

COMMONWEALTH OF PENNSYLVANIA

J.D. ECKMAN, INC.

BEFORE THE BOARD OF
CLAIMS

VS.

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA TURNPIKE COMMISSION

DOCKET NO. 3906

FINDINGS OF FACT

1. J.D. Eckman, Inc. (referred to herein as "Eckman") is a corporation authorized to do business in the Commonwealth of Pennsylvania with its principal place of business located at 141 Lower Valley Road, Atglen, PA 19310. (Statement of Claim at ¶ 1; Commonwealth's Answer and New Matter at ¶ 1; Board Finding).

2. The Pennsylvania Turnpike Commission ("Turnpike Commission") is an agency of the Commonwealth of Pennsylvania, with offices located at the Turnpike Administration Building, 700 South Eisenhower Boulevard, Middletown, PA 17057. (Statement of Claim at ¶ 2; Commonwealth's Answer and New Matter at ¶ 2).

3. On or about March 14, 2006, Eckman and the Turnpike Commission executed publicly bid contract no. 05-036-RCLF-C ("Contract") for the replacement of bridges no. B-465A at Milepost 197.19 & B-645 at Milepost 197.20 in Franklin County carrying State Truck Route 641 over a stretch of the Pennsylvania turnpike, and replacement of existing Type A sign panels in Franklin, Huntington & Fulton counties, Pennsylvania ("sometimes referred to herein as the "Project"). (Statement of Claim at ¶ 3; Defendant's Answer and New Matter at ¶ 3; Ex. P-1 at PATC 17790-17791).

4. The Contract included a special provision entitled "F31.00 - Selected borrow excavation (Rock) and Embankment; item 4205-0200" (hereinafter "SPF31.00") which, as its title suggests, addressed certain types of excavation to be performed on the Project for embankments. (N.T. 48-58, 66-67, 101-108, 158-170; Exs. P-1 at PATC 17762, P-9).

5. Specifically, SPF31.00 required Eckman to acquire a specific type of rock fill material, "Type B rock", for use in constructing the steep-sloped embankment benches which supported the abutments to the bridges. (N.T. 51-58, 66-67, 101-108, 158-170; Ex. P-9).

6. The Contract documents also incorporated by reference the standard specifications found in Pennsylvania Department of Transportation Specifications; Publication 408/2003-3, effective date April 2, 2005 ("Pub. 408"). Section 205 of Pub. 408 addressed

various types of borrow excavation material and provided corresponding definitions for these types of excavation (referred to herein as "Pub. 408 § 205"). (N.T. 48-58, 102-107, 158-170; Exs. P-1 at PATC 17450, P-10).

7. Eckman mistakenly submitted a copy of "Section 205 – Borrow Excavation" from Publication 408/2003-4, instead of Publication 408/2003-3. However, the parties stipulated during the Board hearing on October 26, 2009 (and the Board agrees) that there is no material error here as the texts of Pub. 408 § 205 in both Publication 408/2003-3 and Publication 408/2003-4 are identical. (N.T. 48-58, 103-108, 166-170; Exs. P-1 at PATC 17450, P-10; Board Finding).

8. The Contract documents, including SPF31.00, were drafted by the Turnpike Commission. (Statement of Claim at ¶ 4; Answer and New Matter at ¶ 4; N.T. 58, 65; Exs. P-1, R-3A).

9. The plans and drawings for the Contract ("Contract drawings" or "drawings") were drafted by Sucevic, Piccolomini and Kuchar Engineering, Inc. ("SP&K"), the Turnpike Commission's design consultant on the Project. (N.T. 65, 191, 218; Ex. R-3A).

10. The Contract documents and drawings together directed Eckman to use Type B rock in areas that cross-referenced the work item entitled "selected borrow excavation (rock)", item no. 4205-0200, (referred to herein as "selected borrow excavation (rock)" or "selected borrow excavation"). (N.T. 64-68, 101-108, 153-157, 218-221; Ex. R-3A at sheets 3, 4, 6, 14, 135, 136, 144-151).

11. Among other things, Eckman was directed by the Contract to acquire approximately 12,528 cubic yards of a specific type of rock fill material ("Type B rock") in fulfillment of the work item entitled "selected borrow excavation (rock)", item no. 4205-0200 (herein referred to as "selected borrow excavation (rock)" or "selected borrow excavation"), to be used in constructing the embankment benches which supported the abutments to the bridges. (N.T. 48-58, 65-67, 101-115, 153-157, 192-193; Exs. P-1 at PATC 17762, P-9, P-10, R-3A at sheets 3, 4, 6, 14, 135, 136, 144-151).

12. When submitting its bid on the Project, Eckman quoted a bid price of \$1.50/cy for the selected borrow excavation item. This bid price was based on the premise that Eckman could find the necessary Type B rock on the Project site. (N.T. 57, 62, 107-114).

13. However, Type B rock did not exist in sufficient quantities on the Project site, and Eckman was eventually compelled to acquire 8,405.78 cubic yards of Type B rock from an offsite location and haul it to the jobsite to fulfill the Contract's selected borrow excavation requirement. (N.T. 89-90, 112-113, 257-258).

14. In the course of acquiring Type B rock from off the Project site, Eckman incurred substantial additional hauling costs not reflected in the bid price of \$1.50/cy it submitted for selected borrow excavation. (N.T. 57, 62, 88-90, 113-115).

15. In addition to the required 12,528 cubic yards of selected borrow excavation (Type B rock) required for construction of the embankment benches supporting the bridge abutments, the Contract drawings identified 2000 cubic yards of "foreign borrow excavation", item no. 0205-0100, to be used generally on the Project as directed. (N.T. 133-134, 192-193, 218-220; Ex. R-3A at sheets 3, 11).

16. Selected borrow excavation in SPF31.00 referred to Type B rock material to be used in constructing the embankment benches supporting the bridges as reflected in the Contract drawings. By contrast, foreign borrow excavation did not refer to Type B rock and was not to be used in the embankment benches according to the Contract drawings. (N.T. 52-54, 133-134, 153-157, 192-193; Exs. P-9, P-10, R-3A at sheets 3, 6, 11 and 14).

17. Eckman submitted a bid price of \$35/cy for foreign borrow excavation, which price assumed the need to acquire this material from offsite and haul it to the Project. (N.T. 88-90, 107-115).

18. Because it had to acquire the Type B rock needed for the selected borrow excavation from off the Project site, Eckman requested payment for this material at the foreign borrow excavation rate of \$35/cy rather than its bid price of \$1.50/cy. (N.T. 62, 112-115; Ex. P-15 at ECK 5134-5135).

19. The Turnpike Commission paid Eckman for its acquisition of Type B rock at the original bid rate of \$1.50/cy. (N.T. 88-90, 113-115, 130-131).

Contract Documents

20. As noted above, the Contract generally incorporated the provisions of Pub. 408, including Section 205. (N.T. 48-58, 101-108, 158-170, 218-219; Exs. P-1 at PATC 17450, P-9, P-10, R-3A).

21. Pub. 408 § 205 defined "selected borrow excavation", "common borrow excavation" and "foreign borrow excavation", separately as follows:

SECTION 205 – BORROW EXCAVATION

205.1 DESCRIPTION – This work is excavation of or obtaining embankment material from borrow areas required as specified in Section 105.14 or from other sources for construction of embankments or backfills.

Borrow excavation includes Common Borrow Excavation, Foreign Borrow Excavation, and Selected Borrow Excavation, described as follows:

(a) **Common Borrow Excavation.** Excavation of suitable material as specified in Section 206.2 from borrow areas that can be measured before and after excavation. Common Borrow Excavation also includes the removal of topsoil from borrow areas and stockpiling as specified in Section 801.

(b) **Foreign borrow excavation:** Excavation of or obtaining *satisfactory material from sources outside the limits of the Project* that cannot be measured before and after excavation.

(c) **Selected borrow excavation.** Excavation of or obtaining *material used in specific items of work and designated by quality, size, and/or gradation, from sources outside the limits of the Project* that cannot be measured before and after excavation.

[Emphasis added].

(N.T. 51-52; 103-108, 166-168, 224-225; Ex. P-10).

22. Pub. 408 § 205 clarified that, in contrast to "foreign borrow excavation", "selected borrow excavation" referred to borrow excavation material that must meet certain specifications as to quality, size and/or gradation such as those attributable to Type B rock in SPF31.00. However, Pub. 408 § 205 defines both "foreign borrow excavation" and "selected borrow excavation" to mean material to be acquired from offsite sources. (N.T. 51-52, 103-108, 166-168, 224-225; Ex. P-10).

23. SPF31.00, which was a special provision added to the Contract by DGS and/or its design consultant for the Project, describes the "selected borrow excavation" for embankment construction as follows:

F31.00 SELECTED BORROW EXCAVATION (ROCK) AND EMBANKMENT (ITEM: 4205-0200)

F31.00 Description – This work is the construction of embankments and backfills,

F31.02 Material –

(a) Embankment Material. *Obtain material for embankment construction from the various classes of excavation on the Project, including Common Borrow Excavation, Foreign Borrow excavation, and Selected Borrow Excavation, all meeting the following requirements:*

1. General. Material of maximum size that can be readily placed in loose 8-inch layers, except as specified, and classified as follows:

1.a Soil. Includes earth material with the following physical characteristics

- Gradation – More than 35% passing No. 200 sieve.
- Minimum Dry Mass Density – 95 pounds per cubic foot determined in accordance with PTM No. 106, Method B.

- Maximum Liquid Limit – 65, determined in accordance with AASHTO T 89
- Plasticity Index – Not less than Liquid Limit minus 30, determined in accordance with AASHTO T 980 for soils with liquid limits of 41 to 65.

1.b Granular Material. Includes natural or synthetic mineral aggregates having 35% or less passing the No. 200 sieve.

1.c. Rock, Type B. Durable sound, and hard sandstone greater than 90 percent pure sandstone with less than 10% non-durable rock. Limestone, or other rock types, may only be used with the approval of the Commission's Geotechnical Representative. Neither material width nor thickness shall be less than one third its length. Acceptance will be based on visual inspection.

[Emphasis added].

(Ex. P-9).

24. SPF31.00 described specific technical instructions regarding the placement of rock, Types A, B and C, and then stated:

F31.03 Construction

"Locate and identify a source meeting the requirements above for each category of rock within the limits of Class 1 Excavation.

Subsurface soil and geological information was used to estimate quantities and locations of durable rock. *The intent is to optimize the use of material from excavation.* The classified materials are to be used to the extent practical to obtain quality construction. This is not to imply that the classified material as identified is not subject to change during construction, but is to be used unless otherwise directed. Variations of depth and character from those shown are not a basis for changed conditions.

Stage construction to obtain on site material. Offsite material meeting the requirements may be used upon written authorization."

[Emphasis added].

(N.T. 54-57, 126-129, 227-237; Ex. P-9).

25. Among other things, SPF31.00 instructed the contractor to "obtain material for embankment construction from the various classes of excavation on the Project," to perform its excavation for each category of rock, including Type B rock, "within the limits of Class 1 excavation" and to "stage the construction sequence based on the excavation of on site material". (N.T. 54-57, 126-129, 227-237; Ex. P-9).

26. "Class I Excavation" is defined in the Contract in relevant part as follows:

(a) **Class 1 Excavation.**

- Excavation, as indicated or directed, for benches and for the removal of existing pavements not being rehabilitated.

(d) **Class 1 Excavation (Rock).** Excavation of rock for the installation of single face barrier, guide rail end treatments, and/or of protruding and loose rock on cut slopes, as indicated or directed." (Ex. P-1 at PATC 17569).

27. The descriptions of the work constituting Class 1 excavation in the Contract drawings identify on site activities. (N.T. 54-57, 65-69, 126-129, 227-337; Ex. P-1 at PATC 17569, R-3A).

28. The direction in SPF31.00 to locate and identify a source for the Type B rock "within the limits of Class I Excavation"; to stage construction for excavation of these materials on site; and to obtain the material for embankment construction from the various classes of excavations on the Project, all indicated that Type B rock could be found on the Project site. (N.T. 54-57, 126-129, 227-237; Exs. P-1 at PATC 17569, P-9, P-10; Board Finding).

29. Pub. 408 § 205 refers to "Borrow Excavation" generally, whereas the SPF31.00 is a special contract provision specifically addressing "Selected borrow excavation (Rock) and Embankment" for this particular Project. (N.T. 51-52; Exs. P-9; P-10).

