

ARKANSAS STATE CLAIMS COMMISSION

D1

(501) 682-1619
FAX (501) 682-2823



NORMAN L. HODGES, JR.
DIRECTOR

101 EAST CAPITOL AVENUE
SUITE 410
LITTLE ROCK, AR 72201-3823

January 10, 2012

COPY

Mr. Jack F. Gilbert, Attorney-Advisor
USDT, Federal Highway Administration
Office of Legal Counsel
60 Forsyth Street, S.W., Suite 8M5
Atlanta, GA 30303

RE: Duit Construction Company, Inc.
Claim #: 11-0687-CC
Vs.
Arkansas Highway Department

Dear Mr. Gilbert,

At the direction of the Claims Review Subcommittee of the Arkansas General Assembly I am writing in regard to the above-referenced claim. In a March 27, 2009, letter to Mr. Jack East, Attorney, you denied Mr. East access to testimony from Mr. Tom Rains (copy attached.) My letter is to express the Subcommittee's request that Mr. Rains (a former employee of your agency) be allowed to offer testimony before the Arkansas State Claims Commission. It was the Subcommittee's belief that Mr. Rains' testimony could be limited to factual testimony on conversations he had and roadbed conditions he observed and that speculative and personal beliefs, hearsay and expert opinions could be excluded. Such testimony could clarify for the Subcommittee and the Arkansas State Claims Commission issues that Mr. East and his client had with decisions made by the Arkansas State Highway and Transportation Department in this contract claim.

Your consideration of this request to permit limited testimony by Mr. Rains is appreciated. Please contact me should you have any questions or need additional information prior to your response. My address and phone/fax number are listed above on our letterhead.

Sincerely,

Norman L. Hodges, Jr.
Director

NLH/jch



**U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
Office of Chief Counsel
Southern Legal Services
60 Forsyth Street, S.W., Suite 8M5
Atlanta, Georgia 30303**

ARKANSAS STATE
CLAIMS COMMISSION

JAN 10 2012

RECEIVED

March 27, 2009

Mr. Jack East, III
Attorney-at-Law
Cantrell Valley Plaza
2725 Cantrell Rd, suite 202
Little Rock, Arkansas 72202

Via fax: 501.376.0949

**Re: Duit Construction Co. v. AR Highway Department
Claim No. 07-0575-CC & 08-158-CC**

Dear Mr. East:

We have received and reviewed your letter of March 20, 2009, regarding your proposed deposition of Mr. Tom Rains.

Your letter indicates the issues on which you wish to have Mr. Rains provide testimony. Your claim all involve the alleged breach of contract by the Arkansas Highway and Transportation Department on a Federal-aid project. While you cast the subject of the testimony being sought as being factual in nature it clearly will require Mr. Rains to testify based on information he gathered as an employee of the Federal Highway Administration (FHWA) and while he was acting in the course and scope of his official duties. Further, it also appears that the testimony would require his expert opinion as an engineer.


It is FHWA's policy to not permit our employees to testify in disputes between private litigants where the agency is not a party. Any deviation from this policy could serve to embroil us in any number of controversies which would impact on our ability to carry out our core mission.

Thus, in accordance with the provisions of Title 49 Code of Federal Regulations Part 9, we hereby deny your request and FHWA will not authorize nor permit Mr. Rains to provide any testimony in this matter. By a copy of this letter, FHWA hereby directs Mr. Rains to not testify in these proceedings. Should Mr. Rains receive any subpoena for a deposition we request that he immediately notify agency counsel. FHWA will then refer this matter to US Attorney's office.

2

If you, or Mr. Rains, have any questions about the agency's position, please do not hesitate to contact me directly at 404.562.3924. I am providing copies of this letter to Mr. Rains, Ms. Michelle Davenport, AHTD counsel, and to Ms. Sandra Otto, the FHWA Arkansas Division Administrator.

Cordially,



Jack F. Gilbert
Attorney-Advisor

cc: Thomas H. Rains
5415 Sullivan Road
Little Rock, Arkansas 72210

Via Federal Express and US Mail

Ms. Michelle Davenport

Via fax: 501.569.2164

Ms. Sandra L. Otto

Via agency email



U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
Office of Chief Counsel
Southern Legal Services
60 Forsyth Street, S.W., Suite 8M5
Atlanta, Georgia 30303

ARKANSAS STATE
CLAIMS COMMISSION
FEB 18 2012
RECEIVED

February 10, 2012

Norman L. Hodges, Jr.
Director
Arkansas State Claims Commission
101 East Capitol Ave., suite 410
Little Rock, Arkansas 72201-3823

Via Fax: 501.682.2823
Via U.S. Mail

Re: Duit Construction Company, Inc. v. Arkansas Highway Department
Claim No. 11-0687-CC

Dear Mr. Hodges:

We have received and reviewed your letter of January 12, 2012, regarding the Claims Review Subcommittee's request to have Mr. Thomas H. Rains testify before the Arkansas State Claims Commission. We understand this request is related to Duit Construction's breach of contract claim filed against the Arkansas State Highway and Transportation Department (AHTD). The claim arises out of a Federal-aid highway project on I-30 in Arkansas.

After reviewing your letter and considering the claims pending before the Commission, it is still evident that Mr. Rains' testimony would be directly related to the job duties he carried out on behalf of Federal Highway Administration (FHWA) for oversight of a Federal-aid highway project. While your letter states that Mr. Rains' testimony "could be limited" to "factual testimony" it still appears that it would necessarily require the use of his engineering expertise. We also note that your letter does not address any of the provisions set out under Title 49 of the Code of Federal Regulations, Part 9. Requests for testimony must include all of the factors set out there. 49 CFR §9.15. Finally, as explained in our prior correspondence to Duit's counsel, it is FHWA's policy not to allow our employees (or former employees) to testify in legal actions involving private litigants. Any deviation from this policy could serve to embroil us in any number of controversies which would impact FHWA's ability to carry out its core mission.

After due consideration of the claims pending before the Commission, review and consideration of your letter and also after reconsidering Mr. East's prior request, the FHWA again

must respectfully deny the request for testimony from Mr. Rains. The FHWA, at this time, will again direct Mr. Rains to not testify in relation to these proceedings. Should Mr. Rains receive a subpoena or notice regarding his testimony on this matter, from any entity, we request that he immediately notify the undersigned agency counsel.

Please note that copies of this letter are being sent to Mr. Thomas H. Rains, Senator Robert Thompson, Mr. Jack East, counsel for Duit Construction, Ms. Michelle Davenport, counsel for AHTD, and to Ms. Sandra Otto, the Arkansas Division Administrator for FHWA.

If you, or anyone copied here, has any questions about the agency's decision, please do not hesitate to contact me directly at 404.562.3924 or via email at jack.gilbert@dot.gov.

Cordially,



Jack F. Gilbert
Senior Attorney
Federal Highway Administration

JFG/abc

cc: Thomas H. Rains 5415 Sullivan Road Little Rock, Arkansas 72210	Via Federal Express and US Mail
Sen. Robert Thompson	Via Fax: 870.239.4859
Mr. Jack East, III	Via Fax: 501.376.0949
Ms. Michelle Davenport	Via Fax: 501.569.2164
Ms. Sandra L. Otto	Via agency email

STATE CLAIMS COMMISSION DOCKET
OPINION

Amount of Claim \$ 6,556,372.43

Claim No. 11-0687-t

<u>Duit Construction Co., Inc.</u>	Claimant	<u>Jack East, III, Attorney</u>	Attorneys Claimant
<u>AR Highway & Transportation Dept.</u>	Respondent	<u>Mark Umeda, Attorney Michelle Davenport, Attorney</u>	Respondent
<u>State of Arkansas</u>			
Date Filed <u>May 5, 2011</u>		Type of Claim <u>Breach of contract</u>	

FINDING OF FACTS

PRE-HEARING ORDER OF PROCEDURE
TO BE FOLLOWED AND RULING ON REQUEST OF CLAIMANT

The above-styled claim was heard on the 20th day of October, 2011, by Commissioners Moran, (serving as Chair), Mays and Lancaster.

Upon close of the hearing and upon due deliberation, the Claimant's claim was denied. Claimant appealed the Commission's decision to the Claims Review Sub-Committee of the Arkansas Legislative Council, and on January 20, 2012, that Committee passed a motion to remand the claim to the Commission for further evidence or findings.

The limited matters that the Claims Review Sub-Committee asked the Commission to address on remand are as follows:

- 1) That Claimant have a chance to obtain e-mails that were deleted in the standard Operating procedure by AHTD
- 2) That the Commission address the issue of witness Tom Raines being allowed to testify on the case addressing fact issues only.
- 3) That the Commission explore if there was disparity in treatment on the Gilbert Central Construction and the Duit Construction jobs and, if so, why?
- 4) That the Commission provide an opinion to the Claims Sub-Committee explaining the rendering of their decision for the Sub-Committee's review.

Taking the matters in the order they are listed above, it is the Commission's understanding that deleted e-mails have been and still are available for Claimant to examine, and the Commission at this hearing on remand will receive any additional relevant evidence, e-mail or otherwise, that Claimant moves to introduce going to the merits of its claim.

Regarding the matter of former Federal Highway Administration employee Raines being allowed to testify, the Commission Staff Director made the Sub-Committee's concern on this point known to FHA and received a letter from FHA General Counsel, reiterating their earlier refusal to allow Mr. Raines to testify. The General Counsel's letter is attached as Exhibit "A".

Further regarding this particular matter, it should be noted that in accordance with Rule 4.5 of the Commission's Rules of Procedure, the Chairman, at the initial hearing on the 20th day of October, 2011, did deviate from the formal rules of evidence and allowed Mr. Duit to testify as to what Mr. Raines had told him which, would be presumably in some part what Mr. Raines would testify to if allowed to be a witness. The Duit testimony is a part of the initial hearing record, it being at the Commission's discretion as what weight to place on it.

As regarding the matter of the Commission exploring whether there was disparity of treatment by AHTD on the Gilbert Central and the Duit Construction jobs, the Commission will welcome any additional evidence by Claimant as to disparate treatment on the part of AHTD not contained already in the initial hearing record herein (emphasis added), as this is the question going to the heart of whether Claimant would be entitled to a monetary award on this claim.

Finally, with regard to the Commission providing the Sub-Committee with an opinion, suffice it to say that upon completion of the remand hearing, such opinion will be provided.

