COMMONWEALTH OF PENNSYLVANIA

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| PITTSBURGH BUILDING COMPANY | : | BEFORE THE BOARD OF CLAIMS |
| | : | |
| VS. | : | |
| | : | |
| COMMONWEALTH OF PENNSYLVANIA | : | |
| DEPARTMENT OF GENERAL SERVICES | : | DOCKET NO. 3717 |

## FINDINGS OF FACT

1. On September 19, 2003, Pittsburgh Building Company, hereinafter called "PBC," a Pennsylvania corporation, entered into a general construction contract with the Pennsylvania Department of General Services, hereinafter "DGS" (DGS Contract No. 963-14.1) for the Pennsylvania National Guard Readiness Center. (N.T. page 25)(CX 1).[1]

2. The project consisted of a one-story armory building with an adjacent parking lot located on an undeveloped 22-acre site in Connellsville, Fayette County, Pennsylvania. (CX 1).

3. The Contract was for an original sum of $2,650,000.00. (N.T. page 26).

4. Through the duration of the project, DGS issued a net total of $140,237.00 in change orders thereby increasing the Contract sum to $2,790,237.00, which amount, the parties agree, has been paid. (CX 138).

5. PBC issued subcontracts and purchase orders to its subcontractors and suppliers to perform portions of the work on the Contract. (N.T. page 32).

6. A subcontract in the amount of $350,000.00 was issued to Five-R Excavating, Inc., a certified WBE, to perform the site work on the project pursuant to Division 2 of the specifications issued by DGS. (N.T. pages 33-34).

7. On or about October 10, 2003, DGS issued a Notice to Proceed to PBC. (N.T. page 27).

8. Since the specified contract completion date was August 10, 2004, the Notice to Proceed gave PBC and the other prime contractors ten months to complete this project. (N.T. pages 18 and 27).

9. PBC issued a Project Schedule on October 10, 2003 that incorporated all of the prime contractors' activities with reasonable durations which would support completion of the project on or before August 9, 2004. (N.T. page 35)(CX 11).

[1] CX refers to Claimant Exhibit.

10. This Project Schedule was reviewed by all parties and subsequent revisions were made. A revised Project Schedule dated November 11, 2003 was issued by PBC, which was accepted by all of the other prime contractors on or before November 18, 2003. (N.T. page 35).

11. The bid documents, plans and geotechnical report (the EMI Report) indicated that the project was expected to be a balanced site, wherein the materials cut from the higher elevations of the site could be used to fill the lower elevations of the site without the need for any borrowed fill from outside of the site. (N.T. pages 30, 101-103, 137, 151) (CX 1, 12, 13).

12. The total amount of material to be excavated from the high side of the site and filled on the low side was estimated by Five-R to be 26,000 cubic yards. (N.T. page 29).

13. Given that the building footprint was located predominantly on the fill side of the site there was little other work that could be commenced until the cut and fill work was completed so that the building foundations could be poured in the properly compacted fill. (N.T. page 28).

14. Following an unforeseen delay of approximately five days in securing the building permit, for which DGS granted a time extension to PBC, PBC and Five-R were able to commence the site work for the project on October 15, 2003. (N.T. page 34) (CX 38).

15. The initial operations of clearing and grubbing and topsoil stripping and stockpiling went as planned by PBC and Five-R and were completed on November 4, 2003. (N.T. pages 35, 90, 140, 204-205).

16. For its bid to PBC, Five-R estimated that it could cut and fill at least 1,800 cubic yards of soil per day by using a maximum of five operators and the following equipment: (1) Caterpillar D9 Bulldozer with Ripper, (1) Caterpillar D6 Bulldozer, (2) Caterpillar 621 Scrapers-Pan, (1) Caterpillar Compactor Scraper, (1) John Deere High Lift with Bucket, and (1) Ingersoll-Rand 10-Ton Vibratory Roller. (N.T. pages 125-127, 131).

17. At the estimated 1,800 cubic yards per day, Five-R would have completed the estimated 26,785 cubic yard excavation in fifteen days, which was reflected in the Project Schedule duration for this work activity. (N.T. pages 37, 125, 127, 132, 138).

18. Once the cut and fill excavation operations commenced on November 4, 2003, however, PBC and Five-R encountered soil with excessive moisture at the site. (N.T. pages 290, 303-304, 306, 309).

19. Despite extensive efforts by Five-R, attempts to dry out the on site soils to the degree required to achieve the compaction requirements for the fill work were unsuccessful. (N.T. pages 38, 41, 43, 46-47, 90-91, 127, 133, 141-142, 153, 160, 162, 217, 270).

20. After Five-R spent two weeks attempting to work with the wet soils and stabilize the first bench, PBC notified DGS by a letter dated November 24, 2003 that excavation work was "currently delayed by weather and soil conditions" and that "no work is ongoing at the site." (N.T. pages 46- 48, 92–93, 104, 134) (CX 25).

21. DGS responded that PBC was to continue work. (N.T. page 49) (CX 112).

22. At the same time, DGS asked the design professional for the project, Valentour English Bodnar & Howell (hereinafter "VEBH"), to provide solutions for the excessively moist soil conditions that would allow the work to continue throughout the winter months. (N.T. pages 164-165) (CX 26, 27).

23. VEBH provided several alternatives at various times including suspending the project and/or bringing in shale to mix with the existing soils or importing crushed stone to the project in order to achieve an engineered fill for the footprint area of the building. (N.T. pages 164-165) (CX 24-28).

24. The proposed alternatives requiring imported fill submitted by VEBH were rejected by DGS because of cost. (N.T. pages 167, 321-323) (CX 31, 32, 34).

25. Instead, DGS chose to wait until the weather conditions improved so that the existing soils could be worked and air dried to meet the specified compaction and moisture content. (N.T. pages 54-55, 303) (CX 31, 32, 34).

26. Accordingly, DGS directed a suspension of the work on December 16, 2003, that was made retroactive to November 19, 2003. (N.T. page 56) (CX 34).

27. At the time of the suspension, Five-R had managed to cut and fill only a fraction of the fill required for the first and second bench areas, and none of this fill met the moisture and compaction requirements. (N.T. pages 92-93).

28. In its suspension notice, DGS advised PBC to suspend work pursuant to the General Conditions of the Contract Section 12.1 and that it would grant an extension of time for the length of the suspension, but would not accept responsibility for any additional costs resulting from the suspension pursuant to that section. (PBC Appendix Ex. F)(N.T. pages 56-57) (CX 34).

29. While PBC complied with DGS's suspension directive and ceased further performance, it disagreed that the additional costs it would incur as a direct result of this suspension were non-compensable. PBC notified DGS of its disagreement by letter of February 6, 2004, which stated, inter alia:

    (a) Section 12.1 of the General Conditions does not apply as the fundamental basis for the suspension directive because it was not that PBC was proceeding with any "undue risk," or otherwise due to PBC's fault, but rather was due to

DGS's award of this contract and issuance of the Notice to Proceed with knowledge that the project could not proceed at that time of year due to unsuitable soil conditions, as confirmed in an August 1999 soils investigation performed by the DGS – which was not disclosed to the bidders;

(b) DGS refused to authorize the use of alternate fill, as recommended by the Design Professional, which would have permitted the work to proceed or would have greatly diminished the length of the suspension (N.T. pages 66, 111-112, 158). As such, the suspension directive was for the convenience of DGS under Section 12.3 of the General Conditions, for which a cost adjustment is permitted;

(c) Section 12.1 of the General Conditions expressly contemplates a situation where the work is suspended "temporarily," and the five month suspension at issue is not temporary suspension, but rather is a suspension for an "unreasonable period of time" pursuant to Section 12.4 of the General Conditions for which additional compensation is due; and

(d) DGS's prior and superior knowledge of the unsuitable soil conditions, which was not disclosed to the bidders, renders Section 12.1 of the General Conditions an unenforceable exculpatory provision which cannot be relied upon by the DGS to deprive PBC of its right to additional compensation.

(CX 39).

30. PBC's position was that the suspension directed by DGS was a suspension for the convenience of DGS pursuant to Section 12.3 of the General Conditions and not 12.1, for which PBC would be entitled to additional compensation. (N.T. pages 58-59) (CX 39).

31. On February 6, 2004, PBC requested additional compensation from the DGS as a result of the suspension. (N.T. pages 62-63) (CX 39).

32. The additional compensation was requested for demobilization and remobilization costs; labor and material escalation costs; and extended field and home office overhead costs. (N.T. pages 61-63) (CX 39).

33. On March 24, 2004, at the request of PBC, a meeting was held in order to review the current site conditions and discuss site related issues. (N.T. page 64).

34. This meeting was attended by representatives of DGS, VEBH, Engineering Mechanics, Inc. (EMI) (geotechnical consultant for DGS), Five-R and PBC. (N.T. page 64).

35. PBC and Five-R raised concerns regarding the soil conditions and its suitability for use, the costs associated with the demobilization and remobilization and the anticipated weather using historical NOAA weather data for recommencing site work in the Spring. (N.T. pages 64-66).

36. PBC and Five-R stressed that without temperatures above 70 degrees, sunshine and a steady breeze, air drying of the soils would be slow and productivity for the placement and compaction of the site soils would be very limited. (N.T. pages 133, 245).

37. VEBH suggested that the suspension should be extended until mid-May and that if production continued to be impacted by the unsuitable soils an alternative plan should be devised to complete the cut and fill operations. (N.T. pages 64-65, 170-172).

38. On April 9, 2004, however, DGS ended the suspension and directed PBC to recommence its work by April 15, 2004. (N.T. pages 67, 188, 345) (CX 47).

39. By letter dated April 14, 2004, DGS issued a 148-day extension of time that extended the contract completion date by five months from August 15, 2004 to January 10, 2005. (N.T. page 63) (CX 48).

40. DGS refused to recognize PBC's entitlement to any additional compensation due for the period of suspension. (N.T. pages 65-66).

41. PBC and Five-R recommenced the cut and fill operations, but once again were adversely impacted by the excessively moist soil conditions. (N.T. pages 66-68).

42. Through the Spring of 2004, PBC and Five-R expended significant labor and equipment hours to spread out and disk the wet soil and long time periods to air dry the wet soil in a largely unsuccessful attempt to meet the specifications for compaction and moisture content as directed by DGS. (N.T. pages 67-70) (CX 54, 56).

43. By late May of 2004, the soil conditions were only getting worse as Five-R began utilizing more of the soil in the parking lot area (the primary cut or on site borrow area) for fill. As a result, PBC hired Earthtech, Inc. to analyze the soil on site. (N.T. 70).