30. SPF31.00 did not expressly state an intent to modify the definitions in Pub. 408 § 205 or to redefine "selected borrow excavation." (N.T. 48-58, 101-108, 158-170, 218-225; Exs. P-1 at PATC 17450, P-9, P-10; Board Finding).

31. Based on the Contract documents alone, it was not unreasonable for Eckman to interpret SPF31.00 to mean that there was Type B rock suitable for use in the construction of the bridge embankment benches to be found on the Project site. (N.T. 54-57, 126-129, 227-237; Ex. P-9; Findings of Fact ("F.O.F.") ¶¶ 20-30; Board Finding).

32. The general definition of "selected borrow excavation" in Pub. 408 § 205 conflicted with the indications in the special provision SPF31.00 that selected borrow excavation of Type B rock could be found on the Project site. (N.T. 54-57, 103-108, 126-129, 166-168, 227-237; Exs. P-9, P-10; F.O.F. ¶¶ 20-31; Board Finding).

33. The Contract documents, as a whole, were ambiguous as to whether or not Type B rock for selected borrow excavation to be used for bridge abutment embankments would be found on the Project site. (N.T. 54-57, 103-108, 126-129, 166-168, 227-237; Exs. P-9, P-10; F.O.F. ¶¶ 20-32; Board Finding).

34. SPF31.00 also conflicted with the Contract drawings in that the structure core borings in the drawings showed no positive indication of rock material meeting the requirements for Type B rock on site, and the summary table of quantities indicated that the 12,528 cubic yards of selected borrow excavation was separate from the aggregate 22,400 cubic yards of total Class 1 excavation on the Project. (N.T. 55-56, 64-69, 126-129, 133-136, 192-193, 218-222; Exs. P-9, R-3A).

35. Although the core borings and the quantity estimates in the Contract drawings suggest Type B rock was not to be found on site, the drawings also stated that the core boring data was limited to the specific locations drilled and not part of the Contract and that the summary table of estimated quantities did not waive or alter any provisions of the Contract (such as SPF31.00). (Ex. R-3A at sheet 3).

36. In light of the conflicting language and indications regarding selected borrow excavation in the Contract documents noted above (and summarized in F.O.F. ¶ 28 to 35), the Board finds that the Contract documents, as a whole, were ambiguous with regard to whether or not Type B rock for embankment benches supporting bridge abutments would be found on the Project site. (N.T. 54-57, 55-56, 64-69, 103-108, 126-129, 133-136, 166-168, 192-193, 218-222, 227-237; Exs. P-9, P-10; R-3A; F.O.F. ¶¶ 20-35 Board Finding).

Additional circumstances surrounding Eckman's bid submission

37. The Contract permitted prospective bidders to seek clarification from the Turnpike Commission as to any of the Contract's provisions. Section 102.15 of the contract, entitled "REQUEST FOR INTERPRETATION OF PLANS, SPECIFICATIONS OR OTHER CONTRACT DOCUMENTS" stated that a prospective bidder was permitted to submit to the Chief engineer, no later than 10 days before the bid opening date, a written request for interpretation as to any part of the Contract, plans (drawings) and specifications. (N.T. 77-81, 182-186; Ex. P-1 at PATC 17473).

38. Section 102.15 of the Contract stated that any such request for interpretation would be answered by the Turnpike Commission solely in the form of an addendum to all bidders. (N.T. 77-81, 182-186; Ex. P-1 at PATC 17473).

39. The bidding period for the Project ran between December 21, 2005 and February 8, 2006. (N.T. 182-183; Ex. P-1 at PATC 17452).

40. During the bidding period, Eckman's estimator, Mr. David Gates, conducted a review of the Project site during the bidding period on behalf of Eckman to determine, among

other things, whether any suitable Type B rock for the bridge embankments could be excavated from on site sources. (N.T. 44-45, 61-63, 70-72, 81-82).

41. Following his inspection of the Project site, Mr. Gates was of the opinion that there was not sufficient Type B rock to be found on the Project site. (N.T. 61-63, 70-72, 81-82).

42. Mr. Gates' review of the structure core boring results on the Contract plans and drawings also led him to believe it was improbable that sufficient Type B rock for the Project would be found on site. (N.T. 67-69; Exs. P-2, R-3A at sheets 127-130).

43. Typical use of the term "selected borrow excavation" refers to material to be found offsite and no witness at hearing could recall any other circumstance where "selected borrow excavation" referred to materials found on site. (Plaintiff's Reply in Support of its Proposed Findings of Fact and Conclusions of Law at p. 5; N.T. 88, 129-131; Board Finding).

44. In the course of forming his opinion that the Contract documents (particularly SPF31.00) indicated the existence on site of Type B rock suitable for selected borrow excavation, Mr. Gates did not, as was permitted by the Section 102.05 of the Contract, contact the Turnpike Commission to review the foundation report relating to the geotechnical characteristics of the jobsite. (N.T. 69-71, 215-216, 230-232; Exs. P-1 at PATC 17468, R-19).

45. Eckman also failed to submit a request for interpretation of SPF31.00 and its use of the term "selected borrow excavation" before the 10-day period preceding the bid deadline in accordance with Section 102.15 of the Contract in order to clarify whether or not the provision meant that selected borrow/Type B rock could be found on site. (N.T. 77-81, 182-186; Ex. P-1 at PATC 17473).

46. At no time prior to its bid submission did Eckman submit a written request for interpretation of the Contract documents. (N.T. 78-79; Ex. P-1 at PATC 17473; Board Finding).

47. During the week before the bid opening date of February 8, 2006, Mr. Gates contacted the Turnpike Commission's designated contact person for the Project, Mr. Brad Updegrave, and engaged in a series of three phone discussions with Mr. Updegrave regarding whether or not selected borrow excavation, as used in SPF31.00, meant that Type B rock could be found on the Project site. (N.T. 58-63, 72-79, 182-198, 206-210; Exs. P-1 at PATC 17452, P-15, R-14).

48. Initially, Mr. Gates explained to Mr. Updegrave Eckman's confusion as to interpreting selected borrow excavation as it was used within SPF31.00 and questioned whether it referred to Type B rock being on site or offsite. (N.T. 58-60, 72, 187-195; Exs. P-15, R-14).

49. During the initial discussion with Mr. Gates, Mr. Updegrave agreed with Mr. Gates that SPF31.00 was confusing as to whether or not it indicated there was any Type B rock suitable for selected borrow excavation located on the Project site. At that time, Mr. Updegrave stated that he did not have personal knowledge regarding the geotechnical characteristics of the

jobsite and told Mr. Gates he would look into the matter and get back to him with an answer. (N.T. 58-60, 187-188; Exs. P-15, R-14).

50. Mr. Updegrave consulted an engineer at Sucevic, Piccolomini and Kuchar Engineering, Inc. ("SP&K"), the engineering firm responsible for producing the Contract drawings after the initial call from Mr. Gates. The SP&K engineer informed Mr. Updegrave at the time that selected borrow excavation, as used in SPF31.00, did refer to on site material because Type B rock did exist on site. (N.T. 60, 187- 191; Exs. P-15, R-14).

51. Mr. Updegrave called Mr. Gates immediately after speaking with the engineer from SP&K referenced in Paragraph 50 immediately above and shared this information with Mr. Gates regarding the presence of Type B rock on the jobsite. (N.T. 58-60, 187-191; Exs. P-15, R-14).

52. Later in the same day in which Mr. Updegrave informed Mr. Gates that Type B rock would be found on site, Mr. Updegrave received a call from one of the partners of SP&K, Domenic Piccolomini. Mr. Piccolomini was more familiar with the Project and the nature of the rock fill material required for the selected borrow excavation to be used in constructing the steep-sloped embankment benches for the bridge abutments than the prior SP&K engineer with whom Mr. Updegrave spoke earlier. (N.T. 187-193; Exs. P-15, R-14).

53. Mr. Piccolomini informed Mr. Updegrave that the previous answer relayed to Mr. Gates was incorrect because there was no Type B rock to be found on site. Mr. Piccolomini explained to Mr. Updegrave that the SPF31.00 reference to selected borrow excavation anticipated that Type B rock would have to be brought in from offsite because the on site material was not suitable for use in the embankment benches. (N.T. 187-193; Exs. P-15, R-14).

54. Prior to his final conversation with Mr. Gates, Mr. Updegrave also conferred with Ms. Bonnie Shepler, the construction manager for the Turnpike Commission, regarding the matter. Ms. Shepler, whose approval was needed for any addendum to the bid documents, instructed Mr. Updegrave that an addendum would not be issued because SPF31.00 was adequate in identifying all of the borrow excavation requirements upon which a prospective contractor could calculate its bid. (N.T. 59-61, 194-197, 205-206, 238-239, 249-253; Exs. P-15, R-14).

55. Mr. Updegrave was told by Ms. Shepler that the bid process would continue without the issuance of an addendum and that Eckman should bid SPF31.00 as it saw it. (N.T. 59-61, 194-197, 205-206, 238-239, 249-253; Exs. P-15, R-14).

56. Mr. Updegrave called Mr. Gates shortly after his conversation with Mr. Piccolomini and Ms. Shepler to reverse his earlier advice to Mr. Gates about the availability of Type B rock on the jobsite. In this third and final conversation, which occurred prior to Eckman's bid submission, Mr. Updegrave informed Mr. Gates that his earlier information was incorrect and that suitable Type B rock would have to be brought in from offsite. (N.T. 58-64, 82-84, 187-197, 238-239; Exs. P-15, R-14).

57. During this final phone conversation, Mr. Updegrave also passed along to Mr. Gates the decision of Ms. Shepler that no addendum would be issued as requested by Mr. Gates because SPF31.00 was sufficient in conveying the Contract's borrow excavation requirements. (N.T. 59-61, 72-85, 195-197, 205-208, 238-239, 249-253; Exs. P-15, R-14).

58. During this final conversation in which Mr. Updegrave informed Mr. Gates that Type B rock would have to be brought in from offsite, Mr. Updegrave also passed along Ms. Shepler's generic advice to Mr. Gates that Eckman should bid the job as it saw it. (N.T. 58-64, 72-85, 189-197, 205-208; Exs. P-15, R-14).

59. The Turnpike Commission's generic advice to Eckman and Mr. Gates to bid the specifications as they saw them was not an endorsement of a bid based on the existence of Type B rock on the jobsite given Mr. Updegrave's specific advice to the contrary. (N.T. 58-64, 72-85, 189-195, 205-208, 238-239, 249-253; Exs. P-15, R-14; Board Finding).

60. Mr. Gates' testimony and notes reveal that he understood from the last conversation with Mr. Updegrave that Type B rock would have to be brought in to the Project from an offsite source. (N.T. 58-64, 72-85, 189-207; Exs. P-15, R-14).

61. When Mr. Updegrave finally informed Mr. Gates that Type B rock would have to be brought on to the Project, this served as confirmation of Mr. Gates' earlier impressions from his inspections of the jobsite and core boring data in the drawings and should have left no doubt that sufficient Type B rock did not exist on the jobsite. (N.T. 58-64, 71-85, 188-192; Exs. P-15, R-14; Board Finding).

62. Mr. Updegrave's final notification to Mr. Gates regarding the need to bring in Type B rock from offsite was never contradicted by the Turnpike Commission thereafter. (N.T. 58-64, 72-85, 189-197, 205-208; Exs. P-15, R-14; Board Finding).

63. After learning from Mr. Updegrave that selected borrow excavation in SPF31.00 referred to offsite Type B rock and that no addendum regarding this issue would be put forth by the Turnpike Commission, Eckman still formulated its bid price for the 12,528 cubic yards of selected borrow excavation at a mere \$1.50/cy. (N.T. 59-62, 82-90, 114-115; Exs. P-15, R-14).

64. Eckman submitted a bid price of \$1.50/cy for selected borrow excavation because it interpreted SPF31.00 and selected borrow excavation as referring to on site Type B rock despite specific oral advice from the Turnpike Commission to the contrary. (N.T. 57-62, 114-115; Exs. P-15, R-14).

65. After learning from Mr. Updegrave that Type B rock for selected borrow excavation would need to be brought in from offsite, Eckman's reliance upon its own interpretation of SPF31.00 ran contrary to its actual knowledge regarding the lack of Type B rock on the Project jobsite. (N.T. 58-64, 72-85, 191-208; Exs. P-15, R-14; F.O.F. ¶¶ 40-48, 56-64; Board Finding).

66. In contrast to its bid price for selected borrow excavation, Eckman's bid price for the 2000 cubic yards of foreign borrow excavation, which Eckman admits to having interpreted as referring to offsite excavation and thus entailing hauling costs, was \$35/cy. (N.T. 57-63, 88-89, 111, 130-131; Ex. R-18).