One other matter pending for ruling at this juncture is the request of Claimant that the hearing on remand be heard by all five appointed Commissioners. It is the position of the Commission that it is within the sound discretion of the Commission to grant or deny such requests, and Claimant's request in this instance is denied. However, the same three Commissioners who sat and ruled in the initial October 20, 2011, hearing will be the sitting Commissioners at this hearing on the limited remand that has been allocated a sufficient four hours on the Commission's July 12, 2012, docket.

Date May 10, 2012

Pat Moran
Co-Chair
Keith O. May
Co-Chair
Bill Lancaster
Commissioner
W. A. ...
Commissioner
...
Commissioner

**REPORT
CLAIMS REVIEW SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL
JANUARY 20, 2012**

Co-Chair Baker & Co-Chair Salmon:

Your Claims Review Subcommittee met on Monday, January 9, 2012 and reports its actions to the Arkansas Legislative Council:

**CLAIMS REVIEW SUBCOMMITTEE - SPECIAL ORDER OF BUSINESS
HELD OVER FROM MONDAY, DECEMBER 12, 2011**

A. Denied & Dismissed Claim/Appealed by Claimant

1. #11-0687-CC, Duit Construction Co., Inc. vs. Arkansas Highway and Transportation Department

Senator Hutchinson made a motion to remand the claim to the Claims Commission for further evidence or findings. The following stipulations were included:

- a. The Claimants have a chance to obtain emails that were deleted in the standard operating procedures by the Highway and Transportation Department.**
- b. To address the issue of witness Tom Raines being allowed to testify on the case addressing fact issues only.**
- c. The Claims Commission will explore if there was disparity in treatment on the Gilbert Central Construction and the Duit Construction jobs. If so, why.**
- d. The Claims Commission provide an opinion to the Claims Subcommittee explaining the rendering of their decision for the Subcommittee to review.**

Senator Thompson recommended that the Claims Commission write a letter to the Federal Department of Transportation requesting that witness Tom Raines, a retired Federal Highway Administration official, be available to answer factual questions only on the case.

CURRENT BUSINESS

A. Re-Issuance of Warrant/Unpaid Bill

1.#12-0418-CC, Synergy Petroleum LLC vs. Department of Finance and Administration, Motor Fuel Tax Section

Affirmed. Amount Awarded: \$13,860.67

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

DUIT CONSTRUCTION CO., INC.

CLAIMANT

V.

CLAIM NO. 11-0687-CC

ARKANSAS STATE HIGHWAY
COMMISSION AND ARKANSAS
HIGHWAY AND TRANSPORTATION
DEPARTMENT

RESPONDENTS

**PRE-HEARING BRIEF FOR QUESTIONS ON REMAND
OF RESPONDENT**

ARKANSAS
CLAIMS COMMISSION
JUN 21 2012
RECEIVED

I. INTRODUCTION

This matter is before the Arkansas State Claims Commission on remand from the Claims Review Sub-Committee of the Arkansas Legislative Council. Four issues were identified and set out in the Pre-Hearing Order of Procedure issued by the State Claims Commission filed on May 10, 2012. Only two issues remain to be addressed at the rehearing of this matter. First, that the Claimant have a chance to obtain e-mails that were deleted in the standard operating procedure by the Arkansas State Highway and Transportation Department ("AHTD") and second, that the Claims Commission explore if there was disparity in treatment on the Gilbert Central Construction and the Duit Construction jobs and, if so, why. The Arkansas State Highway and Transportation Department will address these issues in the same order. The following witnesses will provide testimony at the re-hearing on behalf of the Department: Mike Sebren, Staff Construction Engineer (Deposition attached to the original Pre-hearing Brief as Exhibit D4), and Mr. Brian Stewart, Section Head of Computer Services (no deposition taken).

II. Emails

On remand, the Claims Review Sub-Committee of the Arkansas Legislative Council asked that the Claimant, Duit Construction, Inc. ("Duit") have a chance to obtain e-mails that

were deleted in the standard operating procedure by AHTD. Duit, through its representatives Mr. Mike Lipps and Mr. Steve Budzisz, conducted an on-site inspection of computers used in connection with Jobs B60120 and B60122 in December of 2006, prior to filing its first claim with the Arkansas Claims Commission on December 28, 2006. (Exhibit D9, Budzisz pg. 19). Sometime between Duit's filing of the first claim before the Claims Commission and Duit's voluntary non-suit on May 7, 2010, Duit re-inspected the computers maintained by the AHTD. Finally, a third inspection of the computers still maintained by the AHTD occurred on June 5, 2012, after the refiling of the claims on May 5, 2011 by Duit and a full hearing before the Claims Commission. (Exhibit D9, Budzisz pg. 23).

During the inspection of the computers, only the hard drives of the computers were reviewed. (Exhibit D9, Budzisz pg. 10). Duit did not conduct a review of the networked servers or any files stored on the networked server or Microsoft exchange server that handled the email. (Exhibit D9, Budzisz pg. 27). Mr. Budzisz testified during deposition that he determined that there were some files deleted, however they were not entire user profiles, they were random deletes. (Exhibit D9, Budzisz pg. 13-14). Further, he did not maintain any record of the date the files were deleted or if the files belonged to a specific user profile or how many files had been deleted. (Exhibit D9, Budzisz pg. 14 and 27). He did confirm that no program was used to delete blocks of data from the hard drive of any of the computers inspected. (Exhibit D9, Budzisz pg. 17). "Most of the instances of deleted files were pretty normal deleted files. Files get created and deleted by the operating system quite often, so most of those were pretty normal." Exhibit D9, Budzisz pg. 17-18). At all times, the AHTD has provided Duit full access to inspect the files maintained on these jobs, both electronic and paper.

Duit entered into the construction contracts in 2002. At the time of the execution of the contracts, the AHTD had in place a records retention schedule updated on November 3, 1992. (Exhibit 1). This retention policy states that general correspondence was subject to being maintained for three (3) years and then destroyed. The retention policy also describes the types of materials that are required to be and may be contained in the Job file. (Exhibit 1, pg. 3). The emails Duit has repeatedly referenced, including the email from Mr. McMillian, Mr. Sebren and Ms. Wright, were not matters of correspondence between the contractor and the AHTD nor were they notices to the contractor, specifications, estimates or inspection reports. Duit's inspection of the computers did not occur until December of 2006, four years after the commencement of the jobs and after the work had been completed by Duit. (Exhibit 2).

The AHTD was also following two additional policies related to the computer systems of the AHTD. Administrative Order No. 96-01, Electronic Information Systems Policy. (Exhibit 3). This policy states in part that e-mail messages should be read and either discarded, printed or stored on the computer's hard drive to conserve storage. It also sets forth that after an employee has left the AHTD, their computer files and emails may be deleted. The second policy was enacted on November 6, 2002 and is an Update of Electronic Information Systems Policy. In this directive, it clearly states that email records will be retained for thirty days. (Exhibit 4). Further, each night, the Computer Services Division will purge all e-mail records that are more than thirty days old and that all mail records requiring retention should be saved to an appropriate file or folder off-line. The AHTD computer services department also followed the Computer and Electronic Solid Waste Management Security and Privacy of Data held in Electronic Devices guidance issued by the Office of Information Technology. (Exhibit 5). This guidance specifically addresses the deletion and destruction of data on electronic devices.

A number of the emails Duit continually references as being recovered after being deleted are primarily between AHTD personnel and are dealing with general questions, not specific correspondence. Based on the information testified to by Duit's computer examiner, he did not maintain any record as to the date the files were deleted, who deleted them or if they were maintained in another file on the server or elsewhere. No notice was given to AHTD at the time of these emails or within 30 days of their creation that subsoil conditions were items upon which Duit would be filing a claim, creating a specific duty to retain the documents.

As previously briefed, Duit failed to give written notice of its intent to make a claim for additional compensation under the requirements of the contract and, as such, has agreed to waive any claim for additional compensation. (Section 105.18 of the Standard Specifications for Highway Construction, 1996 Edition).

105.18 Claims for Adjustment and Disputes. (a) General. If, in any case, the Contractor deems that additional compensation is due for work or material not clearly covered in the Contract or not ordered by the Engineer as extra work, as defined in Subsection 104.04, **the Contractor shall notify the Engineer in writing of intention to make claim for such additional compensation before beginning the work on which the claim is based. If such notification is not given and the Engineer is not afforded proper time and facilities by the Contractor for keeping accurate account of the actual costs of the work, the Contractor hereby agrees to waive any claim for such additional compensation.** Such notice by the Contractor and the fact that the Engineer has kept account of the cost of the work shall not in any way be construed as proving or substantiating the validity of the claim. (emphasis added).(Exhibit 2 in original Pre-Hearing Brief)

Duit failed to comply with the clear requirements of subsection 105.18 and by failing to notify the AHTD, no specific retention duty was created. At no time during the course of construction did Duit give written notice that it would be filing a claim for additional compensation, and therefore, internal correspondence that was a required part of the Job file was not permanently retained. The deposition testimony of Mr. Gene Tharp, the Resident Engineer

on the project, was clear that he was not given either written or verbal notice that Duit would be filing a claim for additional compensation. (Exhibit D1 Tharp pg. 92).

The AHTD fully complied with the records retention and Electronic information systems policies that were in place at the time of these contracts. Duit has inspected the files of AHTD, both electronic and paper, multiple times during the course of this case.

II. Disparity

The second question addressed to the Commission is to explore if there was disparity in treatment on the Gilbert Central Construction and the Duit Construction jobs and, if so, why. "Disparity" is generally defined as a "marked difference in quantity or quality between two things or among many things". *Black's Law Dictionary*. A disparity is not inherently good or bad, it is simply a "marked difference." The claim filed before the Commission is a request to alter the contract between Duit and the AHTD.

The analysis of disparity in the present case is hindered by the lack of a legal framework in which to analyze the claim. This is not an equal protection claim, nor a claim for employment discrimination. This is a claim for breach of contract in which there is no contract term regarding disparity or disparate treatment. Nor has Duit met its contractual obligations as fully set forth in the previous hearing on this matter. As there is no specific claim or cause of action under the contract, a framework of analysis can be borrowed. While this is in no way an equal protection case, the analysis the Court follows in such cases is helpful.

The law has addressed disparity in a variety of settings, but one of the most familiar settings is in cases involving equal protection claims under the Constitution. In these claims, disparity is the treating of similarly situated persons differently for a prohibited reason. *Ghegan & Ghegan, Inc. V. Barclay*, 345 Ark. 514, 49 S.W.3d 652 (2001). It necessarily follows that

disparity alone does not give rise to a cause of action, but must have the added requirement of a prohibition of that act.

