

BEFORE THE STATE CLAIMS COMMISSION  
Of the State of Arkansas

JUN 26 2018

- Mr.
- Mrs.
- Ms.
- Miss

James Construction Group, LLC, Claimant

vs.

State of Arkansas, Respondent

**COMPLAINT**

<u>James Construction Group, LLC</u> (Name)			the above named Claimant, of			<u>1901 East Kentucky Avenue</u> (Street or R.F.D. & No.)	<u>Ruston</u> (City)	
<u>LA</u> (State)	<u>71270</u> (Zip Code)	<u>318-255-5601</u> (Daytime Phone No.)	County of	<u>Lincoln</u>	represented by	<u>Patrick D. Wilson and Erika Gee</u> (Legal Counsel, if any, for Claim)		
<u>200 W. Capitol Ave., Suite 2300</u> (Street and No.)			<u>Little Rock</u> (City)	<u>AR</u> (State)	<u>72201</u> (Zip Code)	<u>501-371-0808</u> (Phone No.)	<u>501-376-9442</u> (Fax No.)	says:
State agency involved: <u>Arkansas Department of Transportation</u> (ARDOT)			Amount sought: <u>\$1,441,552.02</u>					

Month, day, year and place of incident or service: Appeal of ARDOT's December 28, 2017 decision on Job No. 061277

Explanation: James Construction Group, LLC ("James") is a highway contractor in a dispute with ARDOT over delays, disruptions, and contract administration irregularities on job no. 061277, referred to as "Union Pacific RR STR. and Approaches on Roosevelt Road (LR)(S)." Those problems were not the fault of James. However, ARDOT has refused to provide James with additional compensation for those problems, which made the job take longer and cost more. James makes this formal claim as a request for equitable adjustment, for additional compensation for the time and cost impacts to James' performance. James submitted its initial request for equitable adjustment by its letter to ARDOT's Resident Engineer dated July 14, 2017, which is attached as Exhibit 1. James then submitted a more formal, thorough request for equitable adjustment by its letter of October 24, 2017, which is attached as Exhibit 2. ARDOT denied James' request through the letter of its chief engineer, Emanuel Banks, dated December 28, 2017. That letter is attached as Exhibit 3. James asked for reconsideration of ARDOT's denial through its letter of February 16, 2018. That letter is attached as Exhibit 4. Due to their volume, James is not attaching the exhibits to these letters. Representatives of James and ARDOT then met to discuss this claim on March 12, 2018. At that meeting, Mr. Banks again denied James' claim and said James' next option was to pursue this claim with the Claims Commission.

ARDOT's delays and problems with administration on this job can be placed into six main categories: (1) ARDOT wrongfully assessed liquidated damages; (2) ARDOT failed to make proper contract time adjustments; (3) ARDOT misinterpreted and misadministered the contract; (4) ARDOT violated prompt payment rules and failed to pay for installed quantities; (5) ARDOT failed to issue change orders for additional work; (6) ARDOT threatened punitive disincentive penalties. Those categories of additional compensation due to James total \$1,410,777.13. With the addition of bond costs of 1% and interest at the legal rate of 8%, James' claim for an equitable adjustment totals \$1,441,552.02.

The full amount of James' claim is \$1,441,552.02. James hereby certifies, under oath and according to the formalities required, that: James' claim is made in good faith; its supportive data is accurate and complete to James' best knowledge and belief; and the amount of the claim accurately reflects the actual cost incurred by James.

As parts of this complaint, the claimant makes the statements, and answers the following questions, as indicated: (1) Has claim been presented to any state department or officer thereof?

Yes      when? October 24, 2017      (Month) (Day) (Year)      to whom? Emanuel Banks, ARDOT's Chief Engineer      (Department)

and that the following action was taken thereon: ARDOT denied the request for an equitable adjustment

and that \$0.00 was paid thereon; (2) Has any third person or corporation an interest in this claim? No If so, state name and address

(Name)      (Street or R.F.D. & No.)      (City)      (State)      (Zip Code)

and that the nature thereof is as follows:

: and was acquired on      in the following manner

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

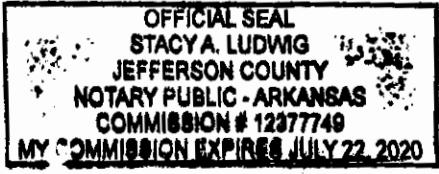
Patrick D. Wilson  
(Print Claimant/Representative Name)

Patrick D. Wilson  
(Signature of Claimant/Representative)

SWORN TO and subscribed before me at Little Rock, AR (City) (State)  
on this 26 day of June (Month), 2018 (Year)

Stacy A. Ludwig  
(Notary Public)

My Commission Expires: July 22 (Month) 2020 (Year)



**BEFORE THE ARKANSAS STATE CLAIMS COMMISSION**

**JAMES CONSTRUCTION GROUP, LLC**

**CLAIMANT**

**V.**

**CLAIM NO. 181073**

**ARKANSAS DEPARTMENT OF  
TRANSPORTATION**

**RESPONDENT**

**ORDER**

Now before the Arkansas State Claims Commission (the “Claims Commission”) is the claim of James Construction Group, LLC (the “Claimant”) against the Arkansas Department of Transportation (the “Respondent”). At the hearing held May 13, 2021, Claimant was represented by Patrick Wilson. Mark Umeda appeared on behalf of Respondent.

**Procedural History and Witness Testimony**

1. Claimant filed this claim against Respondent on June 26, 2018, seeking \$1,441,552.02 in damages. The parties entered into a construction contract (the “Contract”) regarding a project known as Job No. 061277 (the “Project”). Claimant alleged “delays, disruptions, and contract administration irregularities” related to the Project that caused the Project to take longer to complete and to cost more.

2. Respondent denied liability.

**Testimony of John Evans**

3. John Evans was the project manager for Claimant. He no longer works for Claimant but remains on good terms. Evans testified that he had knowledge of the day-to-day issues regarding the Project. Evans has 37 years of experience in highway construction.

4. Claimant's Exhibit No. 2 is a March 12, 2015, letter sent by Evans to Respondent regarding the issues with obtaining a right of entry agreement with Union Pacific. These issues took three months to resolve.

5. Claimant's Exhibit No. 3 is a July 14, 2015, letter sent by Evans to David Norris, Respondent's resident engineer, regarding the underground utility issue. Neither Respondent nor the City of Little Rock knew about the underground utility issue. While Respondent usually has agreements with the utilities ahead of time, the lack of an agreement caused a delay here. Union Pacific had flagmen on site every day and advised that a bill would be submitted for reimbursement.

6. Claimant's Exhibit Nos. 4 and 5 are letters from Evans to Norris regarding other utility and road issues. Utilities were not being relocated pursuant to the Contract, and there were issues getting direction from Respondent. Additionally, the roadbed had to be undercut, and fresh rock had to be brought in to address the roadbed issue. Norris told Claimant to bring in the fresh rock, but Respondent refused to pay for it. Evans asked for a meeting to discuss the delays, but no meeting was scheduled.

