be facilitated by its proposed revision to the ramp profiles). (N.T. 25-28, 70-72; Ex. P-4 at 7; Board Finding).

36. Project Control Meeting #33 was the first formal Project meeting in which Mr. Gaughan discussed JDM's Proposal to change the profiles of the SR9409 ramp. He also identified these proposed changes as a value engineering proposal at this meeting. (N.T. 68-71; Exs. P-3, P-4; Board Finding).

37. The ideas for the changes to the SR9409 ramp profiles that were discussed at Project Control Meeting #33 were essentially the same ideas that Mr. Gaughan had spoken to Mr. Doyne and Mr. Szucsik about during their conversation on January 17, 2002 and had identified as a value engineering proposal at that time as well (i.e. JDM's Proposal). (N.T. 19-22, 25-26, 70-72, 76-79; Board Finding).

38. Minutes for Project Control Meeting #33 dated February 13, 2002, record that JDM stated that the existing sanitary sewer line was not located as indicated on the original plans provided by PennDOT and would be within the footing excavation for the new barrier wall (Type A) for the SR9409 ramp. It was noted in the minutes that PCS would review the plans to see what modifications could be made and would provide details the following week. These minutes also note that JDM suggested revision of the ramp profiles and that PennDOT indicated that relocation of the sewer line would not be a preferred modification. These minutes also record that JDM had “previously indicated” a plan to combine stages in reconstructing the ramp. These minutes mistakenly fail to record that JDM’s Proposal to raise the ramp’s profile had previously been identified to PennDOT representatives as a value engineering proposal and identified again as such at this meeting. (N.T. 21, 25-26, 69-72, 76-77, 84-86; Ex. P-4; Board Finding).

39. During and/or immediately following the Project Control Meeting #33, Mr. Gaughan was informed by Mr. Szucsik and/or Mr. Doyne that he would have to submit the value engineering proposal (i.e. JDM’s Proposal) in writing and in the “proper fashion” on PennDOT forms. However, once again, no timeframe for such submission was mentioned. (N.T. 70-72, 85-86; Board Finding).

40. On February 27, 2002, JDM, PennDOT and PCS representatives attended Project Control Meeting #34. At this meeting, PCS stated that it had revised the profiles for the SR9409 ramp and that this would completely eliminate the Type A concrete barrier and be replaced with a smaller Type B wall which would have no impact on the underground sanitary sewer line. PCS further stated that it would have all the details complete within a week. The minutes also indicate that PCS provided preliminary plans to JDM. (Ex. P-5 at 8).

41. JDM was not informed by PennDOT or its representatives at the February 13 or February 27 meetings that PCS’s review of the sewer line issue and the SR9409 ramp profile or PCS’s work on a preliminary revision of the SR9409 plans would prevent JDM from proceeding with development and submission of JDM’s written value engineering proposal for the ramp with the requisite backup material. (N.T. 29-34, 131-34).

42. JDM did not consider PCS’s actions in reviewing or preliminarily revising the profiles for the SR9409 ramp modifications (as recorded in the minutes of the Project Control Meeting #34 on February 27, 2002) as superceding JDM’s value engineering proposal or precluding JDM from submitting its written proposal with required backup based on the same general ramp modifications that it had previously advanced as its value engineering proposal. (N.T. 29-34, 128-34; Findings of Fact (“F.O.F.”) 16-21, 24, 26-41, 43, 46, 48-49, 51-52, 55-56).

43. Before any value engineering proposal on a PennDOT project would actually be implemented, it is to be expected that PennDOT and the design professional on the project would investigate and evaluate the benefits and advisability of any such proposal made by a contractor on the job. Moreover, such an investigation and evaluation might well include the need for PennDOT and/or its design professional on the project to develop their own set of revised plans incorporating the changes proposed in order to better evaluate the viability and effect of such changes and to calculate the potential benefits of same before implementation. (N.T. 29-34, 128-34; Exs. P-6, P-7, D-26 (Pub. 408/94 § 104.04 at Third Paragraph); F.O.F. 16-21, 24-25, 38, 40; Board Finding).

44. By letter to PennDOT dated March 12, 2002, PCS stated that JDM had originally raised the fact that the sanitary sewer line was located within the footer excavation for the Type A concrete barrier proposed in the original plans and had “questioned” whether raising the profile of the SR9409 ramp would avoid a conflict with the sewer line. PCS then stated that it had “decided to pursue the possibility of raising the roadway profile as a value engineering effort to reduce the height of the retaining wall and therefore raise the elevation and reduce the width of the footing in order to minimize or avoid impacting the existing sewer line.” (Emphasis added). (Ex. P-7).

45. In this letter of March 12, 2002, was PCS’s calculation of the net savings that PennDOT would tentatively gain as a result of the modified SR9409 ramp work. The total net savings was listed as \$268,586.20. Attached to this letter were revised plan sheets, profiles and cross-sections showing these changes. (Ex. P-7).

46. The minutes of the February 13, 2002 meeting at which JDM first presented the issue with the sewer line and JDM’s Proposal to a representative of PCS indicate only that PCS would review the plans to see what modifications could be made and would provide details the following week. These minutes do not authorize nor suggest that PCS should move ahead on its own impetus to engage in its own “value engineering effort” or to produce, at the rapid rate it did, a final re-design of the SR9409 ramp. (N.T. 21, 25-26, 69-72, 76-77, 84-86; Exs. P-4, P-7; Board Finding).

47. The modifications made to the SR9409 ramp described in PCS’s letter of March 12, 2002 were materially identical to JDM’s Proposal. (N.T. 72-75; Exs. P-2, P-4, P-5, P-7; F.O.F. 12-21, 34-38, 40, 44-45; Board Finding).

48. PCS’s letter of March 12, 2002 was not copied to JDM, and JDM did not receive a copy of this letter until some time later. (N.T. 97, 124-25; Ex. P-7).

49. The original engineering/design firms hired by PennDOT for a project are typically expected to effectuate value engineering concepts in their original design and, accordingly, are not compensated for “value engineering proposals” made during the project construction period (as contractors may be) by Sections 104.04 and 110.07 of the 408 Specifications. (N.T. 155-57, 170; Ex. D-26 (Pub. 408/94 §§ 104.04 and 110.07 at Paragraph Second); Board Finding).

50. PCS’s reference in its letter of March 12, 2002 to a “value engineering effort” that PCS itself had decided to pursue, together with the pace at which PCS developed its engineering calculations, preliminary revisions and final plan revisions to the SR9409 ramp (which mirror JDM’s Proposal presented to PCS at the February 13, 2002 Progress Meeting), despite JDM’s stated intent to submit its proposed changes to the SR9409 ramp as a written value engineering proposal with requisite backup, causes the Board to conclude that PCS was compensating for the fact that its initial design had not incorporated the cost saving qualities of JDM’s Proposal by attempting to re-design the SR9409 ramp in an unusually short timeframe before JDM could complete and submit its written value engineering proposal with the backup material required by Section 104.04. (N.T. 71-79, 155-58, 170; Exs. P-7, D-26 (Pub. 408/94 §§ 104.04 and 110.07); F.O.F. 5-7, 15-21, 30-38, 40, 44-49, 51-56; Board Finding).

51. On March 13, 2002, representatives of JDM, PennDOT and PCS attended Project Control Meeting #35. The meeting minutes noted that PCS had provided PennDOT with final plans for the SR9409 ramp's revised profiles and that PCS would later provide a copy of these plans to JDM. (Ex. P-8 at 8).

52. Although JDM learned at Project Control Meeting #35 that PCS had provided PennDOT with plans, JDM was not provided with said plans at that time and was not directed to act on any plans. JDM continued working to develop its own plans and written submission of its value engineering proposal with required backup materials in the understanding that PCS was reviewing possible ramp revisions in cooperation (not in competition) with JDM. (N.T. 29-34, 128-34; Ex. P-8 at p. 8; F.O.F. 24-33, 37, 41-42, 51, 53-56).

53. On March 28, 2002, representatives of JDM, PennDOT and PCS attended Project Control Meeting #36. At this meeting, it was again noted that PCS had supplied final plans to PennDOT for the revised profiles for the SR9409 ramp, and newly noted that a copy of the final plans would be provided to JDM with formal direction to proceed with the indicated revisions to the SR9409 ramp. It was also recorded for the first time in the minutes that JDM had requested PennDOT to accept its suggested profile changes to the SR9409 ramp as a value engineering proposal from JDM. The meeting notes correctly state that JDM had previously proposed changes to the ramp profiles as a possible solution to the ramp design problems, but incorrectly state that JDM did not inform PennDOT that it identified these changes as a value engineering proposal prior to the March 28, 2002 meeting. (N.T. 29-31, 56-59; Ex. P-9 at p. 8; F.O.F. 16-21, 35-39; Board Finding).

54. Significantly, it was at this March 28, 2002 Project Control Meeting that PennDOT first informed JDM that JDM's proposed changes to the SR9409 ramp (which had been incorporated into the ramp re-design by PCS) would not be accepted or considered as a value engineering proposal from JDM because PCS (not JDM) had already performed the re-design work and because JDM was aware that PCS was performing "this work." PennDOT also asserted at this March 28, 2002 meeting, quite incorrectly, that even though JDM had mentioned revisions to the ramp profiles earlier, JDM had not previously notified PennDOT that JDM wished to pursue these changes as a value engineering proposal. (N.T. 29-31, 56-59; Ex. P-9 at p. 9, P-12 at p. 8, and P-14 at p. 2; F.O.F. 16-21, 35-39).

55. During this general timeframe (i.e. the period from the January 17, 2002 conversation between Mr. Gaughan, Mr. Doyne and Mr. Szucsik through the March 28, 2002 Project Control Meeting #36), JDM was proceeding to develop its plans and written backup material necessary to support its value engineering proposal as specified in Section 104.04 (Third Paragraph). (N.T. 30, 77-79, 95-96, 122-24).

56. Prior to the Project Control Meeting #36 on March 28, 2002, no one from or on behalf of PennDOT had ever told JDM that PennDOT would not consider JDM's value engineering proposal regarding the SR9409 ramp because PCS was also working on an engineering re-design of the SR9409 ramp. (N.T. 29-34, 131-34; Ex. P-9 at p. 8; F.O.F. 16-21, 24, 26-43, 46, 48-49, 51-52; Board Finding).