“Equal protection does not require that persons be dealt with identically; it only requires that classification rest on real and not feigned differences, that the distinctions have some relevance to the purpose for which the classification is made, and that their treatment be not so disparate as to be arbitrary....If a rational basis exists, the statute or, in this case, the regulation, will withstand constitutional challenge. Under the rational-basis test, legislation is presumed constitutional and rationally related to achieving any legitimate governmental objective under any reasonably conceivable fact situation. Citations omitted. *Rose v. Arkansas State Plant Board*, 363 Ark. 281, 213 S.W.3d 607 (2005).

While the equal protection argument above is referencing a specific piece of legislation, the general process is one that can be applied to this case. The general analysis set out in *Ghegan*, requires looking at three separate parts and a failure of any will result in a finding of no disparate treatment. The first element is that the parties be similarly situated. Next, there must be a difference in treatment. Finally, that the difference in treatment is for a prohibited reason. To address the first two elements, it is important to look at the basic facts of this claim.

Duit Construction voluntarily bid on and was awarded two separate road construction projects, Jobs B60120 and B60122. Gilbert Central voluntarily bid on and was awarded one road construction project, Job B60119. A third contractor, APAC, bid on and was awarded a road construction project, Job B60121. At the most basic level, these four separate road construction jobs were similar. However, similar does not mean the same as they covered different areas of ground, were of different lengths, and had different structures present on each of them. The front of the job plan sheets for each job illustrate some of these differences by illustrating the different locations of the projects, lengths of road construction, the different bridge data and the different structures over 20 feet on each. (Exhibit 6).

It is true that all four jobs involved rehabilitating Interstate 30 in the same general corridor and contained the standard specifications used by the AHTD on all highway projects, but that similarity is not enough to establish a disparity claim. Digging a little deeper in the contracts, the differences continue. Not all of the same supplemental specifications and special provisions were included in all four of the contracts. (Exhibit 7). Depending on the item, many of the estimated quantities on all four contracts were different, specifically with regard to unclassified excavation, compacted embankment, stone backfill and soil stabilization. (Exhibit 8 a-d and Exhibit 9) In the executed contracts, the bid prices were different on the earthwork items that have been discussed repeatedly, even between Duit's two jobs. These basic differences became much larger differences in the actual construction of each of the jobs, as the construction and decisions related to it would be dictated by the conditions present in that specific area.

Therefore, it is questionable as to whether or not there is enough similarity between the four contracts to determine if there was a disparity of treatment. At the point each contract is let to the specific contractor the administration of each of the contracts begins to change. By necessity, and the terms of the contracts, there are differences in the way each contract is administered as the contracts are based on a very specific set of construction plans that are unique to the area the job is being constructed and the very specific conditions encountered on each job. This can be true even within a relatively small geographical area. Subsoil conditions can vary greatly within a few feet of each other. (See *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1346 (Fed. Cir. 1998) (Soil borings were taken approximately 300 yards away from the excavation site and were substantially different. The reasonableness of reliance on borings taken at a distance from a project site cannot be determined based on a bright line rule, but must rather be determined based on the geologic and topographic features present in each case.) While the

contracts begin as similar construction projects, once construction begins the contracts diverge in a way that they are no longer similar enough to give rise to a disparity claim.

Even if such similarity is found, there is a failure of Duit to establish that each contractor was in fact treated differently by the AHTD with regard to the execution of its contracts. Each of the three contractors were required to submit pricing for new change order items in writing and change orders were granted on all four of the jobs. Gilbert's Job B60119 had 73 total change orders, Duit's Job B60120 had 74, APAC's Job B60121 had 105 and Duit's Job B60122 had 83. Duit was not denied the ability to have change orders on the contract. Nor was Duit denied the ability to request such change orders even if they were not granted. Each of the contractors had weekly meetings with the Department's representatives. During these meetings each contractor had the ability to request a review of days being charged to the contract, both before the work was done and immediately after, to propose changes in the contract by change order, and to discuss the progression of the contract. Duit was not denied the ability to engage in this dialogue with the AHTD. The differences in treatment Duit has attempted to highlight to this point have dealt solely with the use of B stone or stone backfill by Gilbert on Job B60119. Before any kind of disparity can arise, Duit must have requested and been denied the same action. None of the weekly minutes reflect a request by Duit to use more B stone or stone backfill on the Job. In fact, the evidence has shown that Duit was allowed to use B stone for unsuitable soil. (Exhibit 10 and Exhibit 11). Duit was paid \$269,495.10 for 14,971.95 tons of B stone. Further, it was Duit's own representative, Mr. Gary Gaul, who stated that the B-stone placement on Job B60122 was "getting a little excessive" and he wanted to try another method. (Exhibit 12).

It is true that Gilbert Central used more B stone on its job than any of the other three jobs, including APAC. There are a variety of reasons for this. First, there is a large retaining wall and

bridge structure on the project that required a significant amount of B stone that was not included in the quantities in the contract. Second, it was documented that there was unsuitable material present on the job that would require the use of stone backfill or B stone. (Exhibit 13). Additionally, there was significant work at the University Road exit and interchange that required a significant amount of B stone due to the unsuitable soil. (Exhibit 13). It is also clear from the original contract specifications that B stone is the item to be used to address unsuitable, not simply unstable soils. (Exhibit D2 Burnett page 20-21, Exhibit 14). There is no documentation that the majority of subgrade material on Duit's job was unsuitable soil. In one progress meeting, it was noted that Duit was encountering subgrade in the median that was "no PI, non-plastic" material. (Exhibit 15). This is a sandy type soil that is different from the saturated midway clay referenced in the Gilbert change order 56. (Exhibit 13). The very fact that Duit was able to stabilize the soil with soil stabilization shows that the material was simply unstable, not unsuitable. While all four of the jobs experienced unstable subgrades, not all unstable subgrade is unsuitable soil that requires addressing with B stone. (Exhibit D4 Sebren, pg. 48-49). Mr. Gaul, Duit's site superintendent, also testified that there were different types of soil encountered, a strip of gray, silty clay that was unsuitable and other clays that were sandy or had high moisture that were simply unstable. (Exhibit D7 Gaul, pg. 17). Mr. Gaul further stated that on Job B60120 the first section wasn't unsuitable, but it was wet. (Exhibit D7 Gaul, pg. 19). He also indicated that the soils changed over the course of the jobs. (Exhibit D7 Gaul, pg. 34). Further, examining the usage of soil stabilization, stone backfill and undercut on all four of the Jobs shows a great similarity between the three jobs of Duit and APAC, with the exception being the Gilbert Central Job for the reasons set out above. (Exhibit 16 a-d).

Duit's focus on Gilbert Central's use of B stone relates back to the performance of the earthwork portion of all of the contracts. None of the excavation on these four jobs was equal to a major item of work under the contract which would bring the increased quantities under sections 109.02 (Scope of Payment) and 109.03 (Payment and Compensation of Altered Quantities) of the Standard Specifications for Highway Construction as has been previously briefed. In B60120 the estimated earthwork was 3.74% of the contract value and the increase in earthwork according to Duit's numbers only represents 3.55%. When combined, this only equals 7.29% of the contract value. On B60122 the estimated earthwork was only 2.49% of the contract value and the increase was only 3.38% for a total of 5.88% of contract value. Only on Gilbert's Job B60119 was compacted embankment a major item of work when the contract was bid. Otherwise, the major item of work on all four was the portland cement concrete pavement, which is logical as it was the rehabilitation of an existing roadway, not the construction of a new road. The earthwork required in these four contracts does not approach the level of increase or decrease in work (25%) as allowed under the contract in Subsection 104.02a of the Standard Specifications for Highway Construction. Each of the contractors was paid for each item of work for the increase of earthwork at the rates it chose to bid on their respective jobs. As a reference, the AHTD looked at all of the planned quantities of work and estimated a percentage of the planned amounts for each of the four primary earthwork items for each of the four contracts, and did the same analysis as to the final quantities. (Exhibit 17). As this information reflects, there were both increases and decreases in the items of work and the only significant increase in the four jobs was the use of stone backfill on the Gilbert job. This increase has been documented through the change order process and was unique to the conditions surrounding that

job, the soils encountered and the design of that portion of the roadway. Neither Duit nor APAC reached the percentage of work planned for in the original contracts.

Mr. Gaul of Duit, the on-site superintendent even stated that the Gilbert Central job “was totally different than ours. Theirs were more structure oriented and their phasing was built around their structure. It was a completely different job.” (Exhibit D7 Gaul, pg. 25). During the previous hearing on this matter, Mr. Mike Lipps provided testimony to the Commission regarding the soil conditions, even though he was not on site every day. He testified at the hearing that Duit ran into unsuitable soil on the B60122 immediately and was allowed to use stone backfill. (Exhibit HT, pg. 12-13). He also contradicts the testimony of those parties on site and his own by saying that all of the soils were a soft yielding saturated mid weight clay that could not be stabilized. (Exhibit HT, pg. 22). He then goes on to testify that they were allowed to “undercut and put in excavation and compactive embankment in certain locations, b stone in certain locations and soil stabilization in certain locations.” (Exhibit HT, pg. 23). Mr. Lipps further agreed during his testimony before the Commission that having to do more work of the same kind anticipated was not a differing site condition. (Exhibit HT, page. 45.) Mr. Lipps agreed there was no disparity in the way the job was bid and that the same specification applied to all of the bidders on that job and stated that “all work was bid under the worst conditions possible and put as much money in as possible as we can.” (Exhibit HT, pg. 47.) As established by Duit’s own witnesses, while the general contract process was similar, the jobs were separate and different and the contractors themselves were treated the same.

The final element in the analysis is only reached if it is found that the similarly situated people have been treated differently. Even if different treatment is found, that treatment must be for a prohibited reason. It is the job of the Highway Department to be good stewards of the tax

payer's money. If savings can be shown in a change order from any contract on a job, that would be a good decision for the Department to make that change and recommendation to FHWA. (Exhibit 13). The change order process is the process set out by the specifications to ensure that any changes to the signed contracts are agreed to and beneficial to all parties to the contract. As to the approval or denial of change orders or requests, the Department requires the requests to be in writing as they are potentially going to alter that written contract. **Duit never requested a change order to be processed to increase the amount of B stone on the job or to allow for the additional placement of B stone.** When Duit requested the ability to alter the standard specifications by eliminating the drying and processing of the unstable soils it was granted.

