

Arkansas
State Claims Commission

AUG 15 2016

Please Read Instructions on Reverse Side of Yellow copy

Please print in ink or type

BEFORE THE STATE CLAIMS COMMISSION
Of the State of Arkansas

RECEIVED

Mr.
 Mrs.
 Ms.
 Miss R.L. Persons Construction, Inc., Claimant

Do Not Write in These Spaces		
Claim No.	17-0129-CC	
Date Filed	August 15, 2016	
	(Month)	(Day) (Year)
Amount of Claim \$	836,830.00	
Fund	AHTD	
Breach of Contract		

vs.
State of Arkansas, Respondent
Arkansas Highway Dept.

COMPLAINT

R.L. Persons Construction, Inc., the above named Claimant, of P.O. Box 3938, Poplar Bluff,
 (Name) (Street or R.F.D. & No.) (City)
 MO 63902 573-686-1323 County of represented by Jack East III
 (State) (Zip Code) (Daytime Phone No.) (Legal Counsel, if any, for Claim)
 of 2725 Cantrell Rd., Ste. 202 Little Rock, AR 72202 501-372-3278 501-376-0949, says:
 (Street and No.) (City) (State) (Zip Code) (Phone No.) (Fax No.)
 State agency involved: Arkansas State Highway Dept. Amount sought: \$836,830.00
 Month, day, year and place of incident or service: 2012 through 2016, Blytheville, AR
 Explanation: See Complaint attached.

As parts of this complaint, the claimant makes the statements, and answers the following questions, as indicated: (1) Has claim been presented to any state department or officer thereof?
YES when? 09 18 2015 ; to whom? Chief Engineer, AHTD
(Yes or No) (Month) (Day) (Year) (Department)
; and that the following action was taken thereon: Claim Denied

and that \$ 0 was paid thereon: (2) Has any third person or corporation an interest in this claim? NO ; if so, state name and address
(Name) (Street or R.F.D. & No.) (City) (State) (Zip Code)
and that the nature thereof is as follows:
; and was acquired on ; in the following manner:

THE UNDERSIGNED states on oath that he or she is familiar with the matters and things set forth in the above complaint, and that he or she verify believes that they are true.

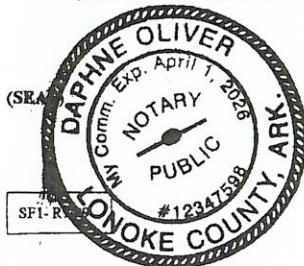
Jack East III
(Print Claimant/Representative Name) Signature of Claimant/Representative

SWORN TO and subscribed before me at Little Rock AR
(City) (State)

on this 15th day of August 2016
(Date) (Month) (Year)

Daphne Oliver
(Notary Public)

My Commission Expires: April 1 2026
(Month) (Day) (Year)



COMPLAINT

Comes now R.L. Persons Construction, Inc. (Persons), and for its Complaint against the Arkansas State Highway Commission (ASHC) and Arkansas State Highway & Transportation Department (AHTD) states:

1. Persons is a highway construction contractor headquartered in Poplar Bluff, Missouri.
2. ASHC and AHTD are agencies of the State of Arkansas.
3. The Commission has jurisdiction of the defendants and subject matter.
4. On or about October 8, 2012 Persons and the ASHC entered into a construction contract (Contract) requiring Persons to complete the construction project (Project) known as "Job 100740, Federal Aid Project STP-9051 (7), Hwy. 61-S. Holland St. (Hwy.18) (Blytheville) (S)" in Mississippi County, Arkansas in exchange for the estimated sum of \$6,529,285.50.

The Project work may be generally described as follows:

THE PURPOSE OF THIS PROJECT IS TO CONSTRUCT 1.080 MILES OF ROADWAY FOR THE NEW RAILROAD OVERPASS ON HWY. 18 AT BLYTHEVILLE IN MISSISSIPPI COUNTY. THIS PROJECT CONSISTS OF EARTHWORK, AGGREGATE BASE COURSE, ACHM BINDER AND SURFACE COURSES, A STORM DRAINAGE SYSTEM, SIGNALS, EROSION CONTROL ITEMS, MAINTENANCE OF TRAFFIC AND MISC. ITEMS.

LENGTH: 1.080000 MILES

The Contract required Persons to complete the Work in 135 working days or suffer liquidated damages of \$1,900.00 per working day and a penalty of \$5,000.00 per working day. A true copy of the Contract with Schedule of Prices and Liquidated Damages/Site Use Special Provisions is attached as Exhibit A.

5. The Contract Schedule of Prices included the item "Soil Stabilization" with a quantity of 500 tons. Persons sealed bid quoted \$350.00 per ton for this item, which totaled

\$175,000.00. A Contract Special Provision, attached as Exhibit B, states that Soil Stabilization is to be used where existing soils are unstable, "and cannot be stabilized through normal drying and compactive efforts". The Resident Engineer and other AHTD officials confirmed at the preconstruction conference that Soil Stabilization would certainly be utilized if the soil was unstable and could not be compacted through normal efforts. AHTD agreed the use of this bid item was critical on this project.

6. AHTD issued a Work Order effective October 23, 2012. It was received by Persons on October 29, 2012.

7. In the 2012 and 2013 work seasons little or no progress was made because of subsurface water issues, unusually rainy weather in 2013, and AHTD changes in storm drain design after the contract was awarded. The subsurface water table was at an elevation not normally encountered in Mississippi County, Blytheville area, and a reasonable contractor would not have anticipated subsurface water to the extent encountered by Persons on this Project. These water problems and the AHTD's failure and refusal to take reasonable steps to address these problems delayed Persons ability to progress the work.