57. By letter dated April 3, 2002, JDM provided written notification to PennDOT that it still intended to submit its value engineering proposal, in writing, with required backup

material concerning the SR9409 ramp in accordance with Section 104.04 of the 408 Specifications. The letter stated that Mr. Gaughan's proposed modifications to the SR9409 ramp construction to raise the elevation of the ramp (i.e. JDM's Proposal) had been discussed in Project Control Meetings #33, #34 and #35 and that PCS's re-design for the SR9409 ramp contained in the letter of March 12, 2002, was based entirely on JDM's original ideas. (Ex. P-11)

58. JDM's letter of April 3, 2002 contested the propriety of the Department's position that PCS's work based on JDM's Proposal precluded JDM from completing its written value engineering proposal submission and concluded by saying that JDM would submit the details of same by April 30, 2002. (N.T. 102-03; Ex. P-11).

59. On April 10, 2002, representatives of JDM, PennDOT and PCS attended Project Control Meeting #37. The meeting minutes noted that JDM had notified PennDOT in its letter of April 3, 2002, that JDM would be submitting a written value engineering proposal in connection with work on the SR9409 ramp. At this meeting, PennDOT reiterated its position that it would not consider the JDM proposal because: PCS (not JDM) had already done the engineering and re-design work; JDM had not earlier notified PennDOT that it intended to submit a value engineering proposal; and JDM had been aware for some time that PCS was performing the work in question. (N.T. 105-11; Ex. P-12 at 8).

60. By letter dated April 15, 2002, PennDOT forwarded to JDM the final, revised plan sheets and cross sections for the re-designed SR9409 ramp made by PCS. This letter directed JDM to proceed with construction of the ramp as outlined in the revised plans. (N.T. 105-11; Ex. P-13).

61. The PennDOT letter of April 15, 2002 was received by JDM on April 16, 2002. Although JDM had previously known of the PCS plans, it was not until receipt of this letter that JDM was formally presented with the revised plans and directed to proceed with the revisions outlined therein. (N.T. 34-36, 59-60, 105-11; Ex. P-13).

62. The ideas for the SR9409 ramp modifications made by PCS in its revised plans and cross sections (and contained in PennDOT's letter of April 15, 2002) were essentially the same as JDM's Proposal for the modification of the SR9409 ramp proposed by Mr. Gaughan on January 17, 2002 and discussed at Project Control Meetings #33, #34, #35 and #36. (N.T. 34-39, 137; Exs. P-2, P-7, P-11; F.O.F. 16-21, 35-40, 44-47, 50-51, 54, 57-61, 63; Board Finding).

63. By letter dated April 16, 2002, PennDOT acknowledged receiving JDM's letter of April 3, 2002 (in which JDM stated it would be submitting a written value engineering proposal in connection with the SR9409 ramp). PennDOT's April 16 letter again confirmed its position and directed JDM not to pursue JDM's value engineering proposal because PCS had completed all the work on the re-design; because JDM had never stated its intention to submit a value engineering proposal at Project Control Meetings #33, #34 and #35; because JDM employees who attended those meetings knew that PCS was investigating a solution to the design conflicts; and because JDM never objected to PCS completing the required engineering work. PennDOT's April 16 letter further asserted that JDM never submitted a value engineering proposal complying with the requirements of Section 104.04 nor any notification of its intent to do so until April 3, 2002. In this letter, PennDOT also directed JDM to proceed with the revised

construction of the SR9409 ramp in accordance with the new plans supplied by PCS in PennDOT's letter of April 15, 2002. (N.T. 105-11, 219-22; Ex. P-14).

64. JDM's project manager, Mr. Greer, who was experienced in construction and in estimating construction projects, as well as preparing value engineering proposals, stated that, given the complexity of the SR9409 ramp, three months was a reasonable amount of time for JDM to prepare a value engineering proposal with the backup material required by Section 104.04 for its proposed changes. (N.T. 91-92, 102, 115-17).

65. The date of April 30, 2002 that JDM proposed to submit its written value engineering plan (with backup material) took into account JDM's analysis and planning of the proposed revisions that had begun in January 2002. (N.T. 104).

66. The Department did not tell JDM that the amount of time for preparing the written proposal (with backup material) was unreasonable or would interfere with the Project's schedules. (N.T. 117-18; Board Finding).

67. JDM's plan to submit the details of its value engineering proposal (with requisite backup material) regarding the SR9409 ramp in writing by April 30, 2002 would not have interfered with the Project's schedule. (N.T. 103-05; F.O.F. 24, 26-33, 64-66, 69; Board Finding).

68. JDM's plan to submit its written value engineering proposal (with requisite backup material) on April 30, 2002 was reasonable considering the complexity of the re-design and allowed enough time for Department investigation and implementation of JDM's Proposal without interference with Project schedules. (N.T. 91-92, 102-05, 115-17; F.O.F. 24, 26-33, 64-67, 69; Board Finding).

69. PennDOT did not cite Project delay or a lack of time for investigation and implementation, nor did it cite any provision or portion of Section 104.04 as grounds for its refusal to allow JDM to submit its written value engineering proposal with requisite backup material. (N.T. 33-34, 104, 163-72; Ex. P-11, P-12 at 8; Board Finding).

70. JDM asserted that it could have achieved an even greater cost savings for the SR9409 ramp construction had it been allowed to submit its written proposal. PennDOT did not know whether JDM's written value engineering proposal (with requisite backup material) would have been exactly the same as the revised plans of PCS. (N.T. 100, 131).

71. By its statements and communications to JDM beginning with the March 28, 2002 meeting (#36) and continuing with the April 10, 2002 meeting (#37) and its letters of April 15 and April 16, 2002, PennDOT clearly indicated to JDM that PennDOT would not accept, and that JDM should not submit to PennDOT, JDM's written value engineering proposal with the requisite backup material specified by Section 104.04 for JDM's suggested changes to the SR9409 ramp. By these actions and representations, PennDOT actively prevented JDM from submitting its value engineering proposal to modify the SR9409 ramp (i.e. JDM's Proposal) in writing with the backup materials specified by Section 104.04 of Publication 408/94, while PennDOT nonetheless implemented JDM's Proposal by either directing or allowing its engineer

(PCS) to incorporate JDM's Proposal into PCS's re-design of the SR9409 ramp and directing JDM to build the ramp per this re-design. (F.O.F. 16-21, 24, 44-47, 50, 53-70; Board Finding).

72. By its statements and communications to JDM beginning with the March 28, 2002 meeting (#36) and continuing with the April 10, 2002 meeting (#37) and its letters of April 15 and April 16, 2002, PennDOT clearly indicated to JDM that PennDOT would not accept, and that JDM should not submit to PennDOT, a written value engineering proposal for JDM's suggested changes to the SR9409 ramp with the backup materials specified by Section 104.04. By these actions and representations, PennDOT prevented JDM from submitting its value engineering proposal for its suggested changes to the SR9409 ramp (i.e. JDM's Proposal) in writing with the backup materials specified by Section 104.04 of Publication 408/94, while it nonetheless implemented JDM's Proposal by either directing or allowing its engineer (PCS) to incorporate JDM's Proposal into PCS's re-design of the SR9409 ramp and directing JDM to build the ramp per this re-design. (F.O.F. 16-21, 24, 44-47, 50, 53-70; Board Finding).

73. JDM did not submit JDM's Proposal in writing as its written value engineering proposal with the seven items of information listed in Section 104.04 of the 408 Specifications because it was repeatedly directed by PennDOT not to do so. (N.T. 109, 111, 123, 163-72, 215-22).

74. By letter dated April 22, 2002, JDM requested a meeting with the District Engineer in order to have the opportunity to respond to PennDOT's letters of April 15 and 16, 2002. The April 22 letter further stated that JDM intended to file a claim with regard to its value engineering proposal and that it would proceed with the revised work over its objection. (N.T. 107-08; Ex. P-15).

75. PennDOT did not grant JDM a meeting to discuss its value engineering proposal as JDM requested in its letter of April 22, 2002. (N.T. 111-12).

76. JDM completed the reconstruction of the SR9409 ramp in accordance with the revised plans and cross sections issued by PCS and PennDOT by letter of April 15, 2002 (which revised plans and cross-sections mirrored JDM's Proposal). (N.T. 35-39; F.O.F. 16-21, 44-47, 50, 53-72).

77. The cost savings realized as a result of the revisions to the SR9409 ramp plans were due to JDM's Proposal (i.e. the changes to the elevations and the retaining wall proposed by JDM as a value engineering proposal at the January 17, 2002 meeting on site; discussed thereafter at subsequent Project meetings; and implemented by PCS's re-design). (N.T. 75-76, 99-100, 137, 218; Exs. P-2, P-4, P-7, P-11; F.O.F. 16-21, 44-47, 50, 53-72).

78. Implementation of the revisions to the SR9409 ramp work which the Board finds to be the actual implementation of JDM's Proposal resulted in net construction cost savings to PennDOT of \$260,000 from the original contract work. (Panel Ex.1-Trial Stipulations ¶ 7; Exs. P-2, P-4, P-7, P-11; F.O.F. 16-21, 44-47, 50, 53-72, 76-77; Board Finding).

79. JDM's Proposal was a cost reduction proposal initiated, developed and submitted to the Department for modifying the plans and specifications for construction of the SR9409 ramp on the SR413 Project which was first submitted to PennDOT on January 17, 2002 and was

identified at that time as a value engineering proposal; which proposal resulted in an immediate net savings to the Department by providing a decrease in the cost of performance of the construction of the SR9409 ramp without impairing the essential functions and characteristics of same. JDM's Proposal was further presented to the Department at the February 13, 2002 progress meeting and identified as a value engineering proposal at that time as well. Additionally, JDM made it clear at both times that it intended to submit a written version of this proposal with the required backup material notwithstanding the fact that PennDOT's minutes do not reflect the identification of this proposal as a value engineering proposal until March 28, 2002. (F.O.F. 16-25, 35-39, 44-45, 50, 53-54; Board Finding).

80. Section 110.07 of the 408/94 Specifications, relating to compensation for value engineering proposals, states in part: "Payment will be made as a Lump Sum item, amounting to one-half of the cost difference of the original contract work and the cost of the new work, as authorized in Section 104.04. . . . One-half of the engineering cost and development cost incurred may be included in the new work costs." (Ex. D-27 (Pub. 408/94 § 110.07)).

81. The total cost that PCS invoiced to PennDOT for its engineering revisions to the SR9409 ramp work was \$6,286.38. (Panel Ex. 1-Trial Stipulations ¶ 6).

82. By letter to JDM dated May 17, 2002, PennDOT stated that its position on JDM's value engineering proposal remained unchanged and that JDM should follow the procedures in Section 105.01 of the 408 Specifications in order to pursue a claim. The letter did not offer to meet with JDM as JDM had requested in its letter of April 22, 2002. (N.T. 112; Ex. P-18).

83. By letter to PennDOT dated May 31, 2002, JDM stated that it wished to appeal the District Engineer's decision to refuse to review JDM's value engineering proposal. JDM requested that its claim be reviewed by the Construction Claims Review Committee. (Ex. P-20).