67. In light of the fact that Eckman was given clear notice that selected borrow excavation Type B rock would have to be brought in from offsite, the discrepancy in Eckman's prices for selected borrow excavation and foreign borrow excavation demonstrates that Eckman blatantly chose to ignore what it had recently learned through Mr. Updegrave—that Type B rock for selected borrow excavation, as used in SPF31.00, would need to be brought in from offsite. (N.T. 62, 88-90, 112-115; F.O.F. ¶¶ 40-48, 56-66; Board Finding).

68. Even though SPF31.00 conflicted with other parts of the Contract and made the Contract ambiguous, Eckman's reliance upon its interpretation of SPF31.00, which assumed the presence of on site Type B rock, was not reasonable reliance on the part of Eckman given Mr. Updegrave's final advice prior to Eckman's bid submission (confirming Mr. Gates own prior site inspection) that Type B rock would have to be brought in from outside the Project site. (N.T. 58-64, 72-85, 191-202; Ex. P-15; F.O.F. ¶¶ 40-48, 56-67; Board Finding).

69. Eckman could not reasonably rely upon the ambiguity in the Contract created by SPF31.00 in submitting a bid based on the premise that Type B rock could be found on the Project site given Mr. Updegrave's final advice prior to Eckman's bid submission (confirming Mr. Gates own prior site inspection) that Type B rock would have to be brought in from outside the Project site. (N.T. 48-62, 83-85, 88-90, 112-115, 146-147, 189-208, 235-239; Exs. P-9, R-15; F.O.F. ¶¶ 20-68; Board Finding).

Deviation Letter of February 9, 2006

70. Following Eckman's bid submission on or about February 8, 2006, but before the bid was awarded to Eckman, the Turnpike Commission wrote a letter to Eckman dated February 9, 2006 which, among other things, informed Eckman that its bid price for selected borrow excavation (rock) item no. 4205-0200 significantly deviated from the engineer's estimate. (N.T. 146-147; Ex. R-15).

71. The Turnpike Commission's February 9, 2006 letter further reinforced Mr. Updegrave's statements to Mr. Gates right before Eckman's bid submission regarding the need to bring Type B rock to the Project from offsite. (N.T. 146-147; Ex. R-15; Board Finding).

72. The Turnpike Commission's February 9, 2006 letter, following Mr. Updegrave's statements to Mr. Gates before Eckman's bid submission and Eckman's own inspection of the jobsite provided a final opportunity for Eckman to address its low ball price for selected borrow excavation based on its incorrect assumption that sufficient Type B rock would be found on the Project site. (N.T. 59-62, 88-90, 112-115, 146-147; Ex. R-15).

73. The Turnpike Commission's February 9, 2006 letter put Eckman on notice as to the contractual terms to which it was agreeing and the fact that it was going to be compensated at

the rate of \$1.50/cy for obtaining the Type B rock if it proceeded. (N.T. 59-62, 88-90, 112-115, 146-147; Ex. R-15).

74. Eckman never responded to the Turnpike Commission's February 9, 2006 letter. (N.T. 146-147; Ex. R-15; Board Finding).

75. Eckman chose to ignore the Turnpike Commission's warning set forth in the February 9, 2006 letter, its own site inspection, and Mr. Updegrave's final advice regarding the need to bring in Type B rock from outside the jobsite and made an apparent business decision to stick with its submitted bid price of \$1.50/cy for selected borrow excavation (rock), item no. 4205-0200 in order to win the Contract bid. (N.T. 59-62, 82-85, 88-90, 112-115, 146-147; Exs. P-15, R-14, R-18; F.O.F. ¶¶ 20-74; Board Finding).

76. During the pre-bid process, no other prospective contractors who submitted a bid for the Project voiced any confusion or submitted requests for interpretation concerning SPF31.00 and whether selected borrow excavation referred to on site or offsite Type B rock. The three contract bidders closest to Eckman's bid all submitted unit prices for selected borrow excavation significantly higher than Eckman and consistent with the need to bring in Type B rock from off the Project site. (N.T. 197-198; Ex. R-18; Board Finding).

77. The plain terms of the Contract state that \$1.50/cy is the price at which Eckman was to be paid for selected borrow excavation. (N.T. 59-62, 82-85, 88-90, 112-115, 146-147; Exs. P-1, P-15, R-18; Board Finding).

Eckman commences work

78. Eckman received its official notice to proceed with its work on March 22, 2006. (N.T. 222-223; Ex. P-1 at PATC 17449).

79. Shortly after commencing its work on or about March 22, 2006, Eckman dug test pits on the Project site, in the presence of Turnpike Commission representatives, to confirm the presence or absence of suitable Type B rock on the jobsite for use on the Project. (N.T. 112-113, 222-223, 255-258).

80. Any on site excavation performed by Eckman for the purpose of finding Type B rock was not ordered by the Turnpike Commission but was voluntary on the part of Eckman. (N.T. 113-115, 164-165, 223-224).

81. Type B rock was not available on site and Eckman was compelled to acquire 8,405.78 cubic yards of it from an offsite location and haul it to the jobsite. (N.T. 59-62, 82-85, 89-90, 113-119; F.O.F. ¶ 13).

82. After confirming that no Type B rock existed on site, Eckman informed the Turnpike Commission that it was requesting to be paid for acquiring Type B rock at its foreign borrow excavation rate of \$35/cubic yard ("cy") for its fulfillment of the requirement for selected

borrow excavation, rather than the \$1.50/cy which it bid under the assumption that Type B rock could be found on site. (N.T. 59-62, 112, 113-115; Ex. P-15).

83. By letter dated May 3, 2006, the Turnpike Commission denied Eckman's request for additional payment at the foreign borrow rate of \$35/cy for obtaining Type B rock in fulfillment of the Contract's selected borrow excavation requirement. (N.T. 88-90, 113-115, 256-257; Ex. P-15).

84. Eckman met with Turnpike Commission representatives in June 2006 to further discuss its request for additional payment for obtaining Type B rock in fulfillment of the Contract's selected borrow excavation requirement. However, the Turnpike Commission still refused to compensate Eckman at the higher rate of \$35/cy. (N.T. 88-90, 113-115, 144-146, 256-257; Ex. P-15).

The Turnpike Commission permitted Eckman to use some on site material as concession

85. During its work on the Project, Eckman was permitted by the Turnpike Commission to substitute approximately 4,122 cubic yards of the 12,528 cubic yards of selected borrow excavation Type B rock originally required by the Contract with on site material for use in constructing access road embankments approaching certain bridge areas. (N.T. 113-115, 164-165, 223-224).

86. The Turnpike Commission apparently determined that certain areas supporting the access roads to the bridges was far enough away from the face of the slope of the steep embankment near certain bridge abutments such that the use of on site material in place of selected borrow excavation (Type B rock) would not compromise the stability of the bridge's abutments. (N.T. 114-115, 164-165, 215-217, 223-224; Board Finding).

87. 4,122 cubic yards of on site material which did not meet the requirements for Type B rock was used in place of a portion of the selected borrow excavation material required by the Contract. (N.T. 114-115, 164-165, 215-217, 223-224).

Hauling unsuitable material offsite was not extra work

88. In addition to its claim for a higher rate of payment for selected borrow excavation, Eckman also makes a claim for additional time and effort used to haul away excess waste materials from the Project site which it asserts was generated by the unexpected need to bring in Type B rock from off the Project site. (Statement of Claim at ¶¶ 13-15; N.T. 117-124, 134-143).

89. Specifically, Eckman explains its alleged entitlement to additional compensation for hauling unsuitable material off the Project site as follows:

When we got into our disagreement about who was responsible for the payment of the select borrow excavation as defined in F31, we said by bringing offsite material to meet a need that was used in the job, we had material on site that now

needed to be hauled off. I think the original quantity of class one excavation on the job was roughly 22,000 cubic yards. Out of that 22,000 cubic yards, the special provision for select borrow led me to believe 12,000 of it was to stay on site as select borrow, rehandle and place. So that means 10,000 of it would have had to be hauled off the job, 10,000 cubic yards of excavation.

But since we didn't find any of that 12,000 cubic yards on site, we now had to haul off the 22,000 cubic yards of material. This was a cost associated with hauling that additional material offsite that we didn't anticipate, which has no pay item associated with it.

(N.T. 117-124, 134-143).

90. Despite for foregoing explanation, Eckman acknowledges that the Turnpike Commission allowed it to utilize approximately 4,122 cubic yards of material on the Project site in place of the selected borrow Type B rock originally prescribed. Thus, by Eckman's reasoning, its claim for extra waste hauling should relate to approximately 8,000 cubic yards. (N.T. 114-115, 117-124, 134-143, 164-165, 215-217, 223-224; Ex. P-18; F.O.F. ¶¶ 85-89; Board Finding).

91. However, Eckman's calculation of damages for this extra hauling claim proffered in Exhibit P-18 consists of an apparent estimate of labor hours and equipment used to haul only 4,123 cubic yards of excess waste material related to the selected borrow excavation controversy from the Project site. (N.T. 117-124, 135-143; Ex. P-18).

92. As noted above, the Board has determined, as a matter of fact, that Eckman's reliance on the ambiguity in the Contract to conclude that there was sufficient Type B rock on the jobsite to satisfy the selected borrow excavation requirement was not reasonable given the final advice given to Mr. Gates by Mr. Updegrave that the Type B rock would have to be brought in from offsite. Accordingly, Eckman's related bidding premise (as stated by Mr. Perloski and summarized in F.O.F. Paragraph 89 above) that the approximate 12,000 cubic yards (representing the selected borrow excavation) of the 22,000 total cubic yards of general Class 1 excavation on the Project could be used on the jobsite and not hauled offsite is also unreasonable. (N.T. 117-124, 135-143; F.O.F. ¶¶ 65-76, 88-92; Board Finding).

93. Additionally, the Contract plans and drawings showed that the selected borrow excavation (estimated at 12,528 cubic yards) was never included in, nor to be considered part of, the estimated 22,400 cubic yards of Class 1 excavation on the Project, further undermining Eckman's rationale (as stated by Mr. Perloski in F.O.F. Paragraph 89) for claiming it hauled excess waste material off the jobsite as a result of the selected borrow excavation controversy. (Ex. R-3A at sheets 3 and 11; F.O.F. ¶¶ 88-92; Board Finding).

94. Eckman's rationale for claiming it hauled excess waste material off the jobsite due to the selected borrow excavation controversy at issue in this matter does not conform to, nor agree with, its damage calculation estimate for this alleged extra work set forth as Exhibit P-18. (Ex. P-18; F.O.F. ¶¶ 88-93; Board Finding).

95. Eckman has failed to provide the Board with any credible evidence that the actual cubic yard amount of Class 1 excavation on the site exceeded the estimated quantity of Class 1 excavation identified in the summary tables of quantities in the Contract drawings. (N.T. 117-124, 134-143; Exs. P-18, R-3A at sheets 3 and 11; Board Finding).

96. Eckman's damage calculation for its alleged hauling of excess waste material from the jobsite due to the selected borrow excavation controversy is not supported by work tickets, supervisor logs or any other contemporary record identifying specific quantities of material attributable to this issue but instead appears to be an estimate by Mr. Perloski of what portion of Eckman's ongoing general excavation material hauling he believes was attributable to the selected borrow controversy. Under the circumstances of this case and the evidence presented we do not find that Eckman has adequately quantified the amount of its alleged extra work hauling unsuitable material away from the jobsite or identified sufficient documentation to substantiate its alleged costs for this activity. (N.T. 117-124, 134-143; Ex. P-18; F.O.F. ¶¶ 88-95; Board Finding).

97. There is no credible evidence that the Turnpike Commission's decision to allow Eckman to use approximately 4122 cubic yards of on site material in place of the Contract's selected borrow excavation requirement of 12,528 cubic yards of offsite Type B rock in any way resulted in Eckman being compelled to haul excess unsuitable material away from the jobsite. (Plaintiff's Proposed Findings of Fact and Conclusions of Law at ¶¶ 126-130; N.T. 114-115, 164-165, 192-193, 215-217, 223-224; Ex. P-18; Board Finding).

98. Eckman has not established with reasonable certainty the damages it claims it is due as a result of its alleged extra work hauling excess material away from the Project site due to the selected borrow controversy. (N.T. 134-143; F.O.F. ¶¶ 88-97; Ex. P-18; Board Finding).