7. Evans testified that he sent letters to Respondent as soon as possible to ensure that Respondent was aware of the issues.

8. Claimant's Exhibit No. 6 is a December 28, 2015, letter from Norris to Evans, in which Respondent gave 22 working days (from July 2015) back to Claimant. However, Evans had requested the return of more than 40 working days.

9. Claimant's Exhibit No. 7 is a March 28, 2016, letter from Evans to Norris requesting the return of 64 additional working days and describing the reasons for the requests, including adding chain link fence around the site of the Project in advance of the Arkansas State

Fair.<sup>1</sup> Evans stated that he got verbal approval for these eight days from Norris but that Respondent never gave those days back to Claimant.

10. Claimant's Exhibit No. 8 is a June 10, 2016, letter from Norris to Evans, in which Norris approved Claimant's request to do a continuous pour for the 260-foot bridge deck. The reason Claimant wanted to do the continuous pour was efficiency. Evans does not know why Respondent required that the concrete remain plastic.

11. Claimant's Exhibit No. 9 is 802.09 from the Standard Specifications for Highway Construction (the "Standard Specifications"). Subsection (d) is the key specification. This specification was not quoted in Respondent's June 10, 2016, letter (CI's Exhibit No. 8). A contract cannot be changed with a letter. No change order was done on this issue. Claimant was using a transverse screed, as Respondent's inspectors present on the job site could see. Claimant's initial request specified that it would be using a transverse screed.

12. Evans was not present for the initial bridge deck pour. The following day, he asked his foreman, Robert Erwin, why the bridge deck pour had not been completed, and Erwin advised that Mark Simecek, employee of Respondent, had stopped the pour. Evans went back to his office and notified Norris that the pour needed to be completed.

13. Claimant's Exhibit No. 10 is a June 30, 2016, letter from Norris to Evans, in which Norris stated that continuing the pour was unacceptable. Norris further stated that Claimant needed to remove the poured concrete. Norris did not provide any engineering analysis or reason. Eventually, Evans was told that Respondent did not provide engineering analysis to a contractor.

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<sup>1</sup> Respondent objected to Evans' testimony, arguing that this subject was not administratively appealed by Claimant and is outside the jurisdiction of the Claims Commission. Respondent's objection was overruled but noted.

14. Claimant's Exhibit No. 11 is a July 27, 2016, letter from Norris to Evans, in which Respondent agreed to pay for removal of the deck from Bent 5 back to the pouring sequence joint. Evans interpreted that to mean that if Respondent wanted it redone, then Respondent would pay to have it redone. This letter does not provide Claimant with any engineering analysis. Chief Banks called Evans and said that if Respondent was going to make Claimant remove the deck, Respondent needed to pay for it. Later, however, Respondent's district engineer said that Respondent would pay for fifty percent of the costs. Evans stated that it was fifty percent or nothing.

15. Claimant's Exhibit No. 12 is an August 12, 2016, letter from Evans to Norris requesting a copy of Respondent's engineering analysis. Evans advised Norris in the letter that Claimant will get its own third-party structural engineering analysis.<sup>2</sup>

16. Because Respondent required the removal of the bridge deck by force account, everything had to be in place before the work started, including approval of equipment rates. The bridge deck pour occurred on June 23, 2016, with a change order in mid-September 2016, and the re-pour in mid-October 2016. Ultimately, stopping the bridge deck pour cost Claimant three months.

17. Claimant's Exhibit No. 13 is an October 19, 2016, letter from Evans to Norris regarding Respondent's notification to Claimant's bonding company that Claimant was out of working days. In that letter, Evans asked Norris to immediately notify the bonding company that Claimant was not, in fact, out of working days, so that Claimant could work on other jobs. Evans also requested the return of 82 working days related to the removal and re-pour of the bridge deck.

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<sup>2</sup> Claimant then submitted the Fleming engineering report to show that there was nothing wrong with the bridge deck. Respondent objected to the report, and Respondent's objection was sustained.

18. Claimant's Exhibit No. 14 is a November 1, 2016, letter from Evans to Norris again requesting the return of the 82 working days.

19. Claimant had plenty of manpower for this Project. Claimant had employees on site on Saturday doing things that did not require inspection.

20. Claimant also has an issue with Union Pacific regarding the flagmen that were sent out when no work was able to be performed.

21. On cross-examination, Evans testified that Respondent had contracts with the utility companies and that it is Respondent's job to work with the utilities, not Claimant's. Referring to page 39 of the Contract, Evans agreed that the contractor is required to make every effort to locate buried utilities, including calling OneCall. Referring to 105.07 of the Standard Specifications, Evans stated that if Respondent does not have the utilities moved, it creates delays and monetary costs for Claimant. Referring to Claimant's Exhibit No. 8, Evans testified that the statement regarding 432 cubic yards needing to remain plastic is not in the Contract and does not follow the Standard Specifications. Referring to a June 27, 2016, letter from Evans to Respondent (which was not offered as an exhibit), Evans noted that a pump truck failure occurred during the pour. Evans explained that Respondent has a contract with the railroads and Claimant has a right of entry agreement, as per page 4 of the Contract. Referring to Claimant's Exhibit No. 10, Evans stated that Respondent sent this letter advising Claimant that the pour was unacceptable and directing Claimant to remove it.

22. On redirect, Evans testified that when Claimant discovered the buried utility issue, Claimant called Respondent, not the utility. Evans stated that Claimant did not agree that the pour should be stopped but was told to stop the pour by Respondent.

Testimony of Robert Erwin

23. Robert Erwin was the foreman of the Project. He has worked on road construction and bridge projects since 1981. His job duties involved lining work out for the crew and getting materials for them. Erwin was present for the bridge deck pour. Erwin has since been promoted to superintendent.

24. While working as foreman on this Project, Erwin was on the job site every day. Claimant was not short on workers for the Project.

25. Erwin testified that Claimant was using a transverse screed. A screed, or a set off machine, is what flattens or smooths out the concrete.

26. The bridge deck pour started between midnight and 1:00 a.m. on June 23, 2016, because of the heat. Working through the night allowed the concrete to stay cool, so it would not set up too quickly. There were approximately fifteen to eighteen people during the bridge deck pour. Erwin had workers from other jobs with experience with bridge deck pours come to help.

27. On the first load of concrete, the pump truck's hydraulics stopped working. This is very unusual, such that it was the first time Erwin had seen this happen in his 40 years' experience. Claimant had a second pump truck ready in case there was an issue. When Erwin saw the problem with the first pump truck, he went downstairs and talked to the pump truck operator, who already had another pump truck on the way. It takes a lot to get a pump truck in place, but when the second pump truck started, the bridge deck pour continued.

