

Arkansas
State Claims Commission
MAY 10 2018

BEFORE THE STATE CLAIMS COMMISSION RECEIVED
Of the State of Arkansas

Mr.
Mrs.
Ms.
Miss
Tanner Construction Company, Inc. Claimant

Do Not Write in These Spaces
Claim No. _____
Date Filed _____
(Month) (Day) (Year)
Amount of Claim \$ _____
Fund _____

vs.
State of Arkansas, Respondent

COMPLAINT

Tanner Construction Company, Inc. the above named Claimant, of [redacted] Laurel, (Name) (Street or R.F.D. & No.) (City)
MS 39440 [redacted] County of Jones represented by Patrick D. Wilson, Wright, Lindsey & Jennings LLP (State) (Zip Code) (Daytime Phone No.) (Legal Counsel, if any, for Claim)
of 200 W. Capitol Ave., Suite 2300, Little Rock, AR 72201 501-212-1343 501-376-9442 (Street and No.) (City) (State) (Zip Code) (Phone No.) (Fax No.) says:

State agency involved: Arkansas Department of Transportation Amount sought: \$2,415,377.63

Month, day, year and place of incident or service: December 7, 2017, letter from Emanuel Banks of Arkansas Department of Transportation ("ARDOT")

Explanation:

Explanation: Tanner Construction Company, Inc. ("Tanner") is a highway contractor in a dispute with ARDOT over additional costs associated with Job No. 005836, the construction of a bridge and approaches over the White River in Jackson County. The bridge consists of twenty foundation bents, or piers, supporting the superstructure for the bridge. Those piers are driven deep into the earth and rock well below the bed of the White River. Two of the twenty piers are at the edge of the river. To erect those two piers, ARDOT's plans called for the construction of cofferdams. Cofferdams are enclosures built within bodies of water and constructed to allow the water to be pumped out of the enclosed area, creating a dry work environment so that a bridge pier can be put in place. Large steel sheets, commonly referred to as sheet piles, are typically used as the walls for the cofferdams. During construction of one of these two cofferdams, the Pier 2 cofferdam, Tanner encountered significant obstructions that were not noted in ARDOT's plans and apparently unknown to all concerned. Specifically, there was a large timber and a metal pipe which penetrated two of the four side walls of the cofferdam. These obstructions made the construction of the Pier 2 cofferdam much more difficult, requiring significant additional materials and labor, far exceeding that contemplated by ARDOT's plans. The obstructions thus constituted a "Differing Site Condition" as that term is used by ARDOT and in the industry. Tanner formally notified ARDOT of this "Differing Site Condition" on April 27, 2016. That letter is attached as Exhibit 1. After further discussion, ARDOT acknowledged the differing site condition through a letter dated April 17, 2017, which stated in part "It has been determined that the timber and metal materials discovered constitutes a "Differing Site Condition" in this situation. You may submit documentation supporting your costs and lost time to the Resident Engineer for his review." That letter is attached as Exhibit 2.

Tanner continued to keep ARDOT informed of the progress of the work and the delays and associated costs from the differing site condition. Tanner then formally submitted a request for equitable adjustment on June 12, 2017. A color copy of that request for equitable adjustment is attached as Exhibit 3.

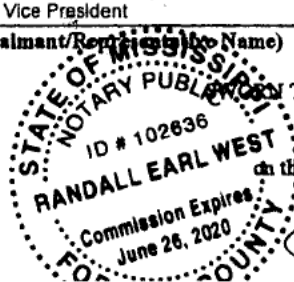
ARDOT responded by its letter of July 17, 2017 and stated it would only consider the costs and time for driving and replacing the damaged sheet piles and removing the obstructions. However, that ignores the significant other costs and delay expenses Tanner incurred. ARDOT further stated it would not consider any comparisons to Pier 1. That letter is attached as Exhibit 4. However, a comparison to Pier 1 is appropriate and consistent with the "measured mile approach" commonly used in these situations. That approach involves comparing the costs and time involved in the construction of an unimpacted item, here Pier 1, to the costs and time associated with an impacted item like Pier 2. That measured mile approach is what Tanner's consultant used to prepare the request for equitable adjustment. After further discussion, ARDOT sent its letter dated December 7, 2017, rejecting much of the request for equitable adjustment. ARDOT did acknowledge again the differing site conditions and awarded additional compensation in the amount of \$509,916.32 and thirty one additional working days. That letter is attached as Exhibit 5. Tanner responded by its letter of February 1, 2018 and acknowledged the partial payment and additional working days but stated ARDOT did not take into account the full impact of the differing site condition. Tanner provided a costs summary and additional detail. Tanner also made a reasonable settlement offer. That letter, with the settlement offer redacted, is attached as Exhibit 6. ARDOT responded by its letter of February 23, 2018, and refused to provide any additional compensation or engage in further discussion. That letter is attached as Exhibit 7. ARDOT has thus breached its contract with Tanner, which breach has directly and proximately caused Tanner damages of \$2,415,377.63. Tanner is also entitled to have 107 additional working days added to the end of the contract.

Yes; when? June 12, 2017; to whom? Arkansas Department of Transportation
(Yes or No) (Month) (Day) (Year) (Department)
and that the following action was taken thereon: ARDOT granted part of Tanner Construction's request for equitable adjustment and awarded \$509,916.32 and a return of thirty-one working days charged for the work, but denied the remainder of Tanner Construction's claim, \$2,415,377.63 and additional days.
and that \$ 509,916.32 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 verily believes that they are true.

Andrew B. Tanner, Vice President (Print Claimant/Representative Name) Andrew B. Tanner (Signature of Claimant/Representative)

TO and subscribed before me at LAUREL MS (City) (State)
(SEAL) on this 9 TH day of MAY 2018 (Date) (Month) (Year)



AUG 17 2018

RECEIVED

BEFORE THE STATE CLAIMS COMMISSION
Of the State of Arkansas

Mr.
Mrs.
Ms.
Miss
Tanner Construction Company, Inc. Claimant

Do Not Write in These Spaces		
Claim No.	180940	
Date Filed	(Month)	(Day) (Year)
Amount of Claim \$		
Fund		

vs.

State of Arkansas, Respondent

AMENDED COMPLAINT

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 MS 39440 [redacted] County of Jones represented by Patrick D. Wilson, Wright, Lindsey & Jennings LLP (State) (Zip Code) (Daytime Phone No.) (Legal Counsel, if any, for Claim)
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Yes ; when? June 12, 2017 ; to whom? Arkansas Department of Transportation (Yes or No) (Month) (Day) (Year) (Department)

: and that the following action was taken thereon: ARDOT granted part of Tanner Construction's request for equitable adjustment and awarded \$509,916.32 and a return of thirty-one working days charged for the work, but denied the remainder of Tanner Construction's claim, \$2,415,377.63 and additional days.

and that \$ 509,916.32 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 verily believes that they are true.

Andrew B. Tanner, Vice President (Print Claimant/Representative Name)

Andrew B. Tanner (Signature of Claimant/Representative)

SWORN TO and subscribed before me at LAUREL MS (City) (State)

on this 16TH day of August, 2018 (Date) (Month) (Year)



BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

TANNER CONSTRUCTION COMPANY, INC.

CLAIMANT

V.