84. PennDOT did not invite JDM to participate in the Construction Claims Review Committee's review of JDM's claim or to otherwise submit documentation supporting its claim. (N.T. 115).

85. By letter dated August 20, 2002, PennDOT denied JDM's claim and advised JDM of its right to file a claim with the Board of Claims. (Ex. P-26).

86. JDM filed its claim with the Board on September 19, 2002. Morrissey v. PennDOT, No. 3548 (Bd. of Claims, filed September 19, 2002).

CONCLUSIONS OF LAW

1. The Board of Claims has exclusive jurisdiction over claims for breach of contract asserted against the Commonwealth. For claims filed with the Board prior to June 28, 2003 this jurisdiction derives from the Board of Claims Act, May 20, 1937, P.L. 728, No. 193 (as amended). 72 P.S. § 4651-4. For claims filed with the Board on or after June 28, 2003, the Board's jurisdiction derives from Act 142, December 3, 2002, P.L. 1147, No. 142. 62 Pa.C.S. § 1724 (2002); DGS v. Limbach Co., 862 A.2d 713, 718-720 (Pa. Cmwlth. 2004), aff'd per curiam, 895 A.2d 527 (Pa. 2006).

2. The present case was filed with the Board on September 19, 2002; therefore the Board of Claims has jurisdiction over this matter pursuant to the Board of Claims Act of May 20, 1937 and the provisions of that act are applicable to this matter. Id.

3. In the present case, the Board has subject matter jurisdiction, meaning it is competent to act on the general class or type of case presented, as well as personal jurisdiction, meaning it has the power to act over the parties in this case to order or affect a particular result. Id.; In re Melograne, 812 A.2d 1164, 1166-67 (Pa. 2002).

4. The parties entered into a contract that incorporated the Defendant's Publication 408 Specifications (1994 Edition), which included Section 104.04 entitled "Value Engineering" and Section 110.07, also entitled "Value Engineering."² Plaintiff's Ex. 1 at 10 and Joint Ex. 1 at 2; Publication 408/94 §§ 104.04, 110.07.

5. Section 104.04 describes and defines a "value engineering proposal" as a cost reduction proposal that may be initiated, developed and submitted to the Department for modifying the plans, the specifications or other contract requirements, which is identified as a value engineering proposal at the time it is submitted, and which would result in an immediate net savings to the Department by providing a decrease in the cost of performance of the specified work without impairing essential functions and characteristics of same. Publication 408/94 § 104.04 at Paragraphs First and Second.

6. The foregoing definition of a "value engineering proposal" contained in Section 104.04 does not require the proposal to be in writing, nor does it require initial notification from the contractor to PennDOT of the contractor's intention to submit a value engineering proposal to be in writing. N.T. 220; Publication 408/94 § 104.04 at Paragraphs First and Second.

7. Section 104.04 does not require any specific form or type of initial notification from the contractor to the Department of Transportation of the contractor's intention to submit a value engineering proposal other than that the proposal must be identified as a "value engineering proposal" at the time it is submitted. Publication 408/94 § 104.04.

8. Section 104.04, at Paragraph Third, does require a contractor to submit certain additional information "with each proposal" and that this additional information be submitted in

² Paragraph number one of the contract provides for "Publication 408, Specifications, dated 2000" to be made part of the contract. Addendum number two to the contract, dated May 26, 2000, provides for the deletion of Publication 408/2000 in the proposal and further provides that Publication 408/94 would be the governing construction specifications for the Project. (Plaintiff's Ex. 1 at 10 and Joint Ex. 1 at 2; N.T. 236-237).

time for the Department to investigate and implement the value engineering proposal without interference with project schedules. (Emphasis added). Publication 408/94 § 104.04 at Paragraph Third.

9. Section 104.04, at Paragraph Third, identifies this additional information as follows:

- a description of the difference between the existing contract requirements and the proposal change, with the comparative advantages and disadvantages of each;
- an itemized list of the contract requirements which are to be changed if the proposal is adopted, with a recommendation for making each change;
- a detailed estimate of the reduction in construction costs that will result from the adoption of the proposal;
- a prediction of any effects the proposed change will have on other Department costs, such as costs of maintenance and operation;
- a statement of the deadline for issuing a change order adopting the proposed change, to obtain the maximum cost reduction during the remainder of the contract, noting any effect on the contract completion time or delivery schedule;
- the dates of any previous or concurrent submissions of the same proposal and any previous actions by the Department; and
- the contract items of work affected by the proposed change, including any quantity changes.”

Publication 408/94 § 104.04 at Paragraph Third.

10. Section 104.04, by the nature of the seven specified items of information identified at Paragraph Third (referred to hereinafter as “backup material” or simply “backup”), does require that this backup material be submitted in writing in order to complete the value engineering proposal submission process. Publication 408/94 § 104.04 at Paragraph Third.

11. Section 104.04 does not require submission of the written backup materials for the value engineering proposals within any particular time other than to require that the contractor submit these materials in enough time for Department investigation and implementation of the proposal without interference with project schedules. Id.

12. Read as a whole, Section 104.04 allows a contractor to offer or initiate a value engineering proposal to PennDOT orally (identifying it as such at the time) in order to ascertain its potential viability and PennDOT’s level of interest; but then requires the contractor to submit the value engineering proposal (with the additional backup materials specified) in writing in order to complete the value engineering proposal submission process. Section 104.04 then further requires the written value engineering proposal (with requisite backup material) be submitted to PennDOT in time to allow PennDOT to investigate and implement the proposal without interference to the project’s schedules in order for the proposal to be considered eligible for implementation and the proposing contractor to be eligible for compensation under Section 110.07. Publication 408/94 §§ 104.04 and 110.07; Conclusions of Law (“C.O.L.”) 5-11.

13. Section 104.04 does not require the Department to consider any value engineering proposal that is submitted. Publication 408/94 § 104.04.

14. Section 104.04 does provide the contractor with the right to initiate value engineering proposals on a job (either orally or in writing) and with the right to develop and submit the written value engineering proposal and the requisite backup material to complete the value engineering proposal submission process prescribed by Section 104.04 if done in time for the Department to investigate and implement the value engineering proposal without effecting the project schedule. Id.

15. Section 104.04 also states that, if the value engineering proposal is accepted for implementation, the Department will do so by issuing a contract work order and that compensation to the contractor for implementation of its value engineering proposal will be as specified in Section 110.07. Publication 408/94 § 104.04 (at Paragraphs Eighth and Last) and § 110.07.

16. Section 110.07 provides that payment for value engineering will be made as a “Lump Sum item” equal to one half of the cost difference of the original contract work and the cost of the new work as authorized by Section 104.04. Publication 408/94 § 110.07.

17. Sections 104.04 and 110.07, read together, provide that if the Department accepts a value engineering proposal properly submitted pursuant to Section 104.04, the Department will do so by issuing a contract work order that incorporates the necessary changes in the plans and specifications and will pay the contractor who submitted the value engineering proposal a lump sum equal to one half of the cost difference of the original contract work and the cost of the new work. Publication 408/94 §§ 104.04 and 110.07.

18. To recover on a breach of contract theory, a plaintiff must establish the existence of a contract, the breach of a duty imposed by the contract, and damages resulting from that breach. Pennsy Supply, Inc. v. American Ash Recycling Corp., 895 A.2d 595 (Pa. super. 2006), appeal den., 907 A.2d 1103 (Pa. 2006).

19. The parties hereto have stipulated to the existence of the contract here at issue between them and that the cost difference between the original contract work and the new work resulting from implementation of PCS’s re-design of the SR9409 ramp (which re-design the Board has found, as a matter of fact, to be the actual implementation of JDM’s Proposal) was \$260,000. Panel Ex.1-Trial Stipulations; F.O.F. 3, 77-78.

20. Because JDM’s Proposal was a cost reduction proposal initiated, developed and submitted to the Department for modifying the plans and specifications for construction of the SR9409 ramp on the Project which was first submitted to PennDOT on January 17, 2002 and was identified at that time as a value engineering proposal; and because JDM’s Proposal resulted in an immediate net savings to the Department by providing a decrease in the cost of performance of the construction of the SR9409 ramp without impairing the essential functions and characteristics of same; and because JDM’s Proposal was further presented to the Department at the February 13, 2002 Progress Meeting and identified as a value engineering proposal at that time (notwithstanding the fact that PennDOT’s minutes do not reflect the identification of this proposal as a value engineering proposal at that time); we hold that JDM’s

Proposal, as delivered orally, was a “value engineering proposal” as defined by Section 104.04. Publication 408/94 §§ 104.04 and 110.07; C.O.L. 5-7.

21. JDM initially submitted its value engineering proposal (i.e. JDM’s Proposal) for the SR9409 ramp to PennDOT on January 17, 2002, and identified it as a “value engineering proposal,” when JDM’s superintendent, Mr. Gaughan, first advanced his proposed changes to the work on the SR9409 ramp orally in a face-to-face meeting with the Department’s resident engineer (Mr. Doyne) and its construction inspection supervisor (Mr. Szucsik), and repeated this submission orally to PennDOT at the February 13, 2002 Progress Meeting where Mr. Gaughan also described JDM’s Proposal and identified it as a value engineering proposal. Publication 408/94 §§ 104.04 and 110.07; C.O.L. 5-7.

22. The Department accepted JDM’s value engineering proposal (i.e. JDM’s Proposal) initially submitted on January 17, 2002 (without the written backup material required by Section 104.04) by considering it, adopting it, revising Project plans based on it and instructing JDM to construct the SR9409 ramp according to the redrawn plans incorporating JDM’s Proposal, but did not issue a work order accepting this value engineering proposal nor pay JDM for one-half the cost savings the Department experienced as a result of JDM’s Proposal pursuant to Section 110.07. Publication 408/94 §§ 104.04 and 110.07; F.O.F. 19, 37, 41-42, 51, 62-63, 66; C.O.L 15-17.

23. For any value engineering proposal submitted in accordance with Section 104.04 which the Department accepted and put into effect, the Department had a contractual obligation to: 1) issue a contract work order accepting same and incorporating the necessary changes in the plans and specifications to permit the value engineering proposal to be put into effect; and 2) to pay the proposing contractor one-half of the cost difference of the original contract work and the cost of the new work. Publication 408/94 §§ 104.04 and 110.07; C.O.L. 5-12, 14-17.

