

ARKANSAS STATE CLAIMS COMMISSION

AUG 17 2009

C5

Please Read Instructions on Reverse Side of Yellow copy

Please print in ink or type

BEFORE THE STATE CLAIMS COMMISSION Of the State of Arkansas

RECEIVED

- Mr. Mrs. Ms. Miss

NEC, Inc. Claimant

vs.

State of Arkansas, Respondent AR Highway & Transportation

Do Not Write in These Spaces Claim No. 10-0286-CC Date Filed August 17, 2009 Amount of Claim \$ 27,360.00 Fund AHTD

Breach of Contract/Refund of Expenses

COMPLAINT

NEC, Inc. the above named Claimant, of 2425 S. 5th Pl., Rogers, AR 72758, 479-621-6324 County of Benton represented by Jack East III of 2725 Cantrell Rd., Ste. 202, Little Rock, AR 72202, 372-3278 376-0949 says: State agency involved: Arkansas State Highway Commission Amount sought: \$27,360.00 Month, day, year and place of incident or service: June 25, 2009 Explanation: See Attached

As parts of this complaint, the claimant makes the statements, and answers the following questions, as indicated: (1) Has claim been presented to any state department or officer thereof? YES when? June 9, 2009 to whom? Arkansas Highway Department and that the following action was taken thereon: Department's Chief Engineer letter is attached. and that \$ -0- was paid thereon: (2) Has any third person or corporation an interest in this claim? No; if so, state name and address NA (Name) (Street or R.F.D. & No.) (City) (State) (Zip Code) and that the nature thereof is as follows: NA and was acquired on NA 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. Jack East III (Print Claimant/Representative Name) Signature of Claimant/Representative

SWORN TO and subscribed before me at Little Rock AR on this 17th day of August 2009 TONYA WOOD MY COMMISSION # 12871305 EXPIRES: May 22, 2019 Pulaski County (Notary Public) My Commission Expires: May 22 2019

SF1-R7-99

**ARKANSAS STATE  
CLAIMS COMMISSION**

AUG 17 2009

**RECEIVED**Facts

1. On January 2, 2008 NEC, Inc. (NEC), as prime contractor, entered into a contract (Contract) to construct job 090073, Federal Aid Project STP-0008(25), with the Arkansas State Highway Commission. A true copy of the two page contract is appended as Exhibit A. The Contract required NEC to construct a passing lane on Hwy 12 near Eureka Springs in exchange for the estimated sum of \$2,495,558.44. The time allowed for performance was 125 working days, with a liquidated damages clause allowing the State of Arkansas to assess liquidated damages in the sum of \$1,440.00 for each unexcused day after the 125th day of performance.
2. The Contract specifications contained and required NEC to have the participation of one or more disadvantaged business enterprises (DBEs) under Arkansas Highway and Transportation Department (AHTD) standard specifications, true copies of which are attached as Exhibit B.
3. On January 24, 2008 NEC entered into a subcontract with DBE firm Erosion Control Specialists, Inc. (ECS), with AHTD approval and consent, for a portion of the Job 090073 work. A true copy of this Subcontract is attached as Exhibit C.
4. ECS failed to timely perform its Subcontract work despite repeated request by NEC as reflected by Exhibit D attached.
5. When ECS's failure to perform began to hamper and interfere with NEC's progress of the work NEC, in compliance with AHTD standard specifications, requested permission from AHTD to perform some of ECS's work in order to keep the job progressing. Such

permission was refused - as was NEC's subsequent request to replace ECS for nonperformance - despite substantial evidence justifying NEC's performance or the termination of ECG's subcontract, as reflected by the contents of a series of letters and emails between AHTD and NEC on the subject which are attached as Exhibit E.

6. AHTD finally allowed NEC to replace ECS on April 7, 2009 as reflected by Exhibit F attached.
7. Due to AHTD's refusal to allow NEC to replace ECS the job was not completed in 125 working days. NEC exceeded, according to AHTD, the allowed time of performance by 19 working days. Such delay in completion was proximately caused by AHTD's refusal to allow NEC to either perform ESC's work in a timely fashion or terminate ESC's subcontract.
8. AHTD has wrongfully assessed liquidated damages against NEC for the delay it caused in the sum of \$27,360.00.
9. The 19 day delay was excusable under standard specification 108.06(d)(2)(b), attached hereto as Exhibit G.
10. NEC should be allowed to have and recover \$27,360.00 from the State of Arkansas due to its unlawful taking of NEC's property.
11. NEC has pursued this matter through the usual AHTD channels as reflected by Exhibit H.