CLAIM NO. 180940

**ARKANSAS DEPARTMENT OF
TRANSPORTATION**

RESPONDENT

ORDER

Now before the Arkansas State Claims Commission (the “Claims Commission”) is the claim of Tanner Construction Company, Inc. (the “Claimant”) against the Arkansas Department of Transportation (the “Respondent”). At the hearing held on June 26, 2020, Patrick Wilson represented Claimant. Mark Umeda and Trella Sparks appeared on behalf of Respondent. Based upon a review of the pleadings, 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 compensation due to Claimant as a result of a differing site condition on a project involving the construction of a new bridge over the White River in Jackson County, Arkansas (the “Project”).

3. As part of the Project, Claimant had to construct cofferdams, which are “box-shaped enclosures built within bodies of water and constructed to allow the water to be pumped out of the enclosed area, creating a dry work environment so that the bridge piers can be put in place.” Cl’s Prehearing Brief at p. 1–2. Respondent similarly described cofferdams as “enclosed structures built within a body of water . . . [to] allow[] the enclosed area to be dewatered.” *See* Resp’s Prehearing Brief at p. 1.

4. The Project included construction of bridge piers, which “support[] the superstructure for the bridge.” *See* Cl’s Prehearing Brief at p. 1. Of the numerous piers involved in the Project, the piers on either side of the river (referred to by the parties and herein as “Pier 1” and “Pier 2”) are the piers at issue in this claim. *See id.*

5. The parties agree that, while constructing the Pier 2 cofferdam, Claimant encountered subsurface obstructions that damaged the cofferdam, namely a large piece of timber and a large metal pipe. *See* Cl’s Prehearing Brief at p. 2 (“This timber and metal pipe split and damaged two of the four sheet piles as they were driven down to form the walls of the cofferdam, creating two separate breaches in an otherwise watertight structure”); Resp’s Prehearing Brief at p. 1 (“These obstructions caused some damage to the cofferdam and were eventually removed in order to complete the Pier 2 cofferdam”).

6. The parties agree that these obstructions created a “differing site condition” under the contract and that Claimant was entitled to additional compensation and working days. *See* Cl’s Prehearing Brief at p. 6; Resp’s Prehearing Brief at p. 2. However, Claimant contends that Respondent denied there was a differing site condition for “about a year.” *See* Cl’s Prehearing Brief at p. 4.

7. The parties disagree as to the calculation of additional compensation and working days owed to Claimant. Respondent contends that the additional compensation of \$509,916.32 already paid to Claimant, as well as the 31 additional working days already given, is sufficient to address the differing site condition. *See* Resp’s Prehearing Brief at p. 2. Claimant contends that the “measured mile approach” should be used instead to compare the costs and time involved in the construction of Pier 1 (which was unimpacted by the differing site condition) with the costs

and time involved in the construction of Pier 2 (which was impacted by the differing site condition). *See* CI's Prehearing Brief at p. 5.

Claimant Witness—Drew Tanner

8. Drew Tanner, Claimant's vice-president, testified that he served as estimator and project manager for the Project.

9. Tanner is a civil engineer.

10. The Project is not finished because of the differing site condition. Without the cofferdam issue, he stated that the Project would have finished a couple of years ago.

11. The value of the Project is \$31 million.

12. Claimant brought this claim based on the differing site condition to recover the costs that Claimant put into the Project and for which Claimant has not been compensated. Claimant alleges damages in the amount of \$2,925,293.95, of which \$509,916.32 has already been paid by Respondent. Claimant also alleges that it is owed the return of 138 working days, of which 31 working days have already been returned by Respondent.

13. The sheet piles used to create the cofferdam are 95 feet long and are driven down into the ground.

14. In October 2014, Tanner stated that there was difficulty driving the sheet piles, but the cause was unknown. Claimant finished driving the sheet piles in February 2015 and began excavating the cofferdams. Sinkholes started appearing as excavation continued. In spring 2016, Claimant hired a dive team to confirm that there was a split in the east wall of the cofferdam.

15. On April 27, 2016, Claimant sent correspondence to Respondent regarding the obstructions found by the dive team. Tanner stated that Respondent responded to the April 27, 2016, correspondence by advising Claimant to proceed with construction.

16. The timber obstruction was ultimately chopped in two by creating a special tool with a cutter bit.

17. Tanner reviewed Claimant's Exhibit No. 1 and explained that the pictures were taken by an employee of Respondent to show the dimensions of the timber and metal obstructions removed.

18. An additional row of sheet piles were required to close in the cofferdam around each obstruction.

19. Prior to April 2017, Respondent did not agree that these obstructions constituted a differing site condition and instead instructed Claimant to "proceed with construction." In April 2017, however, Respondent finally agreed that a differing site condition existed due to the obstructions. *See* Cl's Exhibit No. 5.

20. While trying to address the obstructions, Claimant was unable to do anything else on the Project. Claimant reviewed videos taken to show the seriousness of the problem with material and water continually flowing into the cofferdam.

21. Claimant intended to reuse the Pier 2 sheet piles to build the cofferdam for Pier 1, but because of the differing site condition, Claimant was unable to do so. The sheet piles ordered for Pier 1 were 1/10 inch thicker than the Pier 2 sheet piles because those were the available sheet piles, but the design for the cofferdams was essentially the same.

22. To suggest that the slightly thicker Pier 1 sheet piles could be driven faster is "just wrong."

23. To provide the information requested by Respondent in its April 17, 2017, letter to Claimant agreeing that the obstructions constituted a differing site condition, Tanner submitted a Request for Equitable Adjustment (REA) to Respondent in June 2017. *See* Cl's Exhibit Nos. 5-7.

24. In response to the REA, Tanner, Randall West, and Respondent's Chief Engineer Emanuel Banks met in October 2017 to discuss the issues. On December 7, 2017, Respondent sent correspondence to Claimant awarding Claimant \$509,916.32 in additional compensation and returning 31 working days to Claimant. *See* CI's Exhibit No. 9. Tanner testified that Claimant was not provided a breakdown of how Respondent calculated that amount until this litigation was underway.

25. On January 19, 2018, Claimant sent correspondence to Respondent to advise that the differing site condition was still ongoing. *See* CI's Exhibit No. 10.

26. On February 1, 2018, Claimant sent additional correspondence to Respondent to advise that the amount awarded by Respondent was not sufficient to address Claimant's costs related to the differing site condition. *See* CI's Exhibit No. 11. Claimant included a settlement proposal in that correspondence, which has been redacted from the exhibit produced to the Claims Commission. *See id.*

27. On February 23, 2018, Respondent declined Claimant's settlement offer. *See* CI's Exhibit No. 12.

28. Tanner testified that Huval & Associates, Inc. Consulting Engineers reviewed the cofferdams for Pier 1 and Pier 2 and determined that the cofferdams were similar. *See* CI's Exhibit No. 14.

29. Claimant is asking to be made whole for the money that it put into the Project.

30. On cross-examination, Tanner agreed that all sheet piles are difficult to drive. Claimant completed driving the sheet piles for Pier 2 in February 2015 but did not notify Respondent of a differing site condition until 2016.

31. Claimant was able to work on some other parts of the Project while the differing site condition was present.

32. Claimant has not previously used the measured mile approach.

33. The cofferdams were different sizes.

34. Flooding occurred in late 2015–early 2016, which was not Respondent’s fault.

35. The bid price per cofferdam was approximately \$1,665,000, and Claimant is alleging almost \$3,000,000 in damages due to the obstructions.

36. Claimant is currently 152 days late on the Project.

37. Driving the sheet piles for Pier 1 and Pier 2 took about the same amount of time.

Claimant Witness—Colby Guidry

38. Colby Guidry is a civil engineer with Huval & Associates, Inc. (“Huval”) and has worked with cofferdams for approximately 20 years. Guidry is a licensed professional engineer in Arkansas.