28. Between 4:30 and 5:00 a.m., Respondent's inspector told Erwin that Simecek wanted the pour stopped because concrete was getting hard near the beginning of the pour. The pour was stopped on top of the bridge cap.

29. Erwin did not go back to the beginning of the bridge to check the concrete, but he testified that there was enough retarding agent mixed into the concrete to prevent it from setting up for eight hours. Erwin does not know where Simecek did the finger poke test, but he saw Simecek at the starting point. The bridge deck pour was almost halfway completed when stopped, so 120 feet was probably poured.

30. Erwin subsequently talked with Evans and apprised him of the stoppage of the bridge deck pour. Respondent should not have stopped the pour. Erwin has only seen a bridge deck pour stopped once previously, and that was due to a bad mix.

31. On cross-examination, Erwin testified that it took over an hour to get the second pump truck up and going. Erwin used a different pump truck company for the 400-foot bridge pour. Erwin used Delvo at another project during the same time period and found it to be a great retarding agent. That other project was the first time Erwin had used Delvo.

32. On redirect, Erwin testified that Delvo did not cause any problems on this Project.

#### Mark Simecek Deposition Excerpts

33. Claimant introduced portions of Mark Simecek's deposition, which are summarized or set out below.

34. Simecek is currently in the research section as a research study engineer. Simecek Deposition Transcript at p. 15, lines 5–6.

35. Q: . . . Is it your position . . . that they should have had a backup pump truck there on the east side of the bridge on this job at that time?

A: Thinking back on other jobs, I don't remember seeing any other contractor having two pump trucks, the backup sitting on the job, and the primary, you know, pump truck.

*Id.* at p. 82, lines 7–13.

36. Simecek was at the east edge of the pour when he checked for initial set, which is where the pour started. *Id.* at p. 98, lines 15–19.

37. The screed was far out on the deck, maybe halfway through the pour, when he was testing the concrete. *Id.* at p. 100, lines 8–16.

38. Simecek does not remember who made the call to stop the pour. *Id.* at p. 107, lines 12–14.

39. Simecek did not tell Claimant to stop pouring concrete. He is 99% clear on that. Simecek Deposition Transcript at p. 111, lines 6–12.

40. Claimant was using a transverse screed, not a longitudinal screed. *Id.* at p. 150, lines 6–12.

41. Simecek cannot say that he was within 100 feet of the screed when he did the test. He does not know how far he was from the screed. *Id.* at p. 153, lines 15–17.

42. Q: So we just don't know whether that finger poke test that you did is a sufficient basis to say it was setting up too close to the screed; do we?

A: I don't think so.

*Id.* at p. 154, lines 7–10.

#### Testimony of Dale Willis

43. Dale Willis was the division manager for Claimant at the time of this Project. Willis has a bachelor's degree in engineering from Louisiana Tech and has worked in construction since 1988. Willis has worked in project management most of that time. Willis started with Claimant in 2012 as a senior project manager, then he moved up to division manager.

44. Willis testified that there was no issue with manpower on this Project. Claimant could have gotten additional labor from the Jacksonville or Louisiana projects, if needed.

45. Willis testified that the first major event on this Project was the delays due to utility issues and undercutting.

46. The second picture in Claimant's Exhibit No. 1 shows Rice Street, which is the area where undercutting was necessary. Respondent gave Claimant some days for dealing with this issue.

47. Referring to Section 105.07 of the Standard Specifications, Willis stated that utility delays are the responsibility of the contractor, but the contractor does not have any control over the utility. Respondent has the contract with the utility. If the utilities are installed in the wrong place, there is no way for a prospective contractor to know that when submitting a bid. Additionally, Respondent gave Claimant days related to this issue, which keeps Claimant from having to pay liquidated damages but is contradictory to the Standard Specifications.

48. Willis was not present when the bridge deck was poured.

49. Regarding the installation of fencing issue (the "Fencing Issue"), Respondent, though Kevin White, agreed to give Claimant eight days back to address this issue. Respondent paid for the fencing but then failed to give the eight days back. Willis stated that he was present at the meeting with Kevin White.

50. Regarding the traffic signal issue (the "Traffic Signal Issue"), Claimant submitted a price for the installation of this traffic signal in September 2016. Although Willis does not know why, Respondent spent the next ten months reengineering the traffic signal. Claimant then gave Respondent another price and received a change order memorializing that agreement. However, it took six months to get the material for the traffic signal, and Claimant had to maintain signs and barricades until the traffic signal was installed in March 2018. Claimant got to substantial completion as to the pay items listed in the Contract in June 2017, but Claimant still had overhead

expenses until the traffic signal installation was completed in March 2018. Claimant attempted to mitigate the expenses as best as possible through keeping minimal staff on site and moving equipment off site.

51. Claimant's Exhibit No. 15 is a December 16, 2016, letter from Norris to Claimant's project manager at that time, Jason Lusby. This letter addresses the bridge deck pour and the remediation work directed by Respondent. December 21-March 15 is the winter shutdown period where Respondent does not charge time because of the likelihood of difficult weather conditions. A contractor is permitted to work on a project if able to do so. The delay due to the bridge deck pour occurred in summer 2016, which was not in the shutdown period.

52. Claimant's Exhibit No. 16 is a December 21, 2016, letter from Lusby to Norris related to the bridge deck pour.

53. Claimant's Exhibit No. 17 is a June 15, 2017, letter from Lusby to Norris. This letter was sent to give Respondent notice of the potential claim.

54. Claimant's Exhibit No. 18 is a June 23, 2017, letter from Norris to Lusby regarding the working day issue. The stoppage of the bridge deck pour delayed the end of the Project from December 17, 2016, to March 17, 2017. However, because it was during the winter shutdown period, Respondent only gave five working days back to Claimant.

55. Claimant's Exhibit No. 19 is a June 29, 2017, letter from Norris to Lusby, in which Norris stated that Respondent could not give back days that it would normally not charge. However, Willis stated that the delay happened when Respondent was charging days.

56. Claimant's Exhibit No. 21 is an October 24, 2017, letter from Willis to Respondent's chief engineer, Emanual Banks. In this letter, Willis appealing Respondent's decisions regarding reimbursement and working days. Willis met with Respondent's

representatives. At that meeting, Jerry Trotter spoke for Respondent. On the topic of extended job site overhead, Trotter said that it was allowed but that Respondent did not ever pay for it. The meeting was hostile, and Trotter set the tone. Regarding the railroad flagger issue, Claimant is currently on the hook to pay for the railroad flaggers for 138 days. There is no way to estimate or include those costs in a bid. Claimant is not arguing about the numbers of flaggers that the railroad sent; the dispute is how many days in which Claimant had to have the flaggers.