99. Section 105.14 of the Contract states that Eckman is "responsible for proper disposal of all excess excavation and waste material". (N.T. 134-137; Ex. P-1 at PATC 17490, 17570).

100. Section 203.3 ("Construction") of the Contract reiterates Section 105.14's requirement that the contractor is responsible for proper disposal of all excess excavation and waste material, as it states:

(k) Unsuitable and Surplus Material. Dispose of unsuitable and surplus material in suitable waste areas obtained, as specified in Section 105.14.
(N.T. 134-137; Ex. P-1 at PATC 17490, 17570).

101. Section 102.04 of the Contract ("Interpretation of Approximate Estimate of Quantities"), directs the contractor to "[r]emove any surplus materials from the site at no additional expense to the [Turnpike] Commission". (Ex. P-1 at PATC 17467).

102. Sections 102.04, 105.14 and 203.3 of the Contract clearly state that the contractor is responsible for the hauling of surplus or unsuitable excavated material away from the jobsite. (N.T. 134-137; Ex. P-1 at PATC 17467, 17490, 17570).

103. There were no unusual circumstances such as a significant misrepresentation in the bid documents as to quantity or quality of excavation to be performed on the job, which would draw into question the application of Sections 105.14, 203.03(k) and 102.04 of the Contract to Eckman's claim for disposal of excess waste material. (N.T. 134-137; Ex. P-1 at PATC 17467, 17490, 17570; F.O.F. ¶¶ 88-102; Board Finding).

Eckman's bad faith claim is unsubstantiated

104. Because the Turnpike Commission's refusal to pay Eckman additional compensation at the rate of \$35/cy for obtaining approximately 8400 cubic yards of selected borrow excavation was based on the \$1.50/cy bid price for this work item submitted by Eckman (which later became a term of the Contract), the Turnpike Commission's refusal to compensate Eckman for the selected borrow excavation at a rate of \$35/cy rather than \$1.50/cy was not arbitrary or vexatious. (N.T. 62, 88-90, 114-115, 130-131; F.O.F. ¶¶ 12, 19, 56-77; Exs. P-1, R-18; Board Finding).

105. Because the Contract does not provide for reimbursement to a contractor for hauling unsuitable on site material away from the jobsite, and because Eckman has not established that it performed this work at the direction of the Turnpike Commission or the cost incurred therefore, the Turnpike Commission's refusal to pay Eckman for its extra work claim was not arbitrary or vexatious. (N.T. 114-115, 134-143, 164-165, 223-224; Ex. P-1 at PATC 17467, 17490, 17570; F.O.F. ¶¶ 88-103; Board Finding).

106. Eckman has not prevailed in its claims against the Turnpike Commission in this action. (Board Finding).

CONCLUSIONS OF LAW

1. The Board has subject matter jurisdiction over Eckman's claim in the action based on alleged improper compensation for work performed under the Contract and/or for additional work performed beyond the scope of the Contract. Subject matter jurisdiction obtains here because the Board is competent to hear contract claims against the Commonwealth, which is the general class and type of case presented in Eckman's claim. 62 Pa.C.S. § 1724; DGS v. Limbach Company, et al., 862 A.2d 713, 716-20 (Pa. Cmwlth. 2004) aff'd per curium 895 A.2d 527 (Pa. 2006); Employers Insurance of Wausau v. PennDOT, 865 A.2d 825, 833-34 (Pa. 2005); In re Melograne, 812 A.2d 1164, 1166-1167 (Pa. 2002); Frye Construction, Inc. v. City of Monongahela, 584 A.2d 946, 948-949 (Pa. 1991); Department of Public Welfare v. UEC, Inc., 397 A.2d 779, 784-85 (Pa. 1979); Feingold v. Bell of Pa., 383 A.2d 791, 793-794 (Pa. 1977).

2. In order to establish an action for breach of contract, a party must demonstrate the existence of a contract, breach of duty imposed by the contract, and damages. J.P. Walker Co., Inc. v. Excalibur Oil Group, Inc., 792 A.2d 1269, 1272 (Pa. Super. 2002).

3. A contractor must establish its damages with reasonable certainty. A.G. Cullen Construction v. State System of Higher Education, 898 A.2d 1145, 1174 (Pa. Cmwlth. 2006); J.W.S. Delavau, Inc. v. Eastern American Transport and Warehousing, 810 A.2d 672, 685 (Pa. Super. 2002).

4. The cardinal rule for interpreting a contract is to ascertain the intent of the parties at the time the contract was made and give effect to that intent. Dick Enterprises v. Department of Transportation, 746 A.2d 1164, 1168 (Pa. Cmwlth. 2000); Dep't. of Transp. v. Brozzetti, 684 A.2d 658, 663 (Pa. Cmwlth. 1996).

5. Under the law of contracts, when contract terms are clear and unambiguous, the intent of the parties will be determined from the contract itself. Department of General Services v. Pittsburgh Bldg. Co., 920 A.2d 973, 989 (Pa. Cmwlth. 2007), *citing* Kripp v. Kripp, 849 A.2d 1159, 1163 (Pa. 2004); Dep't. of Transp. v. Brozzetti, 684 A.2d 658, 663 (Pa. Cmwlth. 1996).

6. However, a contract is ambiguous if it is reasonably susceptible to different constructions, is obscure in meaning through indefiniteness of expression, or has a double meaning. Department of General Services v. Pittsburgh Bldg. Co., 920 A.2d at 989 (Pa. Cmwlth. 2007); Dep't. of Transp. v. Brozzetti, 684 A.2d at 663.

7. In order to construe the meaning of a contract containing an ambiguity, the Board may examine the circumstances surrounding the contract in order to ascertain the intent of the parties. Dep't. of Transp. v. Bracken Construction Co., 457 A.2d 995, 997 (Pa. Cmwlth. 1983).

8. When an examination of the circumstances surrounding the execution and performance of a contract fails to clarify the intent of the parties, a court may employ various rules of contract construction to determine the legal effect of the contract's language. Dep't. of Transp. v. Bracken Construction Co., 457 A.2d 995, 997 (Pa. Cmwlth. 1983).

9. It is a well-established principle of contract interpretation that in case of a conflict between specific and general provisions, the specific provisions shall prevail. Ex. P-1 at PATC 17489 (Section 105.04); In re Alloy Mfg. Co. Empl. Trust (Minnotte Appeal), 192 A.2d 394, 396 (Pa. 1963); Dick Enterprises, Inc. v. Commonwealth, Department of Transportation, 746 A.2d 1164, 1169 (Pa. Cmwlth. 2000); Commonwealth v. Brozetti, 684 A.2d 658, 665 (Pa. Cmwlth. 1996).

10. If the language of the contract and the intent of the parties remain ambiguous, such ambiguity will be construed against the drafter of the contract documents. See e.g. Department of General Services v. Pittsburgh Bldg Co., 920 A.2d at 989, citing Jay Twp. Auth. v. Cummins, 773 A.2d 828, 832 n.3 (Pa. Cmwlth. 2001); Sun Co. v. Pennsylvania Turnpike Comm'n, 708 A.2d 875, 878-879 (Pa. Cmwlth. 1998); Department of Transportation v. E-Z Parks, 620 A.2d 712, 718 (Pa. Cmwlth. 1993); State Public School Building Authority v. Quandel, 585 A.2d 1136, 1144 (Pa. Cmwlth. 1991); Commonwealth, Dep't of Transp. v. Semanderes, 531 A.2d 815, 818 (Pa. Cmwlth. 1987); Cent. Transp. v. Bd. of Assessment Appeals, 417 A.2d 144, 149 (Pa. 1980).

11. SPF31.00 did not re-define "selected borrow excavation", but rather, the Contract generally incorporated the provisions of Publication 408/2003-3 including Section 205. N.T. 55-57, 126-129, 228-237; Exs. P-1 at PATC 17450, P-9, P-10; Board Finding.

12. Because the Contract contained a conflict between both SPF31.00 and Pub. 408 § 205 and the drawings, the Contract, as a whole, was ambiguous as to whether "selected borrow excavation" referred to on site or offsite Type B rock. N.T. 55-64, 72-74, 126-129, 194-202, 228-237; Exs. P-1, P-9, P-10, R-3A; Department of General Services v. Pittsburgh Bldg. Co., 920 A.2d at 989 (Pa. Cmwlth. 2007); Department of Transportation v. Brozzetti, 684 A.2d 658, 663 (Pa. Cmwlth. 1996).

13. The ambiguity of the Contract language in the drawings, Pub. 408 § 205 and the poorly drafted Special Provision SPF31.00 was further confirmed by the response of Turnpike Commission representatives when they too agreed with Eckman representatives, as least initially, that the language of SPF31.00 suggested the existence of Type B rock on the Project site. N.T. 55-64, 72-74, 194-202; Exs. P-9, P-10, R-3A; Department of Transportation v. Bracken Construction Co., 457 A.2d 995, 997 (Pa. Cmwlth. 1983).

14. A contractor's reliance on erroneous or ambiguous contract language is unreasonable where the contractor has additional knowledge which puts it on notice as to the error or clarifies the perceived ambiguity and correctly informs it as to the actual scope of work it will have to perform under the contract. Joseph B. Fay Co. v. Pennsylvania Turnpike Comm'n, 2005 PA Bd. Claims LEXIS 3, at *14-16; Argeros & Co., Inc. v. Cmwlth, Dept. of Transp., 447 A.2d 1065, 1067 (Pa. 1982); Cmwlth., Dept. of Transp. v. Brayman Constr. Co., 382 A.2d 767, 769 (Pa. 1978).

15. A contractor is not owed additional compensation due to ambiguous or erroneous contract language where its officers knew, prior to bid and regardless of any such ambiguity or

error in the contract language, that the contractor would have to pay a higher price than what it bid for a particular item of work. Joseph B. Fay Co. v. Pennsylvania Turnpike Comm'n, 2005 PA Bd. Claims LEXIS 3, at *14-16; Argeros & Co., Inc. v. Cmwlth, Dept. of Transp., 447 A.2d 1065, 1067 (Pa. 1982); Cmwlth., Dept. of Transp. v. Brayman Constr. Co., 382 A.2d 767, 769 (Pa. 1978).

16. An owner breaches no contractual duty by failing to compensate a contractor at higher prices than those the contractor submitted in its bid when that contractor relies, unreasonably, on ambiguous contract language in formulating its bid prices. Joseph B. Fay Co. v. Pennsylvania Turnpike Comm'n, 2005 PA Bd. Claims LEXIS 3, at *14-16; Argeros & Co., Inc. v. Cmwlth, Dept. of Transp., 447 A.2d 1065, 1067 (Pa. 1982); Dept. of Transp. v. Brayman Constr. Co., 382 A.2d 767, 769 (Pa. 1978).

17. Because Eckman's reliance on the ambiguous language of SPF31.00 was unreasonable where it knew it was required to obtain Type B rock from an offsite source to fulfill the selected borrow excavation requirement the Turnpike Commission is only required by the Contract to pay for selected borrow excavation at the \$1.50/cy rate submitted in Eckman's bid. The Turnpike Commission's refusal to pay Eckman the higher foreign borrow excavation rate at \$35/cy for its fulfillment of the Contract's selected borrow excavation requirement does not represent any breach of Contract by the Turnpike Commission, and Eckman's claim for damages in this regard must be denied. Joseph B. Fay Co. v. Pennsylvania Turnpike Comm'n, 2005 PA Bd. Claims LEXIS 3, at *14-16; Argeros & Co., Inc. v. Cmwlth, Dept. of Transp., 447 A.2d 1065, 1067 (Pa. 1982); Cmwlth., Dept. of Transp. v. Brayman Constr. Co., 382 A.2d 767, 769 (Pa. 1978).

18. A contractor who performs work beyond the scope of its contract at the direction of the owner is entitled to additional compensation. A.G. Cullen Const., Inc. v. State System of Higher Educ., 898 A.2d 1145, 1171 (Pa. Cmwlth. 2006) *citing* Dep't. of Transp. v. Gramar Constr. Co., 454 A.2d 1205, 1207 (Pa. Cmwlth. 1983); Dep't. of Transp. v. Paoli Construction Co., 386 A.2d 173, 175 (Pa. Cmwlth. 1978).

19. To be entitled to compensation for extra work, a contractor must demonstrate that this work was performed, that it was requested by the owner and that it was not required by the terms of the contract as agreed to by the parties. A.G. Cullen Const., Inc. v. State System of Higher Educ., 898 A.2d 1145, 1171 (Pa. Cmwlth. 2006) *citing* Dep't. of Transp. v. Gramar Constr. Co., 454 A.2d 1205, 1207 (Pa. Cmwlth. 1983); Dep't. of Transp. v. Paoli Construction Co., 386 A.2d 173, 175 (Pa. Cmwlth. 1978).