44. The complications with the soil conditions escalated when it was discovered that the soil in the parking lot area (the primary cut and borrow area) included a large amount of highly plastic clay and other clayey soils of the type classified by DGS specifications as unsuitable for fill under the building regardless of any amount of air drying (i.e. CL, GC and SC soil types). (N.T. pages 72, 115) (CX 1 at Earthwork Specification 2.2A, 63-64).

45. In contrast, the EMI Report provided to the bidders by DGS noted the presence of clay among several other soil types on site, but concluded that all the soil on site (with the

exception of organic or carbonaceous soils) could by used for fill beneath the buildings and pavement, warning only that some of the soil may require air drying before use. (CX 12).

46. The EMI Report at page 7 did exclude from use organic and carbonaceous soils. However, there was no credible evidence presented to suggest that these type soils were present in any material quantity on site or that these exclusions are relevant or material to the issue at hand. (N.T. 31-32) (CX 137) (Board Finding).

47. After an investigation by PBC and Five-R, PBC suggested that the soil materials from an area on the southwestern hillside adjacent to the site could be used as a borrow site. (N.T. page 73).

48. On or about June 1, 2004, DGS directed VEBH to put together a scope of work for using this adjacent hillside as a borrow area and to submit this scope of work to PBC for pricing. (N.T. pages 73-74).

49. PBC and Five-R priced this work and submitted the additional costs to DGS for approval. (N.T. pages 74-75) (CX 66, 69).

50. After several weeks, with virtually no work capable of being performed at the site, DGS responded that PBC should proceed with the scope of work as identified by VEBH, but that all cost would be assumed by PBC. (N.T. pages 175-176, 178) (CX 81).

51. Under protest, PBC and Five-R proceeded on June 28, 2004, to complete the cut and fill excavation work using this suitable material from the adjacent hillside. (N.T. pages 67, 74-75, 273-275).

52. As a result, PBC and Five-R incurred additional costs to accomplish the cut and fill which include: (a) stripping the topsoil from this adjacent hillside, (b) hauling the borrow fill an additional 100 yards across the site and up a slope to the fill area, (c) hauling the clay materials back across the site for disposal in the excavation at the adjacent hillside, and (d) replacing the topsoil over this area once the excavation work was completed. (N.T. pages 74, 84-88) (CX 138).

53. During the time period when it was able to use the suitable fill material, Five-R met its estimated excavation quantity of 1,800 cubic yards per day. (N.T. pages 76-77, 130-131, 277).

54. To resolve the compaction problem with the clay sub-base located below the parking lot area, DGS directed PBC to provide a mesh grid system over the clay and issued a change order to PBC to cover the costs of this system. However, DGS did not take responsibility for the lack of on site borrow fill. (N.T. pages 74,78, 80, 181).

55. The delay in the resolution of this particular problem, however, delayed the installation of the storm drains and the sanitary sewers until the Fall of 2004. (N.T. pages 80-81, 207-208).

56. Since these lines ran through the parking lot area, the paving operations were delayed into the next asphalt batch plant season in the Spring of 2005. (N.T. page 82).

57. Ultimately, all of the major site preparation activities which were scheduled to be completed by the end of December 2003 were not completed until the end of November 2004. (N.T. 74-84,197-199) (CX 138).

58. Since the cut and fill operation was on the critical path and prevented the commencement of any other significant work activities on site, the suspension and the problems with cut and fill operations were the cause of an eleven month overall delay to all of the subsequent work activities on the project. (N.T. 28, 74-94, 221) (CX 138).

59. There was no structure or installation on the project site at the time PBC or its subcontractors were performing the cut and fill excavation work at issue. (N.T. 57).

60. Neither PBC nor any of its subcontractors were taking undue risk of damage to any part of a structure or installation on the project site either before or at the time DGS suspended work on the project. (N.T. 57) (CX 34).

61. DGS produced no credible evidence that PBC would proceed with building the structure or foundation without first meeting the required soil compaction specifications. The substantial weight of evidence establishes that PBC would not do so. (N.T. pages 103, 330-331) (CX 22-27) (Board Finding).

62. DGS failed to exercise its judgment in good faith when it determined that PBC (or its subcontractors) were taking undue risk to a structure or installation when it suspended the cut and fill excavation work on the project in 2003. (Findings of Fact 59-61) (Board Finding).

63. Work on the project was suspended from November 19, 2003 until April 15, 2004 by DGS. After the suspension, work on the project was resumed and completed. The suspension was temporary. (N.T. 61) (CX 34, 47, 48) (Board Finding).

64. When problems with the cut and fill operation occurred in November 2003, the design professional for the project, Steve Kurpiewski of VEBH, first proposed a suspension of work, then later proposed the importation of shale or crushed stone to stabilize the fill under the building area as an alternative to suspending work entirely. (N.T. pages 63-66) (CX 24, 28).

65. DGS rejected the proposal to import fill to stabilize the soil in November 2003 as an alternative to suspending work on the project because of the cost. (N.T. 321-323) (CX 31, 32, 34).

66. VEBH estimated the cost to import fill and keep the project moving instead of suspending the work was between $100,000 to $150,000. DGS estimated the cost to be higher. The cost proposed by PBC for importation of fill as it was eventually accomplished after the suspension was $182,417. (N.T. 321-323) (CX 28, 69).

67. The likely cost to utilize imported fill to stabilize the soil beneath the project building area in 2003 was in excess of 5% of the total project contract cost, a normal contingency fund for a project of this size. (N.T. pages 275, 320-324) (CX 1) (Board Finding).

68. PBC has not established by a preponderance of evidence that DGS had the additional funds available in November/December 2003 to pay for the imported fill alternative. (N.T. 275, 320-324) (Board Finding).

69. PBC has not established by a preponderance of evidence that the suspension was not necessary. (Findings of Fact 18-28, 33-39, 64-68) (Board Finding).

70. After the suspension and months of additional efforts to air dry the on site fill proved fruitless, DGS wound up utilizing imported fill to stabilize the soil beneath the building area. (CX 35, 49, 54, 56, 64, 65, 74, 75, 81).

71. DGS proffered no other reason for its suspension of work other than the discredited assertion that PBC was taking undue risk of damage to structure or installation. The five month suspension of work was for the convenience of DGS and not otherwise justified under the explicit terms of Article 12. Any suspension of work imposed solely for the convenience of DGS and not otherwise justified under the explicit terms of Article 12 constitutes suspension for an unreasonable period of time. (Findings of Fact 18-28, 38-53, 58-70) (CX 1 at General Conditions, Article 12, 137) (Board Finding).

72. PBC and Five-R reviewed the contract documents, plans and specifications and geotechnical information provided by DGS for the site. They also visited and inspected the site as part of their pre-bid site investigation. This was a reasonable investigation and did not reveal the subsurface soil conditions later encountered. (N.T. 29-34, 93-95, 135-138) (CX 12, 63, 64, 137) (Board Finding).

73. The geotechnical information provided to bidders for the site included a full report of investigation performed for DGS by Engineering Mechanics, Inc. and is referred to herein as the "EMI Report". (CX 12).

74. The EMI Report did identify some relatively small amounts of clay on site and contained rather typical cautionary language regarding seasonal weather and precipitation. However, taken as a whole, the report did not accurately identify the extent or amount of clay and clayey soils or the extensive seeps and springs actually found on site. (N.T. pages 30-32, 37-38, 113-116, 120-123, 133-134, 171-175, 314) (CX 12,63,64,137) (Board Finding).

75. The EMI Report at page 7 stated that all the soils found on site could be used for fill below buildings and pavements, with the sole exceptions being identified as organic and carbonaceous soils (which exceptions are irrelevant to the issues at hand because there was no credible evidence introduced or argument made that these types of soils were present in any material quantity or that they affected the soil compaction in the cut and fill operation in any material way). (N.T. pages 30-32, 37-38, 113-116, 120-123, 133-134, 171-175, 314) (CX 12, 63, 64, 137) (Board Finding).

76. The EMI Report did not clearly identify or predict the subsurface soil conditions actually encountered on the project. In fact, the EMI Report did not even use the same soil type classification system as was utilized by DGS in the contract documents to identify unsuitable fill material for the project site. (N.T. pages 30-32, 37-48, 113-116, 120-123, 133-134, 171-175, 314) (CX 12,63,64,137) (Board Finding).

77. The evidence does not establish that any additional site inspection by PBC, short of performing its own full geotechnical investigation and report, would have identified or predicted the subsurface soil conditions actually encountered on the project. (Findings of Fact 72-76) (Board Finding).

78. PBC did not have time to perform its own independent geotechnical investigation and report due to the time frame and constraints of the bid process. (N.T. pages 104, 114-116) (CX 1 at Notice to Bid).

79. Because of time and cost constraints, PBC had no reasonable means of making an independent investigation of the subsurface soil conditions or information presented in the EMI Report beyond what it did in visiting the site. (Findings of Fact 72-78) (Board Finding).

80. The Board has been presented with extensive and conflicting evidence as to whether the moisture and compaction problem with the on site soil were caused by excessively wet and rainy weather or by subsurface soil conditions (i.e. the extent of the underground seeps and springs and additional clay and clayey soils found on the site). (Findings of Fact 80-86) (Board Finding).

81. Initial communications from PBC referenced both weather and soil conditions as contributing factors. (CX 23).

82. However, as time and investigation by PBC's quality control consultant, Earthtech, Inc. proceeded, PBC came to attribute the problem with fill moisture and compaction to the subsurface soil conditions. In particular, PBC referenced the significant presence on site of clayey soils (types CL/GC/SC) which were classified by DGS as unsuitable for fill under the building and the extent of the concealed seeps and springs as the reasons for the soil moisture and compaction problems. This position became dominant at PBC, particularly after the winter suspension, when drying efforts still proved unproductive. (CX 1 at Earthwork Specification 2.2A, 20-22, 29, 39, 45, 51, 55, 56, 59, 63, 64, 83).

83. The assessment of Steve Kurpiewski at VEBH, the design professional and project architect, appears to follow the same progression and to agree with PBC. (CX 28, 40, 43, 45, 49, 58, 65, 77).

84. DGS, on the other hand, immediately and consistently adopts the position that the cause of the problems is the weather conditions. (N.T. 269) (CX 27, 30, 32).

85. When the existence of extensive seeps and springs, which were initially concealed, became apparent, DGS attributed these to excessively rainy weather. (CX 35, 36, 41).

86. DGS presented no credible data or information from a recognized weather service to document or support its anecdotal assertions that the weather was exceptionally rainy during the relevant period of construction. (N.T. 306-309) (Board Finding).