57. Respondent ultimately gave Claimant 115 days through change order in addition to the 138 days listed in the Contract. However, Willis stated that Respondent just does not want to pay the costs for the extra 115 days.

58. Regarding the last paragraph in Claimant's Exhibit No. 21, Willis stated that the markup on bid items could never cover 115 days of delays. If a contractor built in possible delays, the contractor would never be the low bid.

59. Claimant's Exhibit No. 22 is Section 105.18 of the Standard Specifications includes the following language:

All claims shall be in sufficient detail to enable the Engineer to determine the basis for entitlement and the costs incurred, excluding loss of anticipated profits, organization or overhead expenses not related directly to the project or interest.

60. Claimant's Exhibit No. 23 is a December 28, 2017, letter from Banks to Willis, denying Claimant's appeal. Willis stated that this letter was received outside the 60 days permitted in the Standard Specifications.

61. Claimant's Exhibit No. 24 is a February 16, 2018, letter from Willis to Banks and Respondent's director, in which Willis offered to settle this matter for approximately \$579,000. Willis noted that some of Claimant's costs had not yet been incurred, including liquidated damages later assessed, undercut quantities, or overhead associated with the Traffic Signal Issue.

62. In March 2018, Willis, Evans, Mark Buchanan (then president of Claimant), Banks, and ten to fifteen other people from Respondent met to discuss the requested 82 days on the bridge deck. Banks ran the meeting. Respondent decided not to give Claimant any money.

63. Claimant's Exhibit No. 25 is a May 17, 2018, letter from Banks to Willis, in which Respondent awarded Claimant ten additional days. This letter references the March 2018 meeting.

64. Claimant's Exhibit No. 26 is Change Order No. 7, which references the delays from March 15 through May 4, 2015. Respondent gave Claimant 48 days through this change order. These days were authorized in July 2016 even though requested in 2015.

65. Claimant's Exhibit No. 27 is Change Order No. 10, which references the utility conflicts and undercutting. Respondent gave Claimant 46 working days through this change order. These days were authorized in July 2016 even though the delays occurred in spring 2015.

66. Claimant's Exhibit No. 28 is Change Order No. 12, which gave Claimant approximately \$53,000 for the bridge deck removal.

67. Claimant's Exhibit No. 29 is Change Order No. 16 and summarizes the previous change orders. 115 working days total were added to the Contract. This change order is assessing Claimant the amount of \$332,000, which represents 83 days' worth of road user fees. Willis is asking the Claims Commission to award \$332,000 to offset these costs or to direct Respondent to remove the charges. If Claimant gets a judgment in its favor, this amount will come out of it. Willis stated that Respondent should not enforce the road user fees because Respondent should give Claimant back an additional 77 days for the bridge deck issue and eight days for the state fair.

68. Willis reviewed the one-page timeline and agreed that it covered the big events and minor events.

69. Regarding Claimant's Exhibit Nos. 30 and 31, Willis stated that Respondent does not disagree with Claimant's analysis.

70. Claimant's Exhibit No. Ex 32 breaks down the days in graphic form. Claimant planned for the Project to take 138 working days (375 calendar days). The red line shows Extended Performance Period 1, including the change orders giving 115 additional days to Claimant. The darker red line shows Extended Performance Period 2, which goes through the installation of the traffic signal. Calendar days are easier for extended overhead costs than working days.

71. Claimant's Exhibit No. 34 is a summary of Claimant's damages. Willis stated that this fairly and accurately summarizes Claimant's damages.

- a. For Extended Performance Period 1, Willis got the cost per day by dividing the \$404,000 total costs by the number of days. This represents Project overhead, not home office overhead.
- b. For Extended Performance Period 2, Claimant reduced the rate by 75%.
- c. As to the Railroad Flagging Costs, Claimant is not asking for costs associated with the 138 working days planned for the Project.
- d. The Unpaid Quantities line item includes those items for which Claimant has not received payment from Respondent. Respondent originally said that it did not have the ticket, but Claimant made sure that Respondent had all tickets.
- e. The Unsubstantiated Liquidated Damages line item is there because liquidated damages have already been assessed. If Respondent gave the days needed, there would have been no need for liquidated damages.
- f. The Deck Replacement Cost line item is the other half of what it cost.

g. Regarding the Bond Costs, Claimant had to have a bond in place a lot longer because of the issues.

h. The interest rate is standard.

i. The total amount sought is \$1,441,552.02, although this does not include \$332,000 in road user fees. Willis does not know when the road user fees will be assessed.

Claimant does not have a final estimate for the Project from Respondent, and Willis has no idea when he will receive it or why he does not already have it. The Project was completed in 2018.

j. Claimant is also seeking attorney's fees in the amount of \$88,000. The fees are so high because there has been so much involved in putting this claim together. Claimant had counsel involved before the claim was filed. Respondent had a lot of documents for Claimant's counsel to review, and several depositions were required.

72. Regarding damages, Claimant bid this Project as a 138-day job. Respondent tries to protect itself in the Standard Specifications. However, when Respondent agrees to give you almost as many additional days as the number you started with but will not pay you for your time, that does not make any sense. It is impossible for Claimant to accurately bid. It is also impossible for Claimant to absorb. These damages will not represent a windfall to Claimant. These damages will get Claimant back to zero. Without an award, Claimant will lose money on this job.

73. Claimant's Exhibit No. 33 is the overhead and administrative costs ledger. This provides support for the daily rate for Extended Performance Period 1.

74. On cross-examination, Willis stated that Respondent stopped charging time to Claimant in June 2017 and that some of the traffic signal work was done by a subcontractor. Regarding Claimant's Exhibit No. 24, in February 2018, Willis requested approximately \$580,000

for Respondent but is now asking for \$1.4 million. Willis stated that not every charged day required a flagger. 93 days' worth of liquidated damages have been assessed by Respondent.

75. On redirect, Willis stated that the February 2018 letter from Willis to Banks and Respondent's director included a request for an additional 113 working days.

Testimony of David Norris

76. David Norris is a resident engineer for Respondent. He has worked for Respondent since December 2002 and been a resident engineer since 2015. Norris is a professional engineer. He received his bachelor's degree in civil engineering from Arkansas State University.

77. Norris was resident engineer for this Project. He acted as representative for Respondent and oversaw the work on the Project. His job duties include making sure everything is measured and paid for, as well as making sure the Standard Specifications, plans, and contracts are enforced. Norris is familiar with the Standard Specifications, plans, and Contract for this Project.

78. Norris is familiar with the Standard Specifications regarding utilities. Respondent is not able to monetarily compensate a contractor but will award days.

79. On a working day job, a working day is assessed when the contractor is able to utilize 60% of its force for 60% of the time. The working day is determined by the resident engineer and staff. If there is a utility impact, Respondent may not charge a day. The contractor is required to call OneCall before they dig.