Duit has failed to show that the Department acted outside of the agreed upon terms of the contract, or that it treated Duit in some prohibited manner. The Department has previously set forth the general rule for allocation of risk in contracts, the *Spearin* doctrine affirms that the actions taken by the Department are well within the general course and scope of contract law. "[W]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered." *United States v. Spearin*, 248 U.S. 132, 136. Clearly, the Department was not acting in a prohibited manner by requiring Duit to follow the specifications.

III. CONCLUSION

Duit has had every opportunity to inspect the computers of the AHTD as well as review all documents retained in the construction files of these jobs. Duit failed to give written notice of its intent to make a claim for additional compensation under the requirements of the contracts, and has therefore waived any claim for additional compensation and any objections to the

classification of emails as non-substantive.

Duit has attempted to redirect the Commission's review of this Breach of Contract claim to a disparity of treatment claim, more commonly seen in an equal protection case. As discussed, disparity is the treating of similarly situated persons differently for a prohibited reason. For the numerous reasons set forth above, there was no disparity as first, Duit and Gilbert Central were not similarity situated, were not treated differently and there was no prohibited reason for a difference in treatment.

The primary issues in this case have been previously set out before the Commission and the Commission has denied Duit's claims. Duit was paid for all of its work at the unit prices that it bid and should not now be permitted to have prices altered outside the terms of the contract. Encountering unsuitable subgrade material does not constitute justification for a significant change and the modifications in the contract were all implemented by change order and well within the limits of the original requirements of the contract. Further, there is no basis for Duit's contention that the altered quantities rise to the level of extra work or work outside of the scope of the contract. The Department did not warrant the accuracy of the estimated quantities and Duit assumed the risk of those quantities being more or less than stated. As the site conditions did not differ from those shown in the contract as the sub-soil conditions were unknown and the conditions were generally recognized as inherent in the work, Duit's claim does not meet the definition of a significant change in the character of the work. For the foregoing reasons, the Commission's decision to deny Duit's claim in its entirety should be affirmed.

ARKANSAS HIGHWAY AND
TRANSPORTATION DEPARTMENT

By: Michelle Davenport
Michelle L. Davenport, Bar No. 2001-166
AHTD, Legal Division
P. O. Box 2261
Little Rock, Arkansas 72203-2261
(501) 569-2157

CERTIFICATE OF SERVICE

I, Michelle Davenport, certify that I have served a true copy of this instrument upon Claimant by either hand delivery, facsimile, U.S. Postage certified mail, return receipt or U.S. Postage prepaid this 21st day of June, 2012 on:

Jack East, III
Attorney for the Claimant
2725 Cantrell Road, Suite 202
Little Rock, AR 72202

Michelle Davenport
Michelle L. Davenport

ARKANSAS STATE
CLAIMS COMMISSION

JUN 21 2012

RECEIVED

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

DUIT CONSTRUCTION CO., INC.

CLAIMANT

v.

NO. 11-0687-CC

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

RESPONDENTS

PRE-HEARING MEMORANDUM

**1.
Introduction**

The Claims Review Subcommittee remanded this claim on January 20, 2012 per the Report attached as Appendix I. The Claimant, Duit Construction Co., Inc., (Duit), has received the Commission's May 5, 2012 Order of Procedure. Duit reads this Order as stating that the only evidence the Commission will consider at the hearing in July, 2012 will be evidence exploring disparity in treatment "not contained already in the initial record herein". Obviously, the Commission believes it has disposed of the other issues – except for the opinion mentioned in the penultimate paragraph of the May 5, 2012 Order of Procedure.¹ Despite the Commission's restrictions Duit will offer evidence of attempted destruction of email evidence in the face of Duit's claim and the FOI request made by counsel for Duit. If the three member panel chooses not to hear it a proffer will be made.

¹ Duit believes the scope of the inquiry on remand has been restricted too much by the Commission. For example, the Commission has already decided that it was OK for Respondents to delete emails per the alleged "standard operating procedure" at AHTD despite the existence of Duit's existing claim and an FOI request.

The remainder of this Memorandum shall review the evidence of disparate treatment not in the record.

2.

Disparate Treatment of Duit

a.

Review Of The Evidence So Far

Please recall AHTD's position regarding why Duit was treated "differently" from Gilbert Central (GC). AHTD's first position was that GC did not "B-Stone" its entire job. This position was made by Mr. Tharp. (No evidence supporting this falsehood was ever presented by AHTD.) When Duit caught AHTD and Mr. Tharp in this untruth through examination of AHTD's own records the position shifted to "Story 2". Story 2 – also expressed by Mr. Tharp – was that the "B-Stone" was necessary due to a superstructure – the overpass at Baseline Road right beside the AHTD central offices. This Story 2 was quickly disproved by the evidence that this superstructure and approaches was only around 20% of the GC job but GC "B-Stoned" 100% of its job, with AHTD paying for it.

So, AHTD had to resort to another explanation – we'll call it "Story 3". Story 3 is AHTD's claim that the soil on GC's job was worse than the soil on Duit's two jobs, and that the soil quality got better as you went south on the four jobs. Needless to say, this third story is belied by all of the existing evidence. First, see the emails AHTD destroyed per its "standard procedure" which Duit was able to retrieve. These emails are attached as Appendix II. Next, please note that – according to AHTD's Story 3 – the soil magically turned OK at the southernmost limits of GC's job southward. So,

he

voila' Duit, right there where one of your jobs met GC's job the dirt turned from good on your side to bad on GC's side. Does the Commission believe that load of bull? (One interesting twist to this Story 3 story is that a change order was issued transferring responsibility for a small segment of Duit's original road work to GC in the northbound lanes. Until this transfer the soil in this section was OK. Once transferred to GC it had to be B-Stoned!)

b.
New Evidence

The "new" evidence of disparate treatment relates to this AHTD Story 3 position that the soil south of GC's job magically became good soil. Included in Duit's binder is evidence relating to a job in Benton on Military Road beside one of Duit's I-30 jobs. As the Commission can plainly see, the soil quality was bad enough that Benton wanted to use B-Stone on the job for roadway stability, and to progress the work. Benton's engineers supported this position. AHTD didn't attempt to claim the soil quality was good, however, it still wanted Benton to make the contractor do what AHTD unreasonably required Duit to do – disc/dry and then export unanticipated quantities of bad soil and import large, unanticipated quantities of acceptable soil.

3.
**AHTD is Evading the Requirements of the Differing Site Conditions Clause,
with Claims Commission Blessing, in a Way that
Violate Fundamental Principles Relevant to that Clause.**

The Differing Site Conditions Clause – also known as the "Changed Conditions" Clause – is required to be in AHTD's contract by Federal Law. See 23 U.S.C. §112 (e) and 23 C.F.R. §635.109 (1997) included in the Duit binder. The "site conditions" clause

is AHTD (Ed. of 1996) Standard Spec. 104.02 (c). This clause has been a standard clause in federal contracts since the 1920's. It is also a standard clause in American Institute of Architects standard form contracts, and in Engineer Joint Contract Documents Committee standard form contracts. See Duit binder.

Why is a "DSC" clause so universally accepted by everyone **except** the AHTD? The reason has been explained by many court decisions, but the best explanation is presented in Foster Construction C.A. et al. v. The United States, 435 F. 2d 873 (Ct. Cl. 1970):

The purpose of the changed conditions clause is thus to take at least some of the gamble on subsurface conditions out of bidding. Bidders need not weight the cost and ease of making their own borings against the risk of encountering an adverse subsurface, and they need not consider how large a contingency should be added to the bid to cover the risk. They will have no windfalls and no disasters. The Government benefits from more accurate bidding, without inflation for risks which may not eventuate. It pays for difficult subsurface work only when it is encountered and was not indicated in the logs.

All this is long-standing, deliberately adopted procurement policy, expressed in the standard mandatory changed conditions clause and enforced by the courts and the administrative authorities on many occasions. *United Contractors v. United States*, *supra*, 368 F. 2d at 599, 177 Ct. Cl. at 168; *Kaiser Industries Corp. v. United States*, *supra*; *Joseph Meltzer, Inc. of N.J. v. United States*, 77 F. Supp. 1018, 111 Ct. Cl. 389, 481 (1948); *A.S. Horner Construction Co.* ASBCA No. 5334, 59-2 BCA ¶ 2321. See Kendall, *Changed Conditions as Misrepresentation in Government Construction contracts*, *supra*, 35 Geo. Wash. L. Rev. at 979-80, 981-82; Nash, *Risk Allocation in Government contracts*, 34 Geo. Wash. L. Rev. 693, 701 (1966); Nash and Cibinic, *Federal Procurement Law*, ch. 15 (2d Ed. 1969). Faithful execution of the policy requires that the promise in the changed conditions clause not be frustrated by an expansive concept of the duty of bidders to investigate the site. That duty, if not carefully limited, could force bidders to rely on their own

investigations, lessen their reliance on logs in the contract and reintroduce the practice sought to be eradicated – the computation of bids on the basis of the bidders' own investigations, with contingency elements often substituting for investigation. The changed conditions clause "makes it clear that bidders are to compute their bids, not upon the basis of their own preaward surveys or investigations, but upon the basis of what is indicated and shown in the specifications and on the drawings." A. S. Horner Constr. Co., *supra*, 59-2 BCA at p. 10-577. The clause "should induce the bidder not to consider such contingencies" as the latent or subsurface conditions, for which the Government has assumed responsibility. Kendall, *Changed Conditions as Misrepresentation in Government construction Contracts*, *supra* 35 Geo. Wash. L. Rev. at 985.