87. When air drying of the on site soil increasingly proved fruitless and the existence of more clayey soil than anticipated became more apparent, DGS briefly considered a change order for the import of fill. (N.T. pages 175-178, 271-274) (CX 66-70, 79).

88. DGS ultimately reasserted its position that it was the contractor's responsibility to import fill regardless of the circumstances. (CX 49, 51, 53, 78).

89. The preponderance of evidence, including the largely uncontradicted testimony of Steve Kurpiewski, the project architect, and Hiram Ribblett, Plaintiff's soils expert, establishes that it was the unsuitable soil condition (i.e. the unexpected extent of highly plastic, clayey soils and underground seeps and springs) on site that were initially concealed subsurface conditions that caused the soil moisture and compaction problems experienced with the on site fill. (Findings of Fact 80-88) (N.T. 37-48, 69-71, 100, 109-113, 142,153-155, 170, 306-309) (CX 43, 65, 77, 137).

90. The soil moisture and compaction problems caused by these unsuitable soil conditions on site caused PBC and Five-R to incur additional cost to import fill to the site (by cutting and filling material from a hillside adjacent to the construction site) and for lost productivity in the cut and fill operation as a whole. (N.T. 67,73-77,175-178,273-275) (CX 66,69,81,138) (Board Finding).

91. The additional cost and damage incurred by PBC identified in Paragraph 90 immediately above amounts to $484,358, calculated as follows:

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| Five-R Labor Productively Loss | $164,670 |
| Five-R Labor Cost Mark-Up | |
| (15% for overhead and profit) | 24,701 |
| Five-R Equipment Productivity Loss | 228,140 |
| Five-R Equipment Cost Mark-Up | |
| (10% for overhead and profit) | 22,814 |
| Five-R Total | $440,325 |
| PBC Subcontract Mark-Up | |
| (10% for overhead and profit) | 44,033 |
| Total | $484,358 |

(N.T. 194-227) (CX 1 at General Conditions 10.3, CX 138).

92. At all times relevant to this case, including before and during the bid process, award of contracts, and Notice to Proceed, DGS, as an institution, had knowledge and possession of an August 1999 memorandum respecting the soil conditions on the site at issue written by Ron Mamula, a DGS construction inspection supervisor stationed in Pittsburgh. (N.T. pages 51-52,162-163,311-312) (CX 14, 24).

93. The memo by Ron Mamula incorporates geotechnical site observations and report based on test borings of John Bender, P.G. (another DGS employee in the Soils Section of DGS's Engineering Review Division, Bureau of Engineering and Architecture) for the site which is the subject of this litigation (the memo and the Bender report are referred to herein collectively as the "Mamula Memo"). (N.T. pages 51-52,162-163) (CX 14,24).

94. The Mamula Memo indicates a substantial amount of clay and clayey materials on site and states frankly that no Winter or late Spring earthwork should occur on the project site because the site may not drain well and will require a lot of earthwork to move topsoil and fill at these times of year. (N.T. pages 51-52,162-163) (CX 14,24).

95. The Mamula Memo contained material information at variance with the EMI Report and which contradicts the directive by DGS to PBC to commence work on October 10, 2003 and proceed for five months throughout the Winter. (N.T. pages 27,51-53,151-152,162-163) (CX 14,16,24).

96. DGS failed to disclose the Mamula Memo to PBC or other bidders. (N.T. pages 52-53).

97. DGS selected the start time of this project, which put the bulk of the excavation on the site into November and December of 2003. (Findings of Fact 1-10,15,17,18) (CX 61,137,138 at Exhibit 1).

98. The bid materials, plans and specifications, and accompanying geotechnical information which included the EMI Report (collectively referred to herein as the "Bid Documents") provided to PBC and other bidders, as a whole, indicated that the soil on site was generally suitable for a cut and fill operation and that, accordingly, the site was a "balanced site" (i.e. that materials to be cut from higher elevations of the site could be used to fill the lower elevations of the site without the need to borrow fill from outside site). (Findings of Fact 72-79) (N.T. pages 30-34, 101-103, 135-137, 147-151) (CX 12, 13, 137).

99. The representation that the site was balanced and the soil on site was suitable for fill was material to the contract with PBC (as evidenced, inter alia, by the fact that when this turned out not to be the case substantial additional cost was incurred by PBC in order to complete the project). (Findings of Fact 64-68, 87-90) (CX 137, 138) (Board Finding).

100. Steven Kurpiewski, the project architect, testified as to his understanding that DGS stood to lose federal funding if the work on the project was not awarded by September 2003. (N.T. pages 152-153).

101. The failure to disclose the Mamula Memo to PBC and other bidders was either a gross mistake or an arbitrary action on the part of DGS which made the Bid Documents provided by DGS during the bid process materially misleading with respect to the soil conditions on site. (Findings of Fact 71-78, 88-98) (CX 12, 14, 137) (Board Finding).

102. DGS actively interfered with PBC's performance of the contract by causing earthwork on the project to be commenced by PBC in November and December of 2003 while withholding the Mamula Memo because this was contrary to the warning contained in the Mamula Memo and at a time it knew, or reasonably should have known, would be detrimental to PBC's efforts to perform the earthwork obligations of the contract. (Findings of Fact 18-27, 42-53, 66-68, 86-100) (CX 12,14,137) (Board Finding).

103. The unsuitable soil conditions on site were concealed subsurface conditions that were unascertainable from the Bid Documents and at substantial and material variance from the geotechnical and other information contained in the Bid Documents. (Findings of Fact 18-27, 41-54, 70-83, 85-89, 93-99) (Board Finding).

104. Contract provisions contained in General Conditions 10.8, General Requirements (01040) Section 1.14 and Earthwork Specifications 1.4, 1.7 and 3.8, taken as a whole, are unclear and ambiguous as to whether or not PBC is entitled to additional compensation if concealed subsurface conditions on the site vary substantially from the information provided in the Bid Documents and cause the need to import fill to meet soil moisture and compaction requirements beneath the armory building. (Findings of Fact 18-28,64-65) (CX 1,77) (Board Finding).

105. The unsuitable soil conditions on site were the cause of the five month suspension imposed by DGS and the additional six months of delay experienced in completing the cut and fill operation on the project, and accordingly, caused the total eleven month delay on the project for all construction activities subsequent to completion of the cut and fill

operation. (Findings of Fact 1, 4-13, 15-28, 38-58, 63-68, 89-90) (CX 137,138) (Board Finding).

106. PBC's reliance on the incomplete and misleading Bid Documents provided to it by DGS regarding the soil conditions on site caused PBC to incur the additional costs and lost productivity damages described in Paragraphs 90 and 91 above, and, in addition, to experience an eleven month delay on the project composed of a five month work suspension imposed by DGS and an additional six months of delay experienced on the project for all activities subsequent to completion of the cut and fill operation. (Findings of Fact 89- 105) (CX 138) (Board Finding).

107. DGS's active interference with PBC's performance of the contract described above and summarized in Paragraph 102 caused PBC to incur the lost productivity damages described in Paragraphs 90 and 91 above, and in addition, to experience an 11 month delay on the project composed of a 5 month work suspension imposed by DGS and an additional 6 months of delay experienced on the project for all activities subsequent to completion of the cut and fill operation. (Findings of Fact 89-105) (CX 138) (Board Finding).

108. This eleven month delay on all activities subsequent to completion of the cut and fill operation caused PBC to incur damages to complete the project in the amount of $276,081 (composed of $250,983 additional costs plus 10% mark-up claimed by PBC). (N.T. 60-63, 194-229) (CX 138) (Board Finding).

109. There is no claim asserted by Plaintiff against Defendant in this matter for unpaid progress payments due on the contract. (N.T. at page 225) (Board Finding).

110. Defendant did not act in an arbitrary or vexatious manner or exhibit bad faith in its defense of these claims or conduct during litigation of the case at hand. (Board Finding).

111. Plaintiff presented its claim for the delay damage component of the claim to DGS on February 6, 2004, and its claim for unsuitable soil damages on June 25, 2004. Both claims were submitted to DGS prior to the expiration of six months from the date these claims accrued to Plaintiff and filed with the Board before the expiration of 135 days from submittal to DGS. No extensions of time were agreed to by the parties. DGS was clearly on notice of both components of Plaintiff's claim from the outset of Board proceedings, and DGS suffered no surprise or prejudice by the order of claim submittals or filings in this case. (Board Docket Sheet and Record) (CX 39, 83) (Board Finding).

## CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear and determine this matter as a claim against the Department of General Services, an agency and instrumentality of the Commonwealth of Pennsylvania, arising from a contract entered into with said agency of the Commonwealth. (62 Pa. C.S.A. §1724).

2. Both aspects of Plaintiff's claim (i.e. the claim for delay damages due to the suspension of work and for damages resulting from unsuitable soil/concealed subsurface conditions) were filed in substantial compliance with 62 Pa. C.S.A. §1712.1 and 1724.

3. Ambiguous language in a contract must be construed against the drafter, in this case the DGS, and in favor of PBC, if PBC's interpretation is reasonable. See e.g., Jay Twp. Authority v. Cummins, 773 A.2d 828, 832 n. 3 (Pa. Cmwlth. 1998).

4. Article 12.1 of the General Conditions would allow DGS to temporarily suspend work on the project without additional compensation for such periods as are necessary only if PBC was taking undue risk of damage to any part of a structure or installation.

5. Because PBC was not taking undue risk of damage to any part of a structure or installation on the project at the time DGS suspended work, Article 12.1 of the General Conditions does not apply to the five month suspension of work imposed by DGS. Accordingly, DGS may not utilize Article 12.1 of the General Conditions to escape responsibility for the additional costs PBC incurred as a result of the five month suspension directed by DGS.

6. In construing the contract, each and every part must be taken into consideration and given full force and effect if reasonably possible. Cerco v. DeMarco, 137 A.2d 296 (Pa. 1958) ("An interpretation will not be given to one part of a contract which will annul another part of it. . . ."); See also, Capek v. Devito, 767 A.2d 1047, 1050 (Pa. 2001).

7. Section 12.4 of the General Conditions clearly provides for additional compensation for any increase in the cost of performance to contractors (excluding profit) relating to suspension for an "unreasonable" amount of time.

8. Because of the Board's Findings of Fact at Paragraph 71 that the five month suspension constituted a suspension for an unreasonable period of time, Section 12.4 of the General Conditions applies to the five month suspension of work imposed by DGS; provided that, because of the Board's further findings, the terms of Section 12.4 shall not limit Plaintiff's recovery by excluding profit on the costs incurred for this delay.