8. As of December 20, 2013 – some 423 calendar days from the Work Order - only 48 working days had been charged, and Persons does not agree that all those days should have been charged. The work itself was less than 10% complete.

9. In the 2013 summer work season Persons began requesting permission to stabilize the soil as authorized by pay item 0017 in the Contract, and to uses flowable fill, a soil stabilizing product, which was not a contract pay item. Various requests for

information had also been requested by Persons concerning subsurface drainage work to address subsurface water problems. Persons requested this critical information throughout the Winter & Spring of 2014. On or about July 25, 2014 a meeting was held to discuss several items Persons had asked about previously but had not received a response from the AHTD. These items included requests to utilize stone backfill for bedding and backfilling pipe, soil stabilization and flowable fill, removing & relaying drop inlets & pipe on 10th Street due to design changes, and acquiring the latest version of Project Plan & Profile Sheets which had already taken over 6 months. AHTD officials indicated they would check into these items & respond. AHTD responses to these requests were critical to progressing the work. AHTD's delay in responding caused Persons' manpower and equipment to be idle.

10. On August 15, 2014 Persons sent AHTD officials an email again noting that Persons had been unable to progress the work at all in 2013 and 2014 due to AHTD actions and delays. The email is attached as Ex. C. It states, in pertinent part:

Persons Construction bid AHTD Job # 100740 on 9/12/12 and was awarded the project on 9/14/12. When RL Persons Construction bid this project, we had intentions on starting the project the fall of 2012 and completing the project in the summer of 2013. As you know, we have been unable to progress the job due to unforeseen delays. As of today we still have multiple unresolved issues. These issues were presented to you and others almost three weeks ago, and still there has been no resolution to any of the issues...

As it stands today, there is a really good chance that RLP will not be able to complete much of the work this construction season. This will be the third unsuccessful season for RLP since the job was awarded. I appreciate you meeting with us and ask for your help in expediting these issues. I also ask

that you review the time charges that have been assessed to date. As Randy brought up in the meeting, we believe that we have been charged 20-25 days more that applicable due to re-working the sub-grade instead of using the bid item "Soil Stabilization". We have asked to use this bid item several times, but were not given the go ahead.

As far as the job delays, there are cost associated with this that RLP has had to absorb. We cannot continue to do this. RL Persons cannot continue to hold our contract prices as they were bid almost 2 years ago. Please advise us as to what we will need to do to receive additional compensation for lost time and cost increases. We have made several suggestions and have given several options to expedite the project over the last two years that have been turned down.

On August 27, 2014 Persons again emailed AHTD officials for answers and information to which Persons was entitled. Some of these requests had been made over a year prior. A true copy of this email is attached as Ex. D. On August 28, 2014 the AHTD refused to allow Persons to stabilize the soil, refused Persons request to use appropriate pipe bedding material and failed to respond to the other requests by Person. A copy of this letter is attached as Ex. E.

11. In September, 2014 Persons made several requests for answers to prior requests, and for use of soil stabilization and other items, but AHTD did not respond until October 9, 2014, at which time it again refused soil stabilization, approval of appropriate pipe bedding and backfill and other items. True copies of Persons' September efforts and AHTD's October 9, 2014 letter are attached as Ex. F. Throughout the remainder of 2014 AHTD refused to allow soil stabilization and refused to authorize change orders addressing other items as requested by Persons. On November 20, 2014 Persons notified AHTD of its delay related costs and requested payment. On November 21, 2014 Persons notified AHTD it would be initiating a claim to recover delay related costs and that Persons asserted existence of a differing site condition. Copies of these three

letters are attached as Ex. G.

12. In January, 2015 the AHTD claimed it was continuing to "evaluate" the use of soil stabilization. This "evaluation" had already lasted over 2 years. Such a delay was unreasonable and not within the scope of acceptable response time when a contractor is expected to dedicate manpower and expensive heavy equipment to a Project. True copies of AHTD's January 16, 2015 letter and Persons' responses of January 28, 2015 are attached as Ex. H. On January 28, 2015 AHTD requested resubmission of the previously rejected stone backfill request for change order. Such information was resubmitted and a change order was issued by AHTD many months after Persons first requested it. Design changes of the storm drainage system was still ongoing, over 2 years after the start of the Project.

13. On January 28, 2015, some 2.5 years after site conditions indicated soil stabilization was necessary, the AHTD authorized soil stabilization and the use of flowable fill. Equipment & labor costs were incurred by Persons during the entire period of delay. True copies of change orders evidencing these authorizations are attached as Exhibit I. After Persons began stabilizing the soil and using flowable fill the Project work progressed in an orderly and timely fashion. Substantial completion was achieved on July 19, 2016.

14. The AHTD's failure to timely respond to legitimate requests for information, failure to timely authorize use of soil stabilization and flowable fill when job site conditions required it and failure to respond to requests for information and design documents constitute a breach of AHTD's contractual duty of cooperation and promise not to

interfere with timely performance.

15. The excess subsurface water condition was a differing site condition because it was a latent physical condition encountered at the site differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract. Persons offered to provide pricing to remedy the subsurface water conditions early in the project, but was denied.

