



thereafter, on April 24, 2009, the State filed an Answer and Counterclaim against Claimant. In that Counterclaim, the State demanded one hundred sixty-eight thousand four hundred thirty-seven dollars and sixty-two cents (\$168,437.62). Claimant filed a Reply to the Counter Claim on May 11, 2009.

An Order to Schedule was signed on May 20, 2010. The Commission received no response to this Order during the following months. However, the Claimant filed an Amended Notice of Depositions, received on September 15, 2010, as well as a Notice of Deposition on September 29, 2009. Claimant then filed, on July 13, 2010, a Consent Motion [for its counsel] to Appear Pro Hac Vice Before the Claims Commission. An Order granting that Motion issued on July 20, 2010.

A Scheduling Order issued on July 30, 2010 followed by the Commission's receipt of another Notice of Deposition from the Claimant on October 27, 2010. Later on November 19, 2010, the Commission received Claimant's Amended Response to Respondent's First Interrogatories and Request For Production of Documents. The State filed a Motion for Summary Judgment later that same month on November 22, 2010 along with its Undisputed Statement of Facts in Support of Its Motion for Summary Judgment, a Memorandum of Law in Support of Its Motion for Summary Judgment and an Affidavit of Duane Manning.

On December 23, 2010, the Commission received Claimant's Response to Respondent's Statement of Undisputed Facts and Response to Respondent's Motion for Summary Judgment. Claimant then filed a Notice of Filing Original Discovery Materials on December 17, 2011. APAC followed that with a Request for Filing of Original Discovery Materials regarding deposition transcripts from Mike Davis and Gary Loflin on December 23, 2010.

The Commission then issued a Notice of Location of Summary Judgment Motion Hearing filed in the Clerk's office on March 1, 2011. The State filed a Reply Brief in Support of Its Motion

for Summary Judgment on April 7, 2011. On April 18, 2011, the State filed a Notice of Filing Gary Loflin's deposition transcript. The Commission issued an Order denying Summary Judgment on April 27, 2011. A Consent Motion for Continuance was received by the Commission on April 29, 2011. On February 17, 2012 the Commission issued an Order Notifying Parties of Trial Location. That same day the State filed an Amended Counterclaim. On February 27, 2012, the Commission received the Claimant's Reply to Amended Counterclaim along with Claimant's Trial Brief. Both parties filed a post-trial brief between April 19, 2012 and April 20, 2012.

### **CLAIMANT'S EVIDENCE**

This is a contractual dispute involving Special Provision 411C, a part of the TDOT contract CND 214 with APAC.<sup>1</sup> Landon Lawson was APAC's operations manager at the time the six point nine three (6.93) mile paving project on State Route 336 in Blount County was carried out. On that project he prepared the bid and was in charge of the crews performing the work through the completion of the project. (TR 36). Exhibit 1A was introduced through Mr. Lawson and is a portion of TDOT's Standard Specifications. (TR 37). Mr. Lawson was concerned from the outset of the project about the amount of "leveling" mix provided for in the Bid Proposal.<sup>2</sup> (TR 41). The amount appeared to be insufficient.

In the past TDOT's local resident engineer would work with APAC to adjust materials to ensure they were used in the best way possible. (TR 41). These adjustments would involve shifting materials around to different aspects of the job. (TR 41). Adjustments would be made, but the contractor was not given a free hand to overrun the contractual provisions. (TR 41). As long as there were particular bid items in a proposal, some changes could be made to take care of any problems that came up. (TR 42). Mr. Lawson was aware of Special Provision 411C ("SP 411C"), which addressed the "smoothness" specification, and its applicability to this project. (TR 42). He went to SR 336 prior

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<sup>1</sup> References to testimony in this case will be to TR \_\_\_\_. References to an exhibit will be to EXH \_\_\_\_\_. The deposition of a Bryan Egan was filed. References to it will be DEP \_\_\_\_.

to the start of the work and discovered there were variances in width along the length of the highway. In fact, he was not sure that APAC found any location at which the road was twenty-two (22) feet wide. At one point, it narrowed to eighteen (18) feet and three (3) inches. (TR 43). However, the project plans did not reflect this. (TR 43). Lawson checked the road at ten (10) to eleven (11) locations and found only two (2) spots where it was twenty-one (21) feet six (6) inches to twenty-one (21) feet nine (9) inches wide with the remainder being nineteen (19) feet five (5) inches and down to eighteen (18) feet three (3) inches wide at its most narrow point. (TR 44). The TDOT plans showed the road as being twenty-two (22) feet wide. (TR 43).

Exhibit 3 is SP 411C, as it was worded on July 1, 2004. This format of SP 411C was new to APAC. (TR 45). This special provision lays out the smoothness requirement under the contract (TR 47). Addressing the last paragraph on page 1 of SP 411C, Mr. Lawson testified that APAC should be exempted from the requirements of this provision because the southern part of the project included a mile and one-half section which was very rural, quite “curvy,” and had “a lot of superelevation[s] in the curves.” In the northern most portion of the project, which is approximately one (1) mile long, the road is bordered with curbs and guttering and contained manholes and valves set in the pavement as well as some forty (40) to fifty (50) ingress and egress points from county roads and businesses. (TR 47-48). Mr. Lawson testified that the last paragraph of SP 411C, page 1, provided the justification for use of engineering discretion by TDOT to exempt APAC from the smoothness requirements. (TR 48).

Exhibit 4 is an October 4, 2005, letter to David Sisson of TDOT’s Maryville, Tennessee office. In that letter, Mr. Lawson sets out the reasons why it would be difficult for APAC to meet the smoothness requirements of SP 411C. (EXH 4). The reasons for a waiver request here included an inability to use two particular kinds of equipment, a Material Transfer Vehicle (“MTV”) and an

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<sup>2</sup> Leveling mix was frequently referred to as “E-mix.”

Automatic Grade Control System (“AGCS”). (TR 50-51).

The AGCS and the MTV could not be used because of the narrowness of the road. (TR 51). The AGCS has sensors which detect variations in the surface smoothness of the pavement and readjusts the paving equipment automatically as asphalt is put down. (TR 51-52). SR 336 was too narrow for this device, and APAC was forced to use older equipment which required manual readjustments of “screeds” located on either side of a paving machine. The AGCS uses sensors which results in a continuous application of asphalt eliminating the necessity of manually adjusting the screeds. Had APAC been able to use an MTV, it would have eliminated the need for a dump truck to back up to a paving machine creating the possibility that unevenness in the road would result because of contact between a dump truck and a paving machine. The MTV equipment also provided for a more even flow of asphalt when compared to older methods for loading materials into paving equipment. (TR 46-54).

Exhibit 5 is a letter dated October 4, 2005, to TDOT engineer Clint Bane, the operations engineer in the TDOT’s Region I office, from Mr. Sisson. On page 2 a note is found documenting Mr. Lawson’s request for a rideability waiver under SP 411C because of APAC’s inability to use a shuttle buggy (MTV) and ski poles (AGCS) due to objects overhanging the road and width restrictions on SR 336. Additionally, APAC complained that the four hundred (400) tons of leveling mix under the contract would not be enough to level the road. Further, the letter reflects concerns regarding manholes, curbs, curves, and traverse joints, and the 9 o’clock a.m. to 3 o’clock p.m. paving schedule.<sup>3</sup>

The shortened paving period (9 a.m. to 3 p.m.), necessitated by traffic considerations on the heavily traveled SR 336, resulted in the creation of more “traverse joints.” (TR 57). The presence of numerous traverse joints can impact smoothness. (TR 57).

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<sup>3</sup> Mr. Lawson had worked with Mr. Sisson “many, many times.” (TR 55-56).

EXH 6 is a letter from Sisson to Lawson dated October 7, 2005, responding to Lawson's letter of October 4, 2005. Paragraphs 2 and 3 of that letter provide in pertinent part as follows:

If you will go ahead and complete all of the pavement surfaces including the old abandoned railroad crossing, bridges, manholes, valves, curb and gutter sections and with all the stop and yield conditions, the surface will be tested for smoothness with the road profiler in accordance with T.D.O.T. procedures.

After the surface has been tested and broken down into lots then we can determine sections to be considered for exemption as stated in SP 411C. Any exempted areas still must comply with requirements specified in section 411.08 Standard Specifications. (TR 58).

Lawson testified that he was aware of other projects on which SP 411C requirements had been waived (TR 59-60). The State objected to the introduction of this testimony as a violation of the parol evidence rule and also on relevance grounds. (TR 60). Lawson also stated that prior to the work being done, SR 336 had deteriorated and subsided approximately 3-4 inches. Further, it was rutted and uneven.

Leveling mix is used to eliminate structural problems so that the subsequent layers, placed over the lower levels, would result in a flat, smooth surface. (TR 62-63). The leveling E-mix is an estimated quantity under the contract. (TR 63). After the contract was awarded, Mr. Lawson visited the site to determine the quantity of leveling mix needed. When Lawson inspected the road with his construction superintendent, they determined that the quoted quantity was not nearly enough to complete the project. He instructed his superintendent to mark and measure each section of the road which needed to be leveled and repaired. After that, Lawson calculated the amount of leveling mix necessary and determined that fourteen hundred (1400) tons were required. (TR 64-65). He excluded sections at both the north and south ends of the project from his calculations since he felt sure those areas would be eliminated from the SP 411C requirements because of the curb and gutter border on one end and the mile and one-half long curvy section on the other. (TR 65). The State then officially

increased the amount of mix it would pay for from four hundred (400) to seven hundred seventy three (773) tons.

Exhibit 8 documents that APAC actually put in place seven hundred seventy-two point fifty-one (772.51) tons of leveling mix, an increase of four hundred twenty-four point fifty-one (424.51) tons from the original estimate of three hundred seventy (370) tons. (TR 66). Mr. Lawson testified that he had long discussions with Mr. Sisson and was told “[Sissons’] hands [were] tied” and “he couldn’t overrun his budget... .” (TR 67).

Exhibit 9 is a letter from Todd Davis, APAC’s project manager, to Mr. Sisson dated November 18, 2005. This letter indicates that APAC had been advised the amount of stone for use on the margins of the newly paved SR 336 to prevent drop-offs, was being reduced from one thousand seven sixty-eight (1,768) tons to five hundred (500) tons. This was the result of an effort by Mr. Sisson to accommodate APAC’s need for more E-mix while at the same time keeping the entire project on budget. In other words more E-mix was made available to level the road resulting in less availability of shoulder stone. (TR 70). Consequently, the shoulder work could not be done on the entire project. (TR 72). This concerned APAC because drop-offs of more than two inches create safety concerns and the potential for suit against the contractor. (TR 72). Also, TDOT Specifications prohibited drop-offs of more than two (2) inches. Unfortunately, APAC ran out of shoulder stone before the project was complete. (TR 72-73).

Exhibit 10 is a letter to Mr. Sisson from Todd Davis dated January 7, 2006. This letter sets out APAC’s justifications for its request for exemption from the smoothness requirements. (TR 75). This letter is quite detailed as it addresses rationales for waiver for each mile of the project.

Exhibits 14 and 15, offered by Claimant, are a count of the driveways, side roads and business entrances leading onto SR 336. (TR 78). In support of his argument for exemption from the

smoothness requirement, Mr. Lawson testified that there were forty-five (45) side roads, twenty-three (23) business entrances, and one hundred fifty-two (152) private residential driveways along the project route. In addition to the numerous ingresses and egresses on to the state route, Mr. Lawson testified that exemptions were justified by the limitations on the equipment which could be used. (TR 83).

Exhibit 11 is a letter from Sisson to Todd Davis dated March 20, 2006 , advising that SP 411C had not been met, and that liquidated damages would start to accrue on April 1, 2006, and would continue until necessary corrective actions were taken including milling and inlaying certain portions of the project. The post-project smoothness testing took place on December 6, 2005, while the pre-construction testing occurred on May 25, 2005. (TR 84).

Exhibit 12 is a letter to APAC Vice-President Gary Loflin from Mr. Sisson dated April 25, 2006, officially excluding certain sections of SR 336 from the SP 411C requirements based on the exercise of his engineering discretion “where rural locations involve[d] constant changes in superelevations\switchback\reverse curves.” The letter notes that although urbanized locations may be exempted from compliance with SP 411C, those exemptions apply only “ ... where there are numerous commercial driveways present ...”. Initially, some exemptions were granted based on the fact that curbs and gutters were present in certain locations.

Exhibit 13 is a letter from TDOT’s Assistant Director of Construction Pete Falkenberg to Mr. Loflin, dated July 18, 2006, indicating his agreement with Mr. Sisson’s letter of April 25, 2006, and allowing exemptions from SP 411C requirements only for those areas discussed in Sisson’s earlier letter to Loflin of April 25, 2006. Mr. Falkenburg goes on to state that the “asphalt mat itself” was not an issue, and that a milling and inlay correction would only exacerbate the problem.<sup>4</sup> Accordingly, he

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<sup>4</sup> Mr. Lawson testified that the road was resurfaced in 2005 and has not been resurfaced since. (TR 85).

concluded the resolution of the issue would be to withhold pay from APAC for the sections of the road which did not meet SP 411C requirements. APAC's offer of an extended warranty with a negotiated reduction in pay for the entire project was rejected. Since APAC had already been paid the amounts set forth in the original contract, Falkenburg determined that the paperwork necessary for an APAC reimbursement to the State would be processed, but that liquidated damages would not be charged since the matter had been under review at the Department.

On cross-examination, Mr. Lawson conceded that the State's pre-project rideability figures were correct. (TR 88). He testified that if the road had been twenty-two feet (22 ft) wide, as it should have been, then he would be able to use a large paver "which works much better."

He went on to state that because of overhead obstructions it would have been difficult to use the preferable MTV on this project. (TR 93). The problem on this job was the leveling mix and not the CS or D-mixes placed over the base leveling course. (TR 95). He also testified that the leveling or E-mix is normally used for spot leveling.

APAC wanted to use the leveling mix on a full lane basis and estimated their need to at fourteen hundred (1400) tons of E-mix. The quantity actually available was their figure "chopped in half." (TR 95). APAC attempted to use the eventually allocated seven hundred seventy-three (773) tons to level the entire project, but this was less than the fourteen hundred (1400) tons it believed was necessary. Mr. Lawson testified that the original three hundred (300) tons set forth in the bid proposal was a number "... picked out of the air, it don't mean anything." (TR 96). According to his testimony, TDOT arbitrarily uses a figure of fifty (50) tons of E-mix per mile on every project. (TR 96). Lawson admitted that it was not the industry standard to use E-mix as a "layer of [the] subsurface." (TR 96). He agreed that on this project, the E-mix was intended as a spot leveler and not as a leveling layer of

asphalt for the entire road. (TR 96-97). He also testified that using only seven hundred seventy-three (773) tons of E-mix resulted in the entire job not being level. (TR 98).

With regard to SP 411C, this was a new spec, and Lawson did not believe APAC could attain the State's pre-rideability figures set out in Exhibit 20. He said that those pre-project numbers were not included in the proposal. (TR 98-99, 101).