24. The Department’s arguments for its failure to compensate JDM for the savings it realized in implementing JDM’s Proposal may be summarized as follows:

- A) JDM did not submit a “value engineering proposal”; or
- B) JDM did not submit a value engineering proposal in compliance with Section 104.04 of Publication 408/94 Specifications because:
 - (1) JDM failed to submit its value engineering proposal in writing with the requisite backup material;
 - (2) PCS (PennDOT’s original design professional for the Project) had already revised the Project plans for the SR9409 ramp by the time JDM first indicated to PennDOT JDM’s desire to pursue its proposed changes to the SR9409 ramp as a value engineering proposal; and
 - (3) JDM did not do the engineering work required by Section 104.04 of Publication 408/94, but knowingly allowed PCS to do the engineering work and re-design the SR9409 ramp;or
- C) PennDOT did not issue a contract work order to accept JDM’s value engineering proposal.

Defendant PennDOT’s Brief, pp. 2-7.

25. The Department's argument that it is not required to compensate JDM for the savings it realized in implementing JDM's Proposal for modifications to the SR9409 ramp because JDM did not submit it as a "value engineering proposal" is without merit because we have determined that JDM's Proposal, submitted orally to PennDOT on January 17, 2002 and again on February 13, 2002 (and identified as such both times), meets the description and definition of "value engineering proposal" provided by Section 104.04 of the Publication 408/94 Specifications applicable to this Project. Publication 408/94 §§ 104.04 and 110.07; F.O.F. 16-24, 44-45, 62, 76-78; C.O.L. 5-7.

26. The Department's next argument that it is not required to compensate JDM for one-half the savings it realized in implementing JDM's Proposal for modifications to the SR9409 ramp because JDM did not submit a value engineering proposal in compliance with Section 104.04 of Publication 408/94 specifications since it failed to submit same in writing with the requisite backup material required by the Third Paragraph of that section is also without merit because: 1) JDM had a contractual right to submit this value engineering proposal in writing and to submit the backup material required by Section 104.04 so long as such written submissions to complete the value engineering proposal submission process were submitted in time to allow PennDOT to investigate and implement the proposal without interfering with the Project schedule; 2) the evidence establishes that JDM's plan to submit its written value engineering proposal with requisite backup material by April 30, 2002 was reasonable given the complexity of the changes, and would have allowed PennDOT sufficient time to investigate and implement same without interfering with the Project's schedule; and 3) PennDOT itself prevented JDM from submitting its written value engineering proposal with requisite backup as specified by Section 104.04 Third Paragraph. Publication 408/94 §§ 104.04 and 110.07; F.O.F. 16-18, 21-34, 38-41, 44-46, 50, 53-56, 59-69, 71-73; C.O.L. 5-14, 27-33.

27. Where one party to a contract prevents or interferes with the other party's performance, it constitutes an actionable breach. Rothrauff v. Sinking Spring Water Co., 14 A.2d 87, 89 (Pa. 1940). Where performance of a contract or some aspect thereof is prevented by a party, no advantage can be taken of such non-performance by the party who caused it. Iseman v. Joe F. Sherman Co., 105 A.2d 160, 164 (Pa. 1954); Liddle v. Scholze, 768 A.2d 1183, 1185 (Pa. Super. 2001); Ott v. Buehler Lumber Co., 541 A.2d 1143, 1145 (Pa. Super. 1988); Craig Coal Mining Co. v. Romani, 513 A.2d 437, 440 (Pa. Super. 1986); Chervenak, Keane & Co., Inc. v. Hotel Rittenhouse Ass'c, Inc., 477 A.2d 482, 486 (Pa. Super. 1984).

28. The Department cannot claim that JDM failed to comply with the Section 104.04 requirement that JDM's value engineering proposal be submitted in writing with the backup material specified in Paragraph Three thereof as grounds for its refusal to pay JDM for the cost savings realized by PennDOT as a result of JDM's oral value engineering proposal (i.e. JDM's Proposal) when it was the Department itself that directed this noncompliance (i.e. JDM's failure to file its written value engineering proposal with requisite backup material). Rothrauff v. Sinking Spring Water Co., 14 A.2d at 89; Iseman v. Joe F. Sherman Co., 105 A.2d at 164; Liddle v. Scholze, 768 A.2d at 1185; Ott v. Buehler Lumber Co., 541 A.2d at 1145; Craig Coal Mining Co. v. Romani, 513 A.2d at 440; Chervenak, Keane & Co., Inc. v. Hotel Rittenhouse Ass'c, Inc., 477 A.2d at 486.

29. JDM is excused from its failure to submit its value engineering proposal with requisite backup material in writing pursuant to Section 104.04 (Third Paragraph) because that

failure was at the direction of the Department. Rothrauff v. Sinking Spring Water Co., 14 A.2d at 89; Iseman v. Joe F. Sherman Co., 105 A.2d at 164; Liddle v. Scholze, 768 A.2d at 1185; Ott v. Buehler Lumber Co., 541 A.2d at 1145; Craig Coal Mining Co. v. Romani, 513 A.2d at 440; Chervenak, Keane & Co., Inc. v. Hotel Rittenhouse Ass'c, Inc., 477 A.2d at 486.

30. Additionally, where a party to a contract has affirmatively or positively interfered with the other party's performance, provisions of the contract excusing payment due to such non-performance cannot be raised as a defense. Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park, 506 A.2d 862, 865-67 (Pa. 1986); James Corp. v. North Allegheny Schl. Dist., 938 A.2d 474, 484-85 (Pa. Cmwlth. 2007); Dep't of General Svcs. V. Pittsburgh Bldg. Co., 920 A.2d 973, 987 (Pa. Cmwlth. 2007); A.G. Cullen Const., Inc. v. SSHE, 898 A.2d 1145, 1175-76 (Pa. Cmwlth. 2006).

31. Active interference occurs where there is: (1) 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 manner necessary to the prosecution of the work. See e.g. Coatesville Contractors & Engineers, Inc. v. Ridley Park, 506 A.2d at 865-67; James Corp. v. North Allegheny Schl. Dist., 938 A.2d at 484-85; Dep't of General Svcs. V. Pittsburgh Bldg. Co., 920 A.2d at 987; A.G. Cullen Const., Inc. v. SSHE, 898 A.2d at 1175-76.

32. By refusing to allow JDM to submit its written value engineering proposal with requisite backup material and by notifying JDM that the Department "would not entertain" such a submission from JDM pursuant to the terms of the contract, PennDOT actively interfered with JDM's ability to perform the requirement to submit its value engineering proposal with backup material in writing in compliance with Section 104.04, Third Paragraph. Coatesville Contractors & Engineers, Inc. v. Ridley Park, 506 A.2d at 865-67; James Corp. v. North Allegheny Schl. Dist., 938 A.2d at 484-85; A.G. Cullen Const., Inc. v. SSHE, 898 A.2d at 1175-76; See also Able-Hess Associates, Inc. v. SSHE, No. 3369, 2003 WL 22524494 at *13.

33. As a result of the Department's active interference with JDM's performance of Section 104.04 (Third Paragraph) requiring the submission of a value engineering proposal with backup material in writing, the Department cannot cite that provision as a defense against JDM's claim of breach of contract and damages for the Department's refusal to compensate JDM for one-half the cost savings incurred by the Department due to its implementation of JDM's oral value engineering proposal (i.e. JDM's Proposal). Coatesville Contractors & Engineers, Inc. v. Ridley Park, 506 A.2d at 865-867; A.G. Cullen Const., Inc. v. SSHE, 898 A.2d at 1175-76; James Corp. v. North Allegheny Schl. Dist., 938 A.2d at 484-85; Able-Hess Associates, Inc. v. SSHE, No. 3369, 2003 WL 22524494 at *13.

34. Section 104.04 at Paragraph Fifth provides that PennDOT will not be liable for failure to accept or act upon a proposal submitted if such a proposal is similar to a change in the plans or specifications for the Project under consideration by PennDOT at the time the proposal is submitted. Publication 408/94 § 104.04 (Paragraph Fifth).

35. PennDOT's argument that JDM's value engineering proposal did not comply with the requirements of Section 104.04 because PCS had already revised the Project plans for SR9409 by the time JDM first indicated to PennDOT its desire to pursue its proposed changes to the SR9409 ramp as a value engineering proposal is also without merit because: 1) JDM's

Proposal, delivered orally to representatives of PennDOT on January 17, 2002 and again on February 13, 2002 (and identified both times as a value engineering proposal) was a “value engineering proposal” as described by Section 104.04 (Paragraphs First and Second); 2) both these presentations to PennDOT occurred, as a matter of fact, before PCS or any other PennDOT representative was considering such a change to the plans or specifications for the SR9409 ramp. Publication 408/94 § 104.04; F.O.F. 16-20, 34-40; C.O.L. 5-7.

36. PennDOT did not assert that JDM’s attempt to submit its value engineering proposal with requisite backup material in writing pursuant to Section 104.04 would violate the provision of that section requiring that such submission must allow enough time for Department investigation and implementation without interference with the Project schedules, which is the only timing limitation provided in the section for the submission of said information. Publication 408/94 § 104.04; F.O.F. 16-21, 26-33, 53-54, 59, 63-69.

37. Because JDM’s plan to submit its value engineering proposal on April 30, 2002 was reasonable considering the complexity of the re-design and allowed enough time for Department investigation and implementation without interference with Project schedules, JDM’s plan to submit its value engineering proposal with requisite backup material in writing by April 30, 2002, conformed to the timing requirements of Section 104.04 of Publication 408/94. Publication 408/94 § 104.04; F.O.F. 16-21, 26-33, 53-54, 59, 63-69.

38. If, in the alternative, the Department’s argument is that JDM failed to comply with the requirements of Section 104.04 because JDM did not submit the details of its value engineering proposal with requisite backup material in writing before the re-design work for the SR9409 ramp had already been performed by PCS and JDM knew PCS was doing this work but never objected, we also find this argument to be without merit because: 1) JDM had a contractual right to submit a value engineering proposal orally and to complete the value engineering proposal submission process by filing same in writing with the backup material required by Section 104.04 so long as such complete written submission was provided to PennDOT in time to allow PennDOT to investigate and implement same so as to not interfere with the Project’s schedule; 2) PennDOT had a corresponding obligation to allow JDM a reasonable amount of time to do so; 3) PennDOT breached the foregoing contract obligation by allowing its own Project engineer (PCS) to re-design the SR9409 ramp using JDM’s oral value engineering proposal without allowing JDM a reasonable amount of time to do its own engineering work and to produce and file JDM’s written value engineering proposal with required backup material after JDM stated its intent to do so in the January 17 and February 13 meetings and then refusing to allow JDM to develop and submit the details of its own value engineering proposal with requisite backup material in writing as prescribed by Section 104.04 because PCS did it first. Publication 408/94 § 104.04 (Paragraphs First-Third and Fifth); Rothrauff v. Sinking Spring Water Co., 14 A.2d at 89; Iseman v. Joe F. Sherman Co., 105 A.2d at 164 ; Liddle v. Scholze, 768 A.2d at 1185; Ott v. Buehler Lumber Co., 541 A.2d at 1145; Craig Coal Mining Co. v. Romani, 513 A.2d at 440; Chervenak, Keane & Co., Inc. v. Hotel Rittenhouse Ass’c, Inc., 477 A.2d at 486; Coatesville Contractors & Engineers, Inc. v. Ridley Park, 506 A.2d at 865-67; A.G. Cullen Const., 898 A.2d at 1175-76; James Corp. v. North Allegheny Schl. Dist., 938 A.2d at 484-85; Able-Hess Associates, Inc. v. SSHE, No. 3369, 2003 WL 22524494 at *13; F.O.F. 16-21, 26-54, 59, 63-69; C.O.L. 5-14, 27-37.