As this Commission well knows, every time an AHTD contractor brings a DSC claim before the Commission the AHTD strenuously argues the contractor should have investigated the subsurface conditions. AHTD simply does not recognize DSC claims involving soil conditions because it uses its own quantity "errors" to make soil problems a "minor item" of work, thereby forcing contractors to bear this risk of AHTD's gross, or deliberate, quantity errors. (See Claims Commission opinion regarding T.L. James Construction in binder.) To Duit's counsel's knowledge no other government in the United States would allow such a "disclaimer" to invalidate a DSC claim. Note that courts hearing similar arguments do not allow disclaimers to defeat a DSC clause. In Woodcrest Construction Co., v. United States, 408 F. 2d 395 (Ct. Cl. 1969) the Court stated:

The effect of an actual representation is to make the statements of the government binding upon it, despite exculpatory clauses which do not guarantee the accuracy of a description... Here, although there is no statement which can be made binding upon the government, there was in effect a description of the site, upon which plaintiff had a right to rely, and by which it was misled. Nor does

the exculpatory clause in the instant case absolve the Government, since broad exculpatory clauses...cannot be given their full literal reach, and, "do not relieve the defendant of liability for changed conditions as the broad language thereof would seem to indicate." Fehlhaber Corp. v. United States, 151 F. Supp. 817, 825, 355 U.S. 877, 78 S. Ct. 141, 2 L. Ed. 2d 108. As Fehlhaber said, general portions of the specifications should not lightly be read to override the Changed Conditions clause...United Contractors, et al. v. United States, 368 F. 2d 585, 598, 177 Ct. Cl. 151, 165-166 (1966).

408 F. 2d at 410. Based upon the above, and the common-sense fundamental fairness of requiring AHTD to honor its own representations, i.e., quantity estimates will be at least "approximate", Duit submits gross errors by AHTD in unclassified excavation and compacted embankment estimates are a DSC.

Other courts would agree with Duit. A fairly recent case from Virginia is quite similar to this case. In Asphalt Road & Materials Co., Inc. v. Commonwealth, 512 S.E. 2d 804 (Va. App. 1999) the court found grossly erroneous quantity estimates to be a differing site condition. In that case the Virginia Department of Transportation (VDOT) contract required the contractor to remove and replace "any soil unsuitable for use of backfill under utility pipes." The VDOT prepared drawings indicated there were "940 cu. yds. of [unsuitable] soil."

During performance of the work, however, the contractor discovered "many more than 940 cubic yard of unsuitable soil" and VDOT required it to be removed and replaced with "borrow", defined in the contract as, "suitable materials from sources outside the roadway." The VDOT then claimed this additional expense was included in the contract unit prices for the pipe. The contractor asserted the large overruns in excavation and removal of unsuitable soil, and replacement of it with suitable soil, was

a differing site condition, entitling the contractor to additional compensation under separate line items, i.e., select borrow, and removal and disposal of unsuitable material.

The trial court agreed with the contractor, finding that an overrun of 8,807 cubic yards of unsuitable material was a DSC in light of the 940 cubic yards represented in the bid documents as the "estimated" quantity. Additional compensation for select borrow at \$6.18 per cu. yd. and \$11.16 per cu. yd. for removal and disposal of unsuitable soil was awarded.

The Virginia Court of Appeals reversed the award of additional compensation. The Virginia Supreme Court accepted an appeal on grounds that the decision would be of significant precedential value.

The Virginia Supreme Court reversed the Court of Appeals decision, finding that the large quantity overruns in unsuitable soil was a DSC, stating:

The purpose of the differing site conditions clause and similar clauses, described in a number of cases as the "changed conditions clause," has been stated in several cases. The North Carolina Court of Appeals, for example, has stated that its purpose is "[t]o encourage low, competent bids." *Ray D. Lowder, Inc. v. North Carolina State Highway Comm'n*, 26 N.C. App. 622, 217 S.E. 2d 682, 696, cert. denied, 288 N.C. 393, 218 S.E. 2d 467 (1975).

Although the differing site conditions clause included in the contract at issue must be included in most federal highway construction contracts pursuant to 23 C.F.R §635.109 (1997), apparently VDOT voluntarily inserted the clause to obtain its benefits in securing the lowest competent bids. **VDOT does not question the wisdom and utility of the differing site conditions clause, but instead contends that it does not apply to mere increase in government-estimated quantities of material as**

**distinguished from the character and nature of material
We disagree.**

Since we apparently have not been confronted with this issue and the clause in question is similar to those in federal construction contracts, both parties cite, and we consider, cases arising under those contracts. Although VDOT cites cases allegedly supporting its contention that changes in quantity are not cognizable under the differing site conditions clause, we note that most of those cases deal with substantially different factual situations. We think that the better view is expressed by the following statement of the Court of Claims.

The legal conclusion of the Appeals Board that a 39 percent overrun [in clearing all trees and brush along a 20 mile stretch of a river], in the facts and circumstances of this case, was a material change and warranted a price adjustment [under the change of conditions clause], is supported by numerous decisions in this Court. To do otherwise, and hold the contractor to its original lump-sum bid, would negate one of the prime reasons for incorporating a "changed condition" article into these contracts, i.e., "to induce bidders not to increase their prices to cover possible misfortunes which might result from unforeseen developments."

This is true even though the Army attempted to protect itself by inserting caveatory and exculpatory provisions in the contract.

Schutt Construction Co., Inc. v. United States, 173 Ct. Cl. 836, 353 F. 2d 1018, 1021 (1965) (internal citations omitted).

The opinion then rejected VDOT's argument that the contractor should have made its own investigation and, therefore, that the contractor bore the risk of large quantity overruns:

Next, VDOT argues that the Court of Appeals correctly applied §102.04 to deny the claim on the ground that this section made the contractor responsible for any alleged excess quantities of unsuitable soil. As pertinent, § 102.04 provides:

The submission of a bid will be considered conclusive evidence that the bidder has examined the site of the proposed work, proposal, plans, standard drawings, specifications, ...and any other documents specified in the proposal before submitting a bid and is satisfied as to the conditions to be encountered in performing the work and requirements specified in the proposal.

...

The submission of a bid will be considered conclusive evidence that the bidder is satisfied with regard to the subsurface conditions to be encountered in the work.

Additionally, VDOT notes other warnings in §102.04 which advise bidders that the available subsurface data are accurate with regard to test borings only and disclaim any warranty regarding subsurface conditions or the condition, amount, or nature of the material which may be encountered.

We reject these contentions. If we applied these sections to the change of condition shown in the evidence in this case, we would render meaningless the language of sections like [the DSC clause] and negate their salutary purposes. See *Schutt Constr. Co.*, 353 F. 2d at 102.1. For these and other reasons, a number of cases have rejected similar contentions dealing with the relation of clauses like §102.04 to clauses like §104.03. See e.g., *United Contractors v. United States*, 177 Ct. Cl. 151, 368 F. 2d 585 (1966); *Fehlhaber Corp. v. United State*, 138 Ct. Cl. 571, 151 F. Supp. 817, cert. denied, 355 U.S. 877, 78 S. Ct. 141, 2 L. Ed. 2d 108 (1957); *Ray Di. Lowder, Inc.*, 26 N.C. App. 622, 217 S.E. 2d 682; *Morrison-Knudsen Co., v. United States*, 184 Ct. Cl. 661, 397 F. 2d 826 (1968).

Finally, and contrary to VDOT's contention, we conclude that since §104.03 applies to a specific situation, "differing site conditions," it controls, rather than the general language in §§ 302.04 and 520.06. We hold, therefore, that the contractor was entitled to additional compensation for the disposal of excess material under §104.03 of the contract.

A copy of this case is included in Duit's binder.

In this case the quantity overruns were as follows:

<u>Job#</u>	<u>Description</u>	<u>Estimated Quantity</u>	<u>Actual</u>
B60122	Uncl. Ex. (CY)	56,057	173
B60122	Comp. Em. (CY)	56,192	157
B60122	Soil Stab. (ton)	1,000	4,407 (440.7%)
B60120	Uncl. Ex. (CY)	114,372	233,072 (204%)
B60120	Comp. Em. (CY)	53,063	154,137 (290%)
B60120	Soil Stab. (ton)	1,000	8,485 (848%)

The evidence of the above quantities and overruns was undisputed. See original Duit binder Vol. 1 at Tabs (Ex.) 15 and 16. See AHTD binder at Tab (Ex 3.2) regarding final quantities for Job B60120. (AHTD Ex. 3.2 is rather hard to interpret. Relevant items are included and explained in Duit's rehearing binder.)

Again, AHTD never challenged or disputed the above overruns. In fact, the overrun values are based upon AHTD's own calculations. (Note also that AHTD's failure to file an Answer in this case constituted an admission of the factual allegations in the Complaint. See Rule 8 (d), ARCP; Jean-Pierre v. Plantation Homes of Crittenden County, Inc., 350 Ark. 569, 89 S.W. 3d 337 (2002). Duit realizes the Commission does not hold the State in default under Rule 55, ARCP, but it is submitted, at the very least, that the AHTD is bound by the uncontroverted, undisputed facts.) Lastly, even AHTD's exhibit 3.2 validates the overruns on Job B60120 and no AHTD exhibit contradicts the overruns on Job B60122.

3. **Conclusion**

Until this Commission decides to make AHTD honor the differing site conditions clause, contractors will be tricked into competitive bids with risks they never

anticipated. The inclusion of the DSC clause is highly misleading and unfair to contractors due to AHTD's false quantity estimates. Please recall the testimony of AHTD's engineer Mike Sebren:

Jack East: But your spec [102.05] talks about approximate quantity.

Mike Sebren: That is correct.

Jack East: That is not close to being approximate, is it?

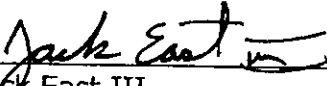
Mike Sebren: Define approximate.

Jack East: 282 percent is not close. How about 58 percent over on unclassified excavation is that approximate? I am talking about, these are on the 120 job, I believe. How about a 309 percent overrun on unclassified excavation on the 122 job? Was that an approximation? How about 280 percent overrun on compacted embankment on the 122? How was a contractor to bid a job if he cannot rely on the estimated quantities?

Mike Sebren: The quantities are estimates, our specifications states that they are approximate, **it is just in there to get a bid from all the contractors.**

See transcript at p. 98. Mr. Sebren's candor is highly refreshing and telling. "It is just put in there to get a bid from all the contractors."

The Commission should put a halt to this shell game. An award to Duit as requested in its Complaint is justified and appropriate.