80. Norris was there at the beginning of the bridge deck pour. He recalled that it took a little over an hour for the second pump truck to get started.

81. Norris has been present for more than 20 bridge deck pours. The failure of the pump truck have been a contributing factor for the delay in progress.

82. Claimant asked to do a continuous pour, rather than a sequenced pour. It is not unusual for a contractor to ask permission to do something outside of the contract. Respondent's bridge division came back with instructions for Claimant to follow, including the instruction that the initial pour could not set. The reason for this was that cracks could develop in the completed deck while pouring the adjacent span due to vertical movement of the beams.

83. Most contractors request to do a continuous pour.

84. Regarding the bridge deck removal, there was a lot of back-and-forth discussion. Claimant pursued an alternate method of destroying the deck to save the reinforcing steel.

85. You could argue that Claimant caused its delays. Respondent gave them direction within a week to ten days, but Claimant decided to pursue different methods. Ultimately, Claimant removed the bridge deck back to the sequence joint, which was Respondent's initial recommendation.

86. The Contract spells out what Respondent can do regarding the railroad. Norris does not think that Claimant was treated fairly by the railroad, but that is between Claimant and the railroad. Respondent did not arrange an agreement between Claimant and the railroad, and Respondent was not responsible for dealing with the railroad.

87. Norris received Claimant's request for an engineering analysis, but the Contract does not require that Respondent prove to Claimant that its remedy is sound.

88. Respondent had the right to reject the bridge deck pour because it was not done according to the directions given. Respondent does not have to prove to Claimant that the bridge deck was improperly built. Respondent typically gives a blanket answer in response, such as "not per specification" or "not per direction." The issue with the bridge deck could have caused

maintenance issues going forward if there were cracks in the bridge deck. Taxpayers pay for maintenance to the bridge.

89. Respondent typically does not provide its means and methods to a contractor. Respondent typically does not tell a contractor to do something in a certain way or to use a certain material or equipment.

90. Norris wants contractors to be successful, so that they will come back and bid on other jobs. However, Respondent has to follow the Contract and the plans. Respondent did follow the Contract on this Project.

91. Upon a question from a commissioner, Norris stated that the 400-foot part of the bridge was done in two pours.

92. Norris was upset that Simecek had not consulted with him before stopping the pour. He was more upset that Simecek did not tell him he was stopping the pour.

93. Norris can tell if concrete has started to set by the look of it or the feel of it. An aluminum welding rod stuck into the concrete could help determine whether the concrete has set. There is no universal test for whether concrete is setting. You can tell by looking mostly. You do not need an engineering degree to determine if concrete is setting.

94. On cross-examination, Norris stated that the bridge looks nice and functions well. He agreed that it is a good bridge and that Claimant did a “tremendous job” on the Project. There were several change orders issued that extended the number of working days, and Norris agrees with those change orders. Part of the days related to the railroad. The railroad was difficult to work with and contributed to the delay. It took from February-May 2015 for Claimant to get a right of entry agreement from the railroad. Respondent granted additional days but did not give Claimant any additional money. The rock and sandstone issues, as well as the unknown utility issues,

constituted differing site conditions. It is unusual to give 40 additional days early in a project. It is not unusual for a contractor to discover utility issues. When that happens, the contractor notifies Respondent, and Respondent calls the utilities. Respondent has a whole section of people who handle utility issues. The Standard Specification on utilities deals with who discovers the utility (the contractor) and who handles the initial communication (Respondent). Depending on the scenario, it can take weeks or months for Norris' superiors to issue a decision. While he thought the 40-day adjustment was correct, his supervisors only awarded 22 days. Depending on scenario, can take weeks or months for W's higher ups to issue decision. Simecek made the decision to stop the bridge pour, and Norris was "so angry" that Simecek did not check with him. Norris would have required more than a finger poke. Norris does not know what he would have done. He does not know whether an engineering analysis was completed by Respondent. Norris does not know whether Respondent can reject a pour and order it removed without any engineering analysis. Norris agreed that it would bolster the argument to have an engineering analysis before rejecting a pour. Without an engineering analysis, Norris agreed that a contractor could be upset. Any issues regarding possible future maintenance for the bridge is speculation. Norris does not know why Respondent agreed to share in the cost of removing the bridge deck. Norris agreed that Claimant was entitled to 82 additional days, but 77 of those days fell in the winter shutdown. Had the time fallen outside the winter shutdown, Claimant would have gotten 77 more days back. The bridge deck issues pushed the completion date of that part of the Project from December 2016 until March 2017, which was in the winter shutdown period. The bridge deck issue caused 82 days of impact. Norris agreed that if a job is extended through an additional winter shutdown or two, that could have a significant impact on the contract because the contractor still has costs on the job during that time. Going from 138 working days to 258 days is a significant increase, and Norris does not

believe that the markup on the bid items should cover the cost of the delays. Claimant had to build through three winter shutdown periods instead of one, which required Claimant to staff the job and have keep items on site longer than expected. Whether Claimant is entitled to monetary compensation is above Norris' pay grade. Overhead expenses directly tied to a project are properly included per the Standard Specifications. Norris does not know why Respondent refused to pay overhead expenses. Norris used the phrase "above my pay grade" ten times in his deposition.

95. On redirect, when Norris said that something was above his pay grade, he meant that he is bound by the Contract and what a resident engineer is limited to do. Claimant is asking for items outside of the Contract, so the resident engineer cannot pay. Awarding five days instead of 82 is in accordance with the Contract and the working day schedule. Respondent is not using the working day method anymore, and the calendar day method is much cleaner.

#### Closing Arguments

96. In closing, Claimant's counsel argued that on virtually all of the key issues, Respondent's sole witness testified that the issues were above his pay grade. Respondent did not bring any other witnesses. The Standard Specification is clear that Claimant is entitled to project overhead, and Respondent is not contesting that Jerry Trotter conceded that point. Respondent expects contractors to follow the Standard Specifications, and Respondent must follow them, as well. As to the Unpaid Quantities line item, Respondent gave no reason why those items have not been paid over the last three to four years. Simecek relied on the wrong specification in stopping the deck pour. Respondent delayed decisions, which increased the costs. Respondent still has not given Claimant a final estimate, which is a pattern for Respondent. It would be inequitable for Respondent not to pay.

97. In closing, Respondent's counsel argued that Claimant has the burden of proof. There is no proof that Simecek was incorrect or that the bridge deck was still plastic when the pour was stopped. Simecek stated the bridge deck had started to set. The Contract states that there is no monetary compensation for utility delays. It would be unfair to the bidding process to allow the contractor to change the contract after signing. It is untrue that Respondent delayed its decisions. After the bridge deck, Respondent gave directions to Claimant. The delay occurred because Claimant did not want to follow those directions. The pump truck failure was the reason for the bridge deck pour starting to set, not Respondent. As to the Unpaid Quantities Issue and Fencing Issue, the Claims Commission has no jurisdiction because the chief engineer did not render a decision. The railroad costs are outside the control of Respondent. Respondent asked the Claims Commission to deny and dismiss the claim.