39. Guidry’s hourly billing rate for this matter is \$185, which is his normal rate.

40. In October 2016, Claimant asked Guidry for help in stabilizing the Pier 2 cofferdam due to damage to the sheet piles. At that point, the obstructions were known.

41. Huval would not have been involved in the Project but for the differing site condition.

42. Huval came up with solutions to stabilize the walls of the Pier 2 cofferdam and redesigned the internal support to regain stability.

43. Huval employees visited the Project site eight or nine times. Guidry was on site three or four times.

44. In late 2016, Claimant asked Huval to come up with a design for Pier 1 since Claimant could not reuse the materials from Pier 2.

45. At that point, the Pier 1 sheet piles were already on site.

46. There were no design problems with the Pier 2 cofferdam to his knowledge.

47. Huval sent correspondence describing the similarities between the Pier 1 and Pier 2 cofferdam at Tanner's request. Guidry testified that the cofferdams were very similar, including the footprint of the cofferdam itself, the elevation for the top of the sheet piles, the excavation elevation, the internal bracing, the design water elevation, the soil conditions. The internal supports for Pier 2 used cables, whereas Pier 1 used threaded rods. But Guidry testified that neither method was wrong and both had the same construction time. Guidry examined the difference in thickness between the sheet piles used for Pier 1 and Pier 2 and concluded that the time required to drive the sheet piles would only differ by one second.

48. Because the cofferdams for Pier 1 and Pier 2 have the same concept and same time frame to construct, Guidry concluded that the cofferdams were "very similar."

49. Guidry testified that Kyle Yeary's opinions were made from inaccurate assumptions, including that Claimant used a "bottom up" approach to build the cofferdams. Claimant did not use that approach, instead going with the standard practice of building the cofferdams from the top down.

50. Guidry testified that the extra 1/10 inch thickness in the Pier 1 sheet piles would not have driven through the metal obstruction.

51. Guidry's and Huval's analysis focus on the construction of the cofferdams, as well as the time needed to construct the cofferdams.

52. On cross-examination, Guidry testified that he did not copy the cofferdam design from Pier 2 and that he used a different internal support system (also known as a “waler system”). Guidry stated that there was a negligible difference.

53. Guidry has not heard of the measured mile approach.

54. On redirect, Guidry testified that his job is not to assist with damage assessments, so it is not unusual that he would not be familiar with the measured mile approach.

55. Upon a question from a commissioner, Guidry testified that he has worked on at least 30 cofferdams.

Claimant Witness—Randall West, Jr.

56. West was previously the controller for Claimant. He left in May 2019 on good terms to become chief financial officer for Parish Transport. He has an accounting degree and a master’s degree in business administration. He is also certified as a construction industry financial professional.

57. As controller, West managed Claimant’s day-to-day financial operations.

58. This claim is very significant for Claimant.

59. West first heard about the cofferdam issues in 2015 when he asked Tanner why the Project was not proceeding.

60. Respondent had inspectors on the job every day.

61. In April 2016, Claimant sent the letter to Respondent because the obstruction had been confirmed. *See* CI’s Exhibit No. 3. West testified that official notification to Respondent then became appropriate.

62. In April 2017, West started looking at the financial impact of the obstructions. The two cofferdams were one bid item in the contract, but West separated them to show the different costs associated with each.

63. In March 2017, West sent an email to Respondent to confirm his phone call with Tanner and Chief Banks. *See* CI's Exhibit No. 4.

64. Although the highway specifications¹ state that Respondent will investigate differing site conditions upon notification, Claimant had to do the investigation.

65. The issues with the Pier 2 cofferdam were suspected in 2015, so the March 2017 email is written looking back on what had happened so far. *See* CI's Exhibit No. 4.

66. In August 2015, Claimant suspected a "blow out" in the Pier 2 cofferdam. Between the divers and the excavation, Claimant was trying to figure out the issue.

67. However, December 2014 is the beginning of the relevant time period for the differing site condition because that is when the sheet piles were driven for Pier 2.

68. The total number of working days assessed from December 9, 2014, through September 28, 2016, is 161 working days. Claimant was impacted by the differing site condition on 138 working days. This was determined by looking at the weekly log sheets and records of what was going on with the Project.

69. West did research on differing site conditions and attended a webinar led by Scott Lowe on the same topic.

70. In spring 2017, West got Lowe involved and asked him to help analyze the cost and impact of the differing site condition. West testified that Lowe asked him to produce "everything" for Lowe to review, including time sheets, invoices, plans, and estimates.

¹ This is referring to the Arkansas Standard Specifications for Highway Construction (the "Specifications").

71. In the REA, Claimant is asking to be made whole.

72. Respondent wanted Claimant to recalculate its damages.

73. At the October 2017 meeting with Chief Banks, Tanner, and West, West understood that Respondent did not want the measured mile approach used and did not want other consultants involved.

74. In December 2017, West noticed that money was electronically deposited in Claimant's bank account by Respondent. He did not know what the money was for and did not receive any sort of breakdown of how the amount was calculated and what portion of it was to compensate Claimant for labor, materials, or equipment. Claimant did not receive a breakdown of the amount until discovery was underway in the instant claim.

75. Between August 2014 and August 2015, Claimant was averaging \$125,000 in revenue per day on the Project. After August 2015, the revenue dropped to approximately \$20,000 per day. This is a significant change in the revenue. The approximately \$500,000 awarded by Respondent in December 2017 does not even cover the additional materials and supplies that were required as a result of the differing site condition. Those additional materials and supplies amounted to approximately \$750,000.

76. Respondent did not respond to the February 1, 2018, settlement offer and was unwilling to negotiate. *See* CI's Exhibit No. 11.

77. Pier 2 took two and a half years to complete, whereas Pier 1 only took six months.

78. The Pier 2 and Pier 1 cofferdams were constructed during similar times of the year and a similar number of man hours was needed to drive the sheet piles to grade. Specifically, the sheet piles for Pier 2 were driven between October 2014 and February 2015 and took 3700 man

hours. The sheet piles for Pier 1 were driven between October 2016 and February 2017 and took 3550 man hours.

79. The length of time necessary to complete excavation of the Pier 2 cofferdam is the reason for the difference in time to complete Pier 2.

80. The equipment costs listed in the REA do not include standby time. Only operating time was included. The equipment costs alone were approximately \$550,000. *See* CI's Exhibit No. 7.

81. Markups on costs are standard practice. Respondent has not quibbled with markups in the past. *See id.*

82. To explain the materials and supplies costs in the REA, additional items were needed to patch the Pier 2 cofferdam. *See id.*

83. The amount of this claim (\$2,415,377.63) was calculated by taking the total amount in the REA (\$2,925,293.95) and subtracting the amount already awarded by Respondent (\$509,916.32).

84. Claimant also incurred \$100,000 in legal fees and \$60,000 in expert fees before the claim was filed.

85. On cross-examination, West confirmed that the sheet piles for Pier 1 and Pier 2 were driven in different years. West testified that while all sheet piles are hard to drive, there was a difference in the sheet piles for the Pier 2 cofferdam.

86. Claimant did not ask for a breakdown of the amount awarded by Respondent.

Claimant Witness—Scott Lowe

87. Scott Lowe has been a construction consultant since 1985. He is a civil engineer.

88. Lowe does trainings for transportation departments around the country, including Arkansas. One of the Respondent employees involved in this claim (Kenny Bowren) attended Lowe's seminar on the measured mile approach.