Jack East III
2725 Cantrell Road, Ste. 202
Little Rock, AR 72202
(501) 372-3278
Bar ID No. 75-036

Certificate of Service

I, Jack East III, Attorney at Law, do hereby certify that a true and correct copy of the foregoing has been served upon the following by U.S. Mail, postage prepaid this 21st day of June, 2012:

Michelle Davenport
Arkansas Highway & Transportation Dept.
Legal Division
P.O. Box 2261
Little Rock, AR 72203-2261



JACK EAST III

REPORT
CLAIMS REVIEW SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL
JANUARY 20, 2012

Co-Chair Baker & Co-Chair Salmon:

Your Claims Review Subcommittee met on Monday, January 9, 2012 and reports its actions to the Arkansas Legislative Council:

CLAIMS REVIEW SUBCOMMITTEE - SPECIAL ORDER OF BUSINESS
HELD OVER FROM MONDAY, DECEMBER 12, 2011

A. Denied & Dismissed Claim/Appealed by Claimant

1. #11-0687-CC, Duit Construction Co., Inc. vs. Arkansas Highway and Transportation Department

Senator Hutchinson made a motion to remand the claim to the Claims Commission for further evidence or findings. The following stipulations were included:

- a. The Claimants have a chance to obtain emails that were deleted in the standard operating procedures by the Highway and Transportation Department.
- b. To address the issue of witness Tom Raines being allowed to testify on the case addressing fact issues only.
- c. The Claims Commission will explore if there was disparity in treatment on the Gilbert Central Construction and the Duit Construction jobs. If so, why.
- d. The Claims Commission provide an opinion to the Claims Subcommittee explaining the rendering of their decision for the Subcommittee to review.

Senator Thompson recommended that the Claims Commission write a letter to the Federal Department of Transportation requesting that witness Tom Raines, a retired Federal Highway Administration official, be available to answer factual questions only on the case.

CURRENT BUSINESS

A. Re-Issuance of Warrant/Unpaid Bill

1.#12-0418-CC, Synergy Petroleum LLC vs. Department of Finance and Administration, Motor Fuel Tax Section

Affirmed. Amount Awarded: \$13,860.67

APPENDIX I

35

13

Mike Lipps

From: /McMillian, Brian [Brian.McMillian@ahfd.state.ar.us]
Sent: /Wednesday, March 12, 2003 12:48 PM
To: /Scott Dubord (E-mail)
Subject: Pavement Design Question

Scott:

I am not sure as to the extent that PBS&J designed the pavement sections on I-30. The situation that has come up with the construction of all of this is the amount of unsuitable material that we have encountered throughout the projects. We are looking at ways to try and minimize the amount of undercutting that we are having to do. What kind of structural number for the subgrade was used in the design? That information would assist in our determination of what kinds of undercutting would be required and depths, etc. There may be some alternatives that we can explore if we knew what kind of strength the designers envisioned for the subgrade.

Thanks

Brian

APPENDIX II

36

was McMillan still employed

By AHD

John Privrat

From: Burnett, David A.
Sent: Friday, March 28, 2003 10:33 AM
To: McMillan, Brian
Subject: RE: Subgrade design recommendations for I-30 rehab projects

Brian,

PCC pavement designs are based on a number of factors, and the factors that have the most effect on the slab thickness are traffic loading and concrete strength. The thickness is not highly sensitive to the quality of the subgrade material. I'm not sure what you mean by a "100% stable subgrade", but uniform support under the PCCP is essential to good pavement performance. PCC pavement designs are not based on "structural numbers". These are used for ACHM pavements. The design for this project was based on a subgrade resilient modulus of 4000 psi, which is typical for clays, but as I said, the slab thickness is not highly sensitive to this value. If the actual field values are slightly less than this, it would not mean a thicker slab is required. Where subgrade materials cannot be stabilized to provide uniform support, measures must be taken to provide uniform support, either by stabilizing the existing material or undercutting and importing good material.

Dave



-----Original Message-----

From: ✓ McMillan, Brian
Sent: ✓ Tuesday, March 25, 2003 1:18 PM
To: ✓ Burnett, David A.
Cc: ✓ Sebren, Mike D.; Tharpe, Donald
Subject: ✓ Subgrade design recommendations for I-30 rehab projects

Dave:

✓ We are currently looking at the undercutting processes that we are encountering up and down the entire length of I-30 ✓ from Geyer Springs to Benton. We are looking at some possible changes to our approach to the stabilization of the ✓ subgrade. An important piece of information for us to determine our assessment of the subgrade is the design criteria that you determined for the pavement design. What structural number was used for the design? How much of the subgrade that you intended to carry the load of the 14" PCCP? Is it necessary to provide a 100% stable subgrade for the PCCP or just stable enough for the contractor to work from? We are encountering undercutting from one end to the other and you can imagine the money value that is involved. We have some different ideas as how to approach the "bad" subgrade but the design issue is something that will determine which ideas will be acceptable. Any information or ideas that you have will be beneficial.

Brian



John Privat

From: ✓ Tharpe, Donald
Sent: ✓ Friday, March 28, 2003 11:01 AM
To: ✓ Sebren, Mike D.
Cc: ✓ Young, Barry; Wright, Teresa; McMillian, Brian
Subject: ✓ Meeting to Discuss subgrade conditions for I-30 Mainline

Mike

✓ On all four of the I-30 mainline projects we are encountering unstable sub grade conditions due to an underlying
✓ soil layer. We are presently undercutting to remove this unstable material; however, ~~this process is greatly~~
✓ ~~increasing the cost as well as requiring substantial additional time to complete. We are searching for alternate~~
✓ ~~solutions that will reduce the cost and expedite the construction.~~ We would like to set up a meeting with you,
✓ highway and materials as soon as we can to talk about acceptable alternate solutions we can apply through out
✓ the corridor. We will be available at your convenience on Monday

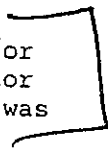
Gene

Dather, Brent

C.O. #85

From: ✓ Sebren, Mike D. [Mike.Sebren@arkansashighways.com]
Sent: ✓ Tuesday, November 01, 2005 4:20 PM
To: ✓ Dather, Brent
Subject: ✓ RE: Days during winter shutdown...Job B60120

✓ The condition of the subgrade would have necessitated the undercut and/or soil stabilization being done, no matter what time of year the Contractor was working on it.....the old existing median and underlying material was that bad.



I don't know if the inserting of the earthwork activities bumped the schedule out or not....our logic was that we were not charging days, so we don't owe them any time for an impact.

mds

-----Original Message-----
From: Dather, Brent [mailto:Brent.Dather@fhwa.dot.gov]
Sent: Tuesday, November 01, 2005 3:22 PM
To: Sebren, Mike D.
Subject: RE: Days during winter shutdown...Job B60120

I'm still thinking about this one - at the time, in the monthly updates when these subject earthwork activities were inserted into the schedule, did they bump out the end date? And if so, were those additional days denied because time was not being charged right then? This begs another question - Did the Contractor have to undercut because they were trying to do earthwork during the winter shut-down? Would they have had to undercut this if they would've done the work when one would customarily do earthwork? Thanks



-----Original Message-----
From: Sebren, Mike D. [mailto:Mike.Sebren@arkansashighways.com]
Sent: Monday, October 31, 2005 2:59 PM
To: Dather, Brent
Subject: Days during winter shutdown...Job B60120

How about this for a description and a reason?????

Description: Increase the Contract time by 12 Working days.

Reason: During the winter shutdown period (December 21 through March 15), on the days shown on the attachment, the Contractor was working on earthwork related items critical to the progression of the project, which were outside the scope of the original contract.

Did we say enough and not too much????

With your blessing we will prepare a CO and address these items with Duit.

mds

IN THE ARKANSAS STATE CLAIMS COMMISSION

JUL 10 2012

DUIT CONSTRUCTION CO., INC.

RECEIVED
CLAIMANT

V. NOS. 11-0687-CC

ARKANSAS HIGHWAY COMMISSION
AND ARKANSAS HIGHWAY AND
TRANSPORTATION DEPARTMENT

RESPONDENTS

**RESPONSE OF DUIT CONSTRUCTION CO., INC.
TO PRE-HEARING BRIEF OF RESPONDENTS**

**I.
Introduction**

The Brief of Respondents contains several factual errors Duit Construction Co., Inc. (Duit) needs to correct.

**II.
Email Destruction**

Respondents claim the emails discovered by Duit in a "recently" deleted file on Inspector Brian McMillan's computer were deleted per the "standard operating procedure" of AHTD. (Please note the word "recently" is used in reference to the inspection by Duit in December, 2006.) Note; however, that:

- a) One of the "standard operating procedures" is that emails are deleted every 30 days unless saved to a file. The emails were in such a file deleted from McMillan's computer shortly before Duit showed up.

b) The second "standard operating procedure" is to delete files from the computer of a former "employee" such as McMillan. Deletion of the files from McMillan's computer shortly before Duit arrives to look is, however, suspicious and wrongful in view of the fact that: (1) Duit had requested access to the files in an FOI request in October, 2006, (2) had notified AHTD of its claim long before that and, perhaps most troubling of all, none of the emails on McMillan's computer were found in any other AHTD records. See Appendix A.

In view of this Duit submits the AHTD is subject to the spoliation doctrine and that the weight of the evidence should be viewed most strongly against it because we do not know what was destroyed but not recovered.

Next, the Respondents quote from Steve Budzisz's deposition in an effort to set up a great deal of "straw men" they can then knock down. For example, Respondents proudly note that, "no program was used to delete blocks of data from the hard drive of any of the computers inspected." So what?? Only six computers were made available out of a prior room full in PBS&J's office. Further, the data actually recovered, the recency of the deletion, and the failure to furnish Duit with any other email traffic, except of one or two innocuous hard copy emails, gives rise, to the inference that a great deal of email traffic previously retained in computer files was destroyed by Respondents despite Duit's pending claim and FOI request. Respondents' assertion that "AHTD has provided full access" to electronic communications is just untrue. Duit requested access to AHTD's network. Such access was refused. AHTD's Brief's implication that Duit did not ask for the network data and communications is, therefore,

completely false. More importantly, it is not up to Duit to ferret out electronic data and communications in the hands of AHTD. Once requested by Duit this data and information should be produced. Further, destruction of self-described "general correspondence" concerning jobs on which claims have been made is improper and violates spoliation principles. (AHTD's reference to destruction of correspondence 3 years after the "beginning" of a job is truly puzzling.) Respondents obviously believe destruction of evidence is okay as long as they unilaterally decide what gets destroyed.

Last in connection with this amorphous record destruction policy the Respondents assert destruction was appropriate because Duit did not provide a notice of claim. This is flat wrong. See Appendix B.

Respondents next make an argument about "notice" that was not within the scope of the remand, and which – according to Mr. Hodges' testimony to the Legislature – was not a basis for the Commission's initial denial of Duit's claim. (Again, however, the emails Duit salvaged from McMillan's computer show a clear differing site condition requiring Respondents to give Duit notice. They did not give the notice.)