#### **Post-Hearing Briefing**

98. Following the hearing, the Claims Commission asked the parties to brief whether Claimant exhausted its administrative remedies as to the Fencing Issue, the Traffic Signal Issue, and the Unpaid Quantities issue.

99. Claimant conceded that it did not go through the full administrative process on the Fencing Issue, Traffic Signal Issue, and Unpaid Quantities Issue but argued that exhaustion of remedies is a procedural—not jurisdictional—issue and that Respondent waived the issue. Claimant noted that the Fencing Issue (representing \$7,498.88 in damages), the Traffic Signal Issue (representing \$67,724.41 in damages), and the Unpaid Quantities Issue (representing \$99,015.00 in damages) collectively represent only twelve percent of Claimant's principal claim amount.

100. Respondent responded to Claimant's post-hearing brief, stating that Claimant's arguments rely on inapplicable caselaw regarding the Arkansas Administrative Procedures Act (APA), that the Contract is not governed by the APA, and that Respondent did not waive Section 105.01 of the Standard Specifications.

101. Respondent also filed a post-hearing brief, arguing that, under the Contract, "the only claims that can be brought to the Claims Commission are claims that were sent to the Resident Engineer and then appealed to the Chief Engineer." Respondent also argued that if Claimant were allowed to proceed with these issues, "it would allow other contractors to bypass the process set out in the contract and simply file a complaint at the Claims Commission" in violation of the Contract.

102. Claimant filed a reply brief, arguing that the exhaustion issue is separate from the Contract, that its caselaw was not based upon the APA, and that Respondent misstated Claimant's waiver argument as being a waiver of a 105.01 as opposed to a waiver of the exhaustion defense.

103. The Claims Commission subsequently asked Claimant for additional information regarding when and how the Unpaid Quantities were originally submitted to Respondent, as well as any supporting documentation. In response, Claimant stated that the Unpaid Quantities were first presented to Respondent on June 20, 2017. Claimant submitted the June 20, 2017, letter from Lusby to Norris, as well as Lusby's July 5, 2017, follow up email to Norris and Norris' response that same day that Respondent was "working through them."

104. The Claims Commission then asked the parties about the effect of Section 105.01 on the Unpaid Quantities Issue and the effect of Section 105.18 on the Fencing Issue and Traffic Signal Issue. Claimant responded, stating, *inter alia*, that the parties may have resolved the Unpaid Quantities Issue. As to the Fencing Issue and Traffic Signal Issue, Claimant stated that Section

105.18 does not apply but that Claimant can still bring these claims under Section 105.01. Respondent responded, stating, *inter alia*, that Claimant cannot receive full payment on the Unpaid Quantities issue because liquidated damages and road user fees were subtracted from the payment. As to the Fencing Issue and Traffic Signal Issue, Respondent conceded that Claimant has not received a final estimate but argued that Claimant has not received a final estimate because Claimant has not provided the necessary information until October 20, 2021 (although Respondent attached emails showing that such information had been requested in January 2019, August 2019, and November 2019). Respondent further argued that if Claimant were permitted to submit claims for the Fencing Issue and Traffic Signal Issue now, that would set a precedent that a contractor could withhold necessary documentation in order to extend the filing deadline.

### **Findings of Fact and Conclusions of Law**

Based upon a review of the pleadings and the law of the State of Arkansas, the Claims Commission unanimously finds as follows:

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

106. The Claims Commission finds that the parties entered into the Contract related to the Project to build a bridge on Roosevelt Road in Little Rock, Arkansas, over the Union Pacific railroad tracks.

### **Damages re Extended Performance Period 1 and Deck Replacement Costs**

107. Claimant alleged \$404,940.44 in damages related to Extended Performance Period 1. Claimant calculated its damages by calculating its average daily overhead from March 30, 2015, through June 14, 2017 (the end of Extended Performance Period 1) and multiplying that number (\$937.36) by the 432 calendar days in Extended Performance Period 1.

108. The Claims Commission finds that Extended Performance Period 1 went from April 8, 2016, until June 14, 2017. During this time, Respondent gave Claimant an additional 115 working days related to utility issues, undercutting, and removal and replacement of the bridge deck. *See* Claimant's Exhibit Nos. 26–28.

109. The Claims Commission finds Willis' testimony regarding his meeting with Trotter and other representatives of Respondent to be significant, especially Trotter's statement that overhead is recoverable under the Standard Specifications but that Respondent never pays it. This testimony is supported by Claimant's Exhibit No. 21, which is an October 24, 2017, letter from Willis to Banks, set out below in pertinent part:

We asked the group at the meeting if they agreed that JCG was entitled to project extended overhead cost as a result of time extensions on the project. Mr. Trotter answered that there was language in the specifications that allowed payment for extended project overhead but that the department never paid it. Section 105.18 [of the Standard Specifications] . . . allows for project extended overhead cost to be paid.

(emphasis added). The Claims Commission notes that no evidence was presented to refute Willis' testimony.

110. Section 105.18 of the Standard Specifications provides in pertinent part:

All claims shall be in sufficient detail to enable the Engineer to determine the basis for entitlement and the costs incurred, excluding loss of anticipated profits, organization or overhead expenses not related directly to the project or interest.

111. The Claims Commission agrees with Claimant's witnesses that Section 105.18 does not preclude recovery of overhead directly related to the Project. As such, the Claims Commission finds that Respondent breached the Contract by not paying Claimant the overhead expenses related directly to the Project.

112. While the Claims Commission finds that Claimant is entitled to overhead damages, the Claims Commission is unconvinced that a calendar day assessment is correct. Instead, the

Claims Commission finds that Claimant is entitled to overhead for the 115 working days added to the Contract. Claimant's witnesses testified that the overhead per diem was \$937.36, such that the total overhead for the additional 115 days would be \$107,796.40. While the Claims Commission acknowledges Respondent's argument as to Section 105.07, the Claims Commission finds that Section 105.07 relates to known utility issues and that Section 105.07 is in conflict with the special provision of the Contract related to utility adjustments. The Claims Commission finds the burden placed on Respondent in Section 105.07 to be significant:

...The Department will notify all known utility companies, all known pipe line owners, or other known parties affected, and endeavor to have all necessary adjustments of the public or private utility fixtures, pipe lines, and other appurtenances within or adjacent to the limits of construction made as soon as practicable.

(emphasis added). Additionally, the Claims Commission finds the testimony of Evans, Willis, and Norris especially helpful with regard to the utility issues, especially Norris' testimony that Respondent has an entire section devoted to handling utilities.