39. The Department's breach of the contract, described in Conclusions of Law, Paragraph 38 above, prevented JDM's ability to submit its value engineering proposal in writing with requisite backup materials prior to PCS's revision of the Project plans and drawings for the SR9409 ramp, and may not be used as a basis to deprive JDM of its contractual right to submit a value engineering proposal to the Department with requisite backup material in writing in order to comply with the value engineering proposal submission procedure prescribed by Section 104.04 (Third Paragraph) and the opportunity to be paid one half of the net construction cost savings achieved by its oral value engineering proposal. Publication 408/94 § 104.04 (Paragraphs First-Third and Fifth) and § 110.07; Rothrauff v. Sinking Spring Water Co., 14 A.2d at 89; Iseman v. Joe F. Sherman Co., 105 A.2d at 164 ; Liddle v. Scholze, 768 A.2d at 1185; Ott v. Buehler Lumber Co., 541 A.2d at 1145; Craig Coal Mining Co. v. Romani, 513 A.2d at 440; Chervenak, Keane & Co., Inc. v. Hotel Rittenhouse Ass'c, Inc., 477 A.2d at 486; F.O.F. 16-21, 26-54, 59, 63-69; C.O.L. 5-14, 27-38.

40. Because the Department's actions and breach of contract, described in Conclusions of Law, Paragraph 38 above, actively interfered with JDM's ability to submit its value engineering proposal in writing with requisite backup materials prior to PCS's revision of the Project plans and drawings for the SR9409 ramp, this cannot be used as a basis to deny payment to JDM for actual implementation of JDM's Proposal in the construction of the SR9409 ramp. Publication 408/94 § 104.04 (Paragraphs First-Third and Fifth); Coatesville Contractors & Engineers, Inc. v. Ridley Park, 506 A.2d at 865-67; A.G. Cullen Const., 898 A.2d at 1175-76; James Corp. v. North Allegheny Schl. Dist., 938 A.2d at 484-85; Able-Hess Associates, Inc. v. SSHE, No. 3369, 2003 WL 22524494 at *13; C.O.L. 5-14, 27-39.

41. JDM did not waive or otherwise abandon its right to submit a value engineering proposal with requisite backup material in writing for the changes to the work on the SR9409 ramp after its oral presentation of JDM's Proposal by its failure to object to the work PCS was also doing on the SR9409 ramp after the February 13, 2002 meeting because any such waiver of a contract right must be done intentionally and the evidence is clear that JDM did not do so intentionally because: 1) JDM asserted its desire and intent to pursue the changes as a value engineering effort consistently from the January 17, 2002 in-person meeting at the Project site when Mr. Gaughan first raised the idea as a value engineering proposal through the various Project meetings and JDM's letter of April 3, 2002; 2) no one from PennDOT ever told JDM that PCS's review of the SR9409 issues raised by JDM or that PCS's development of re-designed plans for the SR9409 ramp would preclude JDM from submitting its written value engineering proposal with requisite backup materials until March 28, 2002 when PCS had completed such revision; and 3) JDM was not unreasonable in its belief that PCS's work on the SR9409 ramp was complimentary not competitive or exclusive of JDM's development of its own proposal because PCS (as the design professional for the Project) would be involved with PennDOT in determining the viability and benefit of JDM's value engineering proposal, PCS would have to do its own independent analysis of JDM's Proposal, and PCS would be responsible for doing any revisions finally made to Project plans on account of JDM's Proposal in any event. Pub. 408/94 § 104.04; See e.g. Dougherty v. Thomas, 313 Pa. 287, 297-98, 169 A. 219, 223 (1933); Kahn v. Bancamerica-Blair Corp., 327 Pa. 209, 214-15, 193 A. 905, 907 (1937); Consolidated Rail Corporation v. Delaware and Hudson Railway Company, 569 F. Supp. 26, 29-30 (E.D. Pa. 1983); F.O.F. 16-20, 24-33, 35-39, 41-43, 46-50, 52-59, 64-69; C.O.L. 5-14, 36-37.

42. The Department's next argument that it is not required to compensate JDM for the savings it realized in implementing JDM's Proposal for modifications to the SR9409 ramp because JDM did not do the engineering work required by Section 104.04 of Publication 408/94 specifications is also without merit because: 1) JDM had a contractual right to submit this value engineering proposal in writing and to submit the backup material required by Section 104.04 so long as such written submissions to complete the value engineering proposal submission process were submitted in time to allow PennDOT to investigate and implement the proposal without interfering with the Project schedule; 2) the evidence establishes that JDM's plan to complete its engineering work in order to submit its written value engineering proposal with requisite backup material by April 30, 2002 was reasonable given the complexity of the changes, and would have allowed PennDOT sufficient time to investigate and implement same without interfering with the Project's schedule; and 3) PennDOT itself caused JDM not to pursue this work by its stated refusal to accept JDM's written value engineering proposal after March 28, 2002. Publication 408/94 § 104.04 (Paragraphs First-Third); Rothrauff v. Sinking Spring Water Co., 14 A.2d at 89; Iseman v. Joe F. Sherman Co., 105 A.2d at 164 ; Liddle v. Scholze, 768 A.2d at 1185; Ott v. Buehler Lumber Co., 541 A.2d at 1145; Craig Coal Mining Co. v. Romani, 513 A.2d at 440; Chervenak, Keane & Co., Inc. v. Hotel Rittenhouse Ass'c, Inc., 477 A.2d at 486. F.O.F. 16-21, 26-54, 59, 63-69; C.O.L. 5-14, 27-37.

43. The Department cannot utilize the fact that JDM did not perform the engineering necessary to submit its value engineering proposal in writing with the requisite backup material specified in Paragraph Three of Section 104.04 as grounds for its refusal to pay JDM for the cost savings realized by PennDOT as a result of PennDOT's implementation of JDM's oral value engineering proposal (i.e. JDM's Proposal) when it was the Department itself that actively interfered with JDM's pursuit of this work by its stated refusal to accept JDM's written value engineering proposal with requisite backup material after March, 28, 2002. Coatesville Contractors & Engineers, Inc. v. Ridley Park, 506 A.2d at 865-67; James Corp. v. North Allegheny Schl. Dist., 938 A.2d at 484-85; A.G. Cullen Const., 898 A.2d at 1175-76; Able-Hess Associates, Inc. v. SSHE, No. 3369, 2003 WL 22524494 at *13; C.O.L. 5-14, 27-42.

44. The Department's next argument, that it is not required to compensate JDM for the savings it realized in implementing JDM's Proposal for modifications to the SR9409 ramp because the Department did not issue a contract work order accepting this proposal is also without merit because: 1) the Department, as a matter of fact, clearly accepted and implemented JDM's Proposal, revised the plans and drawings for the SR9409 ramp construction in accordance therewith and directed JDM in writing to build the ramp in accordance with these revised plans and drawings as evidenced, inter alia, by the Department's letters of April 15 and April 16, 2002 letter (Exs. P-13 and P-14); 2) Section 104.04 (Paragraph Eighth) requires that, if JDM's value engineering proposal was accepted by the Department in whole or in part (as we have found it was), the Department had a contractual obligation to do so by issuing a contract work order; 3) the Department failed to perform its contractual obligation to issue a contract work order specifically to accept JDM's value engineering proposal. Publication 408/94 § 104.04 (Paragraph Eighth).

45. The Department's own breach of the Project contract and specification 104.04 (Paragraph Eighth) by reason of its failure to issue a contract work order specifically to accept JDM's value engineering proposal (when it did, in fact, accept and implement same) cannot be used as a basis for failure to compensate JDM for one-half of the cost savings experienced by the

Department pursuant to Section 110.07 as a result of implementing JDM's Proposal. Pub. 408/94 §§ 104.04 and 110.07; Rothrauff v. Sinking Spring Water Co., 14 A.2d at 89; Iseman v. Joe F. Sherman Co., 105 A.2d at 164 ; Liddle v. Scholze, 768 A.2d at 1185; Ott v. Buehler Lumber Co., 541 A.2d at 1145; Craig Coal Mining Co. v. Romani, 513 A.2d at 440; Chervenak, Keane & Co., Inc. v. Hotel Rittenhouse Ass'c, Inc., 477 A.2d at 486; F.O.F. 16-21, 26-54, 59, 63-69; C.O.L. 5-14, 27-44.

46. Additionally, because the Department's breach of contract and failure to issue a contract work order specifically accepting JDM's value engineering proposal while, as a matter of fact, implementing same constitutes active interference, the Department is precluded from citing the provision requiring such contract work order to excuse payment for JDM's value engineering proposal as a defense. Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park, 506 A.2d at 865-67; James Corp. v. North Allegheny Schl. Dist., 938 A.2d at 484-85; A.G. Cullen Const., 898 A.2d at 1175-76; Able-Hess Associates, Inc. v. SSHE, No. 3369, 2003 WL 22524494 at *13; F.O.F. 16-21, 26-54, 59, 63-69; C.O.L. 5-14, 27-44.

47. JDM has suffered damages as a result of the Department's breaches of contract noted above in Conclusions of Law, Paragraphs 22-23, 25-26, 32-33, 38-40, 42-47 because these breaches deprived JDM of payment of one-half the cost difference between the original contract work and the new work enjoyed by PennDOT on the Project as a result of the implementation of JDM's value engineering proposal. Publication 408/94 §§ 104.04 and 110.07; C.O.L. 22-23, 25-26, 32-33, 38-40, 42-46.

48. Remedies for breach are designed to protect the non-breaching party's interests, including his expectation interest by attempting to put him in as good a position as he would have been had the contract been performed, or his restitution interest by requiring the breaching party to disgorge the benefit he has received by returning it to the party who conferred it. Ferrer v. University of Pennsylvania, 825 A.2d 591 (Pa. 2002).