89. Lowe's hourly rate is \$350, which is in line with the market.

90. West asked Lowe for help in quantifying Claimant's damages associated with the differing site condition.

91. When asked why Lowe's help was needed, Lowe explained that claims are the confluence of many factors. It is not just accounting. Also, Claimant did not have a lot of experience in putting together an REA.

92. When Lowe used the word "embellishment" in an email, he was asking Claimant to provide pictures to help understand the issue.

93. Lowe used the raw data in his calculations. He also reviewed the daily work records (DWR's) from Respondent.

94. Lowe is familiar with the differing site condition clause in the Specifications. Claimant is entitled to an "adjustment," and that term is not defined. The industry standard is an equitable adjustment, which is why the REA is so named.

95. Section 104.02(c) of the Specifications addresses differing site conditions. The second paragraph of that section explains what Claimant is entitled to under the contract.²

96. Respondent is supposed to investigate the differing site condition.

² "Upon written notification, the Engineer will investigate the conditions. If the Engineer determines that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the Contract, an adjustment, excluding loss of anticipated profits, will be made and the Contract modified in writing accordingly. The Engineer will notify the Contractor of the determination whether or not an adjustment of the Contract is warranted." (emphasis added).

97. The measured mile approach has been used dozens or hundreds of times. It is a comparison of unimpacted work versus impacted work.

98. The measured mile approach is how to quantify the impact.

99. The measured mile approach is not just used in road construction.

100. The fact that the measured mile approach is not listed in the Specifications is typical with other states. The tool used to make a contractor whole does not have to be specified in the Specifications. In most situations, the approach to be used is not spelled out.

101. The measured mile approach is not a new calculation method. Every state that Lowe works in uses the measured mile approach.

102. Lowe first learned of the measured mile approach in the late 1980s. He has testified on the measured mile approach seven times, and it has not been rejected.

103. Because the Pier 2 cofferdam took much longer than the Pier 1 cofferdam, the measured mile approach “works great” here.

104. The significant dates are laid out in the REA. *See* CI’s Exhibit No. 7 at p. 3–4. On December 9, 2014, Claimant began experiencing significant problems driving the sheet piles. On September 28, 2016, the obstructions were removed. *See id.*

105. Lowe concluded that a differing site condition did exist; that Claimant spent 138 working days addressing the differing site condition; and that Claimant incurred additional costs of \$2,925,293.95. *See id.*

106. As for the time calculation, the measured mile approach was only used until both cofferdams were 75 percent completed.

107. Lowe discussed Exhibit A to the REA, which shows each day that Claimant addressed the differing site condition and should get the working day back.

108. The differing site condition affected the completion of the Project.

109. The REA also lays out the difference in costs for Pier 1 and Pier 2. *See* CI's Exhibit No. 7 at p. 10.

110. Lowe calculated the inefficiency factor related to the labor costs. *See* CI's Exhibit No. 7 at p. 10–11. The insurance costs are derived from labor hours. *See id.* at p. 11. Lowe testified that subsistence is a real cost. *See id.*

111. Claimant incurred over \$550,000 in equipment costs due to the differing site condition. *See* CI's Exhibit No. 7 at p. 11–12. Claimant is not asking for any standby costs for the equipment, which would be another significant amount.

112. With regard to materials, Claimant needed another set of sheet piles to close the hole in the Pier 2 cofferdam and to have sheet piles for construction of the Pier 1 cofferdam. *See* CI's Exhibit No. 7 at p. 12–14. Lowe testified that these are hard costs that are out-of-pocket for Claimant. Lowe did not use the measured mile approach for materials.

113. If the measured mile approach is rejected, the award given by Respondent is not adequate because it does not even cover the cost of the additional materials and supplies.

114. When asked why all this money is necessary for a piece of timber and a piece of metal, Lowe explained that a cofferdam is like an eight story building built upside down in water. He is not shocked by the amount of damages because of the serious impact of the differing site condition.

115. On cross-examination, Lowe agreed that the measured mile approach is not an exact science.

116. Lowe does not think that Claimant's crew's learning curve between constructing the Pier 2 cofferdam and the Pier 1 cofferdam affected the crew's efficiency because of the gap in

time between the construction of each. Likewise, Lowe does not believe that the individual crews or supervisors are relevant.

117. The Pier 2 cofferdam was exposed to more flooding because of how long it took to construct.

118. Lowe did look at the components for payroll and insurance in calculating the labor costs.

Respondent Witness—Kenny Bowren

119. Kenny Bowren is a resident engineer for Respondent. He has been a professional engineer since 1991.

120. The April 27, 2016, correspondence from Claimant was Bowren's first notification of an obstruction. *See* Resp's Exhibit No. 10.³

121. Bowren responded to that correspondence in May 2016. He did not acknowledge a differing site condition in his letter.⁴ Claimant was told to continue working. There was no way to know what Claimant had hit.

122. On December 14, 2016, Bowren denied that a differing site condition existed in correspondence to Claimant.⁵

123. On January 11, 2017, Claimant appealed Bowren's decision to Chief Banks.

124. On April 17, 2017, Respondent found that a differing site condition existed. *See* Resp's Exhibit No. 11.⁶ This decision overrode Bowren. In the April 17, 2017, correspondence, Claimant was directed what costs and time to submit. *See id.*

³ This is the same correspondence that is referred to, *infra*, as Cl's Exhibit No. 3.

⁴ This correspondence was not introduced as an exhibit.

⁵ This correspondence was not introduced as an exhibit.

⁶ This is the same correspondence that is referred to, *infra*, as Cl's Exhibit No. 5.

125. After Claimant submitted the REA, Bowren sent correspondence to Claimant on July 17, 2017, specifying what costs and time should be submitted. *See* Resp's Exhibit No. 12.⁷ However, Claimant did not recalculate its damages and instead sent the REA to Chief Banks.

126. After an October 2017 meeting with Tanner, West, Chief Banks, and others, correspondence was sent to Claimant on December 7, 2017. *See* Resp's Exhibit No. 13.⁸

127. The electronic payment to Claimant described in the December 7, 2017, correspondence could not have been processed by Respondent without a change order. *See* Resp's Exhibit No. 13. If adding items to a contract via change order, the contractor has to sign the change order. But if Respondent is giving money back, the contractor is not required to sign.

128. Bowren was surprised by the beginning date in the REA of December 9, 2014, because according to Respondent's records, Claimant was not working on the Pier 2 cofferdam that day. Respondent's records indicate that Claimant began driving sheet piles for the Pier 2 cofferdam in October 2014 and end in February 2015.

129. All sheet piles are hard to drive.

130. No one noticed any issues after the sheet piles for the Pier 2 cofferdam were driven until August or September 2015 when the excavation got close to the holes in the sheet piles.

131. There are two or three inspectors on site every day. The inspectors did not notice problems until fall 2015.

132. No extra work was done before August 2015. Claimant did not begin excavating the Pier 2 cofferdam until August 17, 2015. *See* Resp's Exhibit No. 8.

133. The parties are in agreement that September 28, 2016, was the date that the obstructions were removed.

⁷ This is the same correspondence that is referred to, *infra*, as CI's Exhibit No. 8.

⁸ This is the same correspondence that is referred to, *infra*, as CI's Exhibit No. 9.

134. The inspectors provide information on the DWR to allow Bowren to decide whether to charge a working day. A working day is charged if a contractor can use 60 percent of its normal workforce and equipment for at least 60 percent of the day.

135. Claimant was able to do other work during the time that there were issues with the Pier 2 cofferdam, including pouring concrete for bridge caps, decks, footers.