Aug 12 09 03:22p

Nec Inc

14796216328

p.2

ARKANSAS STATE HIGHWAY COMMISSION

CONTRACT

THIS CONTRACT AND AGREEMENT, made and entered into this date JAN 02 2008 and between N.E.C., INC.

hereinafter referred to as the Contractor, and the Arkansas State Highway Commission, hereinafter referred to as the Commission, Witnesseth:

That for and in consideration of the payment to be made as set forth in the Contract Schedule of Prices, the Contractor hereby agrees to furnish all tools, labor, equipment, and materials, and to build and construct that certain project in CARROLL County, designated as

Job 090073

FEDERAL AID PROJECT STP-0008(25)

Job Name: HWY. 12-EUREKA SPRINGS (PASSING LANE) (S)

consisting of an improvement of State Highway 23, Section 10, more specifically described in the Contract Schedule of Prices attached hereto, all in exact accord with the Construction Plans on file in the Office of the Commission at Little Rock, Arkansas; and with the Arkansas Standard Specifications for Highway Construction, Edition of 2003; and with the Proposal filed with the Commission on November 28, 2007; and with the Supplemental Specifications and Special Provisions accompanying said Proposal, copy of said Plans, Specifications, Supplemental Specifications, and Special Provisions being attached hereto and made a part hereof as fully as though copied in full herein; under the direct supervision of the Engineer, and to the entire satisfaction of the Commission, and in accordance with the laws of the State of Arkansas; and in case the United States Government is participating in any portion of the cost of the work, the work shall also be subject to inspection and approval at all times by the appropriate Federal agency.

The Contractor agrees, for the consideration set forth in the Contract Schedule of Prices, to begin work within ten days after a Work Order is issued by the Engineer and to complete the work within one hundred twenty-five (125) working days. If the Contractor shall fail to complete the work within the time limit herein specified, he shall pay to the Commission, as liquidated damages, and not in the nature of a penalty, the sum of one thousand four hundred forty dollars (\$1,440.00) for each day delayed, it being understood and agreed between the parties hereto that the said sum fixed as liquidated damages is a reasonable sum, considering the damages that the Commission will sustain in the event of any such delay, and said amount is herein agreed upon and fixed as liquidated damages, because of the difficulty of ascertaining the exact amount of damages that may be sustained by such delay. The said sum shall be deducted from the final amount of estimate due the Contractor.

ARKANSAS STATE CLAIMS COMMISSION

AUG 17 2009

RECEIVED

Exhibit A

Aug 12 09 03:22p Neo Inc

14796216328

p.3

Commission agrees to pay for the work at the prices stipulated in the Contract Schedule of Prices, such payment to be in lawful money of the United States, and the payment shall be made at the time and in the manner set forth in the Specifications.

WITNESS OUR HANDS, this date JAN 02 2008

CONTRACTOR

N.E.C., INC.

BY: [Signature]  
MICHAEL J. NECESSARY

ARKANSAS STATE HIGHWAY COMMISSION

BY: [Signature]  
Director of Highways and Transportation

W



**MIKE NECESSARY**  
CELL: 479-721-2473

EMAIL: MJNECESSARY@NEC-CONTRACTORS.COM

**KEVIN NECESSARY**  
CELL: 479-721-2474

EMAIL: KJNECESSARY@NEC-CONTRACTORS.COM

June 9, 2009

Frank Vozell, Chief Engineer  
Arkansas Highway and Transportation Dept.  
P.O. Box 2261  
Little Rock, Arkansas 72203-2261

Re: AHTD Job 090073  
Hwy. 12-Hwy. 23 Passing Lanes  
Carroll County  
Time Charges

Dear Sir,

We appeal the decision requesting additional time rendered by Stacy Burge, Resident Engineer, of the named project. I have attached the letter addressed to him concerning the DBE subcontractor of which no one could control because of his lying to all involved including various personnel in your office. I have also attached Mr. Burge's letter denying relief.

Please review and respond at your earliest convenience.

Sincerely

Michael J. Necessary, V.P.

C: File

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

June 25, 2009

Mr. Michael J. Necessary  
Vice President  
NEC, Inc.  
2425 South 5<sup>th</sup> Place  
Rogers, AR 72758

Re: Job No. 090073  
FAP STP-0008(25)  
Hwy. 12-Eureka Springs (Passing Lane) (S)  
Carroll County

Dear Mr. Necessary:

Reference is made to your June 9, 2009 letter appealing the decision of Resident Engineer Stacy Burge denying your request to waive and cancel liquidated damages on this project.