9. Because Section 10.8 of the General Conditions; Sections 1.4, 1.7 and 3.8G of the Earthwork Specifications; and Section 1.14 of the General Requirements (Division I – Section 01040), read as a whole, are ambiguous as to who is responsible for the cost of problems caused by the concealed and unsuitable soil conditions encountered on the

project site (including the cost of importing fill), this ambiguity must be construed against DGS as drafter of these provisions.

10. DGS is, pursuant to the terms of the contract, responsible for the cost of problems caused by the concealed and unsuitable soil conditions encountered on the project site (including the cost of importing fill).

11. The critical factors in determining if constructive fraud exists are as follows:

> (1) Whether a positive representation of specifications or conditions relative to the work is made by the governmental agency letting the contract or its engineers.
> (2) Whether this representation goes to a material specification in the contract.
> (3) Whether the contractor, either by time or cost constraints, has no reasonable means of making an independent investigation of the conditions or representations.
> (4) Whether these representations later prove to be false and/or misleading either due to actual misrepresentation on the part of the agency or its engineer or by what amounts to a misrepresentation through either gross mistake or arbitrary action on the part of the agency or its engineer.
> (5) Whether, as a result of this misrepresentation, the contractor suffers financial harm due to his reliance on the misrepresentation in the bidding and performance of the contract.

See, Acchione and Canuso, Inc. v. Dept. of Transportation, 501 Pa. 337, 461 A.2d 765, 768 (Pa. 1983); Pa. Turnpike Comm. v. Smith, 350 Pa. 355, 39 A.2d 139, 142 (Pa. 1944) (overturned on other grounds).

12. Because the bid materials, plans and specifications and accompanying geotechnical information, including the EMI Report (collectively the "Bid Documents") provided to PBC and other bidders by DGS indicated that the soil on site was generally suitable for a cut and fill operation and that, accordingly, the site was a balanced site; and these representations that the site was balanced and the on site soil was suitable for fill were material to the contract with PBC; and time and cost constraints prevented PBC from making a more thorough and independent investigation of the subsurface conditions than it did; and the failure to disclose the Mamula Memo was either a gross mistake or an arbitrary action on the part of DGS which made the Bid Documents misleading regarding the subsurface soil conditions on site; and, as a result, PBC suffered financial harm due to its reliance on the incomplete and misleading Bid Documents, we find that DGS's actions constitute constructive fraud and breach of contract. Id.

13. Because DGS committed constructive fraud and breach of contract at the inception, PBC is entitled to recover the additional costs and damages it incurred as a result of said breach. Id.

14. Every contract contains the implied obligation that neither party will do anything to prevent, hinder or delay performance. See, e.g., Able-Hess Associates v. SSHE, Slippery Rock University, BOC Docket No. 3369 (October 27, 2003), 2003 WL 22524494; Gasparini Excavating Co. v. Pennsylvania Turnpike Commission, 409 Pa. 465, 187 A.2d 157 (1963); Com. State Highway & Bridge v. Gen Asphalt Paving, 46 Pa. Cmwlth. 114, 405 A.2d 1138 (1979).

15. Because DGS had knowledge of the Mamula Memo (which described subsurface conditions on site at substantial and material variance from the Bid Documents and specifically warned that no earthwork should take place in the winter or early spring) and despite this knowledge, required PBC to begin work during the time of year that DGS knew, or should have known, would be detrimental to the successful completion of the project, DGS's actions constituted active interference with PBC's ability to perform its contractual obligations and breach of contract. Id.

16. Because DGS breached its contract with PBC at the inception by committing constructive fraud with respect to the unsuitable soil conditions on site, DGS may not rely on exculpatory provisions in the contract (such as General Conditions Section 12.1; Earthwork Specifications Sections 1.4, 1.7 and 3.8; or General Requirements (01040) Section 1.14) or other provisions designed to preclude or limit its liability for said conditions. See, Pennsylvania Turnpike Commission v. Smith, 39 A.2d at 142; Acchione and Canuso, Inc. v. Dept. of Transportation, 461 at 768; Gasparini Excavating Co. v. Pennsylvania Turnpike Commission, 409 Pa. 465, 187 A.2d 157 (1963). See also, Soxman v. Goodge, D.C., 539 A.2d 826, 828 (Pa. Super. 1988) (Lying behind exculpatory provision is a residuum of public policy which is antagonistic to carte blanche exculpation from liability, thus the rule that these provisions will be strictly construed with every intendment against the party seeking their protection.)

17. Because DGS breached it contract with PBC at the inception by actively interfering with PBC's contract obligations, DGS may not rely on exculpatory provisions (such as General Conditions Section 12.1; Earthwork Specifications Sections 1.4, 1.7 and 3.8; or General Requirements (01040) Section 1.14) or other provisions designed to preclude or limit its liability for said actions. See, Able-Hess Associates v. Com., State System of Higher Education, Slippery Rock University, BOC Docket No. 3369, 2003 Pa. Bd. Claims LEXIS 3, 32-33 (Pa. Bd. Claims 2003) (denying the protection of exculpatory clauses to owner that provided inadequate information); Gasparini Excavating Co. v. Pennsylvania Turnpike Commission, 409 Pa. 465, 187 A.2d 157 (1963) (by ordering plaintiff to begin work at a time when the owner knew plaintiff could not, the owner directly interfered with plaintiff's ability to do its job); Coatesville Contractors v. Bureau of Ridley, 509 Pa. 553, A.2d 862 (1986); Com. State Highway & Bridge v. Gen Asphalt Paving, 46 Pa. Cmwlth. 114, 405 A.2d 1138 (1979) (denying PennDOT the protection of exculpatory clauses where PennDOT knew of existence of a 12 inch main, which interfered with contractor's work).

18. As a result of DGS's breach of contract by reason of constructive fraud it is liable to PBC for damages and prejudgment interest in the amount of $867,171, calculated as follows:

| | |
|---|---|
| Additional Costs and Lost Productively Damages | $ 484,358 |
| Prejudgment Interest from June 25, 2004 to September 8, 2006 (805 days x 0.000164 x $484,358) | 63,945 |
| Damages for 11 Month Delay | $ 276,081 |
| Prejudgment Interest from February 6, 2004 (945 days x 0.000164 x $276,081) | $ 42,787 |
| Total | $ 867,171 |

19. As a result of DGS's breach of contract by reason of its active interference with PBC, DGS is liable to PBC for damages in the same amount as stated in Conclusions of Law Paragraph 18 (not in addition thereto).

20. DGS is liable to PBC for additional compensation for concealed subsurface conditions pursuant to General Condition 10.8 in the amount of $484,358 plus prejudgment interest of $63,945 (which amount is part of, and not in addition to, the damages awarded pursuant to Conclusions of Law Paragraphs 18 and 19).

21. DGS is liable to PBC for additional compensation for the five month suspension pursuant to General Condition 12.4 in the amount of five elevenths of the total delay costs or ($250,983 x 0.4545 + 945 x 0.000164 x $250,983 x 0.4545 = $131,751), which amount is part of, and not in addition to, the damage awarded pursuant to Conclusions of Law Paragraphs 18 and 19.

22. 62 Pa. C.S.A. §3935, by its explicit terms, applies only to claims for payments under the subchapter of which it is a part, (i.e. Subchapter D). Subchapter D addresses progress payments to be made on the contracts with the Commonwealth. Because the parties here have agreed that all outstanding progress payments due on the contract have been made, 62 Pa. C.S.A. Subchapter D and Section 3935 do not apply to PBC's claims made in this matter. 62 Pa. C.S.A. §3931-3938.

23. PBC has not established entitlement to attorneys' fees. 62 Pa. C.S.A. §3935, 42 Pa. C.S.A. §2503(9).

24. Prejudgment interest at the legal rate of 6% per annum is due to PBC from DGS on this claim. 62 Pa. C.S.A. §1751.

25. DGS is liable to PBC for the total amount of $867,171 plus post judgment interest at the legal rate of 6% per annum until said judgment is paid in full. 62 Pa. C.S.A. §1751.

## OPINION

On September 19, 2003, Pittsburgh Building Company, hereinafter called "PBC," a Pennsylvania corporation, entered into a general construction contract with the Pennsylvania Department of General Services, hereinafter "DGS" (DGS Contract No. 963-14.1) to build the Pennsylvania National Guard Readiness Center. (N.T. page 25) (CX 1). The project consisted of a one-story armory building with an adjacent parking lot located on an undeveloped 22-acre site in Connellsville, Fayette County, Pennsylvania. (CX 1).

The Contract was for an original sum of $2,650,000.00. (N.T. page 26). Throughout the duration of the project, DGS issued a net total of $140,237.00 in change orders, thereby increasing the Contract Sum to $2,790,237.00, which amount, the parties agree, has been paid. PBC issued subcontracts and purchase orders to its subcontractors and suppliers to perform portions of the work on the Contract. (N.T. page 32). A subcontract in the amount of $350,000.00 was issued to Five-R Excavating, Inc., a certified WBE, to perform the site work on the project pursuant to Division 2 of the specifications issued by DGS. (N.T. pages 33-34).

On or about October 10, 2003, DGS issued a Notice to Proceed to PBC. (N.T. page 27). Since the specified contract completion date was August 10, 2004, the Notice to Proceed gave PBC and the other prime contractors ten months to complete this project. (N.T. pages 18 and 27). PBC issued a Project Schedule on October 10, 2003, that incorporated all of the prime contractors' activities with reasonable durations which would support completion of the project on or before August 9, 2004. (N.T. page 35)(CX 11). This Project Schedule was reviewed by all parties and subsequent revisions made. A revised Project Schedule dated November 11, 2003, was issued by PBC, which was accepted by all of the other prime contractors on or before November 18, 2003. (N.T. page 35).

The geotechnical information provided with the bid documents indicated that the project was to be a balanced site wherein the materials cut from the higher elevations of the site could be used to fill the lower elevations of the site without the need for any borrowed fill from outside of the site. (N.T. pages 30-34, 101-103, 136-137, 147-151) (CX 12, 32). The total amount of material to be excavated from the high side and filled on the low side was estimated by Five-R to be 26,000 cubic yards. (N.T. page 29). Given that the building footprint was located predominantly on the fill side of the site there was little other work that could be commenced until the cut and fill work was completed so that the building foundations could be poured in the properly compacted fill. (N.T. page 28).

Following an unforeseen delay in securing the building permit of approximately five days, for which DGS granted a time extension to PBC, PBC and Five-R were able to commence the site work for the project on October 15, 2003. (N.T. page 34). The initial operations of clearing and grubbing and topsoil stripping and stockpiling went as planned by PBC and Five-R. These operations were completed on November 4, 2003. (N.T. pages 35, 90, 140, 204-205).