16. Persons has incurred \$836,830.00 in additional costs due to the AHTD's interference with Person's ability to perform the contract, failure to respond to legitimate change order requests, failure to cooperate and differing site condition. On May 4, 2015 Persons submitted its formal claim document per Standard Specification 105.18 in the sum of \$836,830.00. The Resident Engineer denied the claim on June 19, 2015. Persons filed an appeal to the Chief Engineer on August 4, 2015. The Chief Engineer denied the appeal on September 18, 2015. Persons then requested an extension of time to appeal to the Claims Commission. On March 1, 2016 the Chief Engineer granted the extension. This Complaint is filed prior to the expiration of the extension. Copies of correspondence evidencing the events described in this paragraph 16 are attached as Exhibit J.

WHEREFORE, R. L. Persons Construction, Inc. prays the Claims Commission
allow and award its claim in the sum of \$836,830.00 and for all other appropriate relief.



Jack East III
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MAR 15 2018

**BEFORE THE STATE CLAIMS COMMISSION
OF THE STATE OF ARKANSAS**

RECEIVED

R.L. PERSONS CONSTRUCTION, INC.

CLAIMANT

VS. CLAIM NO. 17-0129-CC

**ARKANSAS STATE HIGHWAY AND
TRANSPORTATION DEPARTMENT,
ARKANSAS STATE HIGHWAY COMMISSION**

RESPONDENTS

AMENDED COMPLAINT


Comes now R.L. Persons Construction, Inc. (Persons), and for its Amended Complaint against the Arkansas State Highway Commission (ASHC) and Arkansas State Highway & Transportation Department (AHTD) states:

1. All allegations contained in the Complaint are adopted and restated except as modified in this Amended Complaint.
2. The purpose of this Amended Complaint is to increase the claim asserted by Persons in accordance with industry accepted standards regarding costs.
3. Complaint paragraph sixteen is Amended to read as follows:

16. Persons has incurred \$1,095,326.00 in additional costs due to the AHTD's interference with Person's ability to perform the contract, failure to respond to

legitimate change order requests, failure to cooperate and differing site condition. On May 4, 2015 Persons submitted its formal claim document per Standard Specification 105.18. The Resident Engineer denied the claim on June 19, 2015. Persons filed an appeal to the Chief Engineer on August 4, 2015. The Chief Engineer denied the appeal on September 18, 2015. Persons then requested an extension of time to appeal to the Claims Commission. On March 1, 2016 the Chief Engineer granted the extension. The Complaint was filed prior to the expiration of the extension. Copies of correspondence evidencing the events described in this paragraph 16 are attached as Exhibit J. The additional costs incurred by Persons at accepted industry and AHTD equipment rates for the 22 month delay is reflected on Exhibit K attached hereto and incorporated by reference.

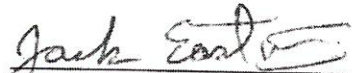
WHEREFORE, R. L. Persons Construction, Inc. prays the Claims Commission allow and award its claim in the sum of \$1,095,326.00 and for all other appropriate relief.


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CERTIFICATE OF SERVICE

I, Jack East III, Attorney at Law, do hereby certify that I have served the foregoing by depositing a copy in the United States Mail, Postage prepaid, this 13th day of March, 2018, addressed to:

Mark Umeda
Staff Attorney
Arkansas State Highway and
Transportation Department
P.O. Box 2261
Little Rock, AR 72203-2261


Jack East III

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

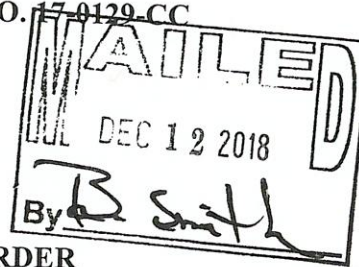
R.L. PERSONS CONSTRUCTION, INC.

CLAIMANT

V.

CLAIM NO. 17-0129-CC

ARKANSAS STATE HIGHWAY
COMMISSION; ARKANSAS
DEPARTMENT OF TRANSPORTATION



RESPONDENT

ORDER

Now before the Arkansas State Claims Commission (the "Claims Commission") is the claim of R.L. Persons Construction, Inc. (the "Claimant") against the Arkansas State Highway Commission (the "Highway Commission") and the Arkansas Department of Transportation (the "Department") (collectively, the "Respondents"). At the hearing held on June 15, 2018, Jack East III represented Claimant, and Mark Umeda appeared on behalf of Respondents. At the conclusion of the hearing, the Claims Commission requested additional briefing by the parties. Based upon a review of the pleadings and post-hearing briefing, testimony of witnesses, argument of counsel, and the law of Arkansas, the Claims Commission unanimously finds as follows:

1. The Claims Commission has jurisdiction to hear this claim pursuant to Ark. Code Ann. § 19-10-204(a).
2. This claim centers on a dispute between the parties regarding the delays experienced by Claimant prior to completion of 1.080 miles of roadway in Blytheville, Arkansas (the "Project"). Claimant seeks \$1,095,326.00 in damages as a result of Respondents' alleged delays.
3. At the beginning of the hearing, Respondents admitted liability for 12 months of delay from June 2014 through May 2015. However, Respondents did not agree with Claimant's evaluation of the delay damages, instead valuing Claimant's damages at \$105,469.44.