136. There were lots of delays on the Project, including parts that were not done right.

137. Claimant did not work on all available days.

138. Respondent has never used the measured mile approach to Bowren's knowledge.

139. Claimant worked 113 days on Pier 1 and 124 days on Pier 2.

140. In September 2016, Claimant "abandoned" Pier 2 and started on Pier 1. Claimant could have finished Pier 2 and then used those materials for Pier 1.

141. Huval redesigned the internal structures for the Pier 2 cofferdam because the sheet piles were already in place.

142. Bowren reviewed the REA and does not think that there is an accurate comparison between the Pier 1 cofferdam and Pier 2 cofferdam because the cofferdams had different designs, and the sheet piles were different thicknesses. Bowren stated that the Pier 1 sheet piles were 30 percent stronger.

143. The Huval design for the Pier 1 cofferdam was very specific, unlike Claimant's design for the Pier 2 cofferdam. The sheet piles for the Pier 2 cofferdam went in, then excavation started before the internal support structure was completed.

144. Section 104.02(c) of the Specifications states that the Engineer will investigate upon notification of a differing site condition. Bowren admitted that Respondent did not do an investigation but said that it was not possible for Respondent to do an investigation.

145. Claimant sent a diver down to investigate.

146. There was a sinkhole on the north side of the Pier 2 cofferdam in September 2015 that was caused by a hole in the sheet piles.

147. Bowren initially denied that a differing site condition existed.

148. Bowren is a resident engineer for Respondent. He is not a bridge engineer in Respondent's bridge division.

149. Bowren did not do any engineering analysis of how the slight differences in the cofferdams would change the construction times.

150. Bowren does not recall going to Lowe's seminar on the measured mile approach.

Respondent Witness—Gary Buzbee

151. Buzbee has been with Respondent for 20 years as a staff construction engineer. A large part of his job has been on bridges. He is a professional engineer. He is familiar with the Project.

152. In response to the April 17, 2017, correspondence from Respondent acknowledging the differing site condition, Claimant did not provide the requested information regarding damages and was asked to recalculate its damages. *See* Resp's Exhibit No. 11.⁹

153. Claimant's work on the Project was not completely shut down by the obstructions.

154. In August 2015, the Project began to be impacted by the obstructions. This is backed up by the DWR's. The REA used December 2014 as the beginning date. Buzbee reviewed the DWR's from December 2014 through September 2016 and determined that 31 working days should be given back to Claimant.

⁹ This is the same correspondence that is referred to, *infra*, as CI's Exhibit No. 5.

155. Buzbee looked at the DWR for August 17, 2015, which showed that work was happening on the Pier 2 cofferdam, and determined that a day should be given back to Claimant. *See* Resp's Exhibit No. 9 at p. 178.

156. Buzbee looked at the DWR for September 8, 2015, which referenced the excavation of the Pier 2 footing, and determined that a day should be given back to Claimant. *See* Resp's Exhibit No. 9 at p. 193.

157. There are 29 other similar days that were credited back to Claimant.

158. In looking at Exhibit A of the REA, Buzbee noted that there were 23 days on the original Exhibit A that were not actually charged to Claimant. As an example, Buzbee looked at the July 28, 2015, DWR and determined that the work was not related to the obstruction. *See* Resp's Exhibit No. 9 at p. 165–66. Buzbee stated that the DWR's for August 11–14, 2015, are similar. *See id.* at p. 174–77. On August 18, 2015, Claimant was progressing on two of the bents, so there was no need to credit back a work day. *See id.* at p. 179. Buzbee stated that there were seven other days like August 18, 2015. On August 10, 2015, there is no Pier 2 work listed on the DWR, so no need to credit back. *See id.* at p. 173. Where Claimant was progressing on another part of the Project, Respondent did not credit time back to Claimant. Buzbee stated that this explained all 138 days claimed by Claimant. When the Amended Exhibit A came in, Buzbee noted that there were 23 new dates added that were not previously on the list. However, six of those dates had already been credited back to Claimant in the December 17, 2017, correspondence to Claimant giving back 31 working days (August 17, 2015; September 8, 2015; November 3–4, 2015; November 13, 2015; and May 24, 2016). This leaves only seventeen new dates in the amended Exhibit A.

159. Respondent did not delay the Project.

160. Buzbee calculated the additional compensation awarded to Claimant.¹⁰ He awarded Claimant approximately \$70,000 in labor costs plus 33 percent for insurance, etc. Buzbee did not include a labor inefficiency factor. He awarded Claimant approximately \$60,000 in materials costs plus a fifteen percent markup. Buzbee stated that Claimant did not discuss with Respondent before purchasing the additional materials. He awarded Claimant approximately \$284,000 in equipment costs.

161. With regard to the additional site resources and uncompensated company resources claimed by Claimant in the REA, Buzbee stated that the documents did not apply to the same time period.

162. The bid for the Pier 2 cofferdam was \$1,600,000.

163. The actual cost claimed by Claimant is \$1,600,000 plus \$2,900,000.

164. In response to Tanner's testimony regarding the lack of direction by Respondent as to the differing site condition, Buzbee stated that it is not Respondent's responsibility to change how a contractor is doing the work. Respondent is at the mercy of the information provided by the contractor. It is solely Claimant's responsibility to figure out what to do.

165. On cross-examination, Buzbee stated that the investigation required by Section 104.02(c) of the Specifications means looking at the information provided by Claimant. Buzbee noted that "investigation" is not defined.

166. Buzbee admitted that the additional compensation awarded to Claimant was done by the "force account" method and that Claimant was not told to track its expenses this way.

¹⁰ This document was not introduced as an exhibit.

167. As to the amended Exhibit A to the REA, the DWR shows work on Pier 2 on July 28, 2015. *See* Resp’s Exhibit No. 9 at p. 165–66. Removal of (also known as “pulling”) the sheet piles was harder because of the differing site condition.

168. Because Buzbee started crediting days back to Claimant as of August 17, 2015, there is not much argument between the parties as to the number of days in question. *See* Cl’s Amended Exhibit A to the REA.

169. As to the equipment costs listed in the REA, the parties are arguing about the relevant dates that the equipment costs should be returned to Claimant but are not arguing about the equipment costs.

170. 161 working days were charged by Respondent to the Project between December 9, 2014, and September 28, 2016.

171. On redirect, Buzbee stated that he looked at the number of days tracked between December 2014 and August 2015.

172. Buzbee stated that a force account is where both parties keep track of costs to allow both parties to validate the number. Buzbee clarified that he does not think Claimant was dishonest.

Respondent Witness—Kyle Yeary

173. Kyle Yeary is the assistant division head of Respondent’s bridge division. He has been in the bridge division for nineteen years. He is a professional engineer.

174. Yeary reviews plans, addresses problems, and maintains the specifications.

175. Yeary had not reviewed cofferdam plans previously.

176. Yeary reviewed the Pier 1 and Pier 2 cofferdam plans to describe the differences between the plans.

177. When the Pier 2 cofferdam “started moving,” it would have been more resistant to moving if Claimant had used the sheet piles from the Pier 1 cofferdam.

178. The December 23, 2019, email from Yeary to Respondent’s previous counsel, Bowren, and Buzbee, included Yeary’s brainstorming why a comparison between the two cofferdams was not an “apples to apples” comparison. *See* CI’s Exhibit No. 15.