20. A contractor must establish its damages for alleged extra work or breach of contract claim with reasonable certainty. A.G. Cullen Construction v. State System of Higher Education, 898 A.2d 1145, 1174 (Pa. Cmwlth. 2006); J.W.S. Delavau, Inc. v. Eastern America Transport and Warehousing, 810 A.2d 672, 685 (Pa. Super. 2002).

21. Section 105.14 of the Contract required that Eckman be held responsible for proper disposal of all excess excavation and waste material. N.T. 135-137; Ex. P-1 at PATC 17490).

22. Section 203.3(k) ("Construction") of the Contract required Eckman to dispose of unsuitable and surplus material in suitable waste areas obtained, as specified in Section 105.14 of the Contract. N.T. 135-137; Ex. P-1 at PATC 17570.

23. Section 104.02 of the Contract ("Interpretation of Approximate Estimate of Quantities") required Eckman to "[r]emove any surplus materials from the site at no additional expense to the [Turnpike] Commission". Ex. P-1 at PATC 17467.

24. As there are no unusual circumstances such as a significant misrepresentation in the bid documents as to quantity or quality of excavation to be performed on the job or some similar problem, the Board finds no reason under these circumstances not to apply Sections 105.14, 203.03(k) and 102.04 of the Contract to Eckman's claim for disposal of excess waste material. (N.T. 134-137; Ex. P-1 at PATC 17467, 17490, 17570; Board Finding).

25. Because 1) there is no factual support for Eckman's assertions that it hauled excess unsuitable material away from the jobsite or that it was ordered to do this work by the Turnpike Commission 2) the Contract provides no basis for a contractor recovering costs for hauling excess material away from the jobsite and 3) Eckman did not establish its damages in support of its extra work claim for hauling unsuitable material away from the jobsite with reasonable certainty, the Turnpike Commission did not breach the Contract by failing to pay Eckman's claim for hauling unsuitable material offsite and Eckman's extra work claim must be denied in full. A.G. Cullen Constr., Inc. v. State System of Higher Educ., 898 A.2d 1145, 1171 (Pa. Cmwlth. 2006) *citing* Dep't. of Transp. v. Gramar Constr. Co., 454 A.2d 1205, 1207 (Pa. Cmwlth. 1983); Dep't. of Transp. v. Paoli Construction Co., 386 A.2d 173, 175 (Pa. Cmwlth. 1978).

26. As the Board has determined that Eckman has not established either of its claims in this matter, Eckman is not a prevailing party in this case. 62 Pa.C.S. § 3935(b); A.G. Cullen Constr., Inc. v. State System of Higher Education, 898 A.2d 1145, 1164 (Pa. 2006); C.O.L. 26-31, 39.

27. Because Eckman is not a prevailing party in this case, it therefore cannot recover attorney's fees pursuant to 62 Pa.C.S. § 3935. 62 Pa.C.S. § 3935(b); A.G. Cullen Constr., Inc. v. State System of Higher Education, 898 A.2d 1145, 1164 (Pa. 2006).

28. Because Eckman did not timely submit a request for interpretation in accordance with Section 102.15 of the Contract, the Turnpike Commission was not required to issue an addendum regarding SPF31.00 and selected borrow excavation. N.T. 77-80, 183-186; Ex. P-1 at PATC 17490.

29. The Contract did not require the Turnpike Commission to pay Eckman additional compensation above its bid price of \$1.50/cy for its obtaining Type B rock in fulfillment of the work item entitled "selected borrow excavation (rock)", item no. 4205-0200. N.T. 62, 88-90, 114, 188-192; Department of General Services v. Pittsburgh Bldg. Co., 920 A.2d 973, 989 (Pa. Cmwlth. 2007), *citing* Kripp v. Kripp, 849 A.2d 1159, 1163 (Pa. 2004); Joseph B. Fay Co. v. Pennsylvania Turnpike Comm'n, 2005 PA Bd. Claims LEXIS 3, at *14-16; Dick Enterprises v. Dep't of Transp., 746 A.2d 1164, 1168 (Pa. Cmwlth. 2000); Dep't of Transp. v. Brozzetti, 684 A.2d 658, 663 (Pa. Cmwlth. 1996); Dep't of Transp. v. Brayman Constr. Co., 382 A.2d 767, 769 (Pa. 1978); Board Finding.

30. Because Sections 102.04, 105.14 and 203.3(k) of the Contract state that the contractor is responsible for the hauling of surplus or unsuitable excavated material away from the jobsite, the Turnpike Commission was not required to reimburse Eckman for performing any such hauling of unsuitable material. N.T. 135-137; Ex. P-1 at PATC 17467, 17490, 17570; Department of General Services v. Pittsburgh Bldg. Co., 920 A.2d 973, 989 (Pa. Cmwlth. 2007), *citing* Kripp v. Kripp, 849 A.2d 1159, 1163 (Pa. 2004); Dick Enterprises v. Dep't of Transp., 746 A.2d 1164, 1168 (Pa. Cmwlth. 2000); Dep't of Transp. v. Brozzetti, 684 A.2d 658, 663 (Pa. Cmwlth. 1996).

31. A prevailing contractor in a proceeding against a government agency to recover any payment due may be awarded reasonable attorney fees if it is determined that the government agency acted in bad faith. 62 Pa.C.S. § 3935(b); A.G. Cullen Constr., Inc. v. State System of Higher Education, 898 A.2d 1145, 1164 (Pa. Cmwlth. 2006).

32. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious. 62 Pa.C.S. § 3935(b); A.G. Cullen Constr., Inc. v. State System of Higher Education, 898 A.2d 1145, 1164 (Pa. Cmwlth. 2006).

33. Arbitrary and vexatious are defined respectively as "based on random or convenient selection or choice rather than on reason or nature" or "without sufficient ground in either law or in fact and if the suit served the sole purpose of causing annoyance." A.G. Cullen Constr., Inc., 898 A.2d at 1164-1165 (citing Cummins v. Atlas R.R. Constr. Co., 2002 Pa. Super. 418, 814 A.2d 742, 747 (Pa. Super. 2002) (quoting Thunberg v. Strause, 682 A.2d 295, 299 (Pa. 1996))).

34. Because 1) Eckman was not a prevailing party in this case pursuant to 62 Pa.C.S. §3935(b); 2) the Turnpike Commission was not required to issue an addendum regarding SPF31.00 and selected borrow excavation; and 3) the Turnpike Commission was not required to pay Eckman either at a higher rate for its obtaining offsite Type B rock or for hauling unsuitable material away from the jobsite as extra work, the Turnpike Commission's conduct and refusal to pay Eckman on its claims do not constitute bad faith. A.G. Cullen Const., Inc. v. State System of Higher Educ., 898 A.2d 1145, 1171 (Pa. Cmwlth. 2006) *citing* Dep't. of Transp. v. Gramar Constr. Co., 454 A.2d 1205, 1207 (Pa. Cmwlth. 1983); Dep't. of Transp. v. Paoli Construction Co., 386 A.2d 173, 175 (Pa. Cmwlth. 1978); C.O.L. 26-31, 39; Board Finding.

OPINION

This matter concerns a publicly bid contract between J.D. Eckman, Inc. ("Eckman") and the Pennsylvania Turnpike Commission ("Turnpike Commission"), Contract No. 05-036-RCLF-C (the "Contract"), for the replacement of bridges located at Mileposts 197.19 and 197.20 carrying State Truck Route 641 over a stretch of the Pennsylvania Turnpike in Franklin County, and replacement of existing sign panels in Franklin, Huntington & Fulton counties, Pennsylvania (the "Project"). Among other things, Eckman was required by the Contract to acquire approximately 12,528 cubic yards of a specific type of rock fill material ("Type B rock") in fulfillment of the work item entitled "selected borrow excavation (rock)", item no. 4205-0200 (herein referred to as "selected borrow excavation (rock)" or "selected borrow excavation"). This selected borrow excavation (rock) was to be used in constructing embankments which supported the abutments to the bridges.¹ Eckman submitted its bid price for selected borrow excavation under the assumption that it could find Type B rock on the Project site. However, sufficient Type B rock did not exist on site, and Eckman was compelled to acquire Type B rock from an offsite location and haul it to the jobsite to fulfill the Contract's selected borrow excavation requirement. The price which Eckman should be paid for this Type B rock is the central issue in dispute between the parties.

Eckman filed a Complaint with this Board on August 27, 2007. Eckman alleges damages in the amount of \$351,854 comprised of: 1) \$294,202 resulting from the Turnpike Commission's

¹ The Contract also called for a work item entitled "selected borrow excavation (structure backfill)", item no. 1001-0730, in the amount of 3981 cubic yards. The 12,528 cubic yards of "selected borrow excavation (rock)", item no. 4205-0200" for use in constructing the bridge embankments is distinct and separate from the 3981 cubic yards of "selected borrow excavation (structure backfill)". (Ex. R-3A, sheets 3, 10, and 14 of 205). The 3981 yards of "selected borrow excavation (structure backfill)" are not at issue in this case. At times we will refer to the selected borrow excavation (rock) as simply "selected borrow excavation". All future references to "selected borrow excavation" herein refer only to "selected borrow excavation (rock)", item no. 4205-200.

failure to pay Eckman for selected borrow excavation (rock) at the price of \$35/cubic yard² ("cy"), as opposed to Eckman's bid price of \$1.50/cy for this item, for acquiring 8,405.78 cubic yards³ of Type B rock from an offsite source and hauling it to the jobsite; and 2) \$57,652 worth of extra work beyond the scope of the Contract for hauling excess unsuitable material related to the selected borrow excavation controversy found on the Project away from the jobsite. Eckman also alleges bad faith on the part of the Turnpike Commission pursuant to 62 Pa.C.S. §3935 of the Commonwealth Procurement Code and seeks appropriate costs and attorneys fees in this matter.

The Turnpike Commission filed an Answer and New Matter on October 26, 2007, to which Eckman replied on November 9, 2007. Thereafter, the Turnpike Commission filed a Motion for Judgment on the Pleadings on December 21, 2007, which was denied by the Board by Order of February 1, 2008. On July 14, 2009, Eckman filed a Motion for Summary Judgment as to the timeliness of Eckman's claim submission before the Board, which was granted in an order dated September 28, 2009. The Board held a hearing to address Eckman's claims on October 20, 2009.

Eckman's Primary Claim

The bulk of the damages claimed by Eckman concerns a particular special provision to the Contract and relates to the price at which Eckman should be compensated for acquiring and

² \$35/cy is the bid price Eckman submitted for the work item entitled "foreign borrow excavation", item no. 0205-0100. See N.T. 89-90, 118-123, 134-143; Ex. P-18.

³ The Turnpike Commission eventually permitted Eckman to use approximately 4122 cubic yards of on site material in place of Type B rock as part of its fulfillment of the 12,528 cubic yard requirement for selected borrow excavation. The Turnpike Commission determined that using some portion of on site material in place of Type B rock would not compromise the stability of the access road to the bridge. Thus the 4122 cubic yards of on site material was not used on the actual bridge abutments themselves. The Turnpike Commission approved this concession to Eckman to maximize the project's efficiency and to save Eckman some money by reducing the amount of offsite Type B rock it would have to haul back to the jobsite.

placing Type B rock on the jobsite. The Contract bid documents incorporated the standard specifications found in Pennsylvania Department of Transportation Specifications, Publication 408/2003-3,⁴ effective date April 2, 2005. These specifications included Section 205 which addressed various types of borrow excavation material and provided corresponding definitions for same (hereinafter "Pub. 408 § 205"). In this instance, the Contract also included a special provision entitled "F31.00 - Selected borrow excavation (Rock) and Embankment; Item 4205-0200" (hereinafter "SPF31.00") which, as its title suggests, also addressed the types of excavation to be performed on the Project. Additionally, the plans and drawings for the Contract ("Contract drawings" or "drawings") directed Eckman to use Type B rock in areas that were cross-referenced with the work item entitled "selected borrow excavation (rock)", item no. 4205-0200.