4. The parties also discussed the “winter shutdown periods” or “dead periods” each year from December through March, in which the Department does not charge working days because of the difficult weather conditions typical for that time of year.

Witness Testimony

5. Kris Powell, Claimant’s secretary/treasurer and project manager for this Project, testified regarding the need for soil stabilization materials, which was a bid item for the Project. Powell stated that Claimant used normal efforts to process the soil but that it remained unstable. Powell testified as to the equipment on site during the duration of the Project. On cross examination, counsel for Respondents pointed Powell to various correspondence to determine when Claimant first requested the use of soil stabilization materials, but Powell noted that it could not use soil stabilization materials unless the Department provided the depth and ratio information for the soil stabilization materials. On redirect, Powell confirmed that he knew what equipment was on site because he was also on site and saw the equipment.

6. Randy Persons, Claimant’s president and owner, testified that he helped to prepare the bid for this Project and that he anticipated the Project being completed in late fall 2013. Claimant testified that the \$6.6 million bond “tapped them out” and that the equipment identified in Claimant’s Hearing Exhibit 21 (Cat 332 Excavator, Bomag Roller, Broom, Case Backhoe, John Deere 750J Dozer, and John Deere Motor Grader, which is collectively referred to herein as the “Equipment”) was left on site because Claimant had to be ready to get back to work as soon as Respondents provided the necessary information.

7. Deric Wyatt, the Department’s district engineer for District 2, testified that he was the resident engineer on this project until 2013. Wyatt also testified that he handled “2 to 3 dozen jobs” in Mississippi County. Wyatt stated that soil stabilization was approved in December 2013. On cross examination, Wyatt testified that the ratio and depth information for the soil stabilization

materials was typically 6-7% and 12-18 inches but that this information was discussed verbally with Claimant's employees and not reduced to writing.

8. Jonathan McKinney, the Department's inspector for the Project, testified that he inspected the Project site "every day" to determine what work was being performed and what equipment was on site. On cross examination, McKinney admitted that while the daily work reports do not reflect the Case Backhoe being on site through the duration of the Project, it may have been on site the whole time.

Post-Hearing Briefing

9. Claimant submitted post-hearing briefing on (1) the equipment Claimant had on site; (2) the length of the delay caused by Respondents; and (3) whether the delay damages had been established. Claimant stated also that Respondents' concession at the hearing that it delayed Claimant's performance by twelve months "was the very first time ARDOT has admitted causing any delay to Persons' performance."

10. As to the equipment issue, Claimant argued that the testimony of Claimant's witnesses demonstrates the presence of the Equipment on the job site throughout the Project delays and that the Department's listing of the Equipment on site in the daily work reports is inaccurate and unreliable. Claimant also pointed to the testimony of McKinney, whose reports showed no equipment on site during winter/spring 2014 but who conceded that the Case 580 backhoe may have been on site for the duration of the Project. Claimant noted that where no work is listed on the daily work report, there is no equipment listed. In Claimant's November 20, 2014, correspondence to the Department, Claimant submitted its list of equipment on site, but the Department never disputed the existence of the equipment on site. Claimant argued that in light of the significant inconsistencies in the Department's daily work reports, the greater weight of evidence establishes that the Equipment was on site for the duration of the Project.

11. As to the length of delay, Claimant argued that it planned to work during the winter shutdown periods (also referred to as “dead periods” herein) but was prevented from doing so by the Department’s failure to furnish accurate plans, to allow soil stabilization, and to authorize flowable fill to address the water in the trenches. Claimant asserted that Respondents were responsible for 22 months of delay, not just 12 months.

12. As to the damage calculations, Claimant argued that the rental rate for the Equipment on site, as well as the two pickup trucks, is the proper measure of damages because Claimant lost the use of his income-producing equipment during the delay period. Claimant pointed to the Persons’ testimony that he was losing money by having the Equipment sit on the site. Claimant asserted that “standby” rates do not compensate for lost income or lost use of the Equipment. Claimant also asserted that inclusion of Powell’s salary and vehicle was proper because Powell spent most of his time in the field and in the office on this Project.

13. Respondents also submitted post-hearing briefing, which addressed the issues of soil stabilization, use of bedding and backfill of pipes, information on 10th Street drainage, plan and profile sheets for the Project, and information from a neighboring project. Respondents argued that the first request related to these issues came on June 18, 2014, and that Claimant received all information on May 8, 2015. Respondents explained that this is why Respondents admitted liability from June 2014 through May 2015.

14. As to the soil stabilization, Respondents argued that the use of soil stabilization materials was approved in 2013 but not used by Claimant until June 2015.

15. Respondents disagreed with Claimant’s calculation that there were 22 months of delays and attributed the disagreement to Claimant’s miscalculation of the dead periods. Claimant stated that between October 2012 and May 2015, two dead periods had occurred, but Respondents asserted that there were three dead periods (December 2012–March 2013, December 2013–March

2014, December 2014–March 2015), which reduces the alleged 22 months of delay to, at most, 19 months of delay.

16. Respondents argued that weather was a significant factor in this Project and that there were nearly 18 months of poor working conditions in 2012, 2013, and 2014. Respondents stated that the Department did not charge any working days when weather or ground conditions prevented the Project from progressing.

17. Respondents argued that it should not be responsible for Powell's yearly salary when he was not on the job site every day during the delays. Respondents asserted that \$33,784.01 is the appropriate measure of damages for Claimant's labor costs.