179. In a January 24, 2020, memo to Respondent’s previous counsel, Yeary summarized the differences between sheet piles used in the two cofferdams, including flexural rigidity (a resistance to flexion or movement), axial capacity (ability to handle the load vertically), and yield strength. As to flexural rigidity and axial capacity, Yeary found that the sheet piles used for the Pier 1 cofferdam were eighteen percent more rigid and able to handle more load vertically than the sheet piles for the Pier 2 cofferdam. The yield strength for the Pier 1 sheet piles was 390 kips per foot, whereas the yield strength for the Pier 2 sheet piles was 314 kips per foot. Yeary noted that Huval’s design was very specific.

180. On cross-examination, Yeary stated that he did not do any engineering analysis regarding whether the Pier 1 sheet piles could have gone through the obstructions found in the Pier 2 cofferdam.

181. Yeary stated that he does not have any experience with cofferdams.

182. Yeary stated that his analysis does not include any details about the lowering and waler systems in the cofferdams. He has no reason to disagree with Guidry’s assessment that the this information is not usually provided.

183. Yeary stated that he ran his thoughts on the differences between the two cofferdams by Respondent’s previous counsel. *See* CI’s Exhibit No. 14.

184. Yeary did not analyze whether the drive time for the Pier 1 sheet piles would have been different from the Pier 2 sheet piles.

185. Yeary does not know whether the lowering and waler systems in the cofferdams were the same. He was only asked to identify differences. He did not look at the lowering system for the Pier 2 cofferdam.

186. Whether the sheet piles were new or used is not relevant because the sheet piles were new for both cofferdams, so the issues with the Pier 2 cofferdam was not from aged sheet piles or reusing sheet piles.

187. Yeary has not studied whether there were any movement issues with the Pier 1 cofferdam.

Findings of Fact and Conclusions of Law

188. The Claims Commission finds that all witnesses were credible.

189. The Claims Commission finds that Claimant and Respondent entered into a contract related to the Project.

190. Per Tanner's testimony, the Claims Commission finds that the value of the Project is approximately 31 million dollars. The Claims Commission also finds that the bid price per cofferdam was approximately 1.6 million dollars.

191. The Claims Commission finds that two subsurface obstructions were found during the construction of the Pier 2 cofferdam. This is undisputed by the parties. The Claims Commission further finds that the subsurface obstructions were later found to be a large piece of timber and a large metal pipe.

192. The Claims Commission finds that the subsurface obstructions damaged the Pier 2 cofferdam. This is undisputed by the parties.

193. The Claims Commission finds that when Claimant began excavating the Pier 2 cofferdam, sinkholes and other issues alerted Claimant that the cofferdam may have a breach.

194. The Claims Commission finds that Claimant hired a dive team to confirm a split in the Pier 2 cofferdam wall.

195. The Claims Commission finds that Claimant hired Huval to help stabilize the Pier 2 cofferdam due to damage to the sheet piles.

196. The Claims Commission finds that the subsurface obstructions created a differing site condition under the Contract.

197. The Claims Commission finds that on April 27, 2016, Claimant sent correspondence to Respondent regarding the obstructions and asked Respondent to “provide further instructions.” Cl’s Exhibit No. 3; Resp’s Exhibit No. 10. Pursuant to Tanner’s testimony and Bowren’s testimony, the Claims Commission finds that Respondent instructed Claimant to proceed with construction.

198. The Claims Commission finds that there is electronic correspondence from Randall West to Respondent on March 8, 2017, regarding another notification to Respondent in September 2016 of the differing site condition. Cl’s Exhibit No. 4. In that March 8, 2017, electronic correspondence, West, on behalf of Claimant, “respectfully again requests for the Department to confirm [that] the Differing Site Condition actually exists so that we can move forward together with the assessment of time and costs.” *Id.* In that electronic correspondence, West also notified Respondent that Claimant would be using the measured mile approach to calculate the impact of the differing site condition on the Project. *Id.*

199. The Claims Commission finds that, in order for Respondent to agree that the subsurface obstructions constituted a differing site condition, Claimant had to appeal the decision

of Respondent's resident engineer to Respondent's chief engineer. *See* CI's Exhibit No. 5; Resp's Exhibit No. 11. In the chief engineer's April 17, 2017, letter to Claimant, the chief engineer stated that "the timber and metal materials discovered constitutes a 'Differing Site Condition' in this situation." *Id.* Claimant was instructed to "submit documentation supporting your costs and lost time to the Resident Engineer for review" and to "limit[] [the submitted costs/lost time] to the driving of sheet piles that were damaged when encountering the obstructions and the driving of additional piles in the locations where the damage occurred . . . [and the] cost and time required to remove the timber and metal materials so that normal sheet piling operations could resume." *Id.*

200. The Claims Commission finds that Claimant submitted its Request for Equitable Adjustment (REA) to Respondent on June 12, 2017. CI's Exhibit Nos. 6–7.

201. The Claims Commission finds that on July 17, 2017, Respondent's resident engineer sent correspondence to Claimant advising Claimant that Respondent "will only consider the cost and time for driving and replacing the damaged sheet piles and removing the obstructions." CI's Exhibit No. 8; Resp's Exhibit No. 12. Claimant was also advised that "[n]o comparisons to Pier 1, which was a new design, will be considered." *Id.*

202. The Claims Commission finds that Tanner, West, and Respondent's chief engineer met in October 2017 to discuss these issues. *See* CI's Exhibit No. 9; Resp's Exhibit No. 13.

203. The Claims Commission finds that on December 7, 2017, Respondent's chief engineer sent correspondence to Claimant advising that Respondent's "opinion" is that Claimant had not provided information to "prove[] that the differing site conditions related to the timber and metal encountered during the installation of the sheet piling for the cofferdam caused all of the problems and additional costs that you claim to have encountered on Pier 2" CI's Exhibit No. 9; Resp's Exhibit No. 13.

204. However, also in that December 7, 2017, correspondence, Respondent's chief engineer stated that Respondent reviewed the "daily work reports starting on August 17, 2015 and ending on September 30, 2016," as well as Claimant's "exhibits for labor, equipment, and miscellaneous cost," and determined that Claimant was entitled to \$509,916.32 in additional compensation and a return of 31 working days. CI's Exhibit No. 9; Resp's Exhibit No. 13.

205. Per West's testimony, the Claims Commission finds that Respondent did not provide a breakdown of this amount to Claimant until the discovery stage of the instant claim.

206. The Claims Commission finds that on January 19, 2018, Tanner sent correspondence to Respondent reiterating its request for reimbursement. CI's Exhibit No. 10.

207. The Claims Commission finds that on February 1, 2018, Tanner again attempted to resolve the dispute with Respondent as to the amounts owed. CI's Exhibit No. 11. The Claims Commission finds that this correspondence accepted the \$509,916.32 as a "partial payment" and the return of 31 working days as a "partial return of days." *Id.*

208. The Claims Commission finds that on February 23, 2018, Respondent's chief engineer sent correspondence to Claimant advising that "no additional contract days or monetary compensation is warranted for this differing site condition." CI's Exhibit No. 12.

209. The Claims Commission finds that, per Tanner's testimony, Claimant intended to reuse the Pier 2 cofferdam sheet piles in constructing the Pier 1 cofferdam but was unable to because of the differing site condition. The Claims Commission also finds that Claimant asked Huval to design the Pier 1 cofferdam since the materials from the Pier 2 cofferdam could not be reused.