49. Section 110.07 of the Publication 408/94 Specifications details how payment will be calculated and made to the contractor for savings realized from implementation of its value engineering proposal: "Payment will be made as a Lump Sum item, amounting to one-half of the cost difference of the original contract work and the cost of the new work, as authorized in Section 104.04. . . . One-half of the engineering cost and development cost incurred may be included in the new work costs." Publication 408/94 §§ 104.04 and 110.07.

50. Accordingly, JDM's damages are its 50% share of the difference between the cost of original contract work on the SR9409 ramp and the cost of the new work on the SR9409 ramp resulting from the changes in the work that the Board has determined were caused by JDM's value engineering proposal, which cost difference has been stipulated by the parties to be \$260,000. Publication 408/94, §§ 104.04 and 110.07; F.O.F. 73-74.

51. Although Section 110.07 also states that one-half the cost of engineering and development incurred with regard to the value engineering proposal may be added to the cost of the extra work, thus reducing the cost difference between original and new work by one-half the amount of such engineering/development costs and reducing the lump sum payout to the contractor by one-quarter of such engineering/development costs, the Board finds such a reduction inappropriate in this case because: 1) the parties have stipulated that the cost difference

between the original contract work and the new work is \$260,000; and 2) given PennDOT's conduct in this matter we find no equities in its favor that would recommend a permissive reduction in the lump sum value engineering payout due JDM.

52. PennDOT is liable to JDM for damages in the amount of \$130,000. C.O.L. 12-14, 17-19, 22-23, 25-51.

53. JDM is also entitled to prejudgment interest from PennDOT on the amount of damages. The Procurement Code provides for interest to be paid at the statutory rate (6% per annum) applicable to judgments from the date the claim was filed with the contracting officer. 62 Pa.C.S. § 1751 (1998); 41 P.S. § 202.

54. The Procurement Code defines contracting officer as "a person authorized to enter into and administer contracts and make written determinations with respect to contracts." 62 Pa.C.S. § 103.

55. Publication 408/94 § 105.01(a) provided JDM with a process to contest the decisions of the engineer on the Project regarding disputes concerning the 408 specifications. However, this provision is unclear and ambiguous with regard to whether the initial filing with the District Engineer/Administrator regarding the dispute (JDM's letter of April 22, 2002) should be considered a "claim" or merely "notice of intent to file a claim;" whether the "appeal" to the Director, Bureau of Construction and Materials for review by the Construction Claim Review Committee (JDM's letter of May 31, 2002) after "rejection of the claim" by the District Engineer is the claim; and/or which person or entity should be considered the "contracting officer." Accordingly, for the purpose of assessing prejudgment interest only, we construe this ambiguity against the drafter (PennDOT) and will award prejudgment interest from JDM's letter of April 22, 2002 notifying the District Administrator of its claim for compensation resulting from the Project engineer's refusal to consider JDM's value engineering proposal. Exs. P-15, P-20; 62 Pa.C.S. § 1751; Publication 408/94 § 105.01(a); Central Transp., Inc. v. Board of Assessment Appeals of Cambria County, 417 A.2d 144, 148-49 (Pa. 1980); Com., State Public School Bldg. Authority v. Noble C. Quandt Co., 585 A.2d 1136, 1144 (Pa. Cmwlth. 1991); F.O.F. 75.

56. Prejudgment interest is payable at the statutory rate for judgments (6% per annum) beginning on April 22, 2002, (the date JDM brought the rejection of its claims to the District Administrator) through the date of this judgment by the Board. 62 Pa.C.S. § 1751 (1998); 41 P.S. § 202 (1974); 62 Pa.C.S. § 103.

57. The 6% per annum statutory rate of interest on the judgment of \$130,000 is appropriately applied from April 22, 2002, to the date of this Order, resulting in prejudgment interest of \$55,518.90 due on the principal damage amount.

58. PennDOT is liable to JDM for a total judgment, including prejudgment interest, of \$185,518.90.

59. PennDOT is also liable for post-judgment interest on the total outstanding judgment at the statutory rate for judgments (6% per annum), calculated in the manner described for prejudgment interest, beginning on the date of the attached Opinion and Order and continuing until the date the judgment is paid in full. 62 Pa.C.S. § 1751; 41 P.S. § 202.

60. Each party shall bear its own costs. 62 Pa.C.S. § 1725(e).

OPINION

Background

Plaintiff, James D. Morrissey, Inc. (“JDM”), brings this claim against Defendant, Commonwealth of Pennsylvania, Department of Transportation (“PennDOT” or “Department”) seeking damages in excess of \$125,000, plus interest thereon, for breach of contract resulting from PennDOT’s alleged interference with JDM’s ability to perform under the contract. JDM claims it incurred damages when it was prevented from completing submission of its proposal for cost saving ideas as a “value engineering proposal” as permitted under the contract. The term “value engineering” applies to cost reduction proposals that may be initiated, developed and submitted to the Department for modifying the plans, specifications or other contract requirements to produce net cost savings for the Department.

The parties executed a contract for the sum of \$19,769,213.25 for the construction and improvement of a section of state highway SR413 (the “Project”) including a ramp identified as the “SR9409 ramp.” This contract, as modified pursuant to Addendum No. 2, incorporated PennDOT’s Publication 408/94 Specifications as a part of the contract. P-1 at 10 ¶ 1; Joint Ex. 1 at 2.

Section 104.04 of the Publication 408 Specifications identifies a “value engineering proposal” as follows:

Value engineering applies to cost reduction proposals that may be initiated, developed, and submitted to the Department for modifying the plans, the specifications, or other contract requirements. This does not apply to a proposal unless it is identified as a value engineering proposal at the time it is submitted.

Value engineering proposals are those which would require a change in the contract and would result in an immediate net savings to the Department. They provide a decrease in the cost of performance, without impairing essential functions and characteristics, such as service life, reliability, economy of operation, ease of maintenance, and safety features.

(Ex. D-26 (Pub. 408/94 § 104.04)).

Thus, pursuant to this provision, a contractor may submit a value engineering proposal, and, if the value engineering proposal is accepted and approved by PennDOT, the contractor is entitled to share in the cost savings. Section 110.07 of the 408/94 Specifications, relating to compensation for value engineering proposals, states, in part:

Payment will be made as a Lump Sum item, amounting to one-half of the cost difference of the original contract work and the cost of the new work, as authorized in Section 104.04. . . . One-half of the engineering cost and development cost incurred may be included in the new work costs.

(Ex. D-27 (Pub. 408/94 § 110.07)).

Here, JDM proposed a design change to save money on the construction of the SR9409 ramp. While planning the excavation work for the Project, JDM determined that raising the infield profiles of the SR9409 ramp from those provided in the contract plans and drawings would avoid interference with an existing eight-inch sanitary sewer line, allow for use of a smaller barrier wall along the ramp and save substantial excavation work, time and cost. In a discussion at the work site on January 17, 2002, JDM's field superintendent (Michael Gaughan) proposed the foregoing idea for change to the Project plans (sometimes referred to hereinafter as "JDM's Proposal") to PennDOT's engineer (John Doyne) and construction inspection supervisor (Joseph Szucsik) on the Project. JDM's field superintendant also stated expressly to PennDOT's representatives at that time that JDM offered this idea as a value engineering proposal. PennDOT's representatives agreed the idea was a good one, and Mr. Gaughan stated that JDM intended to follow-up and submit this proposal in writing to PennDOT for consideration as a value engineering proposal as permitted under the contract. However, despite identification of JDM's Proposal as a value engineering proposal at the work site meeting on January 17, 2002, and again at a Project Progress Meeting on February 13, 2002, PennDOT permitted its original Project design engineer, Pickering, Corts, & Summerson ("PCS"), to quickly re-design the SR9409 ramp before JDM could formalize and submit its written proposal with all the required

backup materials specified in Section 104.04. Thereafter, when JDM sought to proceed with submitting its written value engineering proposal, with full supporting materials, PennDOT instructed JDM that PennDOT would not accept it and that JDM should not pursue it further. Ultimately, the ramp was constructed as re-designed by PCS utilizing JDM's oral proposal of raising the infield profiles, resulting in substantial net savings to PennDOT. No payments were made to JDM for the use of its proposal.

Liability

To recover on a breach of contract theory, a plaintiff must establish the existence of a contract, the breach of a duty imposed by the contract, and damages resulting from that breach. Pennsy Supply, Inc. v. American Ash Recycling Corp., 895 A.2d 595 (Pa. Super. 2006), appeal denied, 907 A.2d 1103 (Pa. 2006). Here, the existence of the contract and the amount of damages at issue are stipulated between the parties and are not in dispute. The only remaining issue of substance is whether the defendant breached the contract. PennDOT argues that it owes no duty of compensation to JDM because, inter alia: JDM never submitted a value engineering proposal; JDM never submitted a value engineering proposal that complied with the requirements of Section 104.04; JDM never did the engineering required for the value engineering proposal but instead waited for PCS to do this work and to do the re-design of the SR9409 ramp before seeking to submit this idea as a value engineering proposal; and because JDM's proposal was never accepted by a contract work order as required by the specifications. JDM argues that the contract was breached by PennDOT's use of its oral proposal and refusal to permit JDM to submit its written value engineering proposal with requisite support materials pursuant to Publication 408/94, Section 104.04.

It is beyond dispute that Publication 408/94 is part of the contract and expressly permits the contractor to submit cost saving proposals for PennDOT's consideration. In addition to the

first two paragraphs of Section 104.04, Paragraph Third states as follows:

Submit the following minimum information with each proposal, allowing enough time for Department investigation and implementation without interference with project schedules:

- a description of the difference between the existing contract requirements and the proposal change, with the comparative advantages and disadvantages of each;
- an itemized list of the contract requirements which are to be changed if the proposal is adopted, with a recommendation for making each change;
- a detailed estimate of the reduction in construction costs that will result from the adoption of the proposal;
- a prediction of any effects the proposed change will have on other Department costs, such as costs of maintenance and operation;
- a statement of the deadline for issuing a change order adopting the proposed change, to obtain the maximum cost reduction during the remainder of the contract, noting any effect on the contract completion time or delivery schedule;
- the dates of any previous or concurrent submissions of the same proposal and any previous actions by the Department; and
- the contract items of work affected by the proposed change, including any quantity changes.

Although these provisions do not require PennDOT to consider any value engineering proposal, the contractor is given the contractual right to submit such proposals as long as the submission (with requisite backup material) would allow the Department sufficient time to investigate and implement the proposal without interfering with the project schedule.

If the Department accepts a proposal, a means for implementing it and making payment to the contractor is provided for in subsequent paragraphs of Section 104.04 and in Section 110.07 of Publication 408/94 as follows:

If the proposal is accepted in whole or in part, such acceptance will be by a contract work order. The work order will incorporate the necessary changes in the plans and specifications, to permit the value engineering proposal, or any part of it accepted, to be put into effect. If the approval of the Department is conditional, the order will note the conditions.