18. Respondents argued that the Equipment was not on site during the entire duration of the Project. In support, Respondents contrasted the deposition testimony of Mike Mazingo, who testified that he was the only one to move equipment on and off the job site, with Claimant's internal work reports, in which there is a note that "Dennis" also moved equipment off the job site.

19. Respondents argued that the *Blue Book* standby rate is the proper rate to compensate Claimant for the Equipment costs attributable to the delays, as opposed to the *Blue Book* operational rate favored by Claimant. Respondents asserted that because the equipment was not being used during that time period, the operational or rental rate is not appropriate. Instead, Respondents stated that Claimant is only entitled to reimbursement for "fixed costs such as depreciation, cost of facilities capital and indirect costs" for the Equipment not being used during the delays. Respondents did find that the active rate was appropriate for the project manager's and superintendent's pickup trucks since those were active during the time period.

20. Respondents also submitted a response to Claimant's post-hearing briefing, in which it noted that the Contract required Claimant to determine the appropriate ratio and depth for

the soil stabilization “through trial mixing.” Respondents disagreed that the Department was responsible for providing the ratio and depth information to Claimant.

Findings of Fact

21. The Claims Commission finds that on or about October 8, 2012, Claimant and the Highway Commission entered into a contract for construction of 1.080 miles of roadway in Blytheville, Arkansas (the “Contract”).

22. The Claims Commission finds that, as part of the Contract, Claimant had to complete the Project in 135 working days.

23. The Claims Commission finds that Claimant expected to complete the Project before the end of 2013.

24. The Claims Commission finds that the Project was not substantially completed until July 19, 2016.

25. The Claims Commission finds that the Project was completed within the contractual number of working days.

26. The Claims Commission finds that Respondents admitted to 12 months of delay from June 2014 through May 2015. The Claims Commission appreciates Respondents’ candor.

27. The Claims Commission finds that Respondents valued the 12 months of delay at \$105,469.44. This amount represents \$33,784.01 in labor costs for the project manager, general superintendent, and general labor; \$37,336.98 in costs for the Equipment and two pickup trucks; \$19,250.00 in area safety manager costs; and \$14,280.00 in office costs, including field offices, telephone/fax, internet, supplies, job signage, restroom, water/ice, and safety supplies.

28. The Claims Commission finds that soil stabilization materials were bid as part of the Contract. The Claims Commission finds that soil stabilization is to be used when the soil is unstable and cannot be stabilized through normal drying and compacting efforts.

29. The Claims Commission finds that the Department did not charge working days during the dead periods from December through March each year.

30. The Claims Commission finds that on May 4, 2015, Powell wrote a letter to the Department stating that 31 months had passed since the Project began and that Claimant had only been able to work three months of that time. In that letter, Powell calculated that there had been two dead periods in that time, which left a balance of 22 months in which Claimant incurred “monthly overhead/general condition costs.”

31. The Claims Commission finds that Respondents are correct that between October 2012 and May 2015, there were actually three dead periods, which occurred December 2012–March 2013, December 2013–March 2014, and December 2014–March 2015. As such, there remains a balance of 19 months.

32. The Claims Commission finds that the weather was a factor during 2012 and spring/summer 2013.

33. The Claims Commission finds that Claimant intended to do some work during the dead periods and that some Project items could be completed in rainy weather.

34. The Claims Commission finds that soil stabilization—and Claimant’s request to use the bid item—was an ongoing discussion beginning in 2013, as evidenced by the following:

- October 8, 2013 – Claimant sent correspondence to the Department referencing the amount of time Claimant spent processing the soil “before it was determined that soil stabilization should be used.”
- June 24, 2014 – Powell typed a note stating that he “[c]alled and asked John Mormon about the outstanding change orders (. . . Soil Stabilization) and the concrete mix designs I submitted to him on 6/18/14 . . . I made him aware of the ground water that was seeping into the sediment basin we dug in the ditch we dug behind the office trailer. He was not aware. He said he was going to get with Jon Mckinney and figure out the elevation. He said that they would have to get a plan together so we could figure out how to progress the project. . . .”

- July 25, 2014 – Powell typed a note stating that he “[m]et with [Department employees] Walter McMillian, Alan Walter, John Mormon, Jon Mckinney, Kevin McLean, Logan, Travis Brasher. Randy, Kevin, Gary & Kris were there from RLP . . . We also discussed the following: 1. Soil Stabilization (Depth, % Cement). 2. Bedding & Backfill of pipe. . . . They said they would check into it and get back to us.
- August 15, 2014 – Powell emailed various Department employees stating that “[a]s Randy brought up in the meeting, we believe that we have been charged 20-25 days more than applicable due to re-working the sub-grade instead of using the bid item ‘Soil Stabilization.’ We have asked to use this bid item several times, but were not given the go ahead.” In that same email, while discussing the costs that Claimant incurred as a result of the delays, Powell stated that “[w]e have made several suggestions and have given several options to expedite the project over the last two years that have been turned down.”
- August 27, 2014 – Powell emailed various Department employees stating that if the “outstanding issues” could be resolved (including soil stabilization), Claimant could work through the fall and winter, but that “[i]f we do not get answers soon, we will have no choice but to shut this job down for the season. We have lost the majority of this season waiting on decisions to be made.”
- August 28, 2014 – Department employee Johnathan Mormon sent correspondence stating that “[s]ince the previous review of the subsurface soil moisture was performed in July numerous days of drying summer weather have occurred. Please provide personnel and equipment to investigate the current condition of the subgrade and possibility of resuming work on the project as soon as possible.”
- August 29, 2014 – Powell responded to Mormon’s letter, stating that “during the pre-construction conference it was brought up by the AHTD that if we encountered any unsuitable conditions, we would be allowed to use the “Soil Stabilization” bid item. We spent multiple days working the sub-grade as your inspectors can attest to.”
- September 4, 2014 – Powell typed a note stating that he talked with Mormon about the “other outstanding issues (Soil Stabilization . . .). He said he was still working on it.”
- September 8, 2014 – Powell typed a note stating that he talked with Mormon, who advised that “they are talking about getting soils [sic] samples of the dirt to decide on the soil stabilization.”
- September 11, 2014 – Mormon sent correspondence to Powell stating that on 9/9/14, the Department “performed exploration activities to determine if the subsurface soil conditions remain a factor in the construction of the project” and decided that Claimant could continue work on the project. Somewhat ironically,