III. Disparity in Treatment

The Legislature was troubled by the disparity in treatment between Gilbert Central and Duit. In the past the Commission itself has also been troubled by disparate treatment in differing districts. See Johnsville decision attached as Appendix C. While Respondents go to irrational extremes trying to show how different the four jobs were, the bottom line is that all four jobs included B stone quantities for unsuitable soil and

that Respondents initially intended B stone as the remedy for unsuitable soil. As noted in the AHTD/PBS&J February 6, 2001 meeting minute, "AHTD did not feel [a soils analysis/investigation would be warranted for mainlane grade changes] and for PBS&J to set up "B" stone for any undercut situations that may arise." See Duit Binder, Tab 1, Ex. 2, last page.

During construction Gilbert Central ran into "undercut" situations and was allowed to B stone virtually all mainlane areas. See November 4, 2002 email from Fuselier to Clements. Duit Binder, Tab 1, Ex. 9. See graphic depiction of Gilbert Central project and PBS&J notes. After investigating the matter, AHTD determined early on that the soil on Gilbert Central's job was to be "unsuitable" from start to finish. And it was. And AHTD paid Gilbert Central for a 4583% overrun in B stone.

As the jobs progressed the PBS&J inspectors became troubled, indeed alarmed, at the amount of "unsuitable" subgrades material on all four jobs. See McMillian email of March 12, 2003. See McMillan email of March 25, 2003 at Duit Binder, Tab 1, Ex. 15. See Tharpe email of March 28, 2003 referencing "unstable" soil at Duit Binder, Tab 1, Ex. 16. (Note that the word "unstable" does not appear in the Contract or anywhere in relevant sections of AHTD's specs. And, in fact, it is only mentioned in two sections unrelated to Unclassified Excavation and Compacted Embankment.)

It was in April, 2003 that the AHTD decided to require Duit and APAC to aerate, disc and blend the soil, rather than replacing it with B stone or stabilizing it with soil cement. See Sebren email of April 7, 2003 at Duit Binder, Tab 1, Ex. 17. Note, however, that Sebren defined unsuitable soil as, "high PI, midway clay, pottery clay,

organic material” and his recommendation was to address such soil with the “cheapest” method to the Department whether appropriate or not. (So how did Gilbert Central get to B stone its entire job? B stone was the most expensive alternative.)

Duit also notes the disparity in treatment with respect to issues regarding time. Recall that Gilbert Central “bid” 314 days and was granted an additional 161 days for increased B stone quantities and change order work. That’s 476 days total. Gilbert Central was “charged” with only 362 days, which resulted in Gilbert Central earning a bonus. Why did Gilbert Central finish early? B stone is the answer.

Duit, on the other hand, bid 226 days on one job and 365 days on another. It was charged 338 days on the former job and 464 days on the latter one. Why did Duit overrun so badly? While AHTD would say, without any supporting credible evidence, that Duit was inefficient, the real reason is the way AHTD made Duit handle soils problems. Please note the one thing that reflects Duit’s time problem was soil related and not efficiency related: once AHTD authorized Duit to generally use soil cement Duit’s production and progress increased dramatically. But at the end Duit earned no bonus and had to engage in lengthy negotiations with AHTD to get the liquidated damages claim of AHTD to zero.

In response to all of this evidence Respondents assert:

- 1) The jobs were different, as evidenced by differing lengths, quantities, special provisions, etc.;
- 2) Subgrade conditions can vary “greatly” within a few feet of each other;
- 3) A large number of change orders was issued on each of the four jobs;

- 4) Notes of weekly meeting minutes do not reflect Duit asked to use B stone;
- 5) The soil on Duit's jobs was not similar to the soil on the Gilbert Central job.

As to item one, two and three above Duit agrees there were differences in the four jobs, however, all four jobs included B stone or soil cement as the remedy for unsuitable soil. Further, all four jobs had many change orders – most of which had absolutely nothing to do with soils issues. The bottom line, however, is that when Gilbert Central encountered unsuitable soil it was allowed to “B stone”. When Duit later encountered unsuitable soil it had to perform much more costly and unanticipated work. Duit submits that is the proven disparity.

As to the “cherry picked” meeting notes dated June, 2002 and “cherry picked” statements by Gary Gaul please note:

- 1) The meeting minutes reflect events occurring early on in the project – after AHTD knew but did not disclose to Duit the extent of the “bad” soil. Also note why B stone was “getting a little excessive.” It was because of the unsuitable soil! Finally, note Duit suggested soil stabilization but AHTD required the useless – but very costly and time consuming – aeration, discing and drying and only then authorized borrow materials, when the contract authorized remedy was B stone.
- 2) The Gaul testimony indicated he believed the unsuitable areas should have called for B stone but the so – called “unstable” areas should have been stabilized with soil cement. AHTD severely limited Duit’s use of B stone, and

allowed proper and efficient soil stabilization only after Duit reduced its "soil cement" price by half.

Note also that AHTD's exhibit 9 – a chart supposedly reflecting overruns on the four Projects – are mathematically incorrect and incomplete. For example, the chart shows unclassified excavation on the B60122 job overran 209.24%. Wrong – it was 309%. Other calculations are also wrong, and the soil stabilization numbers do not come close to the actual quantities used by Duit on its two jobs.

Lastly, counsel for Duit must report that he misunderstood a communication from his client and needs to correct an error in his Brief. At page 3 a reference is made to a transfer of responsibility for a small segment of Duit's job to Gilbert Central. This statement is incorrect. Counsel apologizes for the error on his part.

IV. **Conclusion**


Based upon the evidence Duit Construction Co., Inc. requests the Commission enter an Award in its favor in the sum of \$6,556,372.43 and for all other appropriate relief.



JACK EAST III
2725 Cantrell Road, Suite 202
Little Rock, AR 72202
(501) 372-3278
Bar ID No. 75-036

Certificate of Service

I, Jack East III, Attorney at Law, do hereby certify that a true and correct copy of the foregoing has been served upon Michelle Davenport, AHTD, Legal Division, P.O. Box 2261, Little Rock, AR 72203-2261 by U.S. Mail, postage prepaid this 10 day of July, 2012.



JACK EAST III

FILE COPY

October 10, 2006 ✓

Via Facsimile (569-2400) and Regular Mail
Arkansas State Highway & Transportation Dept.
ATTN: Robert L. Walters, Chief Engineer
P.O. Box 2261
Little Rock, AR 72203-2261

Re: Freedom of Information Act Request ✓

- 1) Job No. B60120
West of Pulaski County Line I-430 (F)
FAP IM-NH-BRN-30-2(256)125
Route 30, Sections 22 & 23
Saline & Pulaski Counties
- 2) Job No. B60122
FAP BIM-B30-0(1)0 and NH-30-2(251)132
Route 30, Section 22
Saline & Pulaski Counties
- 3) Job No. B60121
FAP BIM-B30-0(1)0 and NH-BRN-30-2(251)132 and HPP-1511(1)
West of Alcoa Road - West of Pulaski Co. Line(F)
Saline County
- 4) Job No. B60119
FAP BIM-B30-0(1)0 and IM-NH-BRN-30-2(254)132
Pulaski County
- 5) Job No. B60117
FAP IM-NH-BRN-40-3(117)147
Pulaski County

Dear Mr. Walters:

000001

I represent Duit Construction Co., Inc. Please regard this letter as Duit's formal request under the Arkansas Freedom of Information Act, A.C.A. § 25-19-101 *et seq.*, to inspect and copy all design and construction records concerning the referenced construction projects.

APPENDIX A

Robert L. Walters, Chief Engineer
October 10, 2006
Page 2

This request includes, but is not limited to, all preliminary, and subsequent, design and cost estimates prepared or received by AHTD; as well as all correspondence, communications, minutes of meetings, reports, records, diaries, contracts, contract documents, drawings, change orders, instructions, decisions, submittals, field directives, tests of materials or work; and emails, computer stored data, documents, records and reports prepared by AHTD, or received by AHTD from any source or person whatsoever, including the Federal Highway Administration, and internal emails between AHTD personnel.

Sincerely
Original Signed By
JACK EAST, III

Jack East III

JEIII/ttm

cc: Duit Construction Company, Inc.
ATTN: Jim Duit

000002

49

ARKANSAS STATE HIGHWAY
AND
TRANSPORTATION DEPARTMENT

Dan Flowers
Director
Phone (501) 569-2000 Fax (501) 569-2400



P.O. Box 2261
Little Rock, Arkansas 72203-2261
WWW.ARKANSASHIGHWAYS.COM

October 17, 2006

Mr. Jack East III
Attorney at Law
Cantrell Valley Plaza
2725 Cantrell Road, Suite 202
Little Rock, AR 72202

Re: Job Nos. B60119, B60120, B60121,
B60122 and B60117

Dear Mr. East:

Reference is made to your October 10, 2006 Freedom of Information request regarding design and construction records on the referenced projects.


Records for the five projects are available at the Department's Central Office, Construction Division, 9th floor, located at 10324 I-30 in Little Rock.

Some additional records for Jobs B60119, B60120, B60121 and B60122 are available at the office of PBS&J, 11221 Otter Creek East Blvd., Little Rock; and some additional records for Job B60117 are available at the Resident Engineer's Office located at 803 Eureka Garden Road, North Little Rock, Arkansas.

The records are available for inspection and copying at all three locations during normal business hours (8:00 a.m. to 4:30 p.m.) Monday through Friday. It is requested that you contact the Central Office at 501-569-2251, PBS&J at 501-455-9909, or the Resident Engineer's Office in North Little Rock at 501-945-9514 prior to visiting, due to the volume of documents encompassed by this request. A representative will be available to assist either you or your staff.

If I can be of further assistance in any way, please advise.

Yours truly,


for Robert L. Walters
Chief Engineer

c: Duit Construction Company, Inc.
Assistant Chief Engineer-Operations
State Construction Engineer
Legal Division
Resident Engineer Numbers 61 and 66

000004

50



DUIT CONSTRUCTION CO., INC.



CONCRETE PAVING

I-35 North Waterloo Rd. Interchange
5860 Industrial Blvd. North

Phone 405-340-6026
Fax: 405-348-7627

P.O. Box 3788
Edmond, Okla. 73083

"EQUAL OPPORTUNITY EMPLOYER"

February 11, 2005

Mr. Donald E. (Gene) Tharpe, P.E.
PBS&J
11221 Otter Creek Blvd
Mabelvale, AR 72103



Subject: Job B60120 Cost Overruns and Performance Costs



Dear Mr. Tharpe:

In prior correspondence and meetings we have repeatedly advised you that we have been suffering time and cost impacts as a result of the unsuitable materials encountered and extra earthwork required on this project. This constitutes a significant change in the character of the work required by the contract.