For its bid to PBC, Five-R estimated that it could cut and fill at least 1,800 cubic yards of soil per day by using a maximum of five operators and the following equipment: (1) Caterpillar D9 Bulldozer with Ripper, (1) Caterpillar D6 Bulldozer, (2) Caterpillar 621 Scrapers-Pan, (1) Caterpillar Compactor Scraper, (1) John Deere High Lift with Bucket, and (1) Ingersoll-Ran 10-Ton Vibratory Roller. (N.T. pages 125-127, 131). At the estimated 1,800 cubic yards per day, Five-R would have completed the estimated 26,785 cubic yard cut and fill excavation in fifteen days, which was reflected in the Project Schedule duration for this work activity. (N.T. pages 37, 125, 127, 132, 138).

Once the cut and fill excavation operations commenced on November 4, 2003, however, PBC and Five-R encountered soil with excessive moisture at the site. (N.T. pages 290, 303-304, 306, 309). Despite extensive efforts by Five-R, attempts to dry out the on site soils to the degree required to achieve the compaction requirements for the fill work was unsuccessful. (N.T. pages 38, 41, 43, 46-47, 90-93, 127, 133, 141-142, 153, 160, 162, 217, 270). After Five-R spent two weeks attempting unsuccessfully to work with the wet soils and stabilize the first bench, PBC notified DGS by a letter dated November 24, 2003, that it was "currently delayed by weather and soil conditions . . . and . . . at present no work is ongoing at the site . . . ." (N.T. page 46-48, 92-93) (CX 25). DGS responded that PBC was to continue work. (N.T. page 49).

At the same time, DGS asked the design professional for the project, Valentour English Bodnar & Howell (hereinafter "VEBH"), to provide solutions for the soil conditions that would allow the work to continue throughout the Winter months. (N.T. pages 164-165) (CX 26). VEBH provided several alternatives at various times including suspending the project and/or bringing in shale to mix with the existing soils or importing crushed stone to the project to achieve an engineered fill for the footprint area of the building. (N.T. pages 164-165) (CX 24-28). The proposed alternatives requiring imported fill submitted by VEBH were rejected by DGS. (N.T. page 167). Instead, DGS chose to wait until the weather conditions improved so that the existing soils could be worked and air dried to meet the specified compaction and moisture content. (N.T. pages 54-55, 303) (CX 31, 32, 34).

DGS directed a suspension of the work on December 16, 2003, that was made retroactive to November 19, 2003. (N.T. page 56) (CX 34). At the time of the suspension, Five-R had managed to cut and fill only a fraction of the fill required for the first and second bench areas, and none of this fill met the moisture and compaction requirements. (N.T. pages 92-93). In its

suspension notice, DGS advised PBC that while it would grant an extension of time for the length of the suspension, it would not accept responsibility for any additional costs resulting from the suspension pursuant to provision 12.1 of the General Conditions of the Contract. (PBC Appendix Ex. F) (N.T. pages 56-57) (CX 34).

While PBC complied with DGS's suspension directive and ceased further performance, it disagreed that the additional costs it would incur as a direct result of this suspension were non-compensable because, as stated in its letter of February 6, 2004:

> (a) Section 12.1 of the General Conditions does not apply in that the fundamental basis for the suspension directive was not because PBC was proceeding with any "undue risk," or otherwise due to PBC's fault, but rather was due to the DGS's award of this contract and issuance of the Notice to Proceed with knowledge that the project could not proceed at the time of year due to unsuitable soil conditions, as confirmed in an August 1999 soils investigation performed by the DGS – which was not disclosed to the bidders;
>
> (b) DGS refused to authorize the use of alternate fill arrangements, as recommended by the Design Professional, which would have permitted the work to proceed or would have greatly diminished the length of the suspension (N.T. pages 66, 111-112, 158). As such, the suspension directive was for the convenience of DGS under Section 12.3 of the General Conditions, for which a cost adjustment is permitted;
>
> (c) Section 12.1 of the General Conditions expressly contemplates a situation where the work is suspended "temporarily," and the five month suspension at issue is not temporary suspension, but rather is a suspension for an "unreasonable period of time" pursuant to Section 12.4 of the General Conditions for which additional compensation is due; and
>
> (d) DGS's prior and superior knowledge of the unsuitable soil conditions, which was not disclosed to the bidders, renders Section 12.1 of the General Conditions an unenforceable exculpatory provision which cannot be relied upon by the

DGS to deprive PBC of its right to additional compensation.

PBC also requested additional compensation from the DGS as a result of the suspension. The additional compensation was requested for demobilization and remobilization costs; labor and material escalation costs; and extended field and home office overhead costs. (CX 39).

On March 24, 2004, at the request of PBC, a meeting was held in order to review the current site conditions and discuss site related issues. (N.T. page 64). This meeting was attended by representatives of DGS, VEBH, Engineering Mechanics, Inc. (EMI) (geotechnical consultant for DGS), Five-R and PBC. (N.T. page 64). PBC and Five-R raised concerns regarding the soil conditions and the suitability of its use, the costs associated with the demobilization and remobilization, and the anticipated weather using historical NOAA weather data for recommencing site work in the Spring. (N.T. pages 64-66). PBC and Five-R stressed that without temperatures above 70 degrees, sunshine and a steady breeze, air drying of the soils would be slow and productivity for the placement and compaction of the site soils would be very limited. (N.T. pages 133, 245). VEBH suggested that the suspension should be extended until mid-May. It also suggested that, if production continued to be impacted, an alternative plan be devised to complete the cut and fill operations. (N.T. pages 64-65, 170-172).

On April 9, 2004, however, DGS ended the suspension and directed PBC to recommence its work by April 15, 2004. (CX 47). By letter dated April 14, 2004, DGS issued a 148-day extension of time which extended the contract completion date by five months from August 15, 2004 to January 10, 2005. (N.T. page 63) (CX 48). DGS refused to recognize PBC's entitlement to any additional compensation due for the period of suspension. (N.T. pages 66-68). PBC and Five-R resumed the cut and fill operations, but once again were adversely impacted by the moist soil conditions. (N.T. pages 66-68). Through the Spring of 2004, the on site soils required

extensive labor and equipment hours to spread out and disk the wet soil, and long time periods to air dry the wet soil in an attempt to meet the specifications for compaction and moisture content. (N.T. pages 67-70) (CX 54, 56).

The complications with the soil conditions escalated when PBC and Five-R's geotechnical consultants reported that the composition of the soil in the parking lot area (heretofore the primary borrow area) included a large amount of highly plastic and other clayey soils of the type classified by DGS specifications as unsuitable for fill under the building regardless of any amount of air drying (i.e. CL, GC and SC soil types) (N.T. pages 72, 115) (CX 1 at Earthwork Specification 2.2A, CX 63-65). The EMI Report provided to bidders noted the presence of clay among several other soil types on site, but concluded that all the soil on site could be used for fill beneath the buildings and pavement although it warned that some of the soil may require air drying before use.[2] (CX 12).

After an investigation by PBC and Five-R, PBC suggested that the soil materials from an area on the southwestern hillside adjacent to the site could be used as borrow material. (N.T. page 73). On or about June 1, 2004, DGS directed VEBH to put together a scope of work for using this adjacent hillside as a borrow area and to submit this scope of work to PBC for pricing. (N.T. pages 73-74). PBC and Five-R priced this work and submitted the additional costs to DGS for approval. (N.T. pages 73-74) (CX 66, 69). After several weeks, with virtually no work capable of being performed at the site, DGS responded that PBC should proceed with the scope of work as identified by the VEBH, but that all cost would be assumed by PBC. (N.T. pages 175-176, 178) (CX 81).

[2] The EMI Report at page 7 did exclude from use organic soils and carbonaceous soils (i.e. soils containing vegetation or coal type materials). However, there is no credible evidence to suggest that these exclusions were material or relevant to the issue at hand. (N.T. 31-32).

Under protest, PBC and Five-R proceeded on June 28, 2004, to complete the cut and fill excavation work using this suitable material from the adjacent hillside. (N.T. pages 67, 74-75, 273-275). This involved additional costs: (a) to strip the topsoil from this adjacent hillside, (b) to haul the borrow fill an additional 100 yards across the site and up a slope to the fill area, (c) to haul the clay materials back across the site for disposal in the excavation at the adjacent hillside, and (d) to replace the topsoil over this borrow area once the excavation work was completed. (N.T. page 74). During the time period when it was able to use the suitable fill material, however, Five-R met its estimated excavation quantity of 1,800 cubic yards per day. (N.T. pages 76-77, 130-131, 277).

To resolve the compaction problem with the clay sub-base located below the parking lot area, DGS directed PBC to provide a mesh grid system over the clay and issued a change order to PBC to cover the costs of this system. (N.T. pages 78, 80, 181). DGS did not, however, take responsibility for the lack on on site borrow fill.

Ultimately, all of the major site work activities which were scheduled to be completed by the end of December 2003 were not completed until the end of November 2004. Since the cut and fill operation was on the critical path and prevented the commencement of any other significant work activities on site, the suspension and the problems with cut and fill operations were the cause of an eleven month overall delay to the project.

The damages claimed by PBC, Five-R and PBC's other subcontractors and suppliers on this project fall into two categories. First, PBC and Five-R incurred a significant overrun in the supervision, labor and equipment needed to perform the cut and fill operations of the site work. Second, everyone associated with the project incurred cost increases due to the eleven month

increase to the original project duration of ten months, most of which stemmed from the unprecedented increase in steel prices that occurred over the Winter of 2003.

The Suspension of Work

The Board agrees with Plaintiff that General Conditions Section 12.1 is not applicable and cannot be invoked to deny PBC additional compensation from DGS for the five month suspension of the project from November 19, 2003 to April 15, 2004.

The provisions at issue state as follows:

> **12.1: Suspension of Work Due to Unfavorable Conditions.** If, in the judgment of the Department, the Contractor is taking undue risk of damage to any part of a structure or installation by proceeding with the work during unfavorable weather or other conditions, then the Department may suspend the work temporarily, either wholly or in part for such periods as are necessary. In case of such suspension, a proper Extension of Time will be allowed as provided herein, but no allowance will be made to the Contractor for any expense or damages resulting from the suspension. The failure of the Department to suspend the work does not relieve the Contractor of its responsibility to perform the work in accordance with the Contract Documents.
>
> . . .
>
> **12.3: Suspension of Work for the convenience of the Department.** The Department may order the Contractor in writing to suspend all or any part of the work for such a period of time as it may determine to be appropriate for the convenience of the Department. This Section does not apply under conditions enumerated in Sections 12.1 and 12.2.
>
> **12.4: Adjustment in Cost.** If the performance of all or any part of the work is, for an unreasonable period of time, suspended by the Department, an adjustment shall be made for any increase in the cost of performance of this Contract (excluding profit) necessarily caused by such unreasonable suspension. The Contract shall be modified in writing accordingly. No adjustment shall be made under this clause for any suspension to the extent:
>
> (1) That performance would have been so suspended by any other cause, including the fault or negligence of the Contractor; or

> (2) For which an equitable adjustment is provided for or excluded under any other provision of this Contract.
>
> . . .