Mormon noted that “[t]imely prosecution of the work is an essential element of the Contract, and [it] is imperative that the work be pressed vigorously to completion.”

- September 12, 2014 – Powell responded to Mormon’s letter, stating that even if soil conditions would allow Claimant’s employees to work, “we still need answers to the other various issues [including soil stabilization] that have been requested of you, some of which have been asked over six months ago . . . See below unresolved issues that are still preventing us from going back to work. We cannot progress this project without all these issues being resolved. All of these issues work together in hindering our progression of this project. We did not bid this project to piecemeal it together. When we bid this project, we intended on working on all items not just trying to install part of the pipe.”
- September 18, 2014 – Powell typed a note stating that he spoke with [Department employee] Walter McMillian, who said that “he would personally take a look at all the outstanding issues and try to get some resolve[d].”
- October 1, 2014 – Powell typed a note stating that he “called Walter McMillian and asked about setting up a meeting with Ralph Hall and John Regenold. Walter did not give me any response on this . . . At the end of our conversation, he asked what we needed to go back to work. I told him that we needed answers to all of our outstanding issues.”
- October 9, 2014 – Mormon sent correspondence to Powell suggesting a ratio and depth for soil stabilization (6% cement at a depth of 12-16”) but stating that “[b]efore allowing use of this item,” certain locations needed to be addressed.
- October 10, 2014 – Powell sent correspondence to McMillian stating that “[i]t has been 2 ½ months since our 7/25/14 meeting . . . [s]ince the meeting there have been multiple emails, letters, and conversations and still no resolution.”
- October 22, 2014 – Powell sent correspondence to the Department’s chief engineer Ralph Hall appealing Mormon’s decision regarding time charges, stating that Claimant was “charged 20-25 days last season that should not have been charged due to us struggling with the subgrade when we could have used the contract pay item ‘Soil Stabilization.’”
- November 11, 2014 – Powell sent correspondence to Mormon stating that Claimant “will resume work when weather and conditions allow. However, what will happen when we encounter unsuitable soil conditions once again? We assume AHTD is prepared to reimburse us our cost to prove, yet again, the soils are unsatisfactory.”
- November 19, 2014 – Powell spoke with [Department employee] Steve Peoples about the “unsuitable soil.” Powell stated that Claimant did not know what to do besides contacting an attorney. Peoples told Powell “to let him work on it before we contact an attorney.”

- November 20, 2014 – Powell sent correspondence to Mormon requesting a price increase due to differing site conditions including “unsuitable soil.”
- November 21, 2014 – Powell sent correspondence to Mormon stating that “[a]s you know we haven’t been able to work because the Department has not given RL Persons any resolution to the outstanding issues on this project.”
- December 2, 2014 – Powell sent correspondence to Mormon disputing the days charged in the 11/21/14 time charge letter, stating “[a]s you are aware, we have issues still outstanding on this project. The issues play a major role in us being able to resume work. Until the issues are resolved, we are unable to utilize 60% of our workforce.”
- December 12, 2014 – Powell sent a follow-up email to Peoples, asking whether Peoples has been able to look into this matter and stating “[w]e have not received any resolution to the problems we are facing on this project.”
- December 16, 2014 – Powell sent correspondence to Mormon disputing the days charged in the 12/8/14 time charge letter, stating “[a]s you are aware, we have issues still outstanding on this project. The issues play a major role in us being able to resume work. Until the issues are resolved, we are unable to utilize 60% of our workforce.”
- January 16, 2015 – Mormon sent correspondence to Powell stating that while “[d]iscussions of the soil conditions have been extensive but the soil conditions have only been verified by actual work on the western part of the project.” Mormon also stated that “[t]he Department is evaluating the use of the Soil Stabilization item . . . Additional information may be requested to resolve these issues.”
- January 28, 2015 – Powell sent correspondence to Mormon referencing a 1/6/15 meeting in Little Rock, in which Claimant was advised by the Department that Claimant “would have resolution within 1-2 weeks in regarding to the . . . soil stabilization.” In response, Claimant agreed to “mobilize” to the Project and did mobilize, “but most issues are still not resolved,” including the unsuitable soil conditions.
- January 28, 2015 – Powell sent a second letter to Mormon referencing the 1/6/15 meeting, in which “[d]iscussions were also brought up about the use of soil stabilization and how it is not utilized on fill material.” Powell spoke with the prior project manager, Jeff Alford, and referenced their conversation by stating that Department employee Deric Wyatt said that “the job had to be brought up to finish grade and shown to be unstable before it would even be considered to use soil stabilization. Before Deric left and after numerous areas of instability were proven, RLP was told that we would be soil stabilizing the project from the beginning to Elm Street. The efforts we have made to get the unstable existing dirt to pass compaction testing and the agreement with Deric Wyatt to use soil stabilization on the finish grade, whether existing subgrade or fill, is yet more reason to only charge

20-25 days of actual time used. The rest of the time that has been charged solely has to do with dealing with the unstable existing subgrade. In all reality, we have very few days that have not been spent on issue that have not been associated with unstable subgrade, whether it be roadway construction or pipe laying.”