Lawson testified that the State was expecting a thirty (30) percent improvement in smoothness of the road. He went out and looked at the job and knew what to do, but he could not do it because of "situations beyond our control." These were factors such as overhead obstructions and their effect on the MTV loader. (TR 102). Theoretically, APAC could have declined to submit a bid. (TR 102). Lawson also testified that "I really did not think that this spec would be a part of the job." (TR 103). The reason for that was that the road was bordered by curb and gutter in some areas and certain curvy portions of the road which warranted waiver of SP 411C. In addition, there were superelevations and also issues with numerous ingresses and egresses "through the remainder of the job." He thought all of these would be eliminated from the requirements of SP 411C. Moreover, "... we had a roadway that wasn't anywhere consistent with the typical sections included in the plans." (TR 103). Additionally, he did not request any pre-ride numbers, but he was not sure whether those numbers would have been helpful. (TR 103-105). Part of the northern end of the project was exempted, but the southern end where the road was curvy was not. (TR 105). He agreed that APAC could have paved at night, and that Mr. Falkenberg did not require them to mill and inlay the unacceptable portions of the road (TR 105).

Called as an adverse witness was TDOT's David Sisson, the project supervisor on the SR 336 job. Mr. Sisson had never received any formal training on the interpretation of SP 411C. (TR116). He confirmed he had no idea whether he was interpreting SP 411C in the same way other TDOT project supervisors were. (TR 118). He also agreed that at the outset of the project, APAC requested an

exemption from 411C for the entire project. (TR 119). The pre-construction meeting is the first meeting between TDOT and the contractor following an award on a project. (TR 120).

Sisson discussed Exhibit 6 and he agreed that stopping and starting the paver would make it more difficult to comply with SP 411C. (TR 124). He testified that he did not think traffic was a problem because "...this job was located right next to [APAC's hot mix] plant." (TR 124). He further agreed that the shuttle buggy (MTV) and the ski poles (AGCS) could not be used on this project. (TR 126). These limitations along with the fact that there were numerous curves and other conditions referenced in Exhibit 4 affected the progress of the project. (TR 127). Mr. Sisson testified that he could waive conditions in the contract himself before the completion of the job. He decided to waive the SP 411C requirements in areas where there were curbs and gutters but other possible exemptions awaited the results of the rideability tests. (128-129). At his deposition, he had testified that he was not going to exempt the entire project under SP 411C. (TR 129). He then went on to testify that he in fact could not waive the entire job. (TR 130, EXH 17). Mr. Sisson acknowledged that the reasons set out in Exhibit 10, a letter to him from APAC, may have been valid reasons for exemptions from SP 411C. (TR 131). He also testified that he made the decision rather than anyone else at Region I as to whether or not SP 411C would be waived. He testified at trial that he did not know why he stated at his deposition that he did not make the decision on waiver. (TR 132). At his deposition, he had stated that someone else at Region I had determined that an exemption would not be granted. (TR 133). He testified at trial "[t]hey was makin the decision to agree with me." He explained that when construction officials denied the request for waiver, "it was them agreeing with me." (TR 133). He categorically stated that he was the one who applied SP 411C. (TR 134). He testified that he did grant a waiver in the "urbanized" areas.<sup>5</sup> (TR 136). The waivers he granted were based on the presence of

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<sup>5</sup> There is nothing in SP 411C differentiating rural and urban areas.

curbs and gutters, manholes, driveways, and railroad crossings. Mr. Sisson testified that if the profiling van could not perform its tests traveling five (5) miles an hour then the road was winding enough to warrant exemption. (TR 149-150). However, this provision is not actually found in SP 411C. (TR 149-150). He believes that the penalty assessed here was because the job failed to comply with SP 411C standards and did not qualify for an exemption under that provision. (TR 151). He also testified that insufficient quantities could possibly affect compliance with SP 411C. (TR 151-152).

He stated that TDOT designers use a “common number” of fifty (50) tons of leveling mix per mile. (TR 152-153). Sisson was not aware of what objective measurements TDOT made to determine whether contract quantities were adequate. (TR 152). Mr. Sisson testified that there were state inspectors on the site reporting to him daily. (TR 155). TDOT tries not to overrun a job as far as money is concerned. (TR 156). He also stated that before a project is completed, one could determine that the road was not smooth if it was visibly wavy. The smoothness is not determined until the project is completed. (TR 156-159). He testified that the quantities in the contract were estimated, and that field supervisors could, if conditions warranted, alter those quantities. (TR 159). His hands were not tied on quantities overall, but the control was “money at the end” or the “total money.”(TR 159-160). “[TDOT was not] going to allow an overrun of the total amount of money.” (TR 163).

Accordingly, Mr. Sisson had to “make do with the budget numbers” he had. (TR 164). Mr. Sisson is a forty-three (43) year veteran of TDOT. (TR 166). He was actually in paving for twenty (20) of those years. The contractor knew that the budget could not be overrun. (TR 160). He testified that he did not remember whether there were orders from higher levels at TDOT to meet the budget by cutting the amount of aggregate stone available for use on the margins of the road in order to give APAC additional asphalt leveling material. (TR 160). However, he agreed that he reduced the amount of authorized shoulder stone in order to make up for the cost of the additional leveling mix. (TR 162).

He did not recall how he arrived at the figure of seven hundred seventy-two (772) tons of E-mix as being sufficient for APAC's use on the project. (TR 162). The original figure of three hundred forty-seven (347) tons was based on an estimated fifty (50) tons per mile. Field conditions dictate whether more was necessary. (TR 163). Mr. Sisson testified that the project is divided into 1/10<sup>th</sup> mile lots, and that the contractor asked for an exemption on every lot. (TR 169). His decisions on exemption were approved by his supervisors in the department. (TR 170). He believed that a shuttle buggy (MTV) could have been used and no overhead obstructions would have prevented its use. (TR 171). However, at his deposition, he testified that he would take APAC's word that, in certain areas, a shuttle buggy could not be used. (TR 173).

Prior to the start of a project, TDOT's materials and test department does a pre-ride test. Those figures are given to the bidders. (TR 175-176). This project began in the fall of 2005 and the completion date was November 30, 2005. Mr. Sisson first became aware that the pavement was not going to meet the rideability requirements when he saw the figures from the post-project ride. (TR 177). He would have reported this to his superior, Mr. Manning. (TR 177).

Duane Manning was then called as an adverse witness by APAC. According to him, there are three types of mix used in these projects. The E-mix is used as a leveler to fill deep ruts. The CS mix is then applied. (TR 184). Finally, D mix is the last layer applied on a project. (TR 185).

In determining how much leveling mix is needed, Mr. Manning testified that the engineers look at the roadway following which the quantity is specified. The fifty (50) ton per mile specification of E-mix here has been followed for years and "should be sufficient for completion of [this] project." (TR 186). In reaching this figure, a "subjective measurement" would be determined through a visual inspection and an application of "engineering judgment." Deep cracks and the rutting would require more than fifty (50) tons per mile. Here, fifty (50) tons was deemed sufficient. (TR 186-187).

Mr. Manning testified at his deposition that State Routes are on a twelve (12) year cycle for repaving. District Maintenance Supervisors are advised of roads due for repaving and those roads are then examined for severity of their condition. That information is sent to an engineer at the Department who, using his professional judgment and experience, makes a determination of how much mix will be needed on the project. (TR 188). Mr. Manning could not cite any record showing that the engineer to which the information on SR 336 was relayed, a Mr. Martin, actually went out and viewed the roads. Martin would have been working out of the Region I office in Knoxville, Tennessee. (TR 189).

Mr. Manning testified that contracts are based on estimated quantities. (TR 190). The on-site supervisor has some discretion to authorize changes. (TR 190). Here that would have been Mr. Sisson. In fact, Mr. Sisson would have made all of the decisions on this project. (TR 191). Mr. Manning testified that TDOT relied solely on Mr. Sisson to determine the needed quantities for the project. (TR 192).

To Mr. Manning's knowledge, the question of whether the leveling mix needed to be increased never went above Mr. Sisson's level. In fact, the amount of leveling mix was more than doubled by Sisson. (TR 193).

Mr. Manning testified that "[t]here was a push [at TDOT] at this time to make sure that the project—there was no restriction that Mr. Sisson could not overrun the project but it was highly encouraged for the project to stay on budget." (TR 193).

In evaluating APAC's request for additional E-mix, it was Mr. Manning's understanding that "they were told to keep the quantities as close to plans as possible." (TR 194-195). Manning testified that other than the language found in SP 411C, there was no other information APAC was given as to how this provision was to be interpreted or applied. (TR 195). He "guess[ed]" that at the time of

bidding, APAC could have requested the pre-ride figures. (TR 195). He went on to state that if contractors wanted those pre-ride numbers, they were not “shy” and could have requested them from headquarters. (TR 196-197). Exhibit 20 purports to confirm this. (TR 197). Exhibit 20 contains the Montvale project pre-ride numbers. (TR 197). On this project, Table 2 of SP 411C applied. In order for the contractor to be paid for any particular lot, the improvement would have to be a figure thirty (30) percent lower than the pre-ride numbers. (TR 199).

Mr. Manning testified that on this project, the post-ride numbers actually went up which is “pretty uncommon.” (TR 200). APAC would know from the first page of Exhibit 3 what sections of the contract were exempted. (TR 201). Regarding what was urban or rural under this language, he pointed out that there were specific delineations of what would be considered for exemptions including such things as manholes, intersections, curbing and guttering, etc.... (TR 201). Manning stated that rather than looking to the prior working relationship “[APAC] had with TDOT,” one should look at the language of the contract itself. (TR 202). Yet, Mr. Manning went on to say that “I think it would be hard to accept a contract and to ignore any past history that you’ve had with the Department.” (TR 203). However, he stated that this contract could “stand” on its own. At his deposition, Mr. Manning had testified, “[t]hey can go off their past working history with different reasons.” (TR 203). Mr. Manning also testified that there was no specific training at TDOT regarding application of SP 411C or for determining when exemptions should be granted. (TR 204).

Contractors would use the language in the contract along with their roadway experience to make a determination of whether or not parts of the contract can be exempted. The same considerations would apply to TDOT and Mr. Sisson, who Mr. Manning conceded, was not an engineer. (TR 204).

Mr. Manning also stated that there was no certain way a contractor, prior to bidding, would

know what would be exempted under SP 411C. (TR 205). It was a fair assumption that there was no way to interpret the SP 411C language and know exactly how TDOT intended to apply it. (TR 205). Likewise, APAC and TDOT could interpret the language differently. (TR 205). Mr. Manning stated that there were several construction supervisors reporting to him, and that he had no idea whether those reporting interpreted SP 411C in the same way. (TR 208). Additionally, contractors should have been able to expect that SP 411C's provisions would be applied consistently. (TR 208). Mr. Manning stated that there were other projects "where exemptions were granted for many various reasons, as we look through a host of projects." (TR 209-210).

Claimant's counsel referenced other projects on which exemptions had allegedly been granted. One of those projects was No. CND 215. The State objected to the relevance of any other projects and relied on the parol evidence rule. (TR 210). The Claimant asked Mr. Manning to review the exemptions granted on that project. He testified that on that job there were areas requiring mill and inlay work, but there were no deductions meaning that some sort of exemption must have been granted. (TR 212-213). With regard to contract CND 127, Mr. Manning's pre-trial affidavit (EXH 21) presented two possibilities. One possibility was that the contractor had complied completely with SP 411C so there was no deduction or perhaps that the entire project was exempted. (TR 213-214). Mr. Manning testified that there was the possibility of a SP 411C exemption on any project.

Exhibits 20A through 20D are contracts which APAC contends show that exemptions from the requirements of SP 411C were regularly granted. Two of these contracts involved APAC and the other two were between TDOT and other companies. Mr. Manning had addressed these contracts in his Affidavit (EXH 21, p. 4-5). Manning testified that specifically with regard to the Rogers Group contract, the waiver granted was inconsistent with the practices of the Region

Mr. Manning's attention was then directed to miles 1-3 of this project. He testified that there

was nothing about miles 1-3 Mr. Sisson's supervisors felt warranted an exemption, and thus an override of Mr. Sisson's decision did not occur. (TR 218-219).

The parties stipulated that TDOT withheld two hundred twenty-one thousand nine hundred ninety-eight dollars and thirty-six cents (\$ 220,998.36) from other monies owed APAC. (TR 223). Although the State contemplated requiring mill and inlay work to repair sections which were not improved, eventually it was decided to leave the asphalt in place. (TR 224). It was simply TDOT's conclusion that exemptions were not warranted in areas where they were not granted. (TR 225). Mr. Manning testified that the project was a failure in that the road was paved yet there was a decrease in rideability under SP 411C. (TR 226-227). The road is still functioning and has not been "pulled up" since the job was finished (TR 227).

Gary Loflin was then called as a witness. Mr. Loflin is an engineer with APAC and supervised this project. (TR 233). The project was located two and one-half miles from APAC offices in Blount County. Mr. Loflin testified that Landon Lawson believed E-mix would be necessary on four point six three (4.63) miles of the project. (TR 235). The plans called for spot-leveling. (TR 235). The E-mix was not to be used to pave the entire road but only particular spots. Pre-ride numbers would have shown the bad spots. (TR 237). Mr. Loflin believed that it was possible to achieve SP 411C rideability standards without using a shuttle buggy (MTV). (TR 238). However, the standard could not be met without the use of ski poles (AGCS). At his deposition, though, Mr. Loflin had testified that he could envision circumstances where SP 411C could be met without ski poles. (TR 238-239). He has been involved in asphalt work with APAC for twenty (20) to twenty-five (25) years. (TR 239). He stated that in terms of quantifying the amount and types of asphalt needed, he could "take about any one set of drawings and either confirm or deny that the quantities were correct." (TR 239-240). He testified that he did not believe that compliance with 411C was possible without the use of ski poles unless the

project already had a smooth underlayer. (TR 240-241). He went on to testify that a contractor could not comply with SP 411C if there were inadequate quantities of leveling mix available. (TR 242). Loflin testified that at the time this project was carried out, APAC had numerous resurfacing contracts with TDOT in Knoxville and surrounding areas. On some of these jobs, pre-ride information was available with the plans and on other projects, it was not. (TR 245-246). He was told by TDOT “[w]ell, if you want the pre-ride information all you have to do is call.” (TR245-246). Mr. Loflin agreed that if a contractor does not have all of the information in formulating its bid, that would present a risk in “making a decision on the bid.” (TR 246). Even with the pre-ride information, if it indicated a pretty bad road, you “could not plan how to pave the road at that time.” (TR 248). He stated that the only way to quantify what was needed on this road would be to stop traffic and take measurements on the roadway. Here, because the bad spots ran together, what APAC was looking at was a wholesale correction of the underlying roadway. (TR 250). This was a not a “road [that] he would be proud to say that [APAC] paved ... .” “Something happened on this roadway.” (TR 250). Mr. Loflin did not ride the road before the paving was done and cannot say whether it is smoother now. (TR 250-251).

Mr. Loflin testified that in order to determine how many tons of hot mix are needed on a project, “[y]ou ask for the more detailed information, [such as what is set out in Exhibit D5].” (TR 252, EXH D5). He went on to testify that the profiling machine could assess a road in as fine increments as one desired.