210. The Claims Commission finds Guidry's testimony comparing the Pier 1 and Pier 2 cofferdams to be especially helpful. The Claims Commission finds that the two cofferdams were

similar as to the internal area of the cofferdams, the internal bracing, the sheet pile tip elevation, excavation elevation, design water elevation, and soil conditions. *See* CI's Exhibit No. 14. The Claims Commission agrees with Guidry that the minor differences between the two cofferdams did not render them dissimilar, especially in light of the fact that the differences did not change the construction time. The Claims Commission also agrees that the slight difference in the thickness of the sheet piles did not render the cofferdams dissimilar, especially in light of the fact that the time to drive the sheet piles varied by approximately one second and that Guidry testified that the slightly thicker Pier 1 sheet piles would not have driven through the obstructions that damaged the Pier 2 cofferdam. While the Claims Commission appreciates Yeary's work for Respondent, the fact that he had not previously analyzed a cofferdam (as opposed to Guidry's 20 years of experience with cofferdams) and that he was only asked by Respondent to find differences between the two cofferdams (as opposed to Guidry's more complete analysis of the similarities and the differences) renders Guidry's testimony more credible and more useful to the Claims Commission.

211. The Claims Commission also finds West's testimony regarding the comparison of the two cofferdams to be significant, including the fact that the sheet piles for each cofferdam were driven at same time of year (October 2014–February 2015 for Pier 2; October 2016–February 2017 for Pier 1) and needed a similar number of man hours to complete (3700 for Pier 2; 3550 for Pier 1). The Claims Commission finds that the time needed to complete the cofferdams varied considerably (2 ½ years for Pier 2; six months for Pier 1), although the flooding in late 2015–early 2016 accounts for some of the delay.

212. The Claims Commission finds that Lowe reviewed all of the documents, including Respondent's daily work records, and Claimant's time sheets, invoices, plans, and estimates.

213. The Claims Commission finds that under Section 104.02(c) of the Specifications, Respondent has to “investigate the conditions” upon notification that a differing site condition may exist. Despite Buzbee’s testimony that the word “investigate” is not defined in the Specifications, the Claims Commission finds that Respondent’s actions do not meet any definition of the word “investigate.” To simply advise Claimant to continue working or to proceed with construction is not an investigation. To the extent that Respondent undertook any other efforts, there was no such testimony to that effect.

214. The Claims Commission finds that if Respondent had conducted some investigation, Respondent might have had sufficient information to confirm that a differing site condition existed in April 2016 as opposed to April 2017. To conduct no investigation and to disagree with Claimant’s conclusions seems unreasonable. If Respondent needed additional information to better analyze the situation, advising Claimant of that fact (and specifying what additional information was needed) would have been more helpful than simply advising Claimant to proceed with construction.

215. While the Claims Commission understands that Respondent hires contractors to complete highway projects, certainly the ultimate goal is to have a quality final product without spending extra amounts to obtain that final product. In that sense, Respondent is partnering with these contractors. However, where a partnership mentality does not exist, the costs are likely to increase, and Respondent may be held responsible for some of those costs.

216. The Claims Commission finds that, per Bowren’s testimony, Respondent had two or three inspectors on site every day. Other than to fill out a short, frequently incomplete summary of each workday, the Claims Commission does not have any testimony about the job

responsibilities of an inspector. It would seem reasonable that these inspectors would be the best channel of quick communication between a contractor and Respondent.

217. As to when the differing site condition began, the fact that the parties cannot agree demonstrates why use of the measured mile approach makes sense. One might argue that the differing site condition began when the Pier 2 sheet piles were driven, given that the sheet piles were damaged at that point by the obstruction (regardless of whether Claimant knew at that specific time). One might argue that the differing site condition began when Claimant noticed the issues with the excavation of the Pier 2 cofferdam. One might argue that the differing site condition began on the date that Claimant notified Respondent of the differing site condition. If there had been no delay in Respondent's agreement, one might argue that the differing site condition began on the date that the differing site condition was confirmed by Respondent. But, the Specifications do not give any guidance as to when to calculate the beginning of a differing site condition.

218. Likewise, the Specifications do not define what "adjustment" is owed to Claimant. As such, a comparison between impacted work and unimpacted work appears to be the best method for determining the overall effect of the differing site condition on the Project.

219. The Claims Commission specifically rejects Respondent's use of the force account method in calculating damages, as that accounting method was not agreed upon by the parties. Should Respondent wish contractors to track expenses via force account, that should be agreed upon in the contract.

220. The Claims Commission agrees with Lowe that the purpose of an adjustment is to make Claimant whole. The Claims Commission finds that Lowe's use of the word "embellishment" in his email was intended only to encourage Claimant to provide pictures to illustrate the significant damages caused by the differing site condition. Given the difficulty

Claimant had in convincing Respondent that a differing site condition existed, the Claims Commission believes that Lowe's advice was sound and finds that Lowe's approach was careful, detailed, and appropriate for the situation.

221. The Claims Commission finds it significant that the REA lists 5,135 labor hours required to complete the Pier 1 cofferdam to 75 percent completion versus 17,031.5 labor hours needed to complete the Pier 2 cofferdam to 75 percent completion.

222. As to the labor costs claimed by Claimant in the REA, the Claims Commission finds that Claimant is entitled to \$258,512.18 in additional labor costs. The Claims Commission also finds that Claimant is entitled to a markup of 33 percent (\$85,309.02) on these labor costs, per Buzbee's testimony regarding the markup on labor costs given by Respondent in its December 2017 partial payment. The Claims Commission found the testimony regarding the appropriateness of subsistence or lodging costs to be questionable and declines to award those herein. As such, the Claims Commission awards a total of \$343,821.20 in additional labor costs.

223. As to the equipment costs claimed by Claimant in the REA, the Claims Commission notes that Claimant is only claiming a markup on equipment rented by Claimant, but not on equipment owned by Claimant. The Claims Commission also notes that Claimant is not attempting to recover the standby rates for equipment (which the Claims Commission has previously awarded in another claim). The Claims Commission finds that, as to owned equipment, Claimant is entitled to \$476,091.13 in additional costs. The Claims Commission finds that, as to rented equipment, Claimant is entitled to \$65,021.23 in additional costs. While the Claims Commission appreciates Claimant's detailed breakdown, the Claims Commission declines to award markup costs as to the rented equipment. As such, the Claims Commission awards a total of \$541,112.36 in additional equipment costs.

224. As to the materials and supplies costs claimed by Claimant in the REA, the Claims Commission finds that Claimant's purchase of additional sheet piles to construct the Pier 1 cofferdam to be reasonable. The Claims Commission finds the testimony of Claimant's witnesses on this point to be persuasive. As such, the Claims Commission finds that Claimant is entitled to \$426,592.40 in material costs for the Pier 1 cofferdam materials, plus \$166,553.09 in additional material costs related to the Pier 2 cofferdam, plus \$71,540.56 in additional supplies, for a total of \$664,686.05. The Claims Commission also finds that Claimant is entitled to a markup of fifteen percent (\$99,702.91) on these materials/supplies costs, per Buzbee's testimony regarding the markup on materials/supplies costs given by Respondent in its December 2017 partial payment. As such, the Claims Commission awards a total of \$764,388.96 in additional materials and supplies costs

225. As to the subcontractor costs claimed by Claimant in the REA, the Claims Commission finds that Claimant's use of dive teams and other subcontractors in connection with the damaged Pier 2 cofferdam was reasonable. The Claims Commission finds that Claimant is entitled to \$82,253.12 in additional subcontractor costs. The Claims Commission declines to award markup costs as to the subcontractors. As such, the Claims Commission awards a total of \$82,253.12 in additional subcontractor costs.

226. The Claims Commission is not convinced that it is appropriate for Claimant to recover its claimed "additional site resource[]" or "uncompensated company resource[]" costs. As such, the Claims Commission declines to award these costs to Claimant.