- May 8, 2015 – Department employee Aaron Vowell sent correspondence to Powell, stating that “[t]he Department has processed change orders for “Flow Fill, Stone Backfill, and Soil Stabilization to be utilized if unsuitable material is encountered.”

35. The Claims Commission finds that the number of times Claimant had to ask for information regarding soil stabilization is staggering.

36. The Claims Commission finds that there was no testimony or evidence presented to explain Respondents’ delay in providing this information to Claimant.

37. The Claims Commission finds that Respondents’ argument that Claimant was responsible for determining the ratio and depth information for the use of soil stabilization is negated by Mormon’s October 9, 2014, correspondence to Powell suggesting a 6% ratio at a depth of 12-16”, as well as Powell’s July 25, 2014, note that “Soil Stabilization (Depth, % Cement)” was discussed with various employees of Respondents at a meeting that day, with the employees stating that they would “check into it and get back to” Claimant.

38. Moreover, the Claims Commission finds the Contract to be ambiguous when it states merely that “[t]he rate of application shall be determined by trial mixing and shall be approved by the Engineer,” when it does not specify who is responsible for the trial mixing, especially since the Department frequently had employees on the Project site.

39. The Claims Commission finds that Respondents’ failure to provide other information regarding bedding/backfill of pipe, 10th Street drop inlets/pipe, plan and profile sheets, and information regarding a neighboring job also delayed the Project through 2014 and 2015.

40. The Claims Commission finds that Claimant asked Respondents for a meeting with various employees of Respondents responsible for making decisions on the Project, including the

Highway Commission chairman, as well as the Department's district engineer, resident engineer, and chief engineer, at least four times between August 29, 2014, and October 10, 2014. The Claims Commission finds that, in response to Claimant's repeated meeting requests, the Department's chief engineer sent correspondence on November 7, 2014, advising Claimant that its "requested meeting is not deemed necessary at this time."

41. The Claims Commission finds that, with all of the delays experienced on this Project, the Respondents' decision not to meet with Claimant was inexcusable.

42. As to the Equipment on site, the Claims Commission finds that the Department's daily work reports are remarkably inconsistent and cannot be relied upon to determine what equipment Claimant maintained on site through the delays. The Claims Commission finds the inconsistency of the daily work reports to be troubling, especially in light of the weight placed upon these reports by Respondents. Given the expense and effort required to move heavy equipment to and from the Project site, the Claims Commission finds the following argument made by Claimant in post-hearing briefing to be especially on point:

. . . if ARDOT reports are entirely accurate then one must believe that RLP was incurring the significant expense of hauling equipment to and from the site every time some item of work occurred. See, for example, the . . . entries for Friday, January 30, 2015 listing six pieces of heavy equipment and work being performed. Then note that on Monday, February 2, 2015 no equipment is shown – and no work. Then note that on Tuesday, February 3, 2015 RLP performs work with five pieces of heavy equipment, two pieces of which are listed on January 30 but three of which are not. If ARDOT reports are to be believed RLP was moving equipment on and off site at great expenses on a daily basis. This, of course, makes no sense.

43. The Claims Commission finds Powell's testimony regarding the Equipment being on site during the duration of the delays was more credible than the information and testimony presented by Respondents.

44. The Claims Commission finds that Claimant presented evidence that the Equipment was on site for 16 months of the delays.

45. As to Powell's salary, the Claims Commission finds that there was no testimony to establish that Powell was on site or working on the Project exclusively for the period of the delays such that Claimant should be reimbursed Powell's entire salary. The Claims Commission finds Respondents' assessment of Powell's labor costs to be credible and reasonable. This same analysis applies to the general superintendent's salary and Claimant's general labor costs.

46. The Claims Commission finds that the parties are in agreement regarding the monthly office costs and costs for an area safety manager.

Conclusions of Law

47. The Claims Commission finds that Respondents had an implied duty of cooperation and not to interfere with timely performance. *See Housing Authority of City of Texarkana v. E.W. Johnson Const. Co., Inc.*, 264 Ark. 523, 534, 573 S.W.2d 316, 323 (1978) (“... an owner may not prevent a contractor's early completion of his assignment with impunity”).

48. By a preponderance of the evidence, the Claims Commission finds that Respondents breached this implied duty by delaying the Project from October 8, 2013, until May 4, 2015, which is almost nineteen months to the day.

49. Although this nineteen-month period includes dead periods, Claimant was planning to work during the dead periods if Claimant could get the information it was requesting from Respondents. This is evidenced by Powell's August 27, 2014, email to various employees of Respondents stating that Claimant could work through the fall and winter but that “[i]f we do not get answers soon, we will have no choice but to shut this job down for the season.” Moreover, Respondents admitted liability for delays from June 2014 through May 2015, which included a dead period. As such, the Claims Commission finds that Respondents are liable for 19 months of delay.