### **THE STATE’S PROOF**

Clint Bane testified for the State. Mr. Bane is TDOT’s regional construction supervisor. (TR 256). He manages the nine (9) construction field offices located in the twenty-four counties of Region

I. (TR 256). Mr. Bane testified that at a post-project meeting, Mr. Loflin told TDOT that the paving crew had not done a very good job on Montvale Road in terms of rideability. (TR 258). Yet, Loflin wanted to avoid the mill and inlay solution. (TR 258). Mr. Bane told Mr. Loflin at that meeting that a solution to the rideability issue would have to develop at TDOT headquarters. After the meeting, Bane visited the job site and nothing he saw there changed his mind about Mr. Sisson's refusal to exempt only portions of the roadway. Mr. Bane had the power to override Mr. Sisson with regard to exemptions. (TR 261). He agreed with what Sisson had opined. Pete Falkenberg, then TDOT's assistant director of construction in Nashville could override any decision that Mr. Bane had made. (TR 262). Mr. Falkenberg's decision was the same as that of Region I. (TR 263). Mr. Falkenberg's solution to the issue was not to require the mill and inlay work but to deny payment for the hot mix placed on the road. (TR 263).

Mr. Bane testified that at the time this contract was executed, contractors such as APAC had no way of knowing which areas of the project would be exempted under SP 411C. (TR 265). Bane stated that SP 411C sets out portions of a job that may be considered for exemption. It does not tell which of the sections will be exempted. (TR 266). Bane went on to testify that APAC and TDOT might have different interpretations of what constitutes a rural location. (TR 269).

Claimant's attorney then questioned Mr. Bane regarding revisions to SP 411C which became effective on June 1, 2006 resulting in language stating that "[s]ections excluded in this specification will be identified in the plans." (EXH 22). This same language appears in all versions of SP 411C after June 1, 2006. (EXH 22). Prior to June 1, 2006 this language did not appear in 411C.

Bane testified that he believes that Sisson could justifiably refuse to increase quantities of paving mix on a project if to do so would overrun the budget. (TR 276). He stated that Sisson should "abide by [his] superiors ..." on the subject of going over budget. (TR 276). He would

expect a construction supervisor, if there were shortages in the mix, to bring the issue to him and a decision would be made as to whether amounts were inadequate. (TR 278). Mr. Bane did not review the quantity of E-mix called for in this contract after this issue came up. (TR 278). Bane also testified that during the course of the project, Mr. Sisson did not indicate that there were shortfalls in the amount of E-mix needed. (TR 279). Sisson reported to Bane's assistant Mr. Manning.

Mike Davis then testified as an adverse witness for the State. He was president of APAC at the time of this project. (TR 281). He testified that Mr. Lawson had intended to use E-mix as a layer on the entire project.

Duane Manning was then recalled to the stand by the State. The fact that the language contained in the later versions of SP 411C was not in effect on this project was discussed. The version in effect on July 1, 2004 when this contract was let did not include this language. The rationale behind that version was that "every quality control measure" available should be used to improve the ride. (TR 284). There is a possibility that under the version adopted in June 2006, "excluded" sections under SP 411C might not be adequately addressed by the contractor. (TR 285). According to Manning, setting out the areas which might be exempted was a benefit to the contractor. (TR 285). The risk TDOT took with the older version was that companies might be less motivated to perform an acceptable job. For the benefit of the contractor, TDOT elected to proceed with this method. However, language made a part of SP 411C in June 2006 states in paragraph 5 that "[s]ections excluded from this specification will be identified in the plans."

At the time this dispute arose, county maintenance supervisors would first alert an engineer at Region I, Harold Martin, as to which roads were in a more critical condition, and he would then drive the roads and determine which of those should be addressed first. (TR 285-287). Following receipt of

Mr. Martin's recommendations, a small group of people would select certain roads needing attention and then develop information which was sent to the design component at TDOT where personnel would come up with the quantities for the plans based on the engineer's recommendations. (TR 287). The fifty (50) tons of E-mix per mile standard used by Mr. Martin was not determined using a scientific formula but was "a quality thing ... that has been used in roads, exhibit[ing] signs of rutting or cracking ..." (TR 288). It is based on past experience with contractors and is a significant amount to provide for spot leveling according to Mr. Manning. (TR 289). However, the design department would basically rely on the tonnage recommendation from Mr. Martin although a design engineer could, in his discretion, add more E-mix to the contract if he felt it was necessary.

Manning testified that there was nothing particularly hilly or curvy involved with this job which would prevent the contractor from achieving the ride-specifications. (TR 290-291). He recalled the subject of rideability possibly being waived being discussed at the pre-construction conference, but only certain sections were exempted after reviewing the project. He also remembered conversations about the amount of asphalt needed on the project but nothing specific about E-mix. (TR 292). He believed that the project could have been completed in accordance with the specs without using an MTV and ski poles. (TR 292). He thought with the information available, APAC had many opportunities to improve the ride of the project. (TR 293) He went on to say that he did not believe that ski poles could not be used on this project. Manning was not aware Mr. Sisson had decreased the amount of shoulder stone in order to increase the amount of E-mix for the project. (TR 296). He also stated that it was never brought to the attention of the Region I office that more E-mix was necessary, and that Mr. Sisson was never told "exclusively" that he was not to overrun the project. (TR 297). He testified that if there was a project condition requiring additional E-mix, a request would have been reviewed and an application would be made for additional funds. (TR 297). Everything TDOT deals

with “is based on estimated quantities.” (TR 297). Manning would trust Mr. Sisson’s judgment on authorizing additional materials on the project. (TR 297-298). Manning also testified that E-mix was never meant to be used on the full length of this project but only for spot leveling. (TR 298). Although Exhibit 2 provides that the work hours were between 9 a.m. and 3 p.m., there was no prohibition against paving at night. (TR 299). The pre-ride numbers would have alerted the contractor to areas where additional attention would be required. (TR 300). He also testified that the pre-ride numbers were available for “full review prior to bid or during the bidding process. There is nothing secret about the pre-ride.” (TR 300). It would be Mr. Manning’s hope that any changes made by a supervisor would be reviewed at the regional level, and that there would be consistencies in application of SP 411C throughout the region. (TR 301).

The projects referenced in Mr. Manning’s affidavit (EXH 22) were governed by the version of SP 411C at issue here, and on some of those other jobs, some contractors passed the ride-test and some did not and some received exemptions while others did not. Mr. Manning testified that Exhibit 20, the pre-ride numbers, should have told APAC where the trouble spots were- in 1/10<sup>th</sup> mile increments- but no quantities of leveling mix are set out in this chart.

The estimates contained in any contract are approximate quantities. (TR 304). It was his testimony that if a need for more E-mix surfaced, it was Mr. Sisson’s job to bring that to his attention, and he never received such a request. (TR 305). Mr. Manning conceded that Mr. Sisson made a mistake if more leveling mix was needed, and he believed he could not request more because of budget constraints. (TR 306).

Mr. Manning, testified that the 2005 version of SP 411C set out the exempted areas whereas the 2006 version included language specifying that the sections excluded would be identified in the original plans. (TR 310). Manning stated that he agreed with Mr. Sisson’s decision to authorize over

four hundred (400) additional tons of E-mix. (TR 312).

Once a project is awarded, the field office and its supervisors and staff handle project supervision from start to finish. (TR 315-316). The inspectors on site do not have the tools to measure rideability. (TR 318). Visual inspection may not reveal problems which develop on a project. The road today has “little bumps and humps” and that is what the post-project van ride detects. (TR 319).

### **DEPOSITION OF BRIAN K. EGAN**

Mr. Egan is Director of Construction at TDOT and has held that position since July 1, 2008. He has worked at TDOT since 2002. Prior to becoming Director, he was Assistant Director and in that position he administered contracts for TDOT which involved bidding, letting, and awarding contracts in each of the department’s respective regions. (DEP 6). The job also involved resolving disputes and approving change orders through regional construction offices. Additionally, he was responsible for establishing local program guidelines and specifications. (DEP 7). In his current position, he handles, on a state wide level, anything that deals with construction. (DEP 7-8). Prior to becoming Assistant Director, he was a field operations engineer for five (5) years. (DEP 8). In his current position, he reports to the Assistant Chief Engineer of Operations at TDOT. (DEP 8). In the TDOT organization, five (5) regional construction offices report to a Regional Director who in turn reports to the Chief Engineer. (DEP 9).

The headquarters of the construction office develops statewide policies and procedures. (DEP 10). When contracts are let, his assistants should work directly with the regional construction supervisors to administer the contract. Any time an issue develops, officials in Nashville work with the regional construction supervisors who in turn work with the people on the project in order to resolve or clarify the issue. (DEP 10). Prior to the letting of the contract, Nashville works with the Region to develop provisions that need to go into a contract proposal. (DEP 11).

When this contract was let in May 2005, Egan was an assistant in TDOT's Construction Division. Prior to that he worked in the Materials and Tests Division. (DEP 11). As of May 4, 2005, he began carrying out the Region 4 Assistant to the Director of Construction's role. (DEP 12). In that position, he would have been working on projects involving West Tennessee. He was familiar with SP 411C as it read in May 2005. (DEP 12). SP 411C deals with the smoothness quality for paving jobs on state routes as opposed to interstates. SP 411C is used to determine if a contractor has achieved a certain level of smoothness on a paving job. (DEP 13). The expectation on a project is that after paving, the road will be as smooth or smoother. (DEP 14).

TDOT uses a smoothness measure known as the High-Speed Road Profiler Half Car International Roughness Index. The figures for this index are developed through use of a specially equipped van which determines the profile of the road as it is traveled over. The equipment in the van produces both a HCIRI and an IRI NUMBER, and the IRI NUMBER is the ride specification number used in Tennessee. (DEP 15). Both pre- and post-project numbers are developed as soon as possible at different stages of a contract. Mr. Egan testified that the exemption section is included in SP 411C to allow TDOT to exempt portions of a project on which it concludes a contractor cannot meet the smoothness requirement. (DEP 16). The standards, according to Mr. Egan, are designed to allow the on-site engineer discretion in their application. (DEP 16-17). The use of such discretion occurs after the contract is completed. TDOT does not want to get into a situation where the whole road is exempted when only a portion should be. (DEP 17). Its expectation is that a majority of the project will meet the specification, and that exemptions would apply to only small sections. (DEP 17-18). This was the process when this contract was let. However, the process has now changed. (DEP 18).

In attempting to maintain consistency in the application of SP 411C, TDOT has a specifications committee comprised of representatives of the regions who have input on changes to the

specifications. When this provision was being developed, all regions were aware of its requirements. Additionally, using email, information is sent out to regional construction supervisors and is then filtered down to project supervisors regarding changes in expectations under SP 411C. (DEP 19).

If issues come up during a contract, the parties discuss and attempt to resolve the problem. If they do not reach a resolution, the next level of consideration is at the regional construction and director level. (DEP 19-20). If the problem is still not resolved, TDOT headquarters becomes involved where a decision is made based on available information in an attempt to maintain a level of consistency. (DEP 20). The levelness of a paved surface is measured using a simple straight edge which is referenced in the TDOT's Standard Specifications. A deviation, either a dip or a bump, precludes compliance if it exceeds a quarter inch for surface mixes. (DEP 21). These deviations would have to be repaired at contractor expense.

Currently, the profile method is used to measure deviations and involves the use of computers and lasers to determine if surface deviations are acceptable. (DEP 21-22). Mr. Egan discussed a letter that David Sisson sent to Mr. Loflin at APAC dated April 25, 2006. In that letter, certain portions of the project were exempted under SP 411C . However, Mr. Sisson opined that exemptions for urbanized locations could only be granted where there were "numerous commercial driveways present." The letter states that in the urbanized section of this project, there were "several" private driveways and side streets. With regard to the exclusion of roadways in rural areas, Sisson wrote that in his opinion the changes in superelevations\switchbacks\ reverse curves were not severe enough to warrant exemption. Mr. Egan also testified regarding Exhibit 4, the letter from Pete Falkenberg, TDOT's Assistant Director of Construction in Nashville at the time, to Mr. Loflin at APAC. According to the letter, Loflin and Falkenberg had met on July 5, 2006, and reviewed SP 411C compliance not only on this project, but on other APAC jobs. The letter reiterates that certain

exemptions had been granted on this project but goes on to state that the problem with APAC's performance on CND 214 was not the quality of the asphalt mat but "the ride itself." Falkenberg wrote that a milling/inlay correction of the project might exacerbate the problem, and that it was "indefinite" as to whether adding another layer of surface mix would resolve the issue. Falkenberg stated there that "[b]ased on a very few other projects with similar results, we conclude that we will not pay for sections that do not meet the ride requirements of SP411C and will not require mill and inlay correction on this project since the asphalt mat is otherwise acceptable." The letter rejects APAC's offer of an extended warranty and reduced pay on the project as unacceptable to TDOT. Since payment had already been made to APAC, a reimbursement estimate would be prepared. Liquidated damages were forgiven since the issue had been under review by TDOT.

Mr. Egan testified that this dispute was carried to the "top level of TDOT" in the Construction Division. (DEP 26). It was his recollection that a majority of this project failed to meet the requirements of SP 411C. (DEP 27). He testified that under the standard provisions of the contract, TDOT has discretion to require milling and inlaying at no cost to the State or to permit the pavement to stay in place. (DEP 27). Mill and inlay involves taking up the existing pavement and replacing it with new hot mix. (DEP 28). Mr. Egan testified that he believes that SP 411C standards could be met on this project without using a shuttle buggy (MTV) or ski poles (AGCS) if proper paving and planning techniques had been used. (DEP 28-29). It was Mr. Egan's testimony that the ski poles requirement in the TDOT specification on the paver was not waived in this situation other than by the contractor's option not to use it. Additionally, a shuttle buggy is sometimes but not always specified in a contract. That does not mean that a contractor cannot use that piece of equipment to meet the requirements. (DEP 29). In short, using proper techniques and methods results in the contractor meeting the SP 411C requirements. Mr. Sisson would have been trained in the TDOT Asphalt Paving

Inspectors Class regarding best practices to provide “good smooth pavement.” (DEP 30).

On cross examination, Mr. Egan testified that his involvement in this situation began around the time the claim was submitted. He was not involved when the actual work was ongoing. (DEP 31-32). Mr. Egan testified that SP 411C is included only on projects on which TDOT believes the contractors can meet its requirements. (DEP 34). The thirty (30) percent improvement in the smoothness of the road in order to obtain full payment is based on the contractor using proper paving methods. (DEP 34). The specification applies to nearly every resurfacing contract the state has. Mr. Egan testified that there was existing data which showed that a contractor could have attained a thirty (30) percent improvement on this project. (DEP 35). The data is calculated on a statewide basis and shows that it can be obtained on any road, regardless of what the pre-ride numbers were. (DEP 35-36). The pre-ride data was available to the contractor “at their request.” (DEP 36). In this contract, the pre-ride data was not included in the contract, but it was always available upon request. (DEP 36).