In reviewing our cost records Duit has experienced overruns for earthwork activities and other items in excess of approximately \$1,900,000. Please let this letter serve as an additional notice that Duit intends to pursue recovery of these extra costs.



Additionally, Duit Construction expects to receive extended performance costs as a result of the delays to completion caused by the unsuitable materials and extra earthwork. Currently, we have calculated our overhead to be \$7,460/day. This equates to over \$2,200,000 of extended overhead for this project.

Also, as detailed in prior correspondence, these issues have cost at least 91 days of impact to this project. We are continuing to wait on your response on these days. Additionally, we renew our request that you refrain from assessing liquidated damages against our monthly pay estimates.

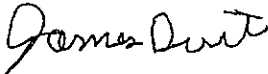
APPENDIX B

000923

51

At this time we are continuing to refine our calculations. We will request a meeting to present them to you as soon as we have fully isolated and defined the impacts. In the meantime if you have any questions or need any additional information please call me at 405-340-6026.

Sincerely,



James Duit
President

CC: Robert Walters, AHTD
Mike Sebren, AHTD

000024



DUIT CONSTRUCTION CO., INC.



CONCRETE PAVING

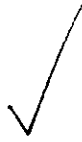
I-35 North Waterloo Rd. Interchange
5860 Industrial Blvd. North

Phone 405-340-6026
Fax: 405-348-7627

P.O. Box 3788
Edmond, Okla. 73083

"EQUAL OPPORTUNITY EMPLOYER"

February 11, 2005



Mr. Donald E. (Gene) Tharpe, P.E.
PBS&J
11221 Otter Creek Blvd
Mabelvale, AR 72103

Subject: Job B60122 Cost Overruns and Performance Costs



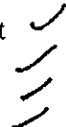
Dear Mr. Tharpe:

In prior correspondence and meetings we have repeatedly advised you that we have been suffering time and cost impacts as a result of the unsuitable materials encountered and extra earthwork required on this project. This constitutes a significant change in the character of the work required by the contract.

In reviewing our cost records Duit has experienced overruns for earthwork activities and other items in excess of approximately \$1,200,000. Please let this letter serve as an additional notice that Duit intends to pursue recovery of these extra costs.



Additionally, Duit Construction expects to receive extended performance costs as a result of the delays to completion caused by the unsuitable materials and extra earthwork. Currently, we have calculated our overhead to be \$5,750/day. This equates to over \$1,400,000 of extended overhead for this project.



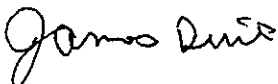
Also, as detailed in prior correspondence, these issues have cost at least 107 days of impact to this project. We are continuing to wait on your response on these days. Additionally, we renew our request that you refrain from assessing liquidated damages against our monthly pay estimates.

000014

53

At this time we are continuing to refine our calculations. We will request a meeting to present them to you as soon as we have fully isolated and defined the impacts. In the meantime if you have any questions or need any additional information please call me at 405-340-6026.

Sincerely,

A handwritten signature in cursive script that reads "James Duit".

James Duit
President

CC: Robert Walters, AHTD
Mike Sebren, AHTD

000015

STATE CLAIMS COMMISSION DOCKET
OPINION

Amount of Claim \$ 379,801.00

Claim No. 10-0193-CC

Johnsville Company, LLC Claimant
vs.

Attorneys
Jack East, III, Attorney Claimant

AR Highway & Transportation Dept. Respondent
State of Arkansas

Mark Umeda, Attorney Respondent

Date Filed July 29, 2009

Type of Claim Breach of contract

FINDING OF FACTS

This claim was filed for breach of contract in the amount of \$379,801.00 against Arkansas Highway Department.

Present at a hearing on January 14, 2010 was the Claimant, represented by Jack East, III, Attorney, and the Respondent, represented by Mark Umeda, Staff Attorney.

The Arkansas State Claims Commission hereby unanimously finds liability on the part of the Respondent and hereby unanimously awards Claimant the amount of \$100,000.00.



The Respondent clearly failed to provide sufficient information in its bid package so that the Claimant and other bidders could more adequately prepare their bids for submission. Additionally, the Respondent's employees did not follow uniform practices when deciding whether to allow additional contractor costs incurred during the actual construction process. The Respondent's district "Resident Engineer" denied additional monies to the Claimant on this project, while an adjacent district "Resident Engineer" was allowing additional monies for similar work to another contractor. In fact, the Claimant had been paid for similar additional work under another contract by another district "Resident Engineer" of Respondent.

Therefore, the Claims Commission hereby unanimously awards this claim in the amount of \$100,000.00 and will include the claim in a Claims Bill to the 88th General Assembly, 2011 General Session, for subsequent approval and payment.

IT IS SO ORDERED.

(See Back of Opinion Form)

CONCLUSION

Upon consideration of all the facts, as stated above, the Claims Commission hereby unanimously awarded this claim in the amount of \$100,000.00 and will include the claim in a Claims Bill to the 88th General Assembly, 2011 General Assembly for subsequent approval and payment.

Date of Hearing January 14, 2010

Date of Disposition February 11, 2010

[Signature]
Chairman

[Signature]
Commissioner

[Signature]
Commissioner

APPENDIX C

**Appeal of any final Claims Commission decision is only to the Arkansas General Assembly as provided by Act 133 of 1997 and as found in Arkansas Code Annotated 19-10-211.

STATE CLAIMS COMMISSION DOCKET
OPINION

Amount of Claim \$ 6,556,372.43

Claim No. 11-0687-CC

Duit Construction Co., Inc. Claimant
vs.

Attorneys
Jack East, III, Attorney Claimant

AR Highway & Transportation Dept. Respondent
State of Arkansas

Mark Umeda, Attorney
Michelle Davenport, Attorney Respondent

Date Filed May 5, 2011

Type of Claim Breach of contract

FINDING OF FACTS

This matter came for partial re-hearing on July 12, 2012, on remand from the Claims Review Subcommittee. The Claims Commission commends both legal counsels for their well-presented arguments at this six-hour re-hearing of a designated portion of the claim. This portion of the claim alleged "disparity" in the treatment of Claimant compared to treatment another contractor received from the Respondent. The entire claim had been unanimously denied and dismissed after the original hearing. In considering all the testimony, evidence and arguments presented prior to and at the re-hearing on this portion of the claim, the Claims Commission unanimously finds no legal or equitable basis upon which to rule in favor of the Claimant. Therefore, this Claim is unanimously denied and dismissed for Claimant's failure to prove any liability on the part of the Respondent.

The bases for the Commission's decision are set forth in the following findings:

1) The Claimant (an out-of-state company, as were the two other companies reconstructing this stretch of highway between Little Rock and Benton) entered into a contract with the Respondent. This contract was written by the Respondent and contained language in it that the Respondent had the authority to interpret. The Claimant signed this contract voluntarily. The Claims Commission unanimously finds the Respondent acted at all times within the language of the contract.

2) Based on the testimony and evidence presented, the Claimant never filed any "change order" requests with the Respondent on the matter on which this claim is being re-heard. While verbal or other communication may have been present the contract required the "change order" request process be used. Therefore, the Claimant did not follow contract required procedure.

3) Although the Claimant argued that the Respondent blocked certain testimony or evidence from being heard by the Claims Commission, the Claims Commission allowed second party testimony on what former Federal Highway Administration employee Tom Raines would have testified to at the original hearing on the claim. Neither party alleged this testimony was inaccurate. The legal counsels for each party were thorough in their presentations and the Claims Commission does not have any basis to believe pertinent e-mails, or any other information, were wrongfully withheld.

4) The contract in question was based on "per unit" pricing rather than a "lump sum" total price contract. All testimony and evidence presented to the Claims Commission proved the Claimant was paid for all the products it used. It is not the fault of the Respondent if the Claimant failed to accurately price its contract bid. Not only was Claimant paid all it was due under contract provisions, but the Claimant was not charged any "liquidated damages" for not completing its project on time. The Respondent recognized the delayed completion date was due to challenging work site conditions and paid the Claimant a total of approximately \$3,500,000.00 in "liquidated damages" that it had earlier withheld.

5) The Claimant argued its project was similar to an adjoining project being done by another out-of-state contractor, Gilbert Central Company (from Nebraska,) and that Gilbert Central was treated very differently by the Respondent than was the Claimant. Based on the evidence and testimony presented to the Claims Commission, the Claims Commission unanimously finds there was substantial difference between the two projects and there was no "disparity" in treatment between the two companies. The Gilbert Central contract was clearly much more super-structure based, i.e. bridges and overpasses, than was the Claimant's. Claimant's project was very similar to the project of the other out-of-state contractor, APAC-Tennessee; which Claimant did not argue was treated differently than Claimant.

THEREFORE, this claim is unanimously denied and dismissed.

IT IS SO ORDERED.

(See Back of Opinion Form)

CONCLUSION

Upon consideration of all the facts, as stated above, the Claims Commission hereby unanimously denied and dismissed this claim for Claimant's failure to prove by a preponderance of the evidence any liability on the part of the Respondent.

Date of Hearing July 12, 2012

Date of Disposition August 10, 2012

Richard May Chairman
Bill Lamm Commissioner
Paul Moore Commissioner

JACK EAST III, P.A.
Attorney at Law

Telephone: (501) 372-3278
Facsimile: (501) 376-0949
jeastiii@windsteam.net

Cantrell Valley Plaza
2725 Cantrell Road, Suite 202
Little Rock, AR 72202

August 30, 2012

Arkansas State Claims Commission
101 East Capitol Ave., Ste. 410
Little Rock, AR 72201

Re: *No. 11-0687-CC; Duit Construction Co., Inc. v. Arkansas State Highway
Commission and Arkansas Highway and Transportation Department*

Dear Sirs:

Duit Construction Co., Inc. appeals from the decision of the Arkansas State Claims Commission dated August 10, 2012 denying Duit's claim. The appeal is authorized by A.C.A. §19-10-211.

Sincerely,



Jack East III

JEIII/tlh

cc: Duit Construction Co., Inc.
Michelle Davenport, Attorney at Law

ARKANSAS STATE
CLAIMS COMMISSION
AUG 31 2012
RECEIVED