To begin with, there was no credible evidence produced which indicated that PBC was taking undue risk of damage to any part of a structure or installation at the time of the suspension. In fact, there was no structure or installation on the building site to put at risk at the time of the excavation at issue. (N.T. page 57). To counter this fact, DGS would have us read the language in Section 12.1 to encompass not only existing structures and installations but future structures or installations as well. Specifically, it argues that continuation of the excavation and attempts to dry the fill in order to achieve defined compaction characteristics (as directed by DGS) posed an undue risk of damage to the structure to be built or a foundation yet to be installed, presumably because required compaction characteristics might not be achieved.

We find DGS's interpretation of Section 12.1 strained and its argument unpersuasive. On a purely factual basis, DGS produced no credible evidence that PBC would proceed with building the structure or foundation without meeting the required compaction specifications. In fact, the weight of evidence points strongly to the contrary. (N.T. pages 103, 330-31) (CX 22-27). Moreover, fundamental principles of contract interpretation preclude the Board from adopting DGS's broad reading of this provision. Although the Board, like Plaintiff, reads Section 12.1, on its face, to apply to existing structures and installations, to the extent the provision could be read to refer to a structure or installation other than an existing one (or "installation" to mean the building process itself) the provision is ambiguous and susceptible to more than one reasonable interpretation when applied to the facts of the case. It is a well-established rule of contracts that a written agreement will be construed against the party preparing it. Central Trans., Inc. v. Brd. of Assessment Appeals of Cambria County, 417 A.2d

144, 149 (Pa. 1980); Longenecker v. Matway, 462 A.2d 261, 263 (Pa. Super. 1983). In addition, when contractual terms are ambiguous they will be interpreted against the drafter. Chester Upland School District v. Meloney, Inc., 901 A.2d 1055, 1061 (Pa. Super. 2006). Accordingly, the Board interprets Section 12.1 to apply to existing structures and installations, not those to be built in the future or the process of building itself. Since there was no possibility of undue risk of damage to a structure or installation pursuant to Section 12.1 when DGS ordered the suspension, Section 12.1 does not apply.[3]

Additionally, Section 12.1 states, "the Department may suspend the work temporarily, either wholly or in part for such periods as are necessary." In this regard, Plaintiff has argued that the suspension was neither temporary nor necessary, just less expensive for DGS.

While we understand Plaintiff's argument that the five month suspension on a ten month project is so long as to amount to a permanent suspension of operations for all practical purposes, we believe the evidence does not support this assertion. As Defendant points out, "temporary" is commonly understood to mean "not permanent." The excavation was recommenced after a five month hiatus, and the project was completed. The stoppage was not permanent.

The testimony at hearing, including that of the project's design professional, Mr. Kurpiewski, supports PBC's assertion that alternatives (particularly the importation of appropriate fill) could have permitted the project to proceed without any significant suspension. (N.T. 163-166). In fact, DGS initially rejected the alternative of imported fill put forth by VEBH to resolve the subsurface conditions in November of 2003, only to wind up utilizing this

[3] The Board acknowledges that determination of "undue risk of damage" is, in the first instance, assigned to the "judgment of the Department." However, there is an implied duty of good faith and fair dealing which arises under the law of contracts. Creeger Brick and Building Supply, Inc. v. Mid-State Bank and Trust Co., 560 A.2d 151, 153 (Pa. Super. 1989). Therefore, despite having discretion to exercise its own judgment, DGS still has a duty to exercise this judgment in good faith. This includes honesty in fact and a fair and appropriate interpretation of Section 12.1. This, in turn, leads to a conclusion that Section 12.1 refers to existing structures/installations and is not applicable to the 5 month suspension directed on this project by DGS.

alternative successfully after the suspension and months of additional efforts to air dry the on site fill ultimately proved fruitless. (CX 26,28,34,35,49,54,56,64,65,74,75,81).

On the other hand, Mr. Kurpiewski's written communication at the time leaves the idea of suspension on the site as an option and appears considerably less adamant about the use of imported fill than his testimony at hearing. It further appears that DGS's unwillingness to pursue the alternatives of imported fill in November 2003 was primarily due to the additional cost. (N.T. 320-322). Curiously this concern directly contradicts DGS's position that PBC is responsible for any and all fill. However, the estimated cost of this stabilizing fill was in excess of 5% of the total project cost, an amount above a normal range of contingency expense for such a project. (N.T. pages 275,322-324) (CX 28) (Board Finding). Add to this the fact that DGS believed the cost would be higher than the $150,000 estimated by the architect, and the Board is unable to conclude that DGS was required to accept the more costly alternative.[4] (N.T. pages 322-324). Additionally, PBC has failed to establish that such extra funding was available to DGS at the time. Under the circumstances, PBC has failed to establish by a preponderance that the suspension was not necessary.

In summation, it is the Board's conclusion that Section 12.1 of the General Conditions is not applicable to, or adequate grounds for, the five month suspension of operation imposed on this project by DGS. Although PBC failed to establish that the suspension was not temporary or necessary, the Board does agree that there was absolutely no "undue risk" to "structure or installation" posed by allowing PBC to continue its work.

Having concluded that Section 12.1 was inapplicable to the five month suspension imposed by DGS, the question next becomes what type of liability accrues to DGS for this

[4] The Board notes that DGS's concern that the importation of fill would actually cost more than the $150,000 estimated by Mr. Kurpiewski finds some support in the change order proposal submitted by PBC of $182,417 when this alternative was eventually utilized.

action. Plaintiff asserts that absent a Section 12.1 justification, the suspension becomes one for the convenience of DGS and that Sections 12.3 and 12.4 clearly entitle Plaintiff to additional compensation relating to such a suspension for convenience (PBC Proposed Findings of Fact and Conclusions of Law, p. 19). DGS does not address this issue in its briefing, having opted to focus entirely on defense of its position that Section 12.1 did apply.

Initially the Board must note that it finds no explicit damages formulation in Section 12.3 (dealing with suspension for convenience), and that Section 12.4 appears to deal primarily with compensation for a suspension of an "unreasonable period of time" or an "unreasonable suspension." However, we also believe that, read as a whole, Article 12 of the General Conditions does contemplate that, unlike a suspension for "undue risk" or other cause enumerated in Article 12, a contractor will be entitled to additional compensation if the suspension of operations is merely for the convenience of DGS. Normally, we would view the compensation formulary contained in Section 12.4 (". . . adjustment shall be made for any increase in the cost of performance of this Contract (excluding profit) necessarily caused by such unreasonable suspension . . .") to be appropriate and applicable to such a suspension for convenience. Put another way, we view any suspension of work ordered by DGS merely for its convenience and not otherwise justified by a provision of Article 12 to be "unreasonable" or "for an unreasonable period of time" as to the contractor and compensable pursuant to Section 12.4. However, as a result of our further findings in this matter, any limitation on damages contained in Section 12.4 must be considered an exculpatory provision, unenforceable due to DGS's prior material breach of the project contract.

Unsuitable Soil and Concealed Subsurface Conditions

Although each party sees the subsurface soil conditions matter to be crystal clear, the Board views this aspect of the dispute to be a close question. Plaintiff emphasizes the testimony of record by PBC, Shirley Ritenour, Hiram Ribblett, Stephen Kurpiewski, and even DGS itself that this site was intended as, and understood to be, a balanced site. Accordingly, it was commercially reasonable that no import or export of fill was expected or bid by any of the contractors. Plaintiff further cites General Conditions 10.8 and Earthwork Specifications 1.7(B) and 1.7(F) in support of its contention that it is entitled to additional compensation for the extra-costs caused by concealed subsurface conditions (e.g. the unsuitable soil, the extensive seeps and springs and the additional topsoil).[5] In response, DGS asserts that the EMI geotechnical report provided to bidders did show that some clay was present and should have put PBC on notice of potential soil moisture problems; that it was primarily the rainy weather conditions which created the seeps and springs and moisture problems with the on site soil; that PBC should have investigated the soils on its own; that DGS did not guarantee a balanced site; and that, in any event, Earthwork Specifications 1.4 and 3.8 squarely put the responsibility for importation or exportation of fill on the contractor, i.e. PBC.

While DGS claims that a proper pre-bid investigation by the contractor would have most likely revealed the problems that were later encountered, the evidence of record refutes this assertion. PBC and its eventual excavation subcontractor, Five-R Excavating, made site visits, reviewed the plans and specifications and reviewed the geotechnical report for the site provided by EMI, DGS's geotechnical consultant. PBC did not have the time to do its own geotechnical report during the bid process. (N.T. pages 104,114-116) (CX 1 at Notice to Bidders). The

[5] General Requirements Section 01040-5 at 1.14F also supports the proposition that should subsurface conditions vary substantially from the EMI Report changes in design and construction of foundations will be made with resulting credits or debits to the Contract sum.

evidence also establishes that the EMI geotechnical report itself (CX 12) did not clearly predict the problems encountered. Under these circumstances, we do not agree with DGS that PBC should have discovered on its own the problems to be encountered during the pre-bid process.

As to DGS's contention that "PBC was on notice of the actual soil conditions" (DGS brief at page 5), the Board finds that the weight of evidence is otherwise. Although the EMI Report that was provided to PBC and other bidders did identify some relatively small amounts of clay at the site and contained some rather typical cautionary language regarding seasonal weather, the Board ultimately finds itself in agreement with the overwhelming weight of testimony that the extent and amount of clayey soils, and the seeps and springs actually found on site was not accurately revealed by the EMI Report. (N.T. pages 30-31,113-115,171-175,314-315) (CX 12,63,64,137).