The SP 411C version at issue in this case was only a year or two old at the time. As TDOT moved forward, “we felt that information [pre-ride numbers] should be included in the provision.” (DEP 37). The information not included in the contract was always available to the contractor “if [it] requested it.” Now, the information is included in all plans without request. (DEP 37). Inclusion of the pre-ride numbers in the contract was “to help improve this process and make information more readily available.” (DEP 38). Mr. Egan agrees that the exemptions provided for in SP 411C are there because a contractor cannot always comply with its provisions. (DEP 39). He testified that he was not familiar enough with this project to know whether “there were numerous ingresses and driveways and egresses” along the project route. (DEP 40). Additionally, he was not aware of the number of superelevations on this project. (DEP 40). The same would be true of his knowledge of the number of switchbacks or reverse curves. (DEP 40). His knowledge of what constitutes an urban area is based on

what Mr. Sisson and Mr. Falkenberg had agreed to. (DEP 40-41). To him, an urban area is one where there are numerous driveways, ingresses, and egresses and an area which is highly developed. Gutters indicate sidewalks where there are many pedestrians. An urban area is not “clearly defined or especially designed” but would be an area where there are curbs and gutters, possibly manholes and signalized intersections. In fact, there are rural areas which have traffic signals and would be exempt under SP 411C. (DEP 42-43). A sidewalk does not necessarily mean that an area is urbanized. Mr. Egan was asked how a contractor would know what areas were exempted under SP 411C as written. He responded that the expectation was that the contractor would meet specification smoothness requirements throughout the project. (DEP 43). Mr. Egan went on to state that contractors preparing to bid on this project would not have a defined method for determining which areas would be exempted from SP 411C. (DEP 44).

Mr. Egan also testified that TDOT has a specification committee that meets regularly to draft changes to both the specifications and special provisions of its contracts. This committee, people from all TDOT regions, would know whether the specifications were being changed and what the requirements were and what TDOT expected. The information would be available to contractors at an annual meeting where the changes are announced and the supporting data provided. (DEP 46).

Mr. Egan could not testify when this supporting data was made available to APAC or to any other contractor unless it was specifically requested. SP 411C is not specific to any one project. He further testified that presentations were given at liaison meetings with road builders and at road builders’ association meetings. (DEP 47-48). Mr. Egan further testified that he did not believe that inadequate amounts of mix would affect a contractor’s ability to comply with SP 411C since a spec was developed “using the standard one hundred and thirty-five pounds inch and a quarter D mix.” (DEP 48). However, if the plan quantity was in error, it could affect compliance. Mr. Egan reviewed

the plans here and concluded that there were adequate quantities available for that thickness. (DEP 49).

### **Decision on the Merits**

This is yet another contract dispute involving the TDOT and a road contractor. As we are permitted to do under Rule 201(c) of the Tennessee Rules of Evidence, the Commission will take judicial notice of a number of cases which have come before it involving contract disputes arising between 2000 and 2011 which involved TDOT and several different road contractors. *State v. Lawson*, 291 S.W.3d 864, 868-870 (Tenn. 2009). The first of those cases which the Commission considered was *Southern Constructors, Inc. v. State of Tennessee*, Claims Commission No. 20070225 (Decision filed January 23, 2009), not appealed (copy attached as Exhibit 1). That case dealt with the interpretation of TDOT Standard Specification 104.02. The work covered by the contract in that case involved a 2004 renovation of the road surface of the Henley Street Bridge in Knoxville which is currently undergoing a massive reconstruction. In that decision, the Commission, at page 30, found that seven separate TDOT officials, including a number of professional engineers, all agreed that the claimant was entitled to additional payments under Supplemental Agreement 102 as a result of “significant changes in the character of [the] work” done. In fact, an impressive witness, Pete Falkenberg, who is also mentioned in this case, “... thought that the SA should be paid because it was the right thing to do;” he also testified “this same type of agreement had been regularly approved by TDOT in the past.” *Id.* at 30. However, these opinions, the proof showed, had been over-ridden at the highest levels of TDOT. *Id.* at 23; *See also Id.* at 5, 7-9.

Later, in *Ray Bell Construction Co., Inc. v. State of Tennessee*, Claims Commission No. K20071215, filed June 8, 2009, the issue before the Commission was whether Bell was entitled to certain incentive payments in connection with a fifty-three million dollar (\$53,000,000.00) job in

Shelby County. In that case too, the Commission found that around 2005 at TDOT there had been a major change in the manner in which Special Provision 108(B) was applied. In our decision we said the following:

It is clear that for a number of years, as shown by the Degges/Blackmon correspondence of early 2005, exceptions to the no extension language for incentives found in the SP 108(B) had been regularly made. Apparently, a watershed change in the way of awarding incentives took place in early 2005 unbeknownst to [Ray Bell Construction Company] and for that matter perhaps, other contractors when FHWA decided unanticipated delays and pro rata quantity increases could not, under its regulations, provide a basis for extending completion dates for purposes of earning an incentive. As a primary provider of funds for large highway construction projects in Tennessee [here TDOT], ... ninety percent (90%), the FHWA was integrally involved with projects such as this one. *Id.* at 39.

As a result of its findings in that case, the Commission rendered a large judgment against the State. That decision was later affirmed by the Eastern Section of the Tennessee Court of Appeals in *Ray Bell Construction Co., Inc. v. State of Tennessee*, No. E2009-01803-COA-R3-CV, 2010 WL 4810670 (Tenn. Ct. App.) (Swiney, J., dissenting). However, the Supreme Court reversed the decision of the Court of Appeals in an opinion authored by Justice Holder in *Ray Bell Construction Co., Inc. v. State of Tennessee*, 356 S.W.3d 384 (2011). A unanimous court found the language of Special Provision 108(B) to be unambiguous.

Finally, the Commission was involved in yet another contract dispute reported in *Kay and Kay Contracting, LLC v. State of Tennessee*, No. E2009-01769-COA-R9-CV, 2010 WL 2553657 (Tenn. Ct. App.). Attached to this Judgment as Exhibit 2 is a copy of an Order the Commission rendered following the Court of Appeals decision just cited. It sets out in some detail the dispute which arose between a contractor and TDOT during the 2000-2010 period. It is the Commission's belief that after the Court of Appeals decision, the matter was resolved between the parties on terms unknown to the Commission.

The Commission takes notice of those earlier cases because it remains clear to us that between

2000 and 2011, serious contract disputes between TDOT and contractors on major projects occurred with some frequency. As is the case here, TDOT began taking a very hard line on keeping projects strictly within the original budget during this time period. (TR 163-164, 193). That this way of operating represented a change the manner in which business was done at TDOT is evidenced by the testimony of Region I Supervisor, Duane Manning in this case. From that testimony we have the following exchange between Claimant's counsel and Mr. Manning:

Q: If Mr. Sisson would have required more E-mix than is stated on final estimate, in other words, if he needed more than double, if he needed even more than that, would that have been reviewed by you and looked at, if Mr. Sisson had brought that to you, would you have looked at it?

A: Absolutely. As stated earlier in the case, I guess from Mr. Sisson, that the Department is on strict budgetary constraints. We are always on budgetary constraints. That is something to be considered, that if there were aspects of the project where more quantities had been required for certain areas of the project, and had been brought to our attention at the regional level, we could have applied and made the request through our regional director that based on the conditions, we feel like that – that more E-mix is required. At no time was that ever brought to our attention that I'm aware of, that we – we never told Mr. Sisson exclusively do not overrun the project. Keep as close to project as even in his deposition stated that and that is correct. We did – he was told to keep it close. **But in addition to that, there was application if – if – if the – everything we deal with is on estimated quantities. If there was a project condition required additional mix, we could have reviewed that and made an application for additional funds or additional – that – that decision would just have to have been elevated to a higher level than it would have been, you know, five or six years ago.** (TR 296-297). (Emphasis added).

The proof in this case is also clear that there was an overwhelming emphasis at TDOT at the time on keeping the project on budget. Although he was not a degreed engineer, TDOT's project manager Sisson had worked for the Department for some 43 years before retiring. He impressed the Commission with his straightforward and credible testimony. According to that testimony, keeping this project within the confines of the original budget was of paramount importance to the TDOT. (TR 166).

APAC argues in its post-trial brief that there was a budget crisis at TDOT which compelled the

Department to press project supervisors to keep projects strictly within budget. Its contention in this regard is based on circumstantial rather than direct evidence. It is true that Mr. Manning, in the passage above conceded that TDOT "... is always [under] budgetary constraints." This is no doubt true. However, the Commission believes and finds that even more important is the fact that for whatever reason, TDOT began taking a very strict approach to the application of the contractual language.

It is also abundantly clear from the proof in this record that most of the witnesses, live and via deposition, were well-acquainted with each other and continue to have on-going professional relationships. With this background in mind, the Commission will proceed to the case at bar.

In this case, APAC-Atlantic, Inc., Harrison Construction Division ("APAC") entered into contract CND 214 ("the contract") with the TDOT on July 8, 2005. The effective date of the contract was July 29, 2005. The work covered by the agreement involved resurfacing approximately 6.930 miles of State Route 336, also known as Montvale Road, in Blount County, Tennessee. Under the terms of the contract, all work was to be completed by November 20, 2005. The contract was signed by APAC Vice President Gary Loflin, a degreed civil engineer who testified in this matter. (EXH 1). TDOT Commissioner Gerald Nicely signed the agreement on behalf of the state.

The dispute here arose when TDOT contended that APAC's work failed to meet the rideability or smoothness requirements set out in Special Provision 411C, Table 2 ("SP 411C," "Table 2"). In addition to Table 2 (attached hereto as Exhibit 3), the particular language from SP 411C which figures prominently in our decision reads as follows:

At the discretion of the Engineer, the following sections of a project may be exempt from this specification: + or -50 feet at the beginning and ending of a project, + or - 50 feet of a bridge approach or departure, + or -50 feet of a rail road crossing, + or - 50 feet of a stop/yield location, + or -25 feet of a manhole/utility gate, and intersections. Also, sections to be considered for exemption are urbanized areas were (sic) the contractor must use a curb/gutter to match profile and urbanized

locations where there are numerous commercial driveways/egresses/ingress's (sic). Rural locations where there are constant changes in superelevations/switchbacks/reverse curves should also be considered for exclusion. Any exempted sections of roadways must comply with the straightedge requirements specified in section 411.08 of the Standard Specifications. (EXH 3).

The significance of SP 411C is highlighted by following paragraph 2 from contract No. CND 214 found six pages from the end of Exhibit 1 (the Proposal Contract):

The Contract Documents are intended to be complementary and to describe and provide for a complete work. Requirements in one of these are as binding as if occurring in all of them. In case of discrepancy, Supplemental Specifications will govern over the 1995 Standard Specifications; the Contract Plans will govern over both Supplemental and Standard Specification, **and Special Provisions [here SP 411C] will govern over both Plans and Specifications.** In interpreting Plans, calculated dimensions will govern over scaled dimensions. Contract Plans, typical cross-sections and approved working-drawings will govern over Standard Drawings. (Emphasis added).<sup>6</sup>

Route 336, or Montvale Road, is a two-lane highway used quite heavily by individuals traveling to and from Maryville, Tennessee. The resurfacing of the 6.930 miles at issue here involved the application by APAC of three sorts of paving materials. The lowest level, something known as "E-mix," or leveling mix, is used to fill in depressions or indentations in the underlying strata of the roadway. Secondly, a material known as CS or scratch mix is applied over the E-mix. Finally, the surface visible to drivers is paved with a substance known as "D-mix." (EXH 7).

Prior to commencement of work on the project, TDOT personnel traveled the road in a vehicle equipped with lasers and sensors which calculated the pre-project smoothness of the road surface in tenth of a mile increments. (EXH 20).

Following completion of the project, and before final payment to the contractor, the same vehicle traveled the road a second time to determine whether or not the contractor had improved the

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<sup>6</sup> This provision is generally known in the construction industry as an order of precedence clause.

road and had met the smoothness requirements of SP 411C, Table 2.

There is a dispute in the proof as to whether or not the pre-project figures set out in Exhibit 20 were available for review by contractors, such as APAC, interested in placing a bid for contract CND 214. The State's position is clearly that this information was available to APAC had it only asked for it.<sup>7</sup> (TR 103). The version of SP 411C at issue in this case before us first appeared in a December 1, 2003 revision. However, subsequent revisions of SP 411C did not contain that language found at page 33 of this decision. Rather, later contracts provided as follows:

**Sections excluded from this specification will be identified in the plans.** (Emphasis added).

APAC argues that this change in the wording of SP 411C is indicative of the problems and confusion created by the waiver language at issue here. APAC also argues that in the past when unanticipated problems arose for contractors in meeting the contractual smoothness requirement, the TDOT worked with them in resolving the issue.

The Commission declines to take into account any version of SP 411C implemented by TDOT after this contract was entered into. In the Commission's view, to do so would run afoul of Tennessee Rule of Evidence 407, which forbids admission of evidence of subsequent remedial measures. Clearly, APAC is arguing that this later language constitutes an admission that APAC and other bidders were misled by TDOT's use of an ambiguous version of SP 411C, and was crafted to redress that problem.

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<sup>7</sup> Exhibit 22 has attached to it, several different versions of SP 411C utilized by TDOT since March 3, 1995. According to the documents attached to the State's Answer to APAC's Second Set of Interrogatories and Requests for Production of Documents, SP 411C was first promulgated on March 3, 1995 and then later revised on December 1, 2001, July 15, 2002, December 1, 2003, July 1, 2004, June 1, 2006, October 1, 2006, February 1, 2007, and October 20, 2007.

The proof here shows that on February 2, 2005<sup>8</sup>, TDOT's project supervisor, David Sisson, met at his offices in Maryville, Tennessee with APAC's representative, Landon Lawson. (EXH 5). Lawson told Sisson that APAC would start work on October 20, 2005. Other matters discussed at the time were Mr. Lawson's concerns that SP 411C could not be met for several reasons. First, APAC did not believe that it could use the sorts of equipment which would result in a surface meeting the smoothness requirements of SP 411C. Additionally, Lawson told Sisson that three hundred fifty seven (357) tons of "E-mix," the amount set out in the Proposal Contract, would not be sufficient to initially level the road. In fact, the proof shows that early on, APAC requested that the State authorize an additional one thousand fifty-three (1,053) tons of E-mix (for a total of fourteen hundred tons). In calculating the amount of E-mix needed to re-pave State Route 336, the Design Division at TDOT used an arbitrary fifty (50) tons per mile figure. This same figure is regularly used by TDOT when calculating specifications for similar paving projects throughout the state. While not specific to the existing conditions on this project, the State's proof was that a fifty (50) ton per mile estimate is based on TDOT's long-term experience in Tennessee.

This early development in the life of the contract leads the Commission to wonder how APAC, a very experienced and well-known paving contractor, could have been so far off in preparing its bid on the basis of an E-mix tonnage factor it now contends was woefully inadequate. The State argues, in that same vein, that all APAC would have to do prior to placing its bid was to request the pre-project rideability figures set out in Exhibit 20. Apparently, APAC did not do so.

Finally, Lawson told Sisson that leveling State Route 336, where there were manholes, curbs, traverse joints, and using a nine a.m. (9 a.m.) to three p.m. (3 p.m.) paving schedule would be difficult. Lawson therefore asked that a waiver of the requirements of SP 411C be granted.

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<sup>8</sup> The date set out in the letter of February 2, 2003, is obviously incorrect in light of the date this project put out for bid and then performed.

Three days later, on October 7, 2005, Mr. Sisson responded to Lawson stating, in part, the following:

According to Region I officials the Department cannot waiver(sic) beforehand. If you will go ahead and complete all the pavement surfaces including the old abandoned rail road crossing, bridges, manholes, valves, curb & gutter sections and with all the stop and yield conditions, then the surface will be tested with the road profiler in accordance with T.D.O.T. procedures.