Continue to perform the work in accordance with the requirements of the contract until the Department issues a work order incorporating the value engineering proposal, in whole or in part.

....

Compensation for value engineering will be as specified in Section 110.07 [pertaining to lump sum payments of one-half the cost difference].

(Ex. D-26 (Pub. 408/94 § 104.04)).

JDM therefore had a clear right under the contract to submit a value engineering proposal so long as it was submitted (with requisite backup) in time to allow PennDOT to investigate and implement same without interfering with the project schedule. The Department had the corresponding contractual obligation to pay for any value engineering proposal submitted in compliance with Section 104.04 that it accepted and put into effect.

When JDM raised its idea for the re-design of the SR9409 ramp with the Department's engineer and construction inspection supervisor on January 17, 2002, identifying the idea as a value engineering proposal at that time, JDM properly initiated this proposal and established its right to complete its submission of same pursuant to Section 104.04. The fact that JDM's proposal was initiated in a face-to-face meeting among JDM's field superintendent and PennDOT's engineer and construction inspector does not diminish the uncontroverted facts that the ramp re-design idea was wholly JDM's and that the idea was identified as a value engineering proposal at the time it was first raised to PennDOT. This idea is consistently attributed to JDM in the words of the witnesses testifying in this case, in the minutes of the Project control meetings and in the correspondence of PCS, the Department's own design engineer.³ Moreover, the idea is regularly referred to as JDM's value engineering proposal throughout the record.

³ See PCS's letter to PennDOT of March 12, 2002. (Exs. P-7, D-10).

It is also beyond dispute that the Department accepted and implemented the design changes to the SR9409 ramp proposed by JDM. PennDOT's representatives on the Project, including the on site engineer and inspection supervisor, recognized that JDM's proposal to raise the infield profiles on the SR9409 ramp was a good idea when it was first presented to them. PennDOT's original Project design engineer, PCS, promptly drew up revised plans admittedly based on JDM's proposal.⁴ The Department then instructed JDM to construct the SR9409 ramp and barrier wall pursuant to the revised plans that implemented JDM's Proposal. (See e.g. Exs. P-13 and P-14). Finally, JDM constructed the re-designed ramp according to the revised plans implementing its proposal, and the Department realized substantial savings on the construction of the SR9409 ramp as a result.

In sum, it is evident from the facts adduced in this matter that JDM proposed to the Department a change in the contract and a modification to the plans and specifications on the Project which would raise the infield profiles of the SR9409 ramp and identified same as a value engineering proposal at the January 17, 2002 meeting on the Project site (and again at the February 13, 2002 Project Progress Meeting). It is equally clear that the Department, in turn, considered, accepted, acted upon and implemented this proposal and realized net construction savings on the SR9409 ramp stipulated by the parties to be \$260,000 as a result. The Department did not, however, pay JDM one-half of these net construction cost savings, apparently on the grounds that JDM did not present its proposal as a "value engineering proposal" as the term is used in Publication 408/94; did not present it in writing and with all the additional backup material as prescribed by Section 104.04; and/or did not otherwise comply

⁴ Design engineering firms hired to do original plans and drawings for a project by PennDOT are not eligible to share in any cost savings realized by PennDOT on such a project as a result of design changes made pursuant to value engineering proposals contemplated by Sections 104.04 and 110.07 of Publication 408/94. (Pub. 408/94 §§ 104.04 and 110.07; N.T. 155-57, 170). Nonetheless, by letter of March 12, 2002, only one month after being informed of JDM's Proposal, PCS had taken upon itself to engage in a "value engineering effort" of its own to re-design the SR9409 ramp. In this letter, sent only to PennDOT, PCS gave credit to JDM for solving the problem of the existing eight inch sanitary sewer line by raising the profile of the ramp and specifically identified that this Project re-design was being made pursuant to JDM's proposed changes. (Exs. P-7, D-10).

with Section 104.04 in submitting its proposal. Accordingly, our analysis turns next to a closer reading of Section 104.04 and an effort to understand the literal language of the provision in light of apparent practice.

Initially, we note that Section 104.04 defines and describes a “value engineering proposal” in the first two paragraphs of Section 104.04 as follows:

Value engineering applies to cost reduction proposals that may be initiated, developed, and submitted to the Department for modifying the plans, the specifications, or other contract requirements. This does not apply to a proposal unless it is identified as a value engineering proposal at the time it is submitted.

Value engineering proposals are those which would require a change in the contract and would result in an immediate net savings to the Department. They provide a decrease in the cost of performance, without impairing essential functions and characteristics, such as service life, reliability, economy of operation, ease of maintenance, and safety features.

(Ex. D-26 (Pub. 408/94 § 104.04 at Paragraphs First and Second)).

We further observe that: (a) these two paragraphs, describing and defining a “value engineering proposal,” do not require nor mention a writing and (b) the foregoing definition/description of a “value engineering proposal” describes perfectly JDM’s proposed changes to the infield profiles of the SR9409 ramp initially presented to PennDOT at the January 17, 2002 work site meeting. Accordingly, we must find that JDM’s Proposal, made orally to PennDOT’s representatives on the Project site on January 17, 2002 (and reiterated on February 13, 2002 at the Project Progress Meeting), was, in every sense of the description contained in Section 104.04, a value engineering proposal.

That said, we further recognize that both parties as well as others, in applying Section 104.04, read this section to require some form of writing in order to consummate or complete a value engineering proposal submission. This writing requirement, in our view, generates from the Third Paragraph of Section 104.04 which, by the nature of the backup material specified therein to be submitted with each value engineering proposal, requires that the proposal and

these seven items of backup information be submitted in writing in order to complete the value engineering proposal submission process specified by Section 104.04. Accordingly, we believe the plain language of Section 104.04 requires us to view JDM's Proposal to raise the infield profile of the SR9409 ramp presented orally to PennDOT on January 17 and February 13, 2002 to be its value engineering proposal, but further acknowledge that JDM did not complete its value engineering proposal submission process (nor comply fully with Section 104.04) by reason of its failure to provide PennDOT with this value engineering proposal in writing with the requisite backup material. Pub. 408/94 § 104.04 (Paragraphs First through Third).

Under normal circumstances, we would view JDM's failure to provide its value engineering proposal in writing with requisite backup material to PennDOT (i.e. its failure to present its value engineering proposal in compliance with Section 104.04) as precluding its ability to claim compensation for one-half of the cost savings experienced on the Project by reason of its design change proposal. However, in the case at bar, the evidence presented clearly establishes that it was the Department's own actions, in contravention of its own contract obligations, which prevented and actively interfered with JDM submitting its written value engineering proposal with the requisite backup material and from otherwise complying with the strictures of Section 104.04.

It has long been the law in Pennsylvania that where one party to a contract prevents or interferes with the other party's performance, it constitutes an actionable breach. Rothrauff v. Sinking Spring Water Co., 14 A.2d 87, 89 (Pa. 1940). Such a breach excuses the consequent nonperformance by the non-breaching party. The Pennsylvania Supreme Court has recognized that "where performance by one of the parties to a contract is prevented by the other party no advantage can be taken of the default by the party who caused it. If a party's rights under a contract are conditioned upon the occurrence or nonoccurrence of some event, his rights under

the contract are not forfeited by a breach of the condition brought about in whole or in part by the acts or conduct of the other party.” Iseman v. Joe F. Sherman Co., 105 A.2d 160, 164 (Pa. 1954). See also Liddle v. Scholze, 768 A.2d 1183, 1185 (Pa. Super. 2001) (“Conduct of one party that prevents the other from performing is an excuse for nonperformance.”); Ott v. Buehler Lumber Co., 541 A.2d 1143, 1145 (Pa. Super. 1988) (a party who has materially breached a contract may not complain if the other party refuses to perform his obligations under the contract); Craig Coal Mining Co. v. Romani, 513 A.2d 437, 440 (Pa. Super. 1986) (a party may not take advantage of an insurmountable obstacle placed by himself in the path of the other party’s adherence to an agreement. “By preventing performance he also excuses it.”); Chervenak, Keane & Co., Inc. v. Hotel Rittenhouse Ass’c, Inc., 477 A.2d 482, 486 (Pa. Super. 1984) (contractor may recover damages where prevented from completing performance under the contract by acts of the other party).

In the present case, PennDOT refused to permit JDM to submit its written value engineering proposal and the seven additional items of information specified in Section 104.04 that were to accompany it, and told JDM not to pursue it. By thus refusing to honor its obligation to accept JDM’s written value engineering proposal and preventing JDM from complying with this aspect of Section 104.04, under Pennsylvania law, the Department excuses JDM from this nonperformance. The Department cannot now claim, as a basis for its refusal to pay JDM for the cost savings it enjoyed by implementing JDM’s value engineering proposal, that JDM failed to comply with all the conditions for completing its value engineering proposal submission, as required by contract, when it was the Department itself that directed this noncompliance.

This holding is further supported by the line of Pennsylvania cases dealing with one party’s active interference with the performance of the other. Where a party to a contract has

affirmatively or positively interfered with the other party's performance, Pennsylvania courts have held that exculpatory provisions of the contract cannot be raised as a defense. Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park, 506 A.2d 862, 865-67 (Pa. 1986); James Corp. v. North Allegheny Schl. Dist., 938 A.2d 474, 484-85 (Pa. Cmwlth. 2007); Dep't of General Svcs. V. Pittsburgh Bldg. Co., 920 A.2d 973, 987 (Pa. Cmwlth. 2007). Applying the courts' reasoning in these cases to the matter at hand, the Board concludes that the Department cannot here raise, as a defense, the contract provisions requiring the formality of a written submission of JDM's value engineering proposal containing the additional backup material specified by Section 104.04 where the Department actively interfered with JDM's attempt to make such a formal submission by expressly and repeatedly refusing to accept it. Those provisions cannot be fairly cited now as a basis for denying JDM payment under the contract.

Based on the foregoing analysis, it is clear that PennDOT's arguments that JDM is not entitled to compensation for use of JDM's Proposal on the Project because (a) this proposal was not a "value engineering proposal" or (b) because JDM failed to identify its proposal as a value engineering proposal until after PCS had already prepared final plans to implement JDM's Proposal, are factually inaccurate and without merit. It is equally clear that PennDOT's arguments that such compensation should be denied because JDM failed to submit its value engineering proposal in writing to PennDOT; failed to supply the seven specific items of backup information listed in Section 104.04; failed to submit its value engineering proposal (with requisite backup material) in writing before PCS had prepared final plans to implement JDM's Proposal; and/or had not done the engineering work needed for the written submission; are also without merit because of the unusual rapidity of PCS's re-design work and the Department's instruction to JDM, on March 28, 2002 and thereafter, not to submit any form of written value engineering proposal and advice to JDM that it would not accept such a submittal.