As to the issue of causation, the Board is presented with a series of conflicting communications among the parties and testimony at hearing as to whether the soil problems encountered were ultimately due to excessively wet weather conditions surrounding the construction period or, instead, due to the existence of concealed underground springs and seeps and a significantly greater amount of clay or clay-like material and topsoil on the site than indicated by the EMI geotechnical report. The Board's review of the evidence indicates that, as the project proceeded from November 2003, each party began to view the problem of excessive moisture in the soil differently. Initial communications from PBC referenced both weather and soil conditions as contributing factors. (CX 23). However, as time and investigation by PBC's quality control consultant, Earthtech, Inc. proceeded, PBC came to attribute the problem with fill compaction to the soil conditions. In particular, PBC referenced the significant presence on site of clayey soils (types CL/GC/SC) classified by DGS as unsuitable for fill under the building and

the concealed seeps and springs as the reasons for the soil moisture and compaction problems. This opinion became dominant at PBC, particularly after the Winter suspension, when drying efforts still proved unproductive. (CX 20-22, 29, 39, 45, 51, 55, 56, 59, 63, 64, 83). The assessment of VEBH, the design professional, appears to follow this pattern as well. (CX 28, 40, 43, 45, 49, 58, 65, 77).

DGS, on the other hand, immediately and consistently adopted the position that the problem was the weather conditions. This position also reflected an immediate concern that the contractor might seek additional compensation. (CX 27, 30, 32). When the existence of previously concealed seeps and springs became apparent, DGS attributed these to excessively rainy weather. (CX 35, 36, 41). When air drying of the on site soil increasingly appeared fruitless and the existence of more clayey soil than anticipated became more apparent (CX 67, 70, 77) DGS briefly considered a change order for import of fill. (N.T. pages 175-178) (CX 66, 69). DGS then ultimately asserted its position that it was the contractor's responsibility to import fill regardless of the circumstances. (CX 49, 51, 53, 78).

Although the Board finds this causation issue to be a close factual question, we are once again persuaded by the weight of the largely uncontradicted testimony (including that of the project engineer and Plaintiff's soils expert) that it was the highly plastic, clayey character of the soils and the significant underground seeps and springs on site that were the underlying cause for the compaction problems.[6] Moreover, Defendant presented no data to support its anecdotal evidence that the weather was exceptionally rainy during the relevant period of construction. It also offered no explanation of why, if it was the rainy weather that was the cause of the problem, the soil from the area adjacent to the site (that was ultimately used to solve the compaction

[6] Defendant presented no witnesses of its own who had actually been on site more than intermittently and no soils expert to rebut the testimony of Hiram Ribblett (PBC's soils expert) and Stephen Kurpiewski (design professional, engineer, and project manager).

problem) was not also adversely affected to the extent of the on site soils that could not be used. (N.T. pages 37-38,69-71,100,109-113,142,153-155,170,275-276,306-314) (CX 43,65,77,137).

Having found, as a matter of fact, that PBC did conduct a reasonable pre-bid investigation of the site and could not reasonably have been expected to have discovered the soil problems encountered during the pre-bid process; that the EMI geotechnical report failed to give accurate notice of the extent of the unsuitable clayey materials, and the seeps and springs on site; and that it was the extent of the clayey materials and seeps and springs on site which caused the compaction problem and interfered with the planned cut and fill operations, we would normally turn next to a discussion of how the relevant contract provisions allocate the risk of same. However, for the reasons stated below, we find that the contract provisions designed and compiled by DGS into this contract to exculpate itself from any responsibility for such subsurface conditions fail to do so.

Constructive Fraud and Interference

Although the Board, as noted, finds some of the issues in this case to be close calls, it finds no such difficulty in addressing the failure of DGS to disclose to PBC and other bidders the content of the Mamula Memo during the bid process. The Mamula Memo, produced in 1999, is a candid, in-house assessment by DGS's own employees and geological technicians of the soils condition at the site here in question. The memo incorporates a report of the on site soils produced by John Bender, P.G. of DGS's Soils Section, Division of Engineering Review, Bureau of Engineering and Architecture, which identifies a significant presence of clayey materials on site (which, collectively, is referred to herein as the "Mamula Memo"). The memo concludes with a refreshingly frank assessment that the site is unsuitable for earthwork in winter and early spring. Specifically, we find that provision of the EMI report to bidders while withholding the

Mamula Memo constituted a materially misleading representation as to the soil conditions to be expected on site at the time of year the construction was to occur. (N.T. pages 161-163) (CX 14,24). We further conclude that DGS's actions in this regard amount to constructive fraud, breach of contract and active interference with PBC's performance by failing to act in an essential manner.

In this case, DGS has actively interfered with PBC's ability to perform its contract duties by failing to disclose the Mamula Memo and directing PBC to begin work on the project at a time it knew would be detrimental to PBC. DGS had knowledge of the Mamula Memo, which described subsurface conditions on site at variance from the EMI Report and specifically warned that no earthwork should take place in the winter or early spring, the time of the year in which DGS was directing PBC to pursue this work. However, Steven Kurpiewski, the project engineer testified as to his understanding that DGS stood to lose federal funding if the work on the project was not awarded by September 2003. (N.T. pages 152-153). So, despite the knowledge of the Mamula Memo, DGS required PBC to begin work during the time of year that DGS knew or should have known would be detrimental to the successful completion of the project. This constituted active interference with PBC's ability to perform its contractual obligations and constitutes a breach of contract. See, e.g., Able-Hess Associates v. SSHE, Slippery Rock University, BOC Docket No. 3369 (October 27, 2003), 2003 WL 22524494; Gasparini Excavating Co. v. Pennsylvania Turnpike Commission, 409 Pa. 465, 187 A.2d 157 (1963); Com. State Highway & Bridge v. Gen Asphalt Paving, 46 Pa. Cmwlth. 114, 405 A.2d 1138 (1979).

In addition, DGS's actions rise to the level of constructive fraud. Constructive fraud occurs when a "misrepresentation was substantial and not a mere inaccuracy or innocent mistake." Acchione and Canuso, Inc. v. Dept. of Transportation, 501 Pa. 337, 461 A.2d 765, 768

(Pa. 1983); Pa. Turnpike Comm's v. Smith, 350 Pa. 355, 39 A.2d 139, 142 (Pa. 1944) (overturned on other grounds). The Supreme Court summarized the critical factors in determining if constructive fraud exists as follows:

> (1) Whether a positive representation of specifications or conditions relative to the work is made by the governmental agency letting the contract or its engineers.
> (2) Whether this representation goes to a material specification in the contract.
> (3) Whether the contractor, either by time or cost constraints, has no reasonable means of making an independent investigation of the conditions or representations.
> (4) Whether these representations later prove to be false and/or misleading either due to actual misrepresentation on the part of the agency or its engineer *or by what amounts to a misrepresentation* through either gross mistake or arbitrary action on the part of the agency or its engineer.
> (5) Whether, as a result of this misrepresentation, the contractor suffers financial harm due to his reliance on the misrepresentation in the bidding and performance of the contract.
> Acchione, 461 A.2d at 768 (original emphasis)

In this case, the bid materials, plans and specifications, and accompanying geotechnical information, including the EMI Report (collectively, the "Bid Documents") provided to PBC and other bidders indicated that the soil on site was generally suitable for a cut and fill operation and that, accordingly, the site was a balanced site. The representation that the site was balanced and the soil was suitable for fill was material to the contract with PBC (as evidenced, inter alia, by the fact that when this turned out not to be the case substantial additional cost was incurred by PBC in order to complete the project). In addition, because of time and cost constraints PBC had no reasonable means of making a more thorough and independent investigation of the subsurface conditions than it did. Furthermore, the failure to disclose the Mamula Memo was either a gross mistake or an arbitrary action on the part of DGS which made the Bid Documents incomplete and misleading regarding the subsurface soil conditions. As a result, PBC suffered financial

harm due to its reliance on the incomplete and misleading Bid Documents. Therefore, DGS's actions rose to the level of constructive fraud, and PBC is entitled to recover its additional costs and damages incurred as a result.

Of course, the Board recognizes that the contract here contains provisions which DGS maintains shift the risk for the subsurface conditions from DGS to PBC. The Board notes initially that Section 3.8G of the Earthwork Specifications requires the contractor to bear the cost of importing or exporting fill to or from the worksite. We also note that Section 10.8 of the General Conditions provides generally for adjustment to the contract price in the event that concealed conditions are encountered, while subsequent specifications, such as those contained in Earthwork Specifications (02300) at 1.4, then attempt to re-define concealed conditions so narrowly as to negate Section 10.8. Finally, we note that General Requirements (01040) Section 1.14 and Earthwork Specification 1.7, in and of themselves, appear to alternate back and forth between forbidding and allowing the bidder to rely on the boring logs and the report and/or allowing for cost or design adjustments if site conditions vary substantially from the geotechnical report. (Compare 1.14A to B and 1.7A to B to F).

The Board views this "modular" system of contract design (where one provision giveth and two others interspersed in the next several hundred pages supposedly taketh away) as fertile ground for latent ambiguities and poor substitute for a single, straightforward statement of risks. The overall ambiguity of these collective provisions as to which party is responsible for imported material to stabilize the fill portion of this project is highlighted even further by DGS's own actions (e.g. eschewing the importation of fill in November 2003 because of the extra cost and indicating initial willingness to issue a change order for imported fill in 2004) and the internal debate among DGS employees and the project engineer as to the effect of these several terms.

(CX 77, 78). As a result, the Board finds the contract provisions regarding responsibility for the importation of fill and related activities when concealed subsurface conditions caused the cut and fill operation to become "unbalanced" on this project to be ambiguous. These provisions will be construed against the drafter, DGS. Accordingly, we hold that DGS is responsible to PBC for the additional costs incurred to complete the cut and fill operations on this project.

Just as importantly, however, the Board acknowledges that exculpatory clauses may not operate to bar recovery to PBC under facts and circumstances such as these. DGS has materially breached the contract and committed constructive fraud at the outset. Its actions here, withholding the Mamula Memo and directing commencement of excavation and construction as it did, also constituted active interference with PBC's ability to perform the contract with respect to its excavation responsibilities. Accordingly, DGS cannot defend itself by relying on the protection of the exculpatory provisions in this contract even if they were clearer and less ambiguous. See, Pennsylvania Turnpike Commission v. Smith, 39 A.2d at 142; Acchione and Canuso v. Dept. of Transportation, 461 A.2d at 768; Gasparini Excavating co. v. Pennsylvania Turnpike Commission, 409 Pa. 465, 187 A.2d 157 (1963). See also, Soxman v. Goodge, D.C., 539 A.2d 826, 828 (Pa. Super. 1988) (Lying behind exculpatory provisions is a residuum of public policy which is antagonistic to carte blanche exculpation from liability, thus the rule that these provisions will be strictly construed with every intendment against the party seeking their protection.)