After the surface has been tested and then broken down into lots, then we can determine sections to be considered for exemption as stated in SP 411C. Any exempted areas still must comply with requirements specified in section 411.08 Standard Specifications. (EXH 6).<sup>9</sup>

The inescapable conclusion, based on these interactions and correspondence, is that there were concerns throughout the life of this project as to whether or not APAC could comply with SP 411C in light of existing roadway conditions on State Route 336, the amount of material allocated for the job under the contract, and the kinds of equipment it could use on the job.

The problems created by the SP 411C language in effect at the time this contract was let is also illustrated by the fact that according to the trial testimony, for years TDOT had worked with contractors in the event the amount of materials set out in a Bid Proposal were inadequate to achieve desired smoothness levels on a particular project. (TR 42). This, at least to the Commission, makes it clear that in the past there had always been a practice of accommodating with contractors when unanticipated problems cropped up in complying with a strict application of contract language.

APAC also argues, quite convincingly in the Commission's view, that the **additional** four hundred twenty-five (425) tons of leveling mix Sisson eventually authorized rather than the one thousand fifty-three (1,053) tons requested by APAC was an attempt by Sisson to keep the job within the original budget at all costs. The evidence in this matter seems to confirm that suspicion.

Under the original bid proposal, it was projected that three hundred forty-seven (347) tons of

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<sup>9</sup> Standard Specification 411.08 was not placed into evidence at trial in this matter.

E-mix would be necessary at a cost of sixteen thousand five hundred fifty-six dollars (\$16,556.00). However, with the additional four hundred twenty-five (425) tons authorized by Mr. Sisson, the final expenditure for E-mix was thirty-seven thousand eighty dollars and forty-eight cents (\$37,080.48). Therefore an additional twenty thousand five hundred twenty-four dollars and forty-eight cents (\$20,524.48) was allocated by Sisson for the purchase of an additional four hundred twenty-five (425) tons of E-mix which was still seven hundred eighteen (718) tons short of the fourteen hundred (1400) tons APAC contended was necessary for it to meet the smoothness requirements of SP 411C.

The question then becomes what other material quantities were reduced by TDOT – through Sisson – to justify purchase of more E-mix and still keep the project on budget.

The answer is found in Exhibit 8 where it is revealed that one thousand seven hundred sixty-eight (1,768) tons of stone used to feather the margins of the paved roadway in order to prevent vehicle drop-offs from the travel surface was originally authorized at a cost of twenty-eight thousand twenty dollars and eighty-eight cents (\$28,022.88). However, only five hundred thirty-nine point four four zero (539.440) tons were actually used at a cost of eight thousand five hundred fifty dollars and twelve cents (\$8,550.12) for a total savings of twenty thousand four hundred seventy-two dollars and sixty-eight cents (\$20,472.68) for stone or only fifty-one dollars and eighty cents (\$51.80) less than what was required to provide the extra four hundred twenty-five (425) tons of E-mix to APAC.<sup>10</sup>

Thus, Sisson was able to keep the project on budget by authorizing more E-mix but decreasing the amount of Grade D mineral aggregate to five hundred thirty-nine point four four zero (539.440) tons from the one thousand seven hundred thirty-eight (1,738) tons originally projected as needed.

APAC was extremely concerned by this development as it pointed out in a letter from its

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<sup>10</sup> On November 11, 2005, TDOT told APAC that the amount of shoulder stone was being reduced from one thousand seven hundred sixty-eight (1,768) tons to five hundred thirty-nine point four four zero (539.440) tons, to be applied to the margins of the roadway to a maximum width of one foot, and that when all of it was used up, use of feathering stone along the remaining margins of the roadway would be terminated. (See EXH 9).

project manager Todd Davis to Mr. Sisson observing that TDOT's own Standard Specification required APAC "... to provide for the safety of the general public and to 'hold harmless in defense' 'TDOT and others' against all claims arising out of the work.'" (EXH 9). In fact, page 5 of Exhibit 2 - prepared by TDOT's own Bureau of Engineering - specifically warns against even temporary margin drop-offs during the life of the project. Why TDOT would allow potential shoulder drop-offs on a completed project in contravention of its own standards during the construction phase is troubling to say the very least.

APAC's concern from a purely legal perspective was imminently justified. Tenn. Code Ann. § 12- 4-503 (1980) provides as follows:

**§ 12-4-503. Performance liability; discharge**

Upon acceptance by the state of a state contractor's work, provided **that such state contractor's work is done in accordance with the plans and specifications**, such state contractor is discharged from all liability to any party by reason of its lack of ordinary care in the performance of, or failure to perform, such work on such state construction project. (Emphasis added).

Importantly, however, subsequent cases addressing situations such as this have made it clear that although a TDOT project may have been completed and accepted by the State, a contractor still faces potential tort liability as a result of a condition it created even though it proceeded according to TDOT requirements and orders. *See Anthony v. Construction Products, Inc.*, 677 S.W.2d 4, 7-8 (Tenn. Ct. App. 1984).

APAC's request for a waiver of SP 411C's smoothness requirements continued into January 2006. (EXH10). However, in a letter to APAC Project Manager Todd Davis dated March 20, 2006, Mr. Sisson advised that APAC's work, based on a comparison of pre- and post-project rideability figures, resulted in a failure of the contractor to meet the standards set out in Table 2 of SP 411C.

(EXH 11). A review of the exhibit to this letter shows that in several instances, the smoothness of the road actually decreased following APAC's work. Consequently, a letter dated April 25, 2006 was sent from Mr. Sisson to Mr. Loflin waiving the rideability requirement but only with regard to a small portion of the entire project at its north and south termini. (EXH 12).

APAC continued to press its case to the extent that on July 5, 2006, Mr. Loflin, traveled to TDOT's Construction Division headquarters in Nashville to discuss the matter further. However, on July 18, 2006, Pete Falkenberg, an assistant director of construction at TDOT, wrote Loflin and pointed out that at the July 5, 2006, meeting, they had reviewed pre- and post-rideability results on not only the Montvale Road project but other jobs APAC had recently performed for the state. Falkenberg confirmed the earlier decision to exempt only a small portion of the completed Montvale Road job from the SP 411C requirements and informed Loflin that TDOT would not waive the standard with regard to the vast majority of the work done. The problem, according to Falkenberg, was not the quality of the asphalt put in place but rather the road's final rideability.

The Department decided not to require APAC to take up and pave over the deficient areas (the mill and inlay process) as there was no guarantee that doing so would solve the smoothness problem. TDOT also refused an offer of compromise made by APAC in the form of an extended warranty on the road and reduced payment on the project. Thereafter, TDOT refused to pay APAC the balance owed on the project of \$213,878.90 and this claim was filed.<sup>11</sup>

In a recent decision from a federal court, *Rossi v. Sun Trust Mortgage*, No. 3:11-CV-01045, 2011 WL 6888530 (M.D. Tenn.), the District judge, citing several well-known Tennessee cases, described the nature of the "good faith and fair dealing" duty in Tennessee:

The purposes of [this] implied-in-law covenant are (1) to honor the parties'

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<sup>11</sup> Actually, APAC had already been paid for work done on this project, but TDOT recouped that payment by withholding funds owed Claimant for other work.

reasonable expectations, and (2) to protect their right to receive the benefits of the agreement into which they entered. *Id.* at 642–43 (citations omitted). The covenant **“does not, however, create new contractual rights or obligations, nor can it be used to circumvent or alter the specific terms of the parties' agreement.”** *Id.* at 643. Further, it is not a standalone claim, but rather part of an overall breach of contract claim. *Jones v. LeMoyné–Owen Coll.*, 308 S.W.3d 894, 907 (Tenn.Ct.App.2009) (citing *Lyons v. Farmers Ins. Exch.*, 26 S.W.3d 888, 894 (Tenn.Ct.App.2000)). *Id.* at \*6. (Emphasis added).

In light of the facts before us, the Commission has some real reservations in finding that TDOT met this standard when dealing with APAC on this project. It is clear to us that in addition to getting Montvale Road paved, a primary driving force for the TDOT was to do so strictly within a set budget. This compulsion to stay on budget, whatever it took, remained even in the face of what APAC told TDOT, once the project began, would be necessary in terms of materials to achieve an acceptably smooth surface on SR 336. This is particularly disturbing in light of the **unrebutted proof** that by reducing the amount of shoulder stone available in order to justify a bit more E-mix, TDOT, the State, and motorists using SR 336 were left with a completed road on which there were apparently shoulder drop-offs the likes of which TDOT forbade in its own construction plans. (EXH 2). The proof is clear that significant portions of this road have shoulders which are too high and sub-standard. This cost-cutting, which the Commission finds was done by the State to stay on budget, raises serious questions regarding the State's good faith in dealing with APAC on this job.

Obviously, Mr. Sisson agreed that APAC needed more E-mix to level the sub-strata of the road. He nearly doubled the amount authorized by the original specifications although to a level slightly more than one half of the fourteen hundred (1400) tons APAC's Lawson argued would be necessary after his company began its work.

The State's good-faith in dealing with APAC on this project is also brought into question

in light of several disturbing discrepancies in the testimony of some state employees. For example, although Mr. Sisson testified that ultimately it was his call as to whether a contract condition should be waived (TR 128-129, 132), at his deposition he had stated that such decisions were made at the Regional level (TR 132). Certainly, the amount of authorized materials on a project could be considered to constitute a part of the conditions of the contract, and Engineer Duane Manning agreed that decisions regarding authorized amounts never went beyond Mr. Sisson (TR 193). However, Engineer Bane, who occupied a position above both Manning and Sisson in the TDOT hierarchy, testified that if Sisson encountered a problem with shortages in materials, he would expect him to bring the issue to TDOT and to abide by what his superiors decided if it appeared that the project was about to go over budget. (TR 276-279).

These differences in the testimony of the State's witnesses raises some questions for the Commission regarding whose word, exactly, was APAC supposed to rely on when an issue developed during the life of this contract. Further, these examples highlight the primacy for TDOT in keeping this project within its budget.

A plausible argument can be made in light of these considerations that the State, perhaps, did not deal fairly and in good-faith with APAC in interpreting and applying SP 411C of CND 214. On the other hand, the provisions of the July 1, 2004 version of SP 411C were crystal clear at the time this contract was entered into. Table 2 is clear and the circumstances under which its standard could be waived are set out in detail on page 1 of SP 411C. APAC argues that what was urban or rural under this standard and the engineering discretion given to a non-engineer, Mr. Sisson, were ill-defined concepts. Be that as it may, the applicable language said what it said at the time the contract was bid, and it was APAC's prerogative to bid using those terms or refuse to do so. Specifically, Table 2 is found in the version of SP 411C used on this project and sets out a very

precise method for calculating the amount APAC would be paid gauged by the percentage of improvement in the smoothness of the road following completion of the project. APAC should have had a method to determine whether it was meeting the standard in place during the life of the project, but, apparently it did not.

As the Supreme Court has recently admonished the Commission, “[i]f the contract language is unambiguous, then the parties’ intent is determined from the four corners of the contract.” *Ray Bell v. State*, at 387, 388; *See also Ray Bell Construction Co. v. State of Tennessee*, 2010 WL 4810670, \*15 (Tenn. Ct. App.) (Swiney, J. dissenting). Additionally, in the Court of Appeals’ decision in *Bell, supra*, and the Commission’s decision below, there were extensive discussions of whether or not parol evidence should be admitted in construing the language of an “unambiguous” contract. The Commission found an “egregious” latent ambiguity in the *Bell* contract caused by an apparent change in how TDOT dealt with contractors applying for incentive payments under a Special Provision found in that contract. While Judge Swiney “...agree[d] with most of the majority’s Opinion ... regarding the law as to what constitutes a latent ambiguity and when parol evidence can be admitted ...,” he found the language of the contract there to be “crystal clear.” *Id.* at \* 15.

This is quite true and as the Sixth Circuit United States Court of Appeals recently observed, citing *Faris v. Bry-Block Co.*, 346 S.W.2d 705, 707 (1961), “... Tennessee law sanctions a party’s use of extrinsic evidence **only to resolve ambiguities, not create them.**” *Chad Youth Enhancement Center, Inc. v. Colony*, No. 10-5745, 6402, 2012 WL 1059404,\*4 (C.A. 6, (Tenn.)) (Emphasis added). As discussed above, the Commission declines to take into account either other contracts on which TDOT granted waivers of SP 411C’s requirements or subsequent versions of that provision’s wording. To do so would be violative of Tennessee Rule of Civil

Procedure 407 and/or the parol evidence rule.

The Commission would also note that the proof in this case of an alleged waiver of SP 411C on other projects is nowhere as extensive or compelling as the proof regarding SP 108) in *Ray Bell*. In fact, in reversing the Commission and the Court of Appeals in *Ray Bell*, the Supreme Court did not discuss what the Commission and Court of Appeals had found to be an abrupt change in the way TDOT administered contracts as evidenced by significant parol evidence. The import of what our highest court held is unmistakably clear. Where the wording of a contract is unambiguous, that wording will control regardless of what had transpired during the course of prior dealings between the parties even in the event of unexpected developments during the life of a particular contract.

However, APAC's failings on this project were numerous. Mr. Loflin, an APAC vice-president and engineer, struck the Commission as an extremely competent and honest witness. He admitted candidly that this was a job he would not be proud to admit his company had done. (TR 250). Further, he conceded that he never thought E-mix would be used to cover the entire length of the project, and that the project plans called for only spot-leveling. Although there was some confusion at APAC as to whether the pre-ride smoothness levels were available to it for use as a benchmark with which to compare the quality of its work on this project, the proof shows that APAC never attempted to obtain the pre-ride information (TR 245-246).

Additionally, Mr. Lawson, who prepared APAC's bid, also impressed the Commission with his forthright testimony. He conceded that he inspected Montvale Road and noted that the TDOT engineering plans prepared for the bid process were inaccurate with regard to the width of the road. He also discovered that in places, the surface of the road had subsided. Further the proof showed that the length of this project was accessed by no less than one hundred fifty-two (152)

driveways, forty-five (45) side roads, and twenty-three (23) business entrance (EXH 14). This data was obviously available to APAC since its offices are located in Blount County and its hot-mix plant in close proximity to SR 336. Likewise, the Commission finds that Lawson's inspection should have revealed to him that the MTV and AGCS equipment were unusable on this job due to overhanging objects and the width of the road, and that the authorized daytime paving schedule might contribute to a less than smooth surface. These were all considerations that APAC should have taken into account before agreeing to accept this job in light of the requirements of SP 411C.

The Commission, as it observed at trial, is mystified as to why neither party on a 6.36 mile project noticed, early on, that the end product was not going to meet the smoothness requirements of SP 411C. The State had at its disposal a special van designed to measure deviations in roadway smoothness. The proof here shows that this equipment was used both on a pre-and post- project basis on Montvale road. Why TDOT did not use, and why APAC did not insist on this equipment's use for periodic testing, is baffling to this Commission. Nevertheless that appears to be what happened here.

Regardless of the sometimes disturbing proof in this case, but in acknowledgement of the Supreme Court's clear holding in *Ray Bell* regarding the primacy of unambiguous contract language – even in the face of what appears to be compelling parol evidence- the Commission has no alternative but to respectfully **DISMISS** APAC's claim.

The counterclaim of the State is **DISMISSED**. Counsel for the State advised at trial and again in a December 20, 2012, telephonic hearing regarding a Notice received from the Court of Appeals Clerk's Office on December 19, 2012, that the State had previously withheld the amount of its ad damnum in the counterclaim from monies owed to claimant on other projects. In light of that circumstance, although the State is the prevailing party in this matter, it is owed no additional

monies with regard to this project and therefore its original counterclaim is moot and hereby **DISMISSED**.