The Board also finds unavailing the Department's argument that JDM somehow waived its right to proceed with the submission of its written value engineering proposal because JDM had not objected to PCS reviewing its oral proposal and developing potential plan revisions based on same prior to March 28, 2002. Pennsylvania case law in this area is explicit that any waiver by a party of a contract right must be done intentionally. See e.g. Dougherty v. Thomas, 313 Pa. 287, 297-98, 169 A. 219, 223 (1933); Kahn v. Bancamerica-Blair Corp., 327 Pa. 209, 214-15, 193 A. 905, 907 (1937). The evidence here is abundant that JDM intended no such waiver. To begin with, JDM expressed its desire to submit its proposal to raise the infield profiles of the SR9409 ramp as a value engineering proposal consistently from first mention on January 17, 2002 through its letter of April 3, 2002 and thereafter. The evidence also establishes that JDM was reasonable in its understanding that PCS's work on the SR9409 ramp was complimentary, not exclusionary, to JDM's development of JDM's written value engineering proposal since no one from PennDOT told JDM otherwise until March 28, 2002 (after PCS's work was substantially complete) and because PCS would have had to do much the same work as it did in order to review and analyze JDM's value engineering proposal before PennDOT approval in any event.

Moreover, we see no reason why PCS's rapid acceptance of JDM's proposal and unusually quick revision of its plans should defeat JDM's rights under the contract. JDM presented its value engineering proposal (identified as such) prior to PCS commencing any work on the ramp re-design; the contract did not make payment for a proposal contingent on plans from JDM; and the Section 104.04 specification merely required that JDM's written backup material be supplied "allowing enough time for Department investigation and implementation without interference with project schedules." JDM offered to submit its specified written backup material by April 30, 2002. PennDOT did not produce any evidence at the hearing, nor does it

now argue, that its refusal to accept or consider JDM's value engineering proposal was based on a concern about interference with Project schedules. The uncontradicted testimony in the record affirms that such a written submission, had it been provided on that date, would not have interfered with the Project schedules. In persuasive testimony at the hearing, JDM explained that this was a reasonable period of time to prepare the backup material required for this type of proposal and that its proposed timeframe would not have impacted the scheduled progression of the Project. (N.T. 104, 116-117).⁵

Finally, PennDOT argues that JDM should not share in the cost savings created by JDM's Proposal because all changes to government contracts must be in writing pursuant to the "extra work" provisions of a contract, and this was not done here. We find the cases cited by PennDOT in support of this argument rather misplaced. The present case does not involve issues of extra work to effectuate the plan revisions to the SR9409 ramp, and, in any event, PennDOT issued such written instructions to JDM by its letters of April 15 and 16, 2002 among others. (Exs. P-13, P-14). Moreover, any failure to provide for payment to JDM pursuant to a specific work order accepting JDM's Proposal or the procedures specified in Section 104.04 would be attributable entirely to PennDOT's failure to comply with its own contract obligation to issue such a work order in light of PennDOT's actual acceptance and implementation of JDM's

⁵ To be clear, the Board is not suggesting here that the design professional responsible for the original plans and drawings on a project may not promptly pursue potential revisions to contract plans and drawings suggested by contractors on a job site. Neither are we suggesting that such design professionals may not proceed promptly to evaluate suggested changes even when they are identified initially by a contractor as value engineering proposals. What we would suggest is that the situation encountered here could have been avoided by improved communication up-front where a potential value engineering proposal is so identified. That is to say, where a value engineering proposal is first presented orally and identified as such by a contractor, and the design professional wishes to pursue work on same without delay, we would encourage PennDOT representatives to promptly advise the proposing contractor (in writing) as to a reasonable and acceptable timeframe for the contractor to develop and submit its written value engineering proposal with requisite backup material should the contractor wish to pursue and complete its value engineering proposal submission for compensation. We believe this would eliminate ambiguity and/or confusion as to how long the contractor had to submit its written materials before the original design professional would proceed on its own with a re-design. Alternatively, improved up-front communication between a proposing contractor, design professional and PennDOT representatives could also result in a streamlined plan revision process where a value engineering proposal does not require extensive backup material and the parties can agree (again, in writing) on an appropriate allocation of responsibilities and commensurate compensation for an expedited process.

Proposal. The cases cited by PennDOT regarding work orders and modification of government contracts therefore do not fit the factual circumstances of this matter. See Pub. 408/94 § 104.04 (Paragraph Eighth); see also Rothrauff v. Sinking Spring Water Co., 14 A.2d at 89; Iseman v. Joe F. Sherman Co., 105 A.2d at 164 ; Liddle v. Scholze, 768 A.2d at 1185; Ott v. Buehler Lumber Co., 541 A.2d at 1145; Craig Coal Mining Co. v. Romani, 513 A.2d at 440; Chervenak, Keane & Co., Inc. v. Hotel Rittenhouse Ass'c, Inc., 477 A.2d at 486; Coatesville Contractors & Engineers, Inc. v. Ridley Park, 506 A.2d at 865-67; James Corp. v. North Allegheny Schl. Dist., 938 A.2d at 484-85; A.G. Cullen Const., 898 A.2d at 1175-76; Able-Hess Associates, Inc. v. SSHE, No. 3369, 2003 WL 22524494 at *13.

JDM proceeded to complete the Project work, including construction of the re-designed ramp, as directed by PennDOT. The cost difference between the original contract work on the SR9409 ramp and the cost of the new work (as a result of the changes and modifications to the ramp we have found due to JDM's Proposal) was stipulated by the parties to be \$260,000 PennDOT realized and retained all of these savings; no portion was paid to JDM.

The Board finds that by ordering JDM to cease work on its written value engineering proposal and by refusing to allow JDM to submit said proposal in writing with the backup information required by the terms of the contract, PennDOT prevented and actively interfered with JDM's performance under this provision of the contract. These actions constituted a breach of contract on PennDOT's part that caused JDM to incur damages in the amount of JDM's share of the net construction cost savings that resulted from its value engineering proposal.

Damages

Under Pennsylvania contract law, "remedies for breach are designed to protect either a party's expectation interest 'by attempting to put him in as good a position as he would have been had the contract been performed, . . . ' or his restitution interest 'by requiring the breaching

party to disgorge the benefit he has received by returning it to the party who conferred it.’ ” Ferrer v. Univ. of Pennsylvania, 825 A.2d 591, 609 (Pa. 2002) quoting Trosky v. Civil Service Com’n, 652 A.2d 813, 817 (Pa. 1995). The contract herein entitles a contractor to submit a value engineering proposal pursuant to Section 104.04 of Publication 408/94 and to be paid in accordance with Publication 408/94 Section 110.07 if PennDOT approves and implements same. Section 110.07 provides that “[p]ayment will be made as a Lump Sum item, amounting to one-half of the cost difference of the original contract work and the cost of the new work. . . .”

The parties have stipulated that “the cost difference between the original contract work on the SR9409 ramp and the cost of the new work as a result of the changes and modifications to the ramp,” was \$260,000. The Department retained these savings and made no payment with respect to them to any other person or party. The Board has also found this cost difference to be the result of PennDOT’s acceptance and implementation of JDM’s value engineering proposal (i.e. JDM’s Proposal) and that JDM is excused from completing submission of its written value engineering proposal by the actions of PennDOT in this case. PennDOT is, therefore, liable to JDM for damages in the principal amount of \$130,000. Id.

Additionally, pursuant to Section 1751 of the Procurement Code, 62 Pa.C.S. § 1751 (1998), JDM is entitled to an award for prejudgment interest of six percent per annum on the damage award from the date the claim was filed with the contracting officer. 62 Pa.C.S. § 1751; 41 P.S. § 202. The contracting officer is defined by the Code as the “person authorized to enter into and administer contracts and make written determinations with respect to contracts.” 62 Pa.C.S. § 103. With respect to the present contract, the Board concludes that April 22, 2002, the date that JDM wrote to the District Engineer giving notice of its claim due to the decision of the Project engineer to deny JDM’s request to submit its value engineering proposal is the date the

claim was filed with the contracting officer for the purpose of 62 Pa.C.S. § 1751.⁶ JDM is therefore awarded prejudgment interest from April 22, 2002 through the date of this Opinion and Order at a rate of six percent per annum of the contract damage award. Thus, JDM is awarded damages of \$130,000 plus prejudgment interest in the amount of \$55,518.90 for a total damage award of \$185,518.90.

PennDOT is also liable for post-judgment interest on the total judgment at the statutory rate of six percent per annum beginning on the date of this Opinion and Order and continuing until the date the judgment is paid in full. 62 Pa.C.S. § 1751; 41 P.S. § 202.

⁶ The language of Publication 408/94, Section 105.01 is unclear and ambiguous as to whether a “claim” is submitted to a “contracting officer” for the purpose of Section 1751 by reason of the “notice of intent to claim” submitted to the District Engineer or by reason of the “appeal” of the District Engineer’s “rejection of the claim” to the Director, Bureau of Construction and Materials for review by the Construction Claim Review Committee. In light of this ambiguity we construe same against the drafter (PennDOT) and, for the purpose of calculating interest only, find the April 22, 2002 letter to the District Engineer the appropriate date to commence interest accrual. 62 Pa.C.S. § 1751; Pub. 408/94 § 105.01(a); Central Transp., Inc. v. Board of Assessment Appeals of Cambria County, 417 A.2d 144, 148-49 (Pa. 1980); Com., State Public School Bldg. Authority v. Noble C. Quandel Co., 585 A.2d 1136, 1144 (Pa. Cmwlth. 1991).

ORDER

AND NOW, this 5th day of June, 2009, it is **ORDERED** and **DECREED** that judgment be entered in favor of the Plaintiff, James D. Morrissey, Inc., and against Defendant, Commonwealth of Pennsylvania, Department of Transportation, in the sum of \$185,518.90. This sum consists of \$130,000.00, the amount owed to Plaintiff for damages incurred as a result of Defendant's breach of contract, and \$55,518.90 in prejudgment interest. In addition, Plaintiff is awarded post-judgment interest on the total outstanding judgment at the statutory rate for judgments (6% per annum) beginning on the date of this Order and continuing until the judgment is paid in full. Each party will bear its own costs and attorney fees.

BOARD OF CLAIMS

Jeffrey F. Smith
Chief Administrative Judge

Harry G. Gamble, P.E.
Engineer Member

OPINION SIGNED

Andrew Sislo
Citizen Member