When submitting its bid on the Project, Eckman quoted a bid price of \$1.50/cy for this selected borrow excavation item because it interpreted the Special Provision, SPF31.00, to indicate that this selected borrow excavation referring to Type B rock could be found on the Project jobsite. Eckman's bid price of \$1.50/cy for selected borrow excavation did not assume the need to acquire Type B rock offsite and haul it back to the Project. However, in fact, no Type B rock existed on site, and Eckman eventually had to obtain this Type B rock entirely from offsite sources. In the course of acquiring the offsite Type B rock, Eckman incurred substantial additional hauling costs not reflected in the bid price of \$1.50/cy it submitted for selected borrow excavation (rock).

⁴ We note that Eckman has mistakenly submitted a copy of "Section 205 - Borrow Excavation" from Publication 408/2003-4, instead of Publication 408/2003-3. However, the parties stipulated during the Board hearing (and the Board agrees) that there is no material error here as Section 205 in both Publication 408/2003-3 and Publication 408/2003-4 are identical. (Exs. P-1 at PATC 17450, P-10; N.T. 105-106, 166-168; Board Finding).

Eckman claims the Contract, particularly Special Provision SPF31.00, erroneously indicated that the selected borrow Type B rock existed on site and misled Eckman into submitting an incorrect price for this item. Therefore, argues Eckman, because the Contract did not otherwise include a work item addressing a contractor's costs in obtaining Type B rock offsite it should be compensated at the \$35/cy rate it submitted in its bid for the work item entitled "foreign borrow excavation", item no. 0205-0100, for obtaining the Type B rock offsite. In contrast to "selected borrow excavation", Eckman interpreted "foreign borrow excavation" as referring to material from offsite sources and thus, asserts Eckman, its foreign borrow excavation bid price of \$35/cy accurately reflects its real costs for the Type B rock. Therefore, Eckman asserts, the foreign borrow bid price of \$35/cy should be the measure of its compensation for its selected borrow excavation work rather than its bid price of \$1.50/cy. Alternatively, Eckman argues that the Contract, with Special Provision SPF31.00, was at very least ambiguous with regard to selected borrow excavation and whether or not Type B rock existed on site, and submits that this Contract ambiguity should be construed against the Turnpike Commission since the Commission drafted SPF31.00 and the Contract as a whole. See e.g., Department of General Services v. Pittsburgh Bldg Co., 920 A.2d 973 (Pa. Cmwlth. 2007).

To support its arguments, Eckman looks to those portions of Special Provision SPF31.00 which indicate that the requisite Type B rock would be found on site by way of several references to, and heavy emphasis upon, on site excavation and use of on site material. Specifically, Eckman focuses on certain lead in language and technical instructions regarding the placement of rock, Types A, B and C in SPF31.00 and claims that references in the provision to locating and identifying a source for the rock "within the limits of Class I Excavation" effectively represents that the rock will be found on the Project site since the parties do not

dispute that the entire Project—including construction of the embankment benches—was located within the limits of Class 1 Excavation. Eckman also argues that the instruction in SPF31.00 to “stage construction to obtain on site material” indicates that Eckman was required to locate the Type B rock on site and that this instruction was further reinforced where SPF31.00 stated the intent to optimize use of material from on site excavation.

Eckman argues it was further misled as to how to interpret SPF31.00 and whether there was Type B rock on the Project site by the Turnpike Commission’s conduct during discussions immediately preceding Eckman’s bid submission in early February 2006. Here, Eckman alleges that the Turnpike Commission’s representative, Mr. Brad Updegrave, misled Eckman’s estimator, Mr. David Gates, by providing conflicting information when Mr. Updegrave and Mr. Gates discussed whether there existed sufficient Type B rock on site for the “selected borrow excavation (rock)” work item and whether or not SPF31.00 was to be interpreted as indicating that selected borrow excavation Type B rock could or could not be found on the Project site. Eckman also alleges that, as a result of these discussions, the Turnpike Commission knew that Eckman would prepare its bid according to Eckman’s interpretation that selected borrow excavation, as used in SPF31.00, meant that Type B rock could be found on site, and further asserts that neither Mr. Updegrave nor any other Turnpike Commission representative corrected Eckman’s mistaken assumption prior to its bid submission with an addendum or some other form of communication issued to all the prospective contractors.

The Turnpike Commission disagrees that Special Provision SPF31.00 or anything else in the Contract bid documents either suggested that Type B rock could be found on site or was ambiguous regarding the meaning of selected borrow excavation. It argues that the term “selected borrow excavation” is clearly defined in its Publication 408 general specifications to

mean material "borrowed" or brought in from offsite and that SPF31.00, when read in conjunction with the Contract as a whole, including the drawings and the applicable provisions of Publication 408 specifications, clearly indicated that the selected borrow excavation Type B rock required for the bridge embankments would have to be brought in from off the Project jobsite. The Turnpike Commission also contends that, in any case, its representatives expressly informed Eckman prior to Eckman's bid submission that selected borrow excavation Type B rock referenced in SPF31.00 would have to be brought on to the Project from offsite. The Turnpike Commission argues that Eckman arbitrarily ignored what it had been told by Mr. Updegrave and had no reasonable basis to interpret SPF31.00 as it did or to assume the presence of Type B rock on the jobsite after having received Mr. Updegrave's final notification to the contrary. Therefore, according to the Turnpike Commission, the decision of Eckman to submit a bid price of \$1.50/cy for selected borrow excavation was made with actual knowledge that no Type B rock existed on site and that this price became a term of the parties' agreement. Thus, according to the Turnpike Commission, the Contract provides no basis for Eckman's request to be paid for selected borrow excavation at its foreign borrow excavation bid price of \$35/cy.

Discussion

In order to establish an action for breach of contract, a party must demonstrate the existence of a contract, breach of duty imposed by the contract, and damages. J.P. Walker Co., Inc. v. Excalibur Oil Group, Inc., 792 A.2d 1269, 1272 (Pa. Super. 2002). Under the law of contracts, when contract terms are clear and unambiguous, the intent of the parties will be determined from the contract itself. Department of General Services v. Pittsburgh Bldg. Co., 920

A.2d 973, 989 (Pa. Cmwlth. 2007), citing Kripp v. Kripp, 849 A.2d 1159, 1163 (Pa. 2004); Department of Transportation v. Brozzetti, 684 A.2d at 663. However, a contract is ambiguous if it is reasonably susceptible to different constructions, is obscure in meaning through indefiniteness of expression, or has a double meaning. Id. In order to construe the meaning of a contract containing an ambiguity, the Board may examine the circumstances surrounding the contract in order to ascertain the intent of the parties. Department of Transportation v. Bracken Construction Co., 457 A.2d 995, 997 (Pa. Cmwlth. 1983). Ultimately, however, if the language of the contract and the intent of the parties remain ambiguous, such ambiguity is properly construed against the drafter, here, the Turnpike Commission. See, Department of General Services v. Pittsburgh Bldg Co., 920 A.2d at 989.

The Contract Documents

Pertinent Contract provisions include SPF31.00, which states, in relevant part, as follows:

F31.00 SELECTED BORROW EXCAVATION (ROCK) AND EMBANKMENT (ITEM: 4205-0200)

F31.01 Description – This work is the construction of embankments and backfills.

F31.02 Material -

(a) Embankment Material. Obtain material for embankment construction from the various classes of excavation on the project, including Common Borrow Excavation, Foreign Borrow Excavation, and Selected Borrow Excavation, all meeting the following requirements:

• • •

Rock, Type B. Durable, sound, and hard sandstone greater than 90 percent pure sandstone with less than 10% non-durable rock. Limestone, or other rock types, may only be

used with the approval of the Commission's Geotechnical Representative. Neither material width nor thickness shall be less than one third its length. Acceptance will be based on visual inspection.

• • •

F31.03 Construction

• • •

“Locate and identify a source meeting the requirements above for each category of rock within the limits of Class 1 Excavation.

Subsurface soil and geological information was used to estimate quantities and locations of durable rock. *The intent is to optimize the use of material from excavation.* The classified materials are to be used to the extent practical to obtain quality construction. This is not to imply that the classified material as identified is not subject to change during construction, but is to be used unless otherwise directed. Variations of depth and character from those shown are not a basis for changed conditions.

Stage construction to obtain on site material. Off-site material meeting the requirements may be used upon written authorization.” [Emphasis added].

(Ex. P-9).

The Contract drawings indicated that the work item entitled “selected borrow excavation (rock)”, item no. 4205-0200, was cross-referenced with areas designated to be filled with Type B rock, thus confirming that this selected borrow excavation Type B rock was to be used for support of embankments near the bridge abutments.

The Board agrees with Eckman that the language of Special Provision SPF31.00, in and of itself, could reasonably have been interpreted to mean that Type B rock did exist on the Project site. Among other things, SPF31.00 instructs the contractor to perform its excavation for each category of rock, including Type B rock, “within the limits of Class 1 excavation” and to

“stage the construction sequence based on the excavation of on site material”. These references in SPF31.00 to locating a source for this rock “within the limits of Class I Excavation” and staging construction for excavation of these materials on site do, in our view, indicate that the Type B rock can be found on the Project site. Indeed, even Brad Updegrave, the Turnpike Commission’s designated contact person for Project bidder inquiries, agreed when initially questioned by Eckman that SPF31.00 did so indicate.

The Board further finds that SPF31.00 created an ambiguity in the Contract documents as a whole. Specifically, the Contract generally incorporated the provisions of Publication 408/2003-3 including Section 205 (hereinafter Pub. 408 § 205). “Selected borrow excavation”, “common borrow excavation” and “foreign borrow excavation” were separately defined in Pub. 408 § 205 as follows:

SECTION 205 – BORROW EXCAVATION

205.1 DESCRIPTION – This work is excavation of or obtaining embankment material from borrow areas required as specified in Section 105.14 or from other sources for construction of embankments or backfills.

Borrow excavation includes Common Borrow Excavation, Foreign Borrow Excavation, and Selected Borrow Excavation, described as follows:

(a) Common Borrow Excavation. Excavation of suitable material as specified in Section 206.2 from borrow areas that can be measured before and after excavation. Common Borrow Excavation also includes the removal of topsoil from borrow areas and stockpiling as specified in Section 801.

(b) Foreign borrow excavation. Excavation of or obtaining *satisfactory material from sources outside the limits of the project* that cannot be measured before and after excavation.

(c) Selected borrow excavation. Excavation of or obtaining *material used in specific items of work and designated by quality, size, and/or gradation, from sources outside the limits of the project* that cannot be measured before and after excavation. [Emphasis added].

(Ex. P-10).

Pub. 408 § 205 thus defined "selected borrow excavation" to mean material from offsite sources. This section also clarified that, in contrast to foreign borrow excavation, selected borrow excavation referred to borrow excavation material that must meet certain specifications as to quality, size and/or gradation such as those attributable to Type B rock in SPF31.00. Thus the definitions in Pub. 408 § 205 conflict with the indication in SPF31.00 that selected borrow excavation of Type B rock could be found on the Project site.

SPF31.00 also conflicted with the Contract drawings. These drawings indicated that Type B rock would only be found from an offsite source in that the structure core borings showed no positive indication of rock material on the Project site meeting the requirements for Type B rock. Also, the summary table of quantities in the drawings, entitled "EARTHWORK SUMMARY ENTIRE PROJECT", indicated that the 12,528 cubic yard requirement for selected borrow excavation was separate from, and in addition to, the aggregate 24,411 cubic yards of total excavation from the various other classes of excavation, including the Class 1 excavation on the Project. (Ex. R-3A, sheets 3 and 8 of 205). Because Class 1 excavation would be considered on site excavation for this Project, one can infer from the drawings' separate identification of 12,528 cubic yards of selected borrow excavation from the 24,411 cubic yards of total excavation (including Class 1) that selected borrow excavation was not included in the anticipated Class 1 excavation as Special Provision SPF31.00 suggested.

Although we find it to be a close question when reading the Contract documents as whole, we ultimately find agreement with Eckman that these documents, as written, are ambiguous as to whether or not the selected borrow excavation Type B rock was to be found on the Project site. Specifically, we note that, although the quantity estimates in the plans suggest Type B rock was not to be found on site, the drawings also stated that the summary table of

estimated quantities did not waive or alter any provisions of the Contract (such as SPF31.00). (Ex. R-3A, sheet 3 of 205; See also Publication 408/2003-3 Section 102.04). Moreover, it is a well-established principle of contract interpretation that in case of a conflict between specific and general provisions, the specific provisions shall prevail. See Publication 408/2003-3, Section 105.04. Thus the implication of SPF31.00, as a special provision to the Contract, that selected borrow excavation Type B rock could be found on site was not entirely negated by the quantity estimates in the drawings or the conflict with Publication 408 definitions regarding the question of whether selected borrow excavation referred to on site or offsite Type B rock. Additionally, as noted above, the ambiguity of this language in the Contract and this poorly drafted special provision was further confirmed by the response of Turnpike Commission representatives when they too agreed with Eckman representatives, at least initially, that this language suggested the existence of Type B rock on the Project site. (N.T. 58-64, 72-74, 194-202).