For these reasons, APAC's claim must be **DENIED** and this case **DISMISSED**.

This the 21<sup>st</sup> day of December, 2012.



**William O. Shults, Commissioner**

P.O. Box 960  
Newport, Tennessee  
(423) 854-5330

### CERTIFICATE

I certify that a true and exact copy of the foregoing **ORDER** has been forwarded to:

**M. Craig Hall, Esq.**  
**Deputy General Counsel**  
**Oldcastle, Inc.**  
900 Ashwood Parkway Suite 700  
571 Main Street  
Atlanta, Georgia 30338

**Melissa Brodhag, Esq.**  
**Assistant Attorney General**  
**Office of the Attorney General**  
**Civil Litigation and State Services Division**  
P.O. Box 20207  
Nashville, TN 37202-0207

This the 27<sup>th</sup> day of December, 2012.



**Paula Swanson, Clerk for the Commission**

Exhibit 1

FILED

JAN 23 2009

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE  
EASTERN GRAND DIVISION

Tennessee Claims Commission  
CLERK'S OFFICE

SOUTHERN CONSTRUCTORS, INC.,

Claimant,

v.

STATE OF TENNESSEE,

Defendant.

Claims Commission No. 20070225

REGISTERED	<input checked="" type="checkbox"/>
C/S-COMM	<input type="checkbox"/>
DOA	<input type="checkbox"/>
AG	<input type="checkbox"/>
ALJ	<input type="checkbox"/>
FED PAID	<input type="checkbox"/>
NOTICE SENT	<input type="checkbox"/>
FILED	<input checked="" type="checkbox"/>

500

DECISION REGARDING AMOUNTS OF UNIT PRICE ADJUSTMENTS,  
AND ATTORNEY'S FEES

This matter initially came on for hearing before the undersigned on September 22, 2008, on the Claimant's, Southern Constructors, Inc.'s ("SCI"), Motion for Partial Summary Judgment and Motion to Amend. Based upon the Claimant's Motion, the State's responses thereto, including all supporting filings and/or responses, the arguments of counsel at the September 22, 2008, hearing, applicable legal precedent, and the record as a whole in the case, it is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

SCI's Motion for Partial Summary Judgment and Motion to Amend are hereby **GRANTED** for the reasons more specifically set forth in the Transcript of the Commission's bench decision attached hereto as Exhibit 1 and incorporated specifically herein by reference. SCI's Amended Complaint shall be deemed filed as of August 18, 2008. In addition, all matters which the defendant has agreed are undisputed as set forth in its Response to SCI's Statement of Undisputed Material Facts in Support of its Motion for Partial Summary Judgment, a copy of which is attached hereto as Exhibit 2, are hereby established for purposes of trial pursuant to Rule 56.05 of the Tennessee Rules of Civil Procedure, considered under.

Having ruled in the Claimant's favor on the underlying issue of whether the State breached its contract with SCI, the claim came on for further hearing before the undersigned on September 24, 2008, in the Chancery Court courtroom in Dandridge, Tennessee.

The issues before the Commission at that time were three-fold. First, the Commission heard evidence regarding the nine (9) items of construction costs set out in Exhibits 11 and 12. Additionally, the Commission heard proof regarding whether the Claimant is entitled to interest and attorney's fees as provided for in the Prompt Pay Act of 1991, Tennessee Code Annotated, Section 66-34-101, et. seq.

Actually, the evidence heard on September 24, 2008, sets forth in great detail the complete underlying factual background in this case including those facts the Commission believes support its decision on the core issue of breach of contract.<sup>1</sup>

As set out in the Commission's prior ruling from the bench, this dispute arose when SCI sought to avail itself of the provisions of Section 104.02 of the Specifications for Contract Number CNC243 with the Tennessee Department of Transportation ("TDOT") entered into on July 23, 2004, which provided, as discussed previously, that in the event of a significant change to a major item of work on the project, SCI could apply for an adjustment of the amounts it was to be paid under the contract. In this instance, the significant change was a decrease in the amount of partial and full depth square yardage repairs SCI was required to complete on the Henley Street repair project, below seventy-five percent (75%) of what the contract had originally anticipated.

The Henley Street repair project involved work on a major thoroughfare over the Tennessee River in Knoxville, Tennessee. The Henley Street Bridge provides a heavily traveled means of

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<sup>1</sup> There is one volume of the testimony in this case and references to that testimony in this opinion will be to "TR\_\_". References to a particular Exhibit will be to "EXH\_\_".

ingress and egress for persons coming to Knoxville from South Knox County, Sevier County, and Blount County. There is no dispute between the parties that a rapid completion of this project was important to the economy of Knoxville and its surrounding areas and a goal of both parties.

The contractor was under significant pressure to complete this project on or before August 31, 2004. SCI began its work on July 5, 2004, and was able to complete the same by August 5, 2004. The contractor had an obvious incentive to complete the work early since it was eligible for a bonus of up to Seventy Thousand Dollars (\$70,000.00) if it was able to complete the work at least twelve (12) days in advance of the contracted for completion date of August 31, 2004. However, if SCI was unable to complete all the work by August 31, 2004, then it would suffer a Five Thousand Dollars (\$5,000.00) a day penalty for every day it was late in finishing the work. There was no cap on the amount which it might be assessed as a penalty.

The estimated cost of the entire contract, set out in TDOT's Proposal Contract, was Seven Hundred and Ninety-Nine Thousand Five Hundred and Sixty-Three Dollars (\$799,563.00). To date, SCI has been paid Six Hundred and Ninety-one Thousand Two Hundred and Thirty-six 24/100 Dollars (\$691,236.24). As discussed previously in the Commission's bench decision on the underlying breach of contract issue, this dispute arose because the amounts of partial depth and full depth repairs to the bridge's deck were significantly less than what both parties had contemplated during the bidding process. In fact, the partial depth repairs were only forty-three percent (43%) of the twenty-eight hundred (2,800) square yards originally anticipated by TDOT, while the full depth repairs were approximately fifty-seven percent (57%) of what the State estimated originally. To be sure these underestimations are not indicative of bad faith on the part of the State or the contractor since as the proof shows, it is extremely difficult for engineers to accurately define what work is needed until the materials overlaying the bridge deck are stripped off and a closer inspection is

possible.

Further, it is important to note that the parties to this dispute are well known to each other since SCI has performed a significant amount of work for the TDOT. In fact, its President, Richard Huskey, who testified at trial, previously worked for TDOT as a student and was supervised by TDOT Assistant Chief Engineer Steve Hall. There is no evidence whatsoever of any pre-existing acrimony between the parties prior to this unfortunate dispute.

As stated above, the proof in this case on September 24, 2008, consisted of much of what the Commission would have expected had the Claimant's motion for partial summary judgment been denied. That, of course, is important should either party appeal any aspect of this case.

What remains for decision now are the issues of what items of additional adjustment costs SCI is entitled to payment for, as well as the matter of interest on those costs and attorney's fees should the Commission determine the State acted in "bad faith" in denying SCI's claim.

#### **I. The Proof**

Work on the contract in this case began on July 5, 2004, and had a required completion date of August 31, 2004. However, SCI was able to complete the work by August 5, 2004. (EXH 1, TR31) The original contract amount was Seven Hundred Ninety-Nine Thousand Five Hundred Sixty-Three Dollars (\$799,563.00) and to date, SCI has been paid Six Hundred Ninety-One Thousand Two Hundred Thirty-Six and 24/100 Dollars (\$691,236.24), not counting the early completion bonus of Seventy Thousand Dollars (\$70,000.00). The Supplemental Agreement ("SA") amount sought by SCI in this case of Eighty-One Thousand Five Hundred Ninety-Three and 01/100 Dollars (\$81,593.01), when added to what has already been paid, would result in total payments of Seven Hundred Seventy-Two Thousand Eight Hundred Twenty-Nine and 25/100 Dollars (\$772,829.25) to SCI, some Twenty-seven Thousand Dollars (\$27,000.00) less than what TDOT

estimated would be the costs under this contract. (TR 69) The Commission previously discussed the Five Thousand Dollar (\$5,000.00) per day incentive and disincentive for work completed early or late. Accordingly, Mr. Huskey testified he had scheduled crews to work around the clock in order to avoid the penalty and earn the bonus. (TR 33) Mr. Huskey pointed out that the contract had a certain degree of risk both for SCI and TDOT. For example, if quantity underruns were less than twenty-five percent (25%), then SCI ran the risk of having planned to do more work than it actually did with no possibility of recovering its costs. On the other hand, if the amount of work actually done by SCI for the State was less than one hundred twenty-five percent (125%) of what was contracted for, then the State did not have the right to ask for an adjustment in its per item costs. The seventy-five percent (75%) and one hundred twenty-five percent (125%) floor and ceiling obviously left each of the contracting parties at some risk for absorbing costs not originally anticipated. (TR 80)

Longtime State employee, professional engineer Pete Falkenberg, who at the time was Assistant Director of Construction for Region I of the State, testified that TDOT itself had utilized this contract provision when quantities had exceeded one hundred twenty-five percent (125%) of estimates and that the seventy-five percent (75%) figure had been implemented when quantities used on a contract went below seventy-five percent (75%) of an estimate. (TR 120 and 124) On the other hand, Assistant Chief Engineer for Operations Steve Hall, a 29 ½ year veteran of TDOT, testified there was no indication in State files that this provision had been used by the State to request a price reduction.

When it became apparent to Mr. Huskey that he had bid and performed a job which required less work than had been anticipated, he began the SA process in December of 2004. (TR 74) This was a Category 1 SA which must be approved by the Commissioner of the Department of Transportation. (EXH 5, TR 177-178, 204) Although he has done many projects for the State, Mr.

Huskey testified SCI had never used this provision in order to request additional monies. (TR 76) He signed the proposed SA on behalf of SCI on December 7, 2004. (TR 61) Subsequently, Huskey contacted TDOT officials at the Knoxville regional office up through March of 2005, following which he discussed processing of the SA with Mr. Falkenberg around Christmas of 2005. Initially, on May 9, 2005, Assistant Chief Engineer of Operations Hall approved SCI's SA. When he did not receive payment on the SA, Mr. Huskey continued his conversations with Mr. Falkenberg, and eventually Mr. Hall. (TR 105-106) On March 1, 2006, he received a letter from Mr. Hall, reversing his previous decision to approve the SA, and denying the same because of how SCI had allocated its fixed costs in the contract and also because a note<sup>2</sup> on Exhibit 4 overrode, in Hall's view, Section 104.02<sup>3</sup> of the State's Specifications dealing with significant changes to major items of work. (EXHS 2 and 10) Mr. Falkenberg testified this particular sort of situation had come up infrequently during his career. (TR 123)

Interestingly, a gentleman named Dwayne Seger, who is Chief of the Bridge Repair Department with TDOT, did not testify in this matter. (TR 173) Witness Clint Bane testified that an e-mail from Mr. Seger to Mr. Hall expressed concern about a note found on the plans and some of the costs which Mr. Huskey sought in his proposed SA. (TR 175) Mr. Hall testified that once he

<sup>2</sup> Exhibit 2 - Section 104.02 - Significant Changes in the Character of Work:

- (1) The engineer reserves the right to make at any time during the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project.
- (2) If the alterations or changes in quantities significantly change the character of the work under the contract, whether or not changed by such different quantities or alterations, an adjustment, excluding loss of anticipated profits, will be made to the contract. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, then an adjustment will be made either for or against the Contractor in such amount as the Engineer may determine to be fair and equitable.
- (3) If the alterations or changes in quantities do not significantly change the character of the work to be performed under the contract, the altered work will be paid for as provided elsewhere in the contract.
- (4) The term "significant change" shall be construed to apply only to the following circumstances:
  - (a) when the character of the work as altered differs materially in the kind or nature from that involved or included in the original proposed construction or
  - (b) when a major item of work is increased in excess of 125% or decreased below 75% of the original contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125% of original contract item quantity, or to the amount of work performed in case of a decrease below 75%.

<sup>3</sup> Exhibit 4 - NOTE: ITEM NO. 604-10.30 AND 604-10.50 SHALL BE BID WITH THE CONTINGENCY THAT THESE ITEMS MAY BE INCREASED, DECREASED, OR ELIMINATED AS DIRECTED BY THE ENGINEER.

contacted Mr. Seger, it was Seger's opinion the SA should not be agreed to. (TR 206) Again, Mr. Seger was not called and did not testify in this matter.

Following submission of the SA, Mr. Braden, the Project Supervisor for the Henley Street bridge project, approved Mr. Huskey's computations as did Mr. Bane, the Regional Construction Supervisor. (TR 51) Mr. Huskey testified that once Mr. Bane and Mr. Braden signed off on the SA that Region I Director, longtime State official Fred Corum, signed the same and forwarded it to Nashville for consideration. (TR 60-61) Subsequently, personnel in the Region I office in Knoxville indicated to Mr. Huskey that the hold up in payment of the SA was occurring in Nashville. (TR 63) Following receipt of this information, Mr. Huskey began his conversations with Mr. Falkenberg. (TR 63) Around Christmas of 2005, Mr. Huskey had his first conversation with Steve Hall. (TR 64) It should be recalled that on May 7, 2005, Mr. Hall initially recommended approval of SCI's requested adjustments in a cover letter sent to Nashville. (EXH 8)

Finally, Mr. Huskey called Mr. Hall personally and Hall told him for the first time the reason TDOT was not going to pay an adjustment on the contract was the fact that SCI received the incentive bonus, and that those monies should more than offset any need for an adjustment in SCI's fixed costs. (TR 63) In a second phone conversation with Mr. Hall, Mr. Huskey was told there was also a conflict between the note in the upper left-hand corner of Exhibit 4 and the specifications for the job set out in Specifications, Section 104.02, and that this conflict was the reason TDOT was not going to pay any adjustments because of the reduced amount of work done. (EXHS 2 and 4) and (TR 63)

Mr. Huskey testified he was aware that the Commissioner of TDOT would have to sign off on this project in order for him to be paid. At trial, Mr. Hall testified the Commissioner himself never denied this claim. (TR 230) However, in the State's Answer to SCT's Interrogatories (EXH

17), Mr. Hall stated the Commissioner had final authority to approve or disapprove a SA and had denied SCI's request here for a price adjustment. (EXH 17, p. 5, TR 230) At trial, Mr. Hall stated that since he was acting for the Commissioner in this case, and since he (Hall) denied it, he interpreted the interrogatory answer to mean that, in fact, the Commissioner had denied it through him. (TR 231)

Mr. Falkenberg, whose testimony has previously been referenced, stated that he retired from TDOT after 31 years and that his last job there was as Assistant Director of Construction for Region I of the State of Tennessee. The Henley Street Bridge is located in Region 1. (TR 111) Mr. Falkenberg is a licensed Professional Engineer. He approved the SA on May 9, 2005. (TR 112-1) Previously, TDOT Regional Director Corum had signed the agreement. (TR 115) Mr. Falkenberg thought the Eighty-One Thousand Five Hundred Ninety-Three and 01/100 Dollars (\$81,593.01) request from SCI was reasonable, and it was his understanding that it had been negotiated between the parties. (TR 117-118) Mr. Falkenberg did not and does not agree with TDOT's decision to deny this claim since he felt the provision in the contract dealt "directly" with this particular type of situation. (TR 120) He discussed this matter with his supervisor, Mr. David Donoho, Construction Division Director for TDOT, as well as with Assistant Chief Engineer of Operations, Mr. Hall, as it made its way through the approval process and was surprised when it was denied. (TR 125) In fact, his supervisor, Mr. Donoho, also had initialed the SA. (TR 125)