50. The Claims Commission finds the fact that Claimant completed the Project within the contractual number of working days to be immaterial. See *E.W. Johnson*, 264 Ark. at 534, 573 S.W.2d at 322 (an owner's breach "may not be cured by simply extending the time of the performance of a contractor's assignment").

51. The Claims Commission finds that any ambiguities in the written contract, including as to which party was responsible for providing ratio and depth information for soil stabilization, "are construed strictly against the drafter." *Emis v. Emis*, 2017 Ark. App. 372, 524 S.W.3d 444 (2017).

52. As for the amount of damages, the parties are in agreement as to the monthly delay costs associated with the offices (\$1,190/month). Multiplying that monthly cost by 19 months of delays, the Claims Commission finds that Respondents are liable to Claimant in the amount of \$22,610.00 for office costs.

53. As for the area safety manager costs, the parties are in agreement as to the monthly delay costs (\$875/month). Multiplying that monthly cost by 19 months of delays, the Claims Commission finds that Respondents are liable to Claimant in the amount of \$16,625.00 for area safety manager costs.

54. As for the labor costs, the Claims Commission finds that Respondents' monthly labor calculations (\$2,815.34/month) are reasonable. Multiplying that monthly cost by 19 months of delays, the Claims Commission finds that Respondents are liable to Claimant in the amount of \$53,491.46 for labor costs.

55. The Claims Commission finds that reimbursement for costs, especially equipment costs, is not dictated by the Contract or under Arkansas law. As such, the Claims Commission reviewed each category of damages separately to determine a reasonable amount.

56. With regard to the two pickup trucks, the Claims Commission finds that the active rate utilized by Respondents is a reasonable measure of damages (\$672.34/month for Powell's pickup truck, \$631.62/month for the general superintendent's truck) and that those monthly costs multiplied by 19 months equals \$24,775.24. Because the pickup trucks were being used by Powell and the general superintendent during this period, the Claims Commission finds that the rental rate favored by Claimant is not the appropriate measure of damages.

57. As for the Equipment costs, the Claims Commission finds that the testimony of Claimant's witnesses regarding the Equipment was far more credible than Respondents' heavy emphasis on the inconsistent daily work reports. The Claims Commission finds that under the preponderance of the evidence, the Equipment was on site for the sixteen months, as established by Claimant's Hearing Exhibit 21 and the testimony of Claimant's witnesses. The Claims Commission finds that the standby rate does not fully compensate Claimant for its damages occasioned by Respondents' hindrance of Claimant's progress on the Project. As such, the Claims Commission finds that the operational rate utilized by Claimant for the Equipment is the better measure of damages. Multiplying the monthly rate of \$26,000.00 by the sixteen months in which the Equipment was on site but unused due to Respondents' delays, the total amount of damages for the Equipment is \$416,000.00.

58. Had Claimant been able to finish the Project without Respondents' delays, Claimant could have moved on to other projects with the Equipment. Had Claimant known that there would be sixteen months of delays on the Project, Claimant could have mitigated its damages by renting out the Equipment or utilizing it on other projects. But, Claimant had to be ready to begin work as soon as Respondents provided the information, which kept Claimant from being able to commit the Equipment to other projects. Also, Claimant's ability to begin other projects would have been hampered by the fact that so much of Claimant's bonding capability was tied up

with this Project (this Project represented over 75% of Claimant's bonding capability). Respondent's delays did not just affect this Project – Respondents' delays affected Claimant's business. While the Claims Commission is not making any award based upon generalized damage to Claimant's business, the Claims Commission finds it important to note that Respondents' delays undermined both the Project and Claimant's business prospects.

59. As such, the Claims Commission hereby unanimously AWARDS Claimant \$533,501.70 and herein refers this claim to the General Assembly pursuant to Ark. Code Ann. § 19-10-215 for approval and placement on an appropriations bill.

IT IS SO ORDERED.

Henry C. Kinslow

ARKANSAS STATE CLAIMS COMMISSION
Henry Kinslow, Co-Chair

Bill Lancaster

ARKANSAS STATE CLAIMS COMMISSION
Bill Lancaster

Mica Strother

ARKANSAS STATE CLAIMS COMMISSION
Mica Strother

DATE: November 5, 2018

Notice(s) which may apply to your claim

- (1) A party has forty (40) days from the date of this Order to file a Motion for Reconsideration or a Notice of Appeal with the Claims Commission. Ark. Code Ann. § 19-10-211(b). If a Motion for Reconsideration is denied, that party then has twenty (20) days from the date of the denial of the Motion for Reconsideration to file a Notice of Appeal with the Claims Commission. Ark. Code Ann. § 19-10-211(b)(3). A decision of the Claims Commission may only be appealed to the General Assembly. Ark. Code Ann. § 19-10-211(a).
- (2) If a Claimant is awarded less than \$15,000.00 by the Claims Commission at hearing, that claim is held forty (40) days from the date of disposition before payment will be processed. *See* Ark. Code Ann. § 19-10-211(b). Note: This does not apply to agency admissions of liability and negotiated settlement agreements.
- (3) Awards or negotiated settlement agreements of \$15,000.00 or more are referred to the General Assembly for approval and authorization to pay. Ark. Code Ann. § 19-10-215(b).