To summarize, the Board finds there to be an ambiguity in the Contract documents as to whether or not the "selected borrow excavation" Type B rock would be found on the Project site because SPF31.00 conflicts with the Pub. 408 § 205 definitions and certain aspects of the Contract drawings. Nonetheless, for the reasons explained below, we find that it was not reasonable for Eckman to rely on this ambiguity in submitting its \$1.50/cy bid price for this selected borrow excavation and then seek a price adjustment to \$35/cy after it won the Contract.

Additional Circumstances Surrounding Bid Submission

Eckman argues that even under an interpretation of the Contract most generous to the Turnpike Commission, it is entitled to additional compensation for acquiring offsite Type B rock as a matter of law because SPF31.00 was ambiguous and our courts have construed ambiguities

against the drafter of the contract, in this case, the Turnpike Commission. Commonwealth Dept. of Transp. v. IA Construction Corp., 588 A.2d 1327 (Pa. 1991). Although we agree that SPF31.00 made the Contract language, as a whole, ambiguous on this selected borrow Type B rock issue, this finding is not dispositive of Eckman's claim. Case law has consistently held that a contractor's reliance on erroneous or ambiguous contract language is unreasonable where the contractor has additional knowledge which puts it on notice as to the error and correctly informs it as to the actual scope of work it will have to perform under the contract. See e.g. Joseph B. Fay Co. v. Pennsylvania Turnpike Comm'n, Commonwealth of Pennsylvania, Board of Claims, 2005 PA. Bd. Claims LEXIS 3 at *14-16; Argeros & Co., Inc. v. Cmwlth, Dept. of Transp., 447 A.2d 1065, 1067 (Pa. 1982); Cmwlth., Dept. of Transp. v. Brayman Constr. Co., 382 A.2d 767, 769 (Pa. 1978). Moreover, a contractor is not owed additional compensation due to ambiguous or erroneous contract language where its officers knew, prior to bid and regardless of any such ambiguity or error in the contract language, that the contractor would have to pay a higher price than what it bid for a particular item of work. Id. Accordingly, an owner breaches no contractual duty by failing to compensate a contractor at higher prices than those the contractor submitted in its bid when that contractor relies, unreasonably, on ambiguous or defective contract language in formulating its bid prices. Id.

Here, the facts demonstrate that Eckman's reliance on the language of SPF31.00 and the ambiguity over the presence of selected borrow excavation Type B rock on the Project site in formulating its bid price for the selected borrow excavation requirement was patently unreasonable because: 1) Shortly before submitting its bid, Eckman was explicitly informed by the Turnpike Commission in a series of discussions between their representatives that, regardless of the language in SPF31.00, Type B rock would have to be brought on to the Project from

offsite; 2) Eckman determined from its own inspection of the jobsite and core borings in the drawings prior to submitting its bid that there was not sufficient Type B rock on site to do the job; and 3) after submitting its bid, but before the Contract was executed, Eckman received notification from the Turnpike Commission that its \$1.50/cy bid price for selected borrow excavation deviated significantly from the cost estimate prepared by the Turnpike Commission's engineer. However, despite all the foregoing, Eckman made a business decision to proceed with its bid as a whole knowing full well that its cost allowance for selected borrow excavation was low because Type B rock would not be found on the Project site.

Discussions Prior to Eckman's Bid Submission

The Contract permitted prospective bidders to seek clarification from the Turnpike Commission as to any of the Contract's provisions. Section 102.15 of the Contract bid documents, entitled "REQUEST FOR INTERPRETATION OF PLANS, SPECIFICATIONS OR OTHER CONTRACT DOCUMENTS," stated that a prospective bidder was permitted to submit to the Chief engineer, no later than 10 days before the bid opening date, a written request for interpretation as to any part of the Contract, plans (drawings) and specifications. Section 102.15 stated that any such request for interpretation would be answered by the Turnpike Commission solely in the form of an addendum issued to all bidders.

The bidding period for the Project ran between December 21, 2005 and February 8, 2006. During the bidding period, Mr. Gates, an experienced bid estimator for Eckman, conducted a review of the Project site on behalf of Eckman to determine, among other things, whether any suitable Type B rock for the bridge embankments could be excavated from on site sources. Following his inspection, Mr. Gates was of the opinion it was highly improbable that any such

Type B rock would be found on site. Additionally, Mr. Gates' review of the Contract drawings, particularly the structure core boring results, led him to believe that there was no Type B rock on site. Mr. Gates also knew that it was unusual, "if not unheard of in the industry" for selected borrow excavation to refer to materials to be obtained on the jobsite. (Plaintiff's Reply in Support of its Proposed Findings of Fact and Conclusions of Law; N.T. 130-132). Neither Mr. Gates nor any other Eckman representative contacted the Turnpike Commission to review the foundation report relating to the geotechnical characteristics of the jobsite as was permitted by the Section 102.05 of the Contract.

Eckman also failed to submit a request for interpretation before the 10-day period prior to the bid deadline in accordance with Section 102.15 of the Contract as to the effect of SPF31.00 on this selected borrow excavation/Type B rock issue. In fact, at no time did Eckman submit a written request for such an interpretation. However, a mere day or two before the bid opening date of February 8, 2006, Mr. Gates did contact the Turnpike Commission's designated representative, Mr. Brad Updegrave, and engage in a series of phone call communications with Mr. Updegrave regarding the question of whether SPF31.00 and its use of the term selected borrow excavation meant that Type B rock would be found on the Project jobsite.

Initially, Mr. Gates called Mr. Updegrave to explain Eckman's confusion as to interpreting selected borrow excavation as it was used within SPF31.00 and whether or not it indicated Type B rock would be found on site or needed to be brought in from offsite. Mr. Gates also inquired of Mr. Updegrave whether an addendum might be issued by the Turnpike Commission to clarify the matter, even though Mr. Gates was aware that he was too late for properly submitting a written request for an interpretation under Section 102.15.

During this initial conversation, Mr. Updegrave agreed with Mr. Gates that SPF31.00 was confusing as to whether or not it indicated there was any Type B rock located on site. Mr. Updegrave stated that he did not have personal knowledge regarding the geotechnical characteristics of the jobsite and told Mr. Gates he would look into the matter and get back to him with an answer.

Promptly after this initial phone call, Mr. Updegrave consulted an engineer at Sucevic, Piccolomini and Kuchar Engineering, Inc. ("SP&K"), the engineering firm responsible for producing the Contract drawings, who informed him at the time that selected borrow excavation, as used in SPF31.00, did refer to on site material because Type B rock did exist on site. Mr. Updegrave called Mr. Gates immediately thereafter and shared with him this information regarding the presence of sufficient Type B rock on the Project site.

However, later that same day, Mr. Updegrave received a call from one of the partners of SP&K, Domenic Piccolomini. Mr. Piccolomini was more familiar with the Project than the prior engineer with whom Mr. Updegrave spoke and better understood the Project and the nature of the Type B rock fill material required for the selected borrow excavation to be used in constructing the steep-sloped embankment benches supporting the bridge abutments. Mr. Piccolomini informed Mr. Updegrave that the previous answer relayed to Mr. Gates was incorrect. Mr. Piccolomini explained that the SPF31.00 reference to "selected borrow excavation" anticipated that Type B rock would have to be brought in from off the jobsite because the on site material was not suitable for use in the bridge embankment benches.

Mr. Updegrave also conferred with Ms. Bonnie Shepler, the construction manager for the Turnpike Commission, regarding the matter. Ms. Shepler, whose approval was needed for any addendum to the bid documents, instructed Mr. Updegrave that an addendum would not be

issued because SPF31.00 was adequate in identifying all of the borrow excavation requirements upon which a prospective contractor could calculate its bid. Mr. Updegrave was told by Ms. Shepler that the bid process would continue without the issuance of an addendum and that Eckman should bid SPF31.00 as it saw it.

Mr. Updegrave called Mr. Gates promptly after his discussion with Mr. Piccolomini about SP&K's determination reversing its earlier advice about the availability of Type B rock on the Project site. Mr. Updegrave spoke this last time to Mr. Gates before Eckman submitted its bid and informed Mr. Gates that his earlier information was incorrect and that the selected borrow Type B rock would have to be brought in from off the jobsite. Mr. Updegrave also passed along Ms. Shepler's decision that no addendum would be issued and that Eckman would have to bid SPF31.00 as it saw it. Mr. Gates acknowledged the new information, that Type B rock would have to be hauled in from an offsite source, and reflected this final advice in his notes. (N.T. 191-193; Ex. P-15). Mr. Updegrave's final advice to Mr. Gates regarding the need to bring in Type B rock from offsite was never contradicted by the Turnpike Commission thereafter.

In addition to the notice provided by the Turnpike Commission through Mr. Updegrave's final communication, Eckman's own estimator, Mr. Gates, inspected the jobsite prior to bid and concluded that it was highly improbable any Type B rock would be found on site. (N.T. 58-63). The same can be said regarding Mr. Gates' review of the structure core boring results on the Contract plans and drawings. (N.T. 67-69). Therefore, when Mr. Updegrave finally informed Mr. Gates that Type B rock would have to be brought in from offsite, it should reasonably have laid to rest any lingering confusion and been seen as a confirmation of Mr. Gates' earlier

impressions from his inspection of the jobsite that Type B rock would have to be brought in from offsite.

Despite all of the foregoing, Eckman formulated its bid price for the 12,528 cubic yards of selected borrow excavation at a mere \$1.50/cy. By contrast, Eckman's bid price for the 2000 cubic yards of foreign borrow excavation, which Eckman admits to having interpreted as referring to offsite excavation and thus entailing hauling costs, was \$35/cy. (N.T. 112). In light of the fact that Eckman was given clear notice that selected borrow excavation referred to offsite Type B rock, this discrepancy in Eckman's prices for selected borrow excavation and foreign borrow excavation demonstrates that Eckman knowingly chose to ignore what it had eventually learned through Mr. Updegrave—that regardless of the ambiguity in the contract language created by SPF31.00, selected borrow excavation Type B rock would have to be hauled in from off the Project site. Under the foregoing circumstances, Eckman's reliance upon its own interpretation of SPF31.00, was completely unreasonable and ran contrary to its own actual knowledge regarding the lack of sufficient Type B rock on the Project site.

Deviation Letter of February 9, 2006

Immediately following Eckman's bid submission, on or about February 8, 2006, but before the bid was awarded to Eckman⁵, the Turnpike Commission wrote a letter to Eckman dated February 9, 2006 which, among other things, informed Eckman that its \$1.50/cy bid price for "selected borrow excavation (rock)", item no. 4205-0200, significantly deviated from the engineer's estimate. This letter, following Mr. Updegrave's statements to Mr. Gates before

⁵ The record does not reveal the precise date on which the bid was awarded to Eckman. However, the Contract indicates that it normally takes four weeks for a contract to be executed after the bid opening date. (Ex. P-1 at PATC 17453). The bid opening date was February, which would normally result in the Contract being executed sometime in early March 2006. In any event, the Contract execution date took place before March 22, 2006, the date on which Eckman received its official notice to proceed with its work. (Ex. P-1 at PATC 17449).

Eckman's bid submission and Eckman's own inspection of the jobsite and drawings provided a final opportunity for Eckman to address its low ball price for selected borrow excavation based on its incorrect assumption that Type B rock would be found on site. Eckman instead chose to ignore this warning, its own site inspection, and Mr. Updegrave's final advice and stick with its submitted bid price of \$1.50/cy for selected borrow excavation (rock), item no. 4205-200, which did not account for the hauling costs entailed in obtaining offsite Type B rock. These additional circumstances further reinforce the Board's finding that Eckman was unreasonable in relying upon the ambiguity in the Contract created by SPF31.00 in submitting a bid based on the premise that Type B rock could be found on the Project site.

Eckman also argues that, while it was given notice as to the absence of Type B rock on the jobsite, it was simultaneously told by Mr. Updegrave, per Ms. Shepler's instructions, to base its bid on SPF31.00 "as it saw it." Thus, Eckman asserts, the advice itself remained ambiguous since the Turnpike Commission knew Eckman read SPF31.00 to indicate Type B rock was on site. We are unpersuaded that the generic advice to Eckman to bid the specifications "as they saw them" somehow amounted to an endorsement of a bid based on Type B rock existing on site after Mr. Updegrave's specific advice to the contrary.