At the time the contract was let, Mr. Falkenberg testified that TDOT did not review what costs had been included in fixed costs and what costs were put into particular categories of work to be done on the project. (TR 129)

It was his understanding that the Commissioner of TDOT had a question about the SA and needed more information in order to make a decision. He did not remember whether the

Commissioner had said not to pay the claim. (TR 133)

Mr. Falkenberg admitted that Project Supervisor Braden could not bind TDOT in approving the claim and that ultimately the only person who had the authority to bind TDOT was the Commissioner. (TR 135)

The fact that SCI earned a bonus on this job could not, in Falkenberg's opinion, "...be the basis for denying the Supplement. It would not be correct to do that." (TR 147) When asked specifically whether he believed there was bad faith in the denial of this SA, Mr. Falkenberg stated, "At the time I reviewed this and talked to the regional prior to my final review and approval, I felt like it was the right thing to do, ... and I felt like it was kind of a black and white situation. I felt like it should be approved and I still do, that it's the right thing to do." (TR 149-150) Mr. Falkenberg believed that if the Commissioner had declined to sign off on this SA, he would have had someone prepare a formal response. (TR 142)

James Braden was Project Supervisor on the Henley Street job. (TR 152) Mr. Braden is not a licensed engineer but has been a project supervisor for the State for ten to fifteen years. Mr. Braden was present on the project site almost constantly during its life and he, Region I Construction Supervisor Clint Bane, and Assistant Region I Construction Supervisor Duane Manning reviewed the figures provided to them by Mr. Huskey and agreed the requested SA amount was appropriate. (TR 155) He testified that he thought SCI met the criteria for an adjustment as set out in the specs. (TR 156)

Clint Bane also testified. He admitted that he signed off on the authorization to proceed with payment of the SA. (EXH 5, TR168) Bane also said he would not have approved the SA if he had known the note set out in the upper left-hand corner of Exhibit 4 existed since he felt the note superseded Specification 104.02. (TR 180) It was his opinion that the basis for the denial of SCI's

claim was "solely" the note found on Exhibit 4. (TR 184) Bane was also willing to take the blame for the rejection of the SA because of his "oversight" of the note as it applied to the proposed adjustment. (TR 186)

Fred Corum's Assistant Director for Region I, Steve Borden, also testified. Mr. Borden is a licensed engineer and was Assistant Regional Director in July and August of 2004. (TR 188) Mr. Borden denied that the basis for the rejection of the adjustment in this case was because SCI received a Seventy Thousand Dollar (\$70,000.00) early completion bonus. (TR 189) However, at his deposition, he testified Mr. Hall denied the claim since SCI performed less work and received a bonus and that the reduced amount of work made it possible for the contractor to proceed more quickly. (TR 190) Also at his deposition, Mr. Borden testified that receipt of a bonus did not conflict with SCI's right to request a unit price adjustment. (TR 190) Mr. Borden also testified that on Exhibit 5 the method of payment box was marked in the "negotiated price" section. (TR 193)

Finally, TDOT Assistant Chief Engineer of Operations Steve Hall testified on behalf of the State. Mr. Hall admitted that originally he recommended approval of the claim for the Commissioner's signature. (TR 204) Subsequently, the Commissioner wrote back to Mr. Hall, in his own hand, that he needed "explanation" on the approval. (TR 205) Mr. Hall did not recall exactly when he recommended the SA for approval to the Commissioner. (TR 206) Mr. Hall stated he based his decision to reverse his prior conclusion and deny the claim on the conflict between the note on Exhibit 4 and the provisions set out for unit adjustments in Exhibit 2. It was his position that the contractor had been told, in the note, that it should bid the project with the note in mind.

At his pre-trial deposition, Mr. Hall testified that Exhibits 2 and 4 were not in conflict and that Exhibit 2 merely told the contractor it could "request" a change in unit price, but the note in Exhibit 4, in turn, told the contractor "you should have expected this [adjustments in amounts] and

not put all your money in this place.” (TR 208) At trial, Mr. Hall again testified there was no conflict between Exhibits 2 and 4. (TR 227) This is at variance with the contents of his letter to Mr. Huskey of March 1, 2006, where he emphasized a conflict between language in Exhibits 2 and 4. (TR 227, EXH 10) Mr. Hall also testified at trial that if there was a discrepancy between the two provisions, it should be pointed out that the Standard Specification 104.02 would be overridden by the note on the plans, found in the upper left-hand corner of this “no plans” contract. (TR 210) Mr. Hall testified that notes such as those found on Exhibit 2 are included “to indicate to the bidders, if you have fixed costs, you know, don’t put all your eggs in this basket, cause these quantities may change.” (TR 211)

Additionally, Mr. Hall testified at trial that certainly the fact that SCI had gotten a bonus was something that should be considered in reviewing the SA. (TR 212) Finally, Mr. Hall testified that when the Commissioner requested an explanation, he never took the issue back to him since he knew Mr. Nicely would be concerned about changing unit prices. (TR 223) Mr. Hall testified there was a delay in giving the final decision to Mr. Huskey because no one wanted to be the individual to tell him. (TR 215)

It is SCI’s contention that bad faith was established in this case in the Commissioner’s note to Mr. Hall indicating an explanation was needed since that was a signal or code word for Hall to deny the claim, and that Hall sat on the claim from at least Christmas of 2005 until March 1, 2006, when a formal written denial issued. (TR 98)

There also was a conflict in the testimony regarding the approval of SAs. In his thirty-one (31) years of experience with TDOT, Mr. Falkenberg stated that SAs were infrequently rejected. (TR 147) However, Mr. Borden testified it was not uncommon for SAs to be rejected and at another point, that a good portion of the SAs do get turned down. (TR 202)

There are nine (9) categories of costs for which Claimant contends it should receive a unit price adjustment since it committed excessive resources for what was actually necessary to complete the project. Those categories are as follows: 1) longshoreman's insurance; 2) railroad protective insurance; 3) railroad flagman; 4) bridge access (Snooper/Hydra-Platform); 5) containment materials and equipment; 6) jackhammers and compressors; 7) saw blades and bits; 8) Bobcat rental; and 9) wasted labor. The amounts requested for these unit price adjustment items are set out in Exhibits 11 and 12.

During the bidding process, Mr. Falkenberg testified bids are reviewed and checked to determine if too much of the work is being allocated to what are known as mobilization costs. Mobilization costs, according to the proof, are usually limited in amount to five percent (5%) of the total contract price. Apparently, this five percent (5%) is paid to the winning bidder in advance. Therefore, bidders want to be paid as much as they can under the mobilization costs category since payments for those items are made on the front end of the project rather than as the project progresses and after it is finished. Final payments sometimes are delayed through a protracted process. In other words, those costs which are front-end loaded are paid earlier and thus, in the contractor's view, it is not financing TDOT projects while TDOT processes subsequent payments.

On this particular job, the proof was that SCI had included Thirty-Nine Thousand Dollars (\$39,000.00) for mobilization costs in its bid, whereas TDOT engineers originally estimated that only Thirty Thousand Dollars (\$30,000.00) should be placed in that category. Further, three bidders had actually bid more in the mobilization cost category while two had bid less. (TR 101-102) The proof in the record is also clear that in the event mobilization costs exceeded five percent (5%) of the total contract amount, TDOT may require a new bid or require the bidder to adjust mobilization costs.

A good deal of the dispute in this case centers around, as set out in Mr. Hall's letter of March 1, 2006 (Exhibit 10), whether or not SCI should have allocated the items enumerated in Exhibits 11 and 12 to mobilization costs rather than to cost centers set up for the partial and full depth repairs. (See Exhibits 10, 11, and 12) The State appears to argue that had some of the costs set out in Exhibits 11 and 12 been allocated to mobilization costs, then SCI would not have been in a position to request unit adjustments for the partial and full depth cost centers.

Mr. Huskey testified the questioned costs were placed under the partial and full depth repair categories since they were, in fact, the only two items of work on this project. (TR 38) He also testified that the four categories of costs questioned in Mr. Hall's memo (EXH 9) involving two insurance policies, saw blades and bits, and wasted labor were all paid by SCI at the time they were obtained. It is his position that the saw blades and bits and the insurance were paid for before the project began since SCI was under a tight time deadline and could not afford to waste time before beginning work. (TR 39, 57) He also contended the two insurance policies would require the same amount of premium, per unit of work, "unless [SCI's] quantities changed [declined] by more than twenty-five percent (25%)". (TR 87) Mr. Huskey admitted that under Specification 717-01 mobilization costs should include costs of insurance. (TR 78, 92; see also Hall testimony at 218) Mr. Borden also testified it was probably a mistake to include the insurance premium in the proposed SA. (TR 128)

In support of SCI's position on wasted labor in the amount of Twenty-Two Thousand Five Hundred Ninety Dollars (\$22,590.00), Mr. Huskey asserted that when the extent of the partial depth repair work was determined [after the pavement had been removed from the bridge surface], he already had three shifts of workers standing ready to do what turned out to be a lesser amount of work. (TR 57-58) At the time he approved the SA, Mr. Bane testified he thought the wasted labor

charge was appropriate. (TR 177) He also testified the rental charges for the jackhammers and compressors, Bobcats, and the Snooper/Hydra-Platform were appropriate. (TR 177, 186-87)

Mr. Huskey testified the Two Thousand One Hundred Seventy-Five Dollar (\$2,175.00) charge for the railroad flagman was affected by the quantity of material removed and that there was a minimum rental period for the Snooper of three months. (TR 88) Mr. Huskey also believed that the containment materials and equipment could be used not only on this project but on others and at this point, he had only been paid for a percentage of their costs in light of the lessened amount of work done.

As the proof showed, at some undetermined point Mr. Hall did a computation of his own regarding the nine (9) contested items, and assuming that SCI was entitled to a unit adjustment, he concluded that under such a scenario, it could be argued the contractor might be entitled to an additional Fifty Thousand Seven Hundred Sixty-Five and 18/100 Dollars (\$50,765.18). (TR 69, EXH 9)

## II. Applicable Law

In this case, the Commission previously determined the Claimant is due additional monies under TDOT Contract Number CNC243, as unit adjustments, in light of reduced amounts of square yardage for partial and full depth repairs which the contractor was actually required to complete in connection with its work performed on the Henley Street Bridge. The Commission's findings regarding this initial issue are set out fully in the decision rendered from the bench on September 22, 2008, attached hereto and incorporated herein as Exhibit 1.

The Claimant, without opposition, was permitted to amend its original claim to assert a demand for interest and attorney's fees pursuant to the provisions of the Prompt Pay Act of 1991, Tennessee Code Annotated, Section 66-34-101, et seq. Section 66-34-602(b) of that Act provides

that attorney's fees may be assessed against the State if it is determined that the State acted in bad faith in denying SCI's claim for additional compensation. Additionally, pursuant to Tennessee Code Annotated, Section 66-34-601, the Claimant may recover interest at the rate prescribed in Tennessee Code Annotated, Section 47-14-121, "from the date due until the date paid," if the Claimant shows it was not paid "in accordance with the schedule for payments established within the contract and within thirty (30) days after application for payment is timely submitted." (See Tenn. Code Ann. § 66-34-202(a).) Tennessee Code Annotated, Section 66-34-602 provides that in the event a contractor is not timely paid, it may notify the defaulting party by registered or certified mail, return receipt requested that unless payment is made or a response tendered setting out adequate legal reason for failure to make such payments, then the notifying party may "...in addition to all of the remedies available at law or in equity, sue for equitable relief, including injunctive relief, for continuing violations of this chapter, in the Chancery Court of the county in which the real property is located." Tennessee Code Annotated, Section 66-34-602(a)(13).<sup>4</sup>

The Prompt Pay Act is applicable to construction contracts with the State and any of its departments or agencies. (See Tenn. Code Ann. § 66-34-701.)

In Tennessee, good faith performance on the part of each party to a contract is a duty. *Wallace v National Bank of Commerce* at 686. This lawful duty of good faith and fair dealing is presumptively known by all of the contracting parties. *TSC Industries, Inc. v Tomlin*, 743 S.W.2d 169,173 (Tenn. Court App. 1997), citing Restatement 2d Contracts Section 205 (1979). However, a determination of whether the parties have performed their obligations under a contract in good faith requires that their actual performances be measured against the language and terms set out in the

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<sup>4</sup>The Court of Appeals in *Rose v Raintree*, No. W2000-01388-COA-R3-CV, 2001 WL1683746 (Tenn. Court App.) held that Chancery Court is not the only jurisdiction in which Prompt Pay Act remedies may be sought. *Id.* at \*5.

contract. *Id.* at 686.

Should they so choose, the contracting parties themselves may determine in their agreement those standards by which performance may be measured. *Id.* at 686. See also *Covington v. Robinson*, 723 S.W.2d 643, 645-646 (Tenn. App. 1986) and *Bank of Crockett v. Cullipher*, 752 S.W.2d 84, 91 (Tenn. App. 1988).

Only the “objectively reasonable expectations of the parties ... will be examined in determining whether the obligation of good faith has been met.” *Wallace v National Bank of Commerce*, at 686, quoting *Tolbert v. First Nat’l Bank*, 823 P2d 965, 971 (1991); *Goot v. Metropolitan Govt. of Nashville and Davidson County*, 2005 WL 3031638 \*7 (Tenn. App.).

Although arguably a simplistic approach to any discussion of the topic of good faith, Black’s Law Dictionary, (6<sup>th</sup> Ed. 1990), at p. 693, provides a useful benchmark for determining whether good faith or bad faith has been exhibited in any particular setting. In *State v. Golden*, 941 S.W.2d 905, at 908 (Tenn. App. 1996), the Court cited Black’s for the general proposition that “bad faith may be defined as the state of mind involved when one is not being faithful to one’s duty or obligation”.

Of course, this implied-in-law covenant of good faith and fair dealing accomplishes two salutary purposes. First, “...it honors the contracting parties’ reasonable expectations.” Secondly, it affords protection to each party for the benefit of the bargain they struck between themselves. *Id.* at \*7; see also *Barnes and Robinson Company, Inc. v. OneSource Facilities Services, Inc.*, 195 S.W.3d 637, 642 (Tenn. App. 2006).

At the hearing in this case on the bad faith issue, both parties readily admitted there is a relative dearth of case law in Tennessee regarding the application of the Prompt Pay Act in the construction contract area. In fact, there does not appear to be either a reported or un-reported decision applying this particular piece of legislation in a State contract setting. Accordingly, the

Court of Appeals decision in *Trinity Industries, Inc. v. McKinnon Bridge Company, Inc.*, 77 S.W.3d 159 (Tenn. App. 2001) was a welcome addition to the State's jurisprudence in the frequently high stakes construction contract area. Although the State, through TDOT, was a party to that litigation, the issue of a bad faith penalty under the Prompt Pay Act did not involve the State.