113. The Claims Commission also finds that Claimant is entitled to overhead for the 82 working days related to the bridge deck issues, for a total of \$76,863.52. The fact that a bridge pour was stopped on the basis of a finger poke is remarkable, especially in light of Simecek's mistake regarding the screed used by Claimant and Norris' resulting frustration with Simecek. Respondent's refusal to either conduct any engineering analysis or to provide the engineering analysis to Claimant is also remarkable, given that the basis for stopping Claimant's pour could be considered rudimentary at best.

114. The Claims Commission is unpersuaded by Respondent's argument that it agreed to pay half of the deck replacement costs because it wanted to expedite the work, especially in light of Evans' testimony regarding his conversation with Chief Banks. The Claims Commission

notes there was no testimony presented that refuted Evans' testimony. As such, the Claims Commission finds that Claimant is entitled to the other half of the deck replacement costs, for a total of \$53,475.00.

Damages re Extended Performance Period 2

115. The Claims Commission finds that Claimant has not exhausted its administrative remedies related to the Traffic Signal Issue, such that the Claims Commission cannot award damages to Claimant related to Extended Performance Period 2. To the extent that Claimant may still present these damages to Respondent as an unresolved dispute under Section 105.01 or as a claim for additional compensation under Section 105.18 ("...All claims must be submitted to the Resident Engineer within 180 calendar days after receipt of the Final Estimate..."), the Claims Commission takes no position.

Damages re Railroad Flagging Costs

116. The Claims Commission finds that the working days added to the Contract necessarily had an impact on Claimant's railroad flagging expenses. The Claims Commission does not find it reasonable that Claimant should have to absorb an enormous railroad flagging bill when a huge number of working days were added to the Contract. Claimant included in its bid \$250,000.00 in railroad flagging expenses over the 138 working days Claimant expected the Project to require. Dividing Claimant's estimate by the 138 working days, Claimant was effectively budgeting \$1,811.59 per working day for railroad flagging expenses. The Claims Commission finds that it is appropriate for Respondent to cover this expected per diem for the additional working days referenced in Paragraphs 114–15, for a total of \$356,883.23.

117. The Claims Commission finds that calculating the per diem using Claimant's budgeted amount for railroad flagging expenses to be fairer than the amount listed in Claimant's Exhibit No. 34.

118. To the extent that one or both parties argued that the railroad was sending more flaggers than required, the Claims Commission takes no position. Perhaps Claimant and Respondent can pursue the railroad to recover for the alleged overcharges. However, to the extent that such a claim may be time-barred or otherwise unsuccessful, it is undisputed that there were issues and delays that necessarily extended this Project, and the Claims Commission believes it would be monumentally unfair for Claimant to bear those railroad flagging expenses related to those extensions alone. Had Claimant known that an additional 197 working days would be required to complete the Project, it follows that Claimant would have budgeted additional money for railroad flaggers.

#### Damages re Unpaid Quantities Issue

119. The Claims Commission finds that it is unclear whether the parties have resolved the Unpaid Quantities Issue, although it appears that they have not. Claimant stated the following in post-hearing briefing:

...To try to resolve this issue, Mr. Willis of James sent the DBE certification to Mr. Norris of ARDOT, by email, last Wednesday, October 20. Mr. Willis stated in that same email that if ARDOT will confirm in writing to the Commission and James that now that it has received the DBE certification it will in fact give James credit on the unpaid quantities of approximately \$85,000, James will consider this unpaid quantities issue resolved and will not need a decision on it.

Presumably on the same issue, Respondent stated that:

...In any event, Dale Willis from James Construction sent an email to ArDOT on October 20, 2021, with a copy of an estimate. Mr. Willis wrote, "if we receive payment on the items listed (in the estimate), we will consider the unpaid quantities item resolved." The estimate showed that James was paid for the items. However, since the Project was not completed on time, James was charged liquidated

damages and road user costs (labeled A+C) in accordance with the Contract. Since liquidated damages and road user costs were subtracted from the payment, James did not receive full payment for the work it completed and instead received \$4,503.20.

(internal citations omitted).

120. The Claims Commission understands that more questions may arise from post-hearing briefing, and the Claims Commission appreciates the parties' help in trying to work through these complicated facts.

121. However, the Claims Commission finds that Claimant has not exhausted its administrative remedies related to the Unpaid Quantities Issue. While Claimant brought the Unpaid Quantities Issue to Norris' attention in the June 20, 2017, email (and the follow up email), the Claims Commission disagrees that Claimant has obtained a decision from Banks on this issue. The Claims Commission disagrees that Banks' December 28, 2017, letter (attached to Claimant's complaint) addressed the Unpaid Quantities Issue. To the extent that Banks verbally addressed and decided the Unpaid Quantities Issue in a March 12, 2018, meeting, specific evidence or testimony on this point was not presented. Moreover, Section 105.01 requires that Banks' decision be in writing.

122. To the extent that Claimant may still present the Unpaid Quantities Issue to Respondent pursuant to Section 105.01, the Claims Commission takes no position.

#### Liquidated Damages

123. In connection with its ruling in Paragraph 115, the Claims Commission finds it monumentally unfair that Claimant was awarded five working days related to the bridge deck delay instead of the 82 requested, especially in light of Norris' testimony that there was no dispute over the number of working days impacted by the bridge deck. The Claims Commission finds that the bridge deck delays occurred when the pour was stopped, and that occurred prior to the winter

shutdown period. As such, the Claims Commission finds that Claimant is entitled to reimbursement for 77 days' worth of liquidated damages assessed by Respondent, or \$154,000.

124. This finding is in line with the Claims Commission's previous decision in *Tanner Construction Company, Inc. v. Arkansas Department of Transportation*, Claim No. 180940.<sup>3</sup> In that claim, the Claims Commission held that it does not have the authority to order Respondent to return working days to a contractor or to prohibit Respondent from assessing a contractor for liquidated damages, but the Claims Commission can reimburse a contractor for improperly assessed liquidated damages.

125. The Claims Commission finds that it does not have sufficient evidence or testimony in order to reimburse Claimant for other liquidated damages.

#### Damages re Fencing Issue

126. The Claims Commission finds that Claimant has not exhausted its administrative remedies related to the Fencing Issue, such that the Claims Commission cannot award damages to Claimant. To the extent that Claimant may still present these damages to Respondent as an unresolved dispute under Section 105.01 or as a claim for additional compensation under Section 105.18 ("...All claims must be submitted to the Resident Engineer within 180 calendar days after receipt of the Final Estimate..."), the Claims Commission takes no position.