227. Combining the additional costs awarded for labor, equipment, materials/supplies, and subcontractors, the Claims Commission finds that Claimant is entitled to additional compensation in the amount of \$1,731,575.64. The Claims Commission finds that Respondent is

entitled to an offset in the amount of \$509,916.32, which was already paid to Claimant in December 2017. As such, Claimant is entitled to a total award of \$1,221,659.32.

228. Other than some general testimony regarding the attorney's fees and expert fees incurred prior to the filing of this claim, as well as the hourly rates of Lowe and Guidry, the Claims Commission finds that it does not have sufficient testimony before it to make an award for attorney's fees and expert fees and declines to do so.

229. With regard to the workdays that Claimant would like returned, the Claims Commission finds that the dispute between the parties may rest upon Respondent's reliance on its own daily work records. Upon review of these work records, the Claims Commission finds these work records to be incomplete at best. However, the Claims Commission does not see how it has jurisdiction to make an award to Claimant of working days. The Claims Commission has repeatedly held it does not have authority to provide redress that is non-monetary (for example, an injunction). The Claims Commission was created to satisfy the "just and legal debts" of the State of Arkansas. *Fireman's Ins. Co. v. Arkansas State Claims Com'n*, 301 Ark. 451, 784 S.W.2d 771 (1990). To the extent that the parties believes otherwise, the Claims Commission will give the parties 30 days to submit briefs regarding this issue (no brief is required if one or both parties agree that the Claims Commission does not have such authority). If a party does submit a brief, the opposing party will have fourteen days to file a response.

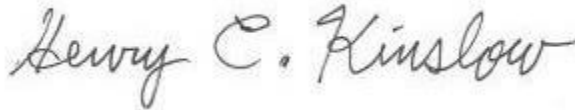
IT IS SO ORDERED.



ARKANSAS STATE CLAIMS COMMISSION
Courtney Baird



ARKANSAS STATE CLAIMS COMMISSION
Dexter Booth



ARKANSAS STATE CLAIMS COMMISSION
Henry Kinslow, Co-Chair

DATE: September 1, 2020

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(a)(1). 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(a)(1)(B)(ii). A decision of the Claims Commission may only be appealed to the General Assembly. Ark. Code Ann. § 19-10-211(a)(3).
- (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(a). 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).

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

TANNER CONSTRUCTION COMPANY, INC.

CLAIMANT

V.

CLAIM NO. 180940

**ARKANSAS DEPARTMENT OF
TRANSPORTATION**

RESPONDENT

ORDER RE ADDITIONAL DAMAGES

Now before the Arkansas State Claims Commission (the “Claims Commission”) is the claim of Tanner Construction Company, Inc. (the “Claimant”) against the Arkansas Department of Transportation (the “Respondent”). In the Claims Commission’s September 1, 2020, order, the Claims Commission allowed the parties time to submit post-hearing briefs regarding whether the Claims Commission is empowered to return working days to Claimant. Based upon a review of the pleadings and the law of the State of Arkansas, the Claims Commission unanimously finds as follows:

1. The Claims Commission herein incorporates its findings of fact and conclusions of law in the September 1, 2020, order.

2. In Claimant’s post-hearing brief, Claimant argued that “each working day beyond the working days allotted in the contract is worth a specific dollar amount,” otherwise known as liquidated damages. Claimant stated that the liquidated damages figure is \$2,500.00 per day, per the contract between the parties, and that there were 107 days related to the differing site condition that should be returned. Citing to the Arkansas Supreme Court’s reasoning in *Ark. Tech University v. Link*, 341 Ark. 495, 17 S.W.3d 809 (2000), Claimant asserted that Claims Commission has authority to make awards that would increase the State’s financial obligations. Claimant also argued that, in light of the Claims Commission’s findings that Respondent did not adequately

compensate Claimant for the differing site condition in terms of labor and equipment, it would not make sense for the Claims Commission to find that Respondent did adequately compensate Claimant for the differing site condition in terms of working days.

3. Respondent responded, arguing that a Claims Commission award would not subject Respondent to financial liability and “would only potentially serve to reduce” the liquidated damages that Claimant would have to pay to Respondent. Respondent also argued that Claimant “is asking to NOT pay” Respondent liquidated damages rather than asking Respondent to pay Claimant money. Respondent noted that the Claims Commission does not have authority to issue injunctive relief, meaning that the Claims Commission cannot order Respondent to do a particular act, like returning working days to Claimant. Respondent argued that the amounts owed under the contract are different from the amounts charged as liquidated damages under the contract and that a working day is “not valued in the same way as days assessed for [l]iquidated [d]amages.” If the Claims Commission were inclined to make an award to Claimant, Respondent asserted that the 107 days argued by Claimant should be reduced by the 31 days already returned by Respondent.

4. Claimant filed a reply, arguing that the 107 days already take into account the 31 days credited by Respondent and that Respondent has assessed Claimant for liquidated damages.

5. The Claims Commission finds that it does not have the authority to order Respondent to return working days to Claimant. Similarly, the Claims Commission cannot prohibit Respondent from assessing Claimant for liquidated damages under the contract.

6. However, the Claims Commission disagrees with Respondent’s characterization of Claimant’s request and finds that Claimant is not “asking to NOT pay” Respondent liquidated damages. Instead, Claimant is effectively seeking reimbursement for improperly assessed liquidated damages due to the differing site condition. The Claims Commission agrees with

Claimant that it is empowered to make such an award of damages, as it would subject the State to financial liability. *See Ark. Tech University v. Link*, 341 Ark. 495, 17 S.W.3d 809 (2000).

7. Claimant's argument regarding the Claims Commission's prior findings is especially compelling. Claimant is correct that the Claims Commission found in its September 1, 2020, order that Respondent did not adequately compensate Claimant for the differing site condition. If the differing site condition warranted additional labor and equipment, it naturally follows that the differing site condition would have cost Claimant additional workdays that would count against the number of days Claimant is permitted under the contract (before liquidated damages are assessed).

8. Per the testimony from Claimant's witnesses at hearing, there are an additional 107 working days attributable to the differing site condition that were not returned to Claimant. Claimant's expert, Scott Lowe, examined all of the data, including both Claimant's and Respondent's work records. However, the testimony of Respondent's witnesses indicated that Respondent's daily work records were the guiding force in Respondent's analysis. The Claims Commission found that Respondent's daily work records were "short, frequently incomplete summar[ies]" of the workdays. As such, the Claims Commission finds Lowe's testimony and opinion to be more useful and persuasive and finds that 107 additional days are attributable to the differing site condition.

9. Respondent has already assessed and/or will continue to assess Claimant liquidated damages for each working day over the contractually agreed number of working days. The Claims Commission herein finds that 107 of the assessed days are improperly assessed and herein makes an award to reimburse Claimant for the value of those assessments.

10. Under the contract, liquidated damages are assessed at a rate of \$2,500.00 per day.

11. As such, Claimant is entitled to an additional award of \$267,500.00, representing 107 days of improperly assessed liquidated damages.


IT IS SO ORDERED.



ARKANSAS STATE CLAIMS COMMISSION
Courtney Baird



ARKANSAS STATE CLAIMS COMMISSION
Dexter Booth



ARKANSAS STATE CLAIMS COMMISSION
Henry Kinslow, Co-Chair

DATE: December 22, 2020

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(a)(1). 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(a)(1)(B)(ii). A decision of the Claims Commission may only be appealed to the General Assembly. Ark. Code Ann. § 19-10-211(a)(3).
- (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(a). 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).