In sum, the exculpatory provisions in this contract do not relieve DGS of liability for the concealed subsurface conditions encountered (i.e. excessive clayey soils, extensive seeps and springs and excessive topsoil covering) because the contract provisions, as a whole, are ambiguous as to responsibility for the cost of imported fill where the need for same is caused by

concealed subsurface conditions. Moreover, such provisions cannot operate to exculpate DGS for responsibility for additional costs and damages incurred by PBC resulting from the excavation problems encountered because of DGS's constructive fraud and active interference with respect to the excavation.

Interest and Attorney's Fees

Pennsylvania law recognizes that pre-judgment interest is to be awarded as a matter of right to the prevailing party in an action to recover upon a contract. See e.g., Widmer Engineering, Inc. v. Dufalla, 837 A.2d 459, 469 (Pa. Super. 2003); Pittsburgh Construction Co. v. Griffith, 834 A.2d 572, 590 (Pa. Super. 2003); Vemer v. Shaffer, 500 A.2d 479, 482 (Pa. Super. 1985). Interest shall run at the statutory rate from the date this claim was filed with the contracting officer. 62 Pa. C.S.A. §1751.

Section 3935 of the Procurement Code permits penalty interest and attorneys' fees only if the government agency acted in "bad faith" in withholding progress payments due on the contract in bad faith. In this case, no progress payments due on the contract were withheld. The claims at issue are for additional compensation,[7] and Section 3935 does not apply.

Although 42 Pa. C.S. A. §2503(9) does provide an alternative basis for attorney's fees, it requires a showing that DGS's defense of this suit (i.e. during this litigation) was conducted in bad faith (i.e. in an arbitrary or vexatious manner). Conduct will be deemed arbitrary if it is based on random or convenient selection or choice rather than reason or nature. Hart v. Arnold,

[7] 62 Pa. C.S.A. §3395 states, in relevant part: "(a) Penalty.- If arbitration or claim with the Board of Claims or a court of competent jurisdiction is commenced to recover payment due under this subchapter and it is determined that the government agency, contractor or subcontractor has failed to comply with the payment terms of this subchapter, the arbitrator, the Board of Claims or the court may award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was withheld in bad faith. . . . (b) Attorney fees.- Notwithstanding any agreement to the contrary, the prevailing party in any proceeding to recover any payment under this subchapter may be awarded a reasonable attorney fee in an amount to be determined by the Board of Claims." Section 3935 is contained in Subchapter D. Prompt Payment Schedules and contains only Sections 3931-3939 relating to progress payments. Subchapter E addresses final payments and does not contain attorney's fee or penalty provisions. See also, 62 Pa. C.S.A. §3398 and Pa. C.S.A. §§1924, 1932.

884 A.2d 316, 342 (Pa. Super. 2005). Conduct will be deemed vexatious if it is without sufficient ground in either law or in fact and if the sole purpose is to cause annoyance. Id.

In this dispute, PBC emphasizes the difficulties encountered on the construction site while DGS relies primarily for its defense on exculpatory provisions or different interpretations of reports, documents or other contract provisions. PBC acknowledges the exculpatory provisions but rather points to other principles which entitle it to additional compensation despite these provisions. Although the Board finds in favor of PBC on certain substantive issues, there is no finding against DGS for bad faith during this litigation. DGS presented a reasonable defense even though the Board ultimately found in favor of Plaintiff.

Jurisdiction

DGS argues that PBC did not comply with Section 1712.1 of the Procurement Code with respect to its claim for unsuitable soil/concealed subsurface conditions, and, consequently, the Board of Claims lacks jurisdiction over this claim. Section 1724(c) of the Procurement Code provides "the [Board of Claims] shall have no power and exercise no jurisdiction over a claim asserted under (a)(1) unless it is filed with the [Board of Claims] in accordance with section 1712.1." Section 1712.1 provides in relevant part:

> (a) Right to claim. – A contractor may file a claim with the contracting officer in writing for controversies arising from a contract entered into by the Commonwealth.
>
> (b) Filing a claim.- A claim shall be filed with the contracting officer within six months of the date it accrues. If a contractor fails to file a claim or files an untimely claim, the contractor is deemed to have waived its right to assert a claim in any forum. Untimely filed claim shall be disregarded by the contracting officer.
>
> (c) Contents of claim.- A claim shall state all grounds upon which the contractor asserts a controversy exists.

> (d) Determination. – The contracting officer shall review a claim and issue a final determination in writing regarding the claim within 120 days of the receipt of the claim unless extended by consent of the contracting officer and the contractor. If the contracting officer fails to issue a final determination within the 120 days unless extended by consent of the parties, the claim shall be deemed denied. The determination of the contracting officer shall be the final order of the purchasing agency.
>
> (e) Statement of claim. – Within 15 days of the mailing date of a final determination denying a claim or within 135 days of filing a claim if no extension is agreed to by the parties, whichever occurs first, the contractor may file a statement of claim with the board.
>
> (f) Applicability. – The provision of 2 Pa. C.S. (relating to administrative law and procedure) shall not apply to this section.

Fundamentally, Section 1712.1 requires that a claim be filed with the contracting officer of the agency involved and that the agency be given an opportunity to resolve same before the claim is submitted to the Board for resolution. It also requires the claim to state all grounds upon which a controversy exists.

Importantly, Defendant makes no assertion, and indeed confirms in its own filings with the Board, that the Plaintiff has filed and presented its claim for concealed subsurface conditions to Defendant's contracting officer. Indeed, Defendant asserts that the complaint at the Board is insufficient with respect to the subsurface conditions issue because this aspect of the claim was not filed with the contracting officer until three days <u>after</u> commencement of the present action at the Board, and because Plaintiff has failed to amend its complaint at the Board to include the subsurface condition problem. We do not agree that this timing issue is fatal to the claim for concealed subsurface conditions.

As noted above, the most important element of Section 1712.1 is that the claim or issue be presented to the contracting officer of the agency to resolve before Board action on the issue. This was done on or about June 25, 2004, by letter of same date from Plaintiff's counsel to DGS.

(CX 83). We further note that over 120 days have passed since this aspect of Plaintiff's claim was filed with the contracting officer, so it may clearly be deemed denied by DGS and ripe for decision by the Board.

The next question then becomes whether or not the concealed subsurface condition claim was placed before the Board before the expiration of 135 days from submittal to the contracting officer. This is also answerable in the affirmative. The Procurement Code permits the Board of Claims to "establish, by regulation, rules governing practice before the [Board of Claims] consistent, except as may be provided by this part, with the Pennsylvania Rules of Civil Procedure and the Pennsylvania Rules of Evidence." 62 Pa. C.S.A. § 1722(6). Accordingly, the Board of Claims can look to the Rules of Civil Procedure to determine if a claim was properly pled before it. Specifically, Pa. R.C.P. Rule 1019(a) provides that "the material facts on which a cause of action or defense is based shall be stated in a concise and summary form." This rule requires that a complaint must adequately place the defendant on notice of the claim being asserted and the essential facts to support the claim. Cardenas v. Schober, 738 A.2d 317, 325 (Pa. Super. 2001). It is not necessary that the plaintiff identify the specific legal theory underlying the complaint. Id. However, it is the duty of the court to discover the facts alleged in a complaint to support the legal theory, if any. Id. Moreover, the Rules of Civil Procedure are to be liberally construed. Id.

Paragraph 15 of the Complaint filed with the Board of Claims does state all grounds upon which the contractor asserts a controversy. This includes the claim for additional compensation related to the subsurface condition. Paragraph 15 states:

> On or about April 9, 2004, the DGS directed PBC to remobilize and recommence its work by April 15, 2004. PBC remobilized and recommenced its work in accordance with this directive but, to date its work has once again been adversely impacted by

> unsuitable soil conditions. In particular, the on site materials are not as represented in the pre-bid geotechnical report or in the plans and specifications regarding classification or moisture content and, as a direct result, PBC has been unable to meet the specified moisture and compaction requirements without significant additional time, effort and cost.

Specifically, Paragraph 15 refers to unsuitable soil conditions causing significant additional time, effort and cost. It more specifically states the on site materials are not as represented in the pre-bid geotechnical report or in the plans and specifications regarding classification. Accordingly, we believe that PBC's claim for unsuitable soil and concealed subsurface conditions was placed before the Board upon the expiration of 120 days from the day PBC filed this supplemental claim with the DGS contracting officer. While amendment of the claim after this period to include the soil conditions issue would surely have been allowed, we would agree with Plaintiff that the existing pleadings were broad enough to include the unsuitable soils concealed subsurface conditions issue.

While the Board certainly acknowledges that this order of filing is not preferred, we do believe that Plaintiff has substantially complied with Section 1712.1 by giving DGS an opportunity to resolve the issue prior to the Board's consideration and that the complaint filed with the Board has quite adequately put DGS on notice of the unsuitable soils issue as well as the issue regarding the suspension. It is, for instance, quite clear that DGS had sufficient notice of the unsuitable soils claim in order to prepare its defense here at the Board. DGS addressed the unsuitable soil claim in its new matter, and in the complaint and in its own summary judgment motion. DGS was not at all surprised or prejudiced by this claim.[8] For all the reasons stated above, PBC's claim for concealed subsurface conditions shall be found in substantial compliance with the Procurement Code and consistent with the Pennsylvania Rules of Civil Procedure. To

[8] In point of fact, if anyone is being surprised or prejudiced it is PBC as DGS has gone through the entire hearing process and only raises the issue now in a post-hearing brief.

find otherwise would, in our view, celebrate form over substance to the detriment of this entire proceeding. The Board of Claims has subject matter jurisdiction over this claim.

Damages

Plaintiff has submitted its expert report on damages without objections from Defendant. Moreover, Defendant did not contest Plaintiff's damages calculation in any manner, either at hearing or via post-hearing brief. Except for minor adjustment and deletion of one item which we deem obviously duplicative, the Board otherwise accepts Plaintiff's damage calculations. That element which the Board views as duplicative is the inclusion of $32,643 in Five-R home office overhead in addition to the 10% mark-up to Five-R for overhead and profit.

## ORDER

**AND NOW**, this 8th day of September, 2006, it is hereby **ORDERED**, that an award is entered on behalf of the Plaintiff, Pittsburgh Building Company, and against the Commonwealth of Pennsylvania, Department of General Services, in the amount of $867,171.00, plus post judgment interest at 6% per annum until paid. Each party shall bear its own costs. It is so **ORDERED**.

BOARD OF CLAIMS

_____
Jeffrey F. Smith
Chief Administrative Judge

_____
Ronald L. Soder, P.E.
Engineer Member

*_____
John R. McCarty
Citizen Member

**OPINION SIGNED**

*Citizen Member John R. McCarty did not participate in this decision pursuant to recusal motion of Plaintiff and Order of March 23, 2006.