#### Other Requested Damages

127. With regard to Claimant's request for an award of \$332,000 to offset the road user fees to be charged to Claimant in Change Order No. 16, the Claims Commission notes that this is \$4000 per day for 83 days over the working days allowed. See Claimant's Exhibit No. 29. In line with the Claims Commission's finding that Claimant is entitled to reimbursement for 77 days of

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<sup>3</sup> This award was reviewed and affirmed by the Claims Review Subcommittee of the Arkansas General Assembly on February 25, 2021.

liquidated damages, the Claims Commission similarly finds that Claimant would not have been charged for this amount of road user fees if Respondent had given the 77 days back to Claimant. As such, the Claims Commission finds that Claimant should not have to pay \$308,000.00 of the road user fees charged by Respondent. However, Respondent may elect to either (a) not charge Claimant for this amount of road user fees and to reimburse Claimant for road user fees already deducted from payments to Claimant (up to \$308,000.00); or (b) charge Claimant for the road user fees and have the Claims Commission include an additional award for the \$308,000.00 in road user fees that will be or already have been charged to Claimant. The Claims Commission will give Respondent fourteen days from the date of this Order to advise the Claims Commission of its preference. Respondent's indication of its preference will not be construed by the Claims Commission as Respondent's agreement with the Claims Commission's award.

128. With regard to Claimant's request for an award of its bond costs, the Claims Commission finds that it has insufficient evidence of the damages related to bond costs to make an award.

129. With regard to Claimant's request for an award of interest, the Claims Commission find that an award of post-judgment interest is not appropriate, given that Respondent is unable to pay the award until the Arkansas General Assembly approves the award and places it on an appropriations bill in the next legislative session. As for pre-judgment interest, the Claims Commission finds that such request is appropriate and awards Claimant six percent pre-judgment interest from the filing of this claim on June 27, 2018, until the entry of this Order. *See Ark. Code*

Ann. § 4-57-101(d) (“The rate of interest under a contract in which a rate of interest is not specified is six percent (6%) per annum”).<sup>4</sup>

130. Ark. Code Ann. § 16-22-308 provides that the prevailing party in a breach of contract action may recover a “reasonable” attorney’s fee. In light of the voluminous discovery conducted by the parties, including numerous depositions, the Claims Commission finds that Claimant should be awarded an additional \$10,000.00 in attorney’s fees.

#### Conclusion

131. The Claims Commission AWARDS Claimant \$184,659.92 in overhead; \$53,475.00 for the remaining half of the deck replacement; \$356,883.23 in additional flagging costs; \$154,000.00 in improperly assessed liquidated damages, and \$10,000.00 in attorney’s fees. The Claims Commission will enter a total award amount, including pre-judgment interest, following Respondent’s submission of its preference regarding the road user fees.

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<sup>4</sup> To the extent that the Contract provided for a different rate of interest, such evidence was not presented to the Claims Commission. There was no argument provided by the parties regarding the applicable rate of interest, other than Willis’ testimony that the requested interest rate was standard.

IT IS SO ORDERED.



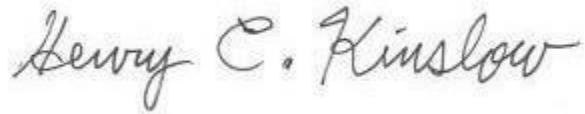
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ARKANSAS STATE CLAIMS COMMISSION  
Courtney Baird



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ARKANSAS STATE CLAIMS COMMISSION  
Dexter Booth



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ARKANSAS STATE CLAIMS COMMISSION  
Henry Kinslow, Co-Chair

DATE: November 9, 2021

**Notice(s) which may apply to your claim**

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

**BEFORE THE ARKANSAS STATE CLAIMS COMMISSION**

**JAMES CONSTRUCTION GROUP, LLC**

**CLAIMANT**

**V.**

**CLAIM NO. 181073**

**ARKANSAS DEPARTMENT OF  
TRANSPORTATION**

**RESPONDENT**

**ORDER RE AWARD AMOUNT**

On November 9, 2021, the Arkansas State Claims Commission (the “Claims Commission”) entered an order awarding James Construction Group, LLC (the “Claimant”) \$184,659.92 in overhead; \$53,475.00 for the remaining half of the deck replacement costs; \$356,883.23 in additional flagging costs; \$154,000.00 in reimbursement for improperly assessed liquidated damages; and \$10,000.00 in attorney’s fees. The Claims Commission also found that Claimant was improperly charged \$308,000.00 in road user fees and asked the Arkansas Department of Transportation (the “Respondent”) to confirm the status of these road user fees.

Through electronic correspondence, Claimant confirmed that Respondent has not yet assessed Claimant for any road user fees. Respondent also confirmed that it would not assess Claimant for the \$308,000.00 in road user fees, such that the Claims Commission need not award reimbursement herein. The parties also agreed that prejudgment interest would not be appropriate on road user fees not yet assessed.

The Claims Commission appreciates Respondent’s willingness to forego assessing Claimant for \$308,000.00 in road user fees and herein makes no award for road user fees.

As such, the Claims Commission AWARDS Claimant a total of \$910,837.44 in damages, as specified below:

- Pursuant to its November 9, 2021, order, the Claims Commission awards Claimant \$595,018.15 in overhead, the remaining half of the deck replacement costs, and additional flagging costs;
- Pursuant to its November 9, 2021, order, the Claims Commission awards Claimant reimbursement for \$154,000.00 in improperly assessed liquidated damages;
- Pursuant to its November 9, 2021, order, the Claims Commission finds that Claimant is entitled to prejudgment interest at a rate of six percent per annum from June 26, 2018, until November 9, 2021, for a total of \$151,819.29:

$$\$595,018.15 + \$154,000 = \$749,018.15 \quad (\text{total principal award})$$

$$6\% \text{ of } \$749,018.15 = \$44,941.09 \quad (\text{prejudgment interest owed per annum})$$

$$\$44,941.09 / 365 = \$123.13 \quad (\text{prejudgment interest owed per day})$$

$$6/26/2018–11/9/2021 = 1233 \text{ days} \quad (\text{no. of days from filing of claim until entry of order})$$

$$\$123.13 \times 1233 = \$151,819.29 \quad (\text{prejudgment interest owed to Claimant})$$

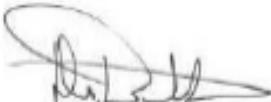
- Pursuant to its November 9, 2021, order, the Claims Commission finds that Claimant is also entitled to \$10,000.00 in attorney's fees pursuant to Ark. Code Ann. § 16-22-308.

IT IS SO ORDERED.



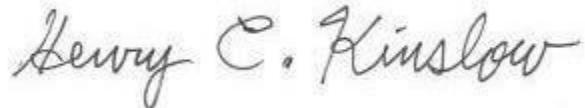
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ARKANSAS STATE CLAIMS COMMISSION  
Courtney Baird



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ARKANSAS STATE CLAIMS COMMISSION  
Dexter Booth



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ARKANSAS STATE CLAIMS COMMISSION  
Henry Kinslow, Co-Chair

DATE: December 7, 2021

**Notice(s) which may apply to your claim**

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