Subsection 108.06 (c) of the Standard Specifications, Edition of 2003, states in part, "*The ability of... subcontractors to provide... services is considered within the Contractor's control...*" Your Subcontractor failed to perform required work activities within the time frame required for compliance with the NPDES permit and the project Stormwater Pollution Prevention Plan. Therefore, other project-related work was ceased, as allowed by Subsection 110.08 of the Standard Specifications, until erosion control measures were addressed to bring the project into compliance.

Based on these requirements, time charges and liquidated damages were assessed in accordance with the Standard Specifications.

Sincerely,

Frank Vozel  
Deputy Director and  
Chief Engineer

c: Director  
Assistant Chief Engineer-Operations  
Construction  
District 9  
Resident Engineer 92

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

NEC, INC.

CLAIMANT

VS.

CLAIM NO. 10-0286-CC

ARKANSAS STATE HIGHWAY AND  
TRANSPORTATION DEPARTMENT

RESPONDENT

ANSWER

1. Respondent ADMITS Paragraph 1.
2. Respondent ADMITS Paragraph 2.
3. Respondent ADMITS Paragraph 3.
4. Respondent ADMITS Paragraph 4.

ARKANSAS STATE  
CLAIMS COMMISSION

SEP 08 2009

RECEIVED

5. Respondent ADMITS that Claimant requested permission from Respondent to perform some of the work of the subcontractor and that permission was initially refused. However, Claimant was later allowed to perform some of the work of the subcontractor. Respondent also ADMITS that Claimant's request to replace the subcontractor was not initially approved. Again, Claimant was later given approval to replace the subcontractor (See Paragraph 6 of the Complaint). Respondent DENIES the characterization of the evidence used by Claimant in Paragraph 5.
6. Respondent ADMITS Paragraph 6.
7. Respondent ADMITS that Claimant exceeded the allowed time of performance by nineteen working days. The other allegations contained in Paragraph 7 are DENIED.
8. Respondent DENIES the allegation that it "wrongly" assessed liquidated damages against Claimant. However, Respondent ADMITS that liquidated damages were assessed in the sum of \$27,360.00 against Claimant.
9. Respondent DENIES Paragraph 9.



10. Respondent DENIES Paragraph 10.
11. Respondent ADMITS Paragraph 11.

Respectfully submitted,  
Arkansas State Highway and Transportation Department

BY:  \_\_\_\_\_

Mark Umeda, 2007285

Staff Attorney

Arkansas State Highway and Transportation Department

P.O. Box 2261


Little Rock, AR 72203-2261

(501) 569-2165

[mark.umed@arkansashighways.com](mailto:mark.umed@arkansashighways.com)

#### CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing pleading was made to NEC, Inc., 2425 S. 5th P1., Rodgers, AR 72758 and Jack East, Attorney at Law, 2725 Cantrell Road, Suite 202, Little Rock, AR 72202 on this the 3rd day of September, 2009, by placing same, properly addressed, in the U.S. mail with postage sufficient for delivery.



\_\_\_\_\_  
Mark Umeda

STATE CLAIMS COMMISSION DECISION  
OPINION

Amount of Claim \$ 27,360.00

Claim No. 10-0286-CC

NEC, Inc. Claimant

Attorneys

Jack East, III, Attorney Claimant

vs.

AR Highway & Transportation Dept.  
State of Arkansas Respondent

Jack Umeda, Attorney Respondent

Date Filed August 17, 2009

Type of Claim Breach of contract, refund  
of expenses

FINDING OF FACTS

This claim was filed for breach of contract and a refund of expenses in the amount of \$27,360.00 against Arkansas Highway and Transportation Department.

Present at hearing December 10, 2009 was the Claimant, represented by Jack East, III, and the Respondent, represented by Jack Umeda, Attorney.

The Claims Commission unanimously awards this claim in the amount of \$27,360.00 and will submit the claim in a Claims Bill to the 88<sup>th</sup> Arkansas General Assembly, 2010 Legislative 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 awards this claim in the amount of \$27,360.00 and will submit the claim in a claims bill to the 88<sup>th</sup> General Assembly, 2010 Legislative Session for subsequent approval and payment.

Date of Hearing December 10, 2009

Date of Disposition December 10, 2009

[Signature] Chairman  
[Signature] Commissioner  
[Signature] Commissioner

\*\*Appeal of any final Claims Commission decision is only to the Arkansas General Assembly as provided by Act #33 of 1997 and as found in Arkansas Code Annotated §19-10-211.