Eckman's insistence that it was unsure of what rate to submit for selected borrow excavation due to Mr. Updegrave's inconsistent positions regarding the on site presence of rock throughout their multiple communications is equally unpersuasive. Eckman has not pointed to any evidence that would cast reasonable doubt on Mr. Updegrave's final communication reversing his earlier answer. Rather, Mr. Gates' testimony reveals that he understood from his follow-up communications with Mr. Updegrave that rock would have to be brought in from an offsite source. Thus any reliance upon a contrary interpretation of SPF31.00—even though

SPF31.00 was ambiguous and conflicted with other parts of the Contract—was not reasonable reliance on the part of Eckman. Joseph B. Fay Co. v. Pennsylvania Turnpike Comm'n, Board of Claims Docket No. 3565, (September 30, 2005); Argeros & Co., Inc. v. Cmwlth, Dept. of Transp. 447 A.2d 1065, 1067 (Pa. 1982); Cmwlth., Dept. of Transp. v. Brayman Constr. Co., 382 A.2d 767, 769 (Pa. 1978). (N.T. 235-239). Therefore, Eckman's bid price for selected borrow excavation at \$1.50/cy is an enforceable term of the Contract despite the conflict between SPF31.00 and other parts of the Contract regarding selected borrow excavation and whether it referred to on site Type B rock.

Finally, Eckman argues that an addendum to all prospective contractors regarding the lack of on site Type B rock would have eliminated any confusion stemming from the ambiguity created by the conflict between SPF31.00 and other portions of the Contract documents, Mr. Updegrave's instructions, and the inconsistent answers provided by Mr. Updegrave. Although, we wholeheartedly agree that the issuance of an addendum by the Turnpike Commission to all bidders clarifying this poorly drafted SPF31.00 would clearly have been the best course (and would have avoided the unnecessary costs of this litigation for itself and the bid-winning contractor), Eckman simply waited too late to pose this question in order to force the Turnpike Commission to issue same.

Excess Waste Hauling Claim

In addition to its claim for a higher rate of compensation for the selected borrow excavation Type B rock supplied to the Project, Eckman also claims it is due \$57,651.70 as compensation for extra work hauling excess unsuitable material from the job to a waste site.

Eckman, through Mr. Michael Perloski, one of its project managers, describes the basis for this claim as follows:

When we got into our disagreement about who was responsible for the payment of the select borrow excavation as defined in F31, we said by bringing offsite material to meet a need that was used in the job, we had material on site that now needed to be hauled off. I think the original quantity of class one excavation on the job was roughly 22,000 cubic yards. Out of that 22,000 cubic yards, the special provision for select borrow led me to believe 12,000 of it was to stay on site as select borrow, rehandle and place. So that means 10,000 of it would have had to be hauled off the job, 10,000 cubic yards of excavation.

But since we didn't find any of that 12,000 cubic yards on site, we now had to haul off the 22,000 cubic yards of material. This was a cost associated with hauling that additional material offsite that we didn't anticipate, which has no pay item associated with it.

(N.T. 117-124, 134-143).

The Turnpike Commission disagrees that hauling excess unsuitable material was extra work under the Contract, arguing that the Contract unequivocally required Eckman to haul unsuitable material away from the jobsite at its own cost. The Turnpike Commission also questions whether such hauling by Eckman even occurred; denies that it specifically directed Eckman to do any such work hauling unsuitable material away from the jobsite; and asserts that, regardless of whether the work was performed, Eckman failed to provide sufficient documentary evidence of the costs it incurred and thus did not meet its burden in establishing its damages for this part of its claim.

A contractor who performs work beyond the scope of its contract at the direction of the owner is entitled to additional compensation. A.G. Cullen Const., Inc. v. State System of Higher Educ., 898 A.2d 1145, 1171 (Pa. Cmwlth. 2006) *citing* Dep't. of Transp. v. Gramar Constr. Co., 454 A.2d 1205, 1207 (Pa. Cmwlth. 1983); Dep't. of Transp. v. Paoli Construction Co., 386 A.2d 173, 175 (Pa. Cmwlth. 1978). To be entitled to compensation for extra work, Eckman must

demonstrate that this work was performed, that it was required by the Turnpike Commission and that it was not required by the terms of the Contract as agreed to by the parties. Eckman must also establish its alleged damages for such work with reasonable certainty. A.G. Cullen Construction v. State System of Higher Education, 898 A.2d 1145, 1174 (Pa. Cmwlth. 2006); J.W.S. Delavau, Inc. v. Eastern America Transport and Warehousing, 810 A.2d 672, 685 (Pa. Super. 2002).

We find no merit to Eckman's claim for allegedly hauling excess unsuitable material off the jobsite. To the extent this claim is based on the ambiguity created in the Contract by SPF31.00 which Eckman asserts led it to the mistaken assumption that 12,000 cubic yards of Type B rock was available for reuse on the jobsite (and thus reduced the total Class 1 excavation to be removed from the site from 22,000 cubic yards to 10,000 cubic yards), we have already determined that Eckman did not reasonably rely on the initial ambiguity created by SPF31.00 because it had actual knowledge that the Type B rock instead had to be brought in from offsite. Eckman's rationale for this second claim is further undermined by the fact that the selected borrow quantity of 12,528 cubic yards was never represented to be included in, or part of, the estimated 22,400 cubic yards of Class 1 excavation, but was instead indicated to be a separate, additional quantity on the Project plans and drawings.

Additionally, Eckman's rationale for this excess hauling claim does not support its damage calculation. Specifically, Eckman's stated explanation of this claim would lead one to conclude that there should have been approximately 12,000 cubic yards of excess material to be removed from the site (See Perloski testimony, N.T. 117-124, 134-143). Allowing for the 4,122 cubic yards of on site material the Turnpike Commission allowed Eckman to use in place of the original Type B rock at certain locations, this reasoning would still suggest Eckman had

approximately 8,000 cubic yards of excess material to remove. However, its cost/damage calculation (Exhibit P-18) shows it removing only 4,123 cubic yards. Thus, Eckman's own explanation for the creation of excess unsuitable material, which it claims to have hauled away as a result of the selected borrow excavation controversy, does not match its own damage estimate for this work.

The foregoing discrepancy between its explanation for the excess unsuitable material and its damage estimate for same serves to further highlight the fact that Eckman's damage calculation for its alleged hauling of excess waste material from the jobsite due to the selected borrow excavation issue is not supported by work tickets, supervisor logs or any other contemporary record identifying specific quantities of material attributable to this issue. Instead, this damage calculation appears to be an estimate by Mr. Perloski of some arbitrary portion of Eckman's ongoing general excavation hauling he believes was attributable to the selected borrow controversy.

Under the circumstances of this case, we do not find that Eckman has adequately quantified the amount of its alleged extra work hauling unsuitable material away from the jobsite or identified sufficient documentation to substantiate its costs. In point of fact, Eckman has failed to provide the Board with any credible evidence that the actual cubic yard amount of Class 1 excavation on the site exceeded the estimated quantity of Class 1 excavation initially estimated in the summary tables of quantities in the Contract drawings. In sum, Eckman's extra work claim for alleged hauling of excess unsuitable material from the jobsite fails factually because its explanation of its claim is based on several incorrect premises, does not support its damage calculation and fails to quantify the amount of this alleged extra work or calculate damages incurred with reasonable certainty. (N.T. 117-124, 134-143; P-18). A.G. Cullen Construction v.

State System of Higher Education, 898 A.2d 1145, 1174 (Pa. Cmwlth. 2006); J.W.S. Delavan, Inc. v. Eastern America Transport and Warehousing, 810 A.2d 672, 685 (Pa. Super. 2002).

Moreover, the Turnpike Commission is correct that, under Section 105.14 of the Contract, Eckman is “responsible for proper disposal of all excess excavation and waste material”. (Ex. P-1 at PATC 17490). This responsibility is reiterated in Section 203.3(k) (“Construction”) of the Contract as follows:

(k) Unsuitable and Surplus Material. Dispose of unsuitable and surplus material in suitable waste areas obtained, as specified in Section 105.14.

(Ex. P-1 at PATC 17570).

Section 102.04 of the Contract (“Interpretation of Approximate Estimate of Quantities”), also directs the contractor to “[r]emove any surplus materials from the site at no additional expense to the [Turnpike] Commission”. (Ex. P-1 at PATC 17467). Absent unusual circumstances such as a significant misrepresentation in the bid documents as to quantity or quality of excavation to be performed on the job, or some similar problem, the Board finds no reason why it should not apply Sections 105.14, 203.03(k), 102.04 of the Contract to Eckman’s claim for offsite disposal of excess waste material.

Eckman has not established that the Contract indicated otherwise or was ambiguous regarding its responsibility to haul waste material away from the jobsite at its own cost. (N.T. 134-137). Coupled with the fact that Eckman did not establish a factual explanation for this claim in a credible manner, nor show its damages as to its alleged extra work with reasonable certainty, the Board finds no basis for Eckman to recover on this claim. Accordingly, Eckman’s

claim of \$57,652 for its alleged hauling of unsuitable on site material away from the jobsite must also be denied.

Eckman's bad faith claim is unsubstantiated

Eckman alleges bad faith damages under 62 Pa.C.S §3935 asserting the Turnpike Commission: 1) knew Eckman interpreted SPF31.00 to indicate the presence of on site Type B rock; 2) was aware that Type B rock would have to be brought in from an outside source, and yet told Eckman to bid SPF31.00 as it saw it rather than instruct Eckman to submit a bid price for selected borrow excavation which accounted for the absence of on site Type B rock; 3) failed to issue an addendum to all bidders prior to the bid submission deadline to clarify the meaning of selected borrow excavation.

Bad faith damages may be awarded to a prevailing party pursuant to 62 Pa.C.S. §3935 if it is determined that a government agency withheld monies owed to a contractor and did so in an arbitrary or vexatious manner. A.G. Cullen Constr., Inc. v. State System of Higher Education, 898 A.2d 1145, 1164 (Pa. 2006). An action is arbitrary if it is "based on random or convenient selection or choice rather than on reason or nature," and is vexatious if it is "without sufficient ground in either law or in fact". A.G. Cullen Constr., Inc. 898 A.2d at 1165.

We find no bad faith on the part of the Turnpike Commission for refusal to pay either of Eckman's claims in this matter as we have determined both to be without merit. Additionally, because the Board has determined that Eckman shall not recover any monies on either of its claims, Eckman is not a prevailing party in this matter under 62 Pa.C.S. §3935 and therefore cannot recover attorney's fees in this case. 62 Pa.C.S. §3935(b); A.G. Cullen Constr., Inc. v. State System of Higher Education, 898 A.2d 1145, 1164 (Pa. 2006).

Conclusion

The Turnpike Commission's refusal to pay Eckman the higher foreign borrow excavation rate of \$35/cy for obtaining offsite Type B rock does not represent any breach of Contract because Eckman's reliance on the ambiguity of SPF31.00 was unreasonable where it had actual knowledge that it was required to bring in Type B rock from offsite to fulfill the selected borrow excavation requirement. Joseph B. Fay Co. v. Pennsylvania Turnpike Comm'n, 2005 PA Bd. Claims LEXIS 3, at *14-16; Argeros & Co., Inc. v. Commonwealth, Dept. of Transportation, 447 A.2d 1065, 1067 (Pa. 1982); Commonwealth Dept. of Transp. v. Brayman Constr. Co., 382 A.2d 767, 769 (Pa. 1978). Additionally, we have found that Eckman's extra work claim for hauling unsuitable material off the jobsite has no basis in law or in fact, and thus, the Turnpike Commission did not breach the Contract for failing to pay Eckman on this second aspect of its claim. As Eckman is not the prevailing party in this case, it cannot recover bad faith damages under 62 Pa.C.S. § 3935.

ORDER

AND NOW, this 13th day of January, 2011, it is hereby **ORDERED, ADJUDGED** and **DECREED** that judgment in this matter is entered in favor of the Commonwealth of Pennsylvania, Pennsylvania Turnpike Commission and against J.D. Eckman, Inc. No award is made to J.D. Eckman, Inc. Each party will bear its own costs and attorneys' fees.

BOARD OF CLAIMS

OPINION SIGNED

Jeffrey F. Smith
Chief Administrative Judge

Harry G. Gamble, P.E.
Engineer Member

Andrew Sislo
Citizen Member