In briefly addressing the good faith/bad faith issue, the *Trinity Industries* Court said the following:

The Act [Prompt Pay Act] does not define bad faith. There are, however, cases defining bad faith in other areas of the law. ... There are more cases interpreting what amounts to good faith under the Uniform Commercial Code's definition as honesty in fact in the conduct or transaction concerned. In *Glazer*, [*Glazer v. First American Nat'l Bank*, 930 S.W.2d 546 (Tenn. 1996)] the Court explored the various meanings of honesty and concluded that bad faith should be construed as 'actions in knowing or reckless disregard of ... contractual rights'. We would add that the definition should include rights or duties under the contract. In *Huntington*, [*Huntington Nat'l Bank v. Hooker*, 840 S.W.2d 916 (Tenn. App. 1991)] we said that good faith imposes an honest intention to abstain from taking any unconscious advantage of another, even through the forms and technicalities of the law. *Id.* at 181 (some internal citations omitted). (Emphasis supplied.)

Intentional and reckless conduct was discussed by the Tennessee Supreme Court in *Doe v Roman Catholic Diocese of Nashville*, 154 S.W.3d 22 (Tenn. 2005):

Recklessness is a hybrid concept which resembles both negligence and intent, yet which is distinct from both and can be reduced to neither. 'A person acts intentionally when it is the person's conscious objective or desire to engage in the conduct or cause the result.' Although the reckless actor intends to act or not to act, the reckless actor lacks the 'conscious objective or desire' to engage in harmful conduct or to cause a harmful result. 'Recklessness and negligence are incompatible with desire or intention.' The reckless actor 'does not intentionally harm another, but he intentionally or consciously runs a very serious risk with no good reason to do so'. Nevertheless, recklessness contains an awareness component similar to intentional conduct which is not demanded of negligence. Recklessness 'entails a mental element that is not necessarily required to establish gross negligence.' 'The element of awareness of risk ... does distinguish

between recklessness and negligence.’ *Id.* at 38. (Internal citations omitted.)

Bad faith has been defined in states other than Tennessee and in the Federal System on occasion.

In *Proctor v Kewpee, Inc.*, 2000 WL 44556 \*6 (Ohio App. 3 Dist., 2008) the Court wrote:

Bad faith has been defined as a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another. *Id.* at \*6.

The Court in *United States v Convertino*, 2008 WL 2008613 (E.D. Mich., 2008) cited *United States v Trew*, 250 F.3d 410 (6<sup>th</sup> Cir. 2001) for the following definition of bad faith:

Bad faith is defined as “not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will”. *Id.* at 418.

Because it contains an explicit definition of good faith, the Uniform Commercial Code often serves as a reference point for analyzing that issue. Many of the cases discussed in the *Trinity Industries* case confirm this observation.

Tennessee Code Annotated, Section 47-1-203 imposes a duty of good faith in the performance or enforcement of a contract falling within the Code’s purview. Further, good faith is defined in the Code as honesty in fact in a parties’ conduct or in a particular transaction. Tenn. Code Ann. § 47-1-201(19); see *Lane v. John Deere Company*, 767 S.W.2d 138, 140 (Tenn. 1989).

All the Uniform Commercial Code requires contracting parties to do is to “act honestly in the conduct of business”, as required by Tennessee Code Annotated, Sections 47-1-102(3) and -201(19). *Id.* at 92; see also *Glazer v. First American Nat’l Bank*, 930 S.W.2d 546, 548 (Tenn. 1996) and *McConnico v. Third Nat’l Bank*, 499 S.W.2d 874 (Tenn. 1973).

Finally, although the parties to a contract "...may not totally disclaim the obligations of good faith, diligence, reasonableness and care", by the terms of that same agreement, they are permitted to set up measurement standards for the performance of their respective duties under the contract. *Crockett v. Cullipher*, 752 S.W.2d 84, 91 (Tenn. Court App. 1988)<sup>5</sup>

### III. Decision.

The enforceability of contracts entered into by competent parties is, should be, and must be a bedrock principle of Tennessee Law.

The issues raised in this particular case are interesting and in some respects somewhat unique.

The contract between the State and SCI, as observed earlier, is counter-intuitive for here, SCI under Specification 104.02 is actually due more money for performing less work than it originally thought it would be doing. However, as discussed at length previously, as well as in the Commission's bench decision of September 22, 2008, there is nothing unfair about such a proposition. Here, it was imperative that a major bridge in Knoxville be repaired expeditiously given the volume of traffic which travels regularly over it, as well as the various venues it connects. Accordingly, the contract contained both a Five Thousand Dollar (\$5,000.00) per day incentive for early completion, as well as a Five Thousand Dollar (\$5,000.00) per day disincentive (or penalty) if the work was not completed by August 31, 2004.

As the Commission previously ruled, in order to avail itself of the possibility of earning the bonus which TDOT freely included in its bid proposal, as well as avoiding the imposition of a

<sup>5</sup> The Lane Court, *supra*, quoting a passage from a law review article which cited a Kentucky court's decision in *Warfield Natural Gas Co. v. Allen*, 59 S.W.2d 334, 338 (1933), sets forth a succinct yet insightful definition of good faith. "The good faith requirement is independent of particular privileges and duties that arise under the code or under the contracts. It imposes 'an honest intention to abstain from taking any unconscientious advantage of another, even through the forms and technicalities of the law'." *Id.* at 140.

potentially devastating Five Thousand Dollar (\$5,000.00) a day penalty, SCI, and the other bidders on the project, necessarily had to provide for the allocation of workers and materials to a bridge project, the scope of which was difficult for the State's pre-project estimator to describe and likewise difficult for contractors to bid on since the extent of what needed to be done could not be determined until the paved surface of the bridge had been stripped away.

Therefore, in many respects both the State and the various bidders were guessing, in good faith, as to what the requirements of the project would be. It should also be kept in mind, as discussed previously, that both SCI and the State ran the real risk of suffering losses if unit underruns or overruns did not exceed seventy-five percent (75%) or one hundred twenty-five percent (125%) respectively of the projected costs involved in the work.

It has been and remains somewhat curious to the Commission as to why neither of the parties discussed Specification 104.02, subparagraph 2 under a subsection captioned "Differing Site Conditions". That subsection reads, in part, as follows:

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

There are two important aspects to this passage. First, there has been no evidence whatsoever presented to the Commission that when it became clear to both parties there would be an "underrun" in the amount of work SCI would be doing on the Henley Street bridge that the contract was ever modified in writing. This is perhaps understandable given the alacrity with which both parties understood the project needed to be completed. Nevertheless, the contract specification did seem to call for a written modification.

Secondly, it is clear under the terms of the specification put out by the State that any unit price adjustments would not include a profit component. This would seem to emphasize the fact that unit price adjustments are the consequence of unanticipated changes in the scope and cost of the work for both the Contractor and the State. Therefore, under the very terms of the contract, the fact that the Contractor may have received a bonus for completing its work ahead of schedule logically should not factor whatsoever into whether or not SCI should receive additional monies for an underrun in the square yardage of work done on the Henley Street Bridge. The unit price adjustment appears not to include a profit factor but rather is a mechanism by which a contractor can recover its costs when it has purchased the wherewithal to complete what was originally thought to be a greater amount of work. There is no profit in a unit price adjustment.

Further, the Commission finds absolutely no contradiction between the provisions of Section 104.02 of the Specifications (Exhibit 2) and the note found in the upper left-hand corner of Exhibit 4. Certainly, both the State and SCI entered into this contract with the understanding that under unknown contingent circumstances, items involved with both the partial depth and full depth repairs of the bridge could result in an increase, a decrease, or an elimination of the need for certain component quantities of the project. There is absolutely no contradiction between that provision and the provision of Section 104.02 which provides for possible adjustments in money earned by the Contractor and paid by the State in the event such changes should eventuate.

The attempt by the State to create a contradiction between these complementary terms must fail.

The Commission does not accredit Mr. Bane's attempt to take the blame for purportedly failing to appreciate any now perceived contradiction between these two provisions. (TR 186) In fact, Mr. Bane's willingness to take the blame appears to be an attempt on the part of the State to

develop an after-the-fact justification for denying the unit price adjustment. Actually, Banes' colleague - Borden - admitted at trial that at deposition he had testified Mr. Hall told him he was going to deny SCI's claim because it had performed less work which made it possible for the contractor to proceed more quickly, and yet had received a bonus. Consequently, the State was now going to pay additional money for less work done. In fact, Mr. Hall told Mr. Borden that he was reviewing the SA with such a consideration in mind. (TR 190)

Mr. Hall's testimony both at trial and at his deposition along with his correspondence in this case also reveals a shifting rationale on his part over what has now become a four year period of dispute regarding this SA.

At trial, Mr. Hall testified that certainly the fact SCI received a bonus should be considered in reviewing this situation. (TR 212) However, he also testified his decision to deny the SA was, in fact, motivated by a presumed inconsistency between the terms of Exhibits 2 and 4 - an inconsistency which the Commission has determined not to exist. (TR 208) At yet another juncture in his testimony, Mr. Hall attempted to justify denial of the SA on the ground that the Exhibit 4 note somehow directs the contractor to allocate more fixed costs to the mobilization costs portion of the contract rather than to items such as full and partial depth repairs which may vary. If, in fact, all of the questioned fixed costs should have been allocated to the mobilization costs of the contract, then the bid proposal language should have been much more explicit. However, in the Commission's view, this line of reasoning again is an after-the-fact attempt to rationalize the denial of the SA. The testimony was extremely clear that if a bidder (such as SCT) allocated more than five percent (5%) of the total contract price to mobilization costs that the bid would be rejected or modified in order to bring those costs within the State's five percent (5%) limit. In this case, if the items which SCI now seeks an adjustment on had been included in mobilization costs, it appears that they, along with the

costs already placed in SCI's bid, would have exceeded five percent (5%) of the total contract price.

Mr. Hall's position at trial and the statements set out in his March 1, 2006, letter of denial to Mr. Huskey are also contradictory. Although at trial Mr. Hall admitted there was no conflict between the provisions of Exhibits 2 and 4, in his letter of denial he stated that the note on Exhibit 4 overrode Section 104.02 of the Specifications (Exhibit 2). Again, Mr. Hall's position at various times appears to travel from rationale to rationale in an attempt to find a way to deny SCI a unit price adjustment.

Although the State has consistently taken the position that only the Commissioner himself could make the ultimate decision on a unit price adjustment, Mr. Hall testified that once the Commissioner told him he needed an "explanation", he took it upon himself to make the decision as the Commissioner's designee and never took the issue back to the Commissioner after that point.

Accrediting Mr. Hall's testimony as to the assertion that ultimately he made the decision to deny SCI's SA, it is therefore clear that TDOT did not follow its own procedures in assessing this SA since he and not the Commissioner had to make the ultimate decision. The proof is that a Category I SA must be approved by the Commissioner of TDOT.

Finally, it appears there was real turmoil at TDOT regarding this whole situation since Mr. Hall testified the delay in the final denial of SCI's claim occurred because no one wanted to be the one to relay that decision to Mr. Huskey. (TR 215)

These shifting positions by TDOT regarding its justifications for denying SCI's claim certainly must be taken into consideration in determining whether attorney's fees should be paid by the State because of bad faith actions as authorized by Tennessee Code Annotated, Section 66-34-602(b).

All of these factors will be considered in making that decision.

**Fixed Costs for Which Claimant is Entitled to a Unit Price Adjustment.**

The Commission has studied closely the proof introduced at trial regarding the nine (9) items set out in Exhibits 11 and 12 for which SCI seeks unit price adjustments. The Commission FINDS that of those five (5) items discussed in Exhibit 11, SCI should not receive an adjustment for Railroad Protective Insurance since TDOT's Standard Specification 717.01 for road and bridge construction includes "insurance required by railroads" as an element of mobilization expense. Therefore, the Twenty-Five Hundred Dollars (\$2,500.00) should not have been allocated to the full depth repair cost center utilized in SCI's bid. However, there is no such directive in Specification 717.01 requiring that Longshoreman's Insurance be used in the calculation of mobilization costs, and that adjustment is allowed in the amount of Nine Thousand One Hundred Twenty-Five Dollars (\$9,125.00).

The Commission FINDS the costs associated with Railroad Flagman insurance of Two Thousand One Hundred Seventy-Five Dollars (\$2,175.00) and the Snooper/Hydra-platform of Thirty-Four Thousand One Hundred Dollars (\$34,100.00) are costs for which Claimant should receive a unit price adjustment. Finally, with regard to Exhibit 11, the Commission finds it difficult to precisely calculate what portion of the containment materials and equipment expense, which totals Thirty-Six Thousand Fifty-Two and 50/100 Dollars (\$36,052.50), is eligible for a full depth unit price adjustment. The testimony at trial indicated that this category of materials and equipment involves basically scaffolding and boards used in connection with the work. Apparently, because of the decreased amount of work that actually occurred on this project, not as much scaffolding and plywood was necessary. Mr. Huskey testified this equipment is usable on other projects and, in fact, he had used perhaps ten percent (10%) of it on other work. All of the equipment/materials in this category are now stored on SCI's lot. Mr. Huskey asserted that the amount of such equipment

originally purchased was necessary for the project as bid. He also contended, at trial, that he paid for these materials even though all of it eventually turned out not to be necessary. It is disturbing to the Commission that Mr. Huskey was forced to buy this equipment and materials in order to bid the project as it was described to him but that eventually, even though he paid for it, he did not use it. On the other hand, it is also disturbing that if a unit price adjustment is ordered with regard to this equipment, then in essence, the State will be billed for equipment that may not be used on a TDOT state-related project. Accordingly, the Commission ORDERS that half of the sum claimed or Eighteen Thousand Twenty-Six and 25/100 Dollars (\$18,026.25), be used in a computation for a unit price adjustment on the full depth repairs.

The Claimant, therefore, is awarded the sum of Sixty-Three Thousand Four Hundred Twenty-Six 25/100 Dollars (\$63,426.25) to be used in the computation of a unit price adjustment for the full depth repairs.

Using this figure, instead of the Eighty-Four Thousand Dollar (\$84,000.00) sum used by Mr. Huskey in his August 18, 2004, letter, and then utilizing the method Huskey used in computing the full depth unit price adjustment, the Defendant is ORDERED to pay Claimant for full depth unit price adjustments in the amount of One Hundred Twenty and 36/100 Dollars (\$120.36) per square yard which would result in an adjusted figure of Four Hundred Twenty and 36/100 (\$420.36) per square yard for full depth repairs on the bridge.

With regard to those four (4) items dealt with in Exhibit 12, regarding partial depth repairs, the Commission FINDS that the Claimant is entitled to unit price adjustments for the expenses involving jackhammers and compressors, BobCat rental, and wasted labor, amounting to Fifty-Six Thousand Five Hundred Forty Dollars (\$56,540.00).

The Commission further FINDS that the saw blades and bits purchased for Twenty-Two Thousand Nine Hundred Fifty Dollars (\$22,950.00) are not eligible for usage in calculating unit price adjustments for partial depth repairs. Although these blades and bits were purchased for use on the Henley Street bridge project, they were never used and remain with the Claimant for utilization on other possibly non-TDOT related projects.

Utilizing the method used by the Claimant in Exhibit 12, the Commission FINDS that SCI is entitled to a unit price adjustment on the partial depth repairs of Twenty-Four and 70/100 Dollars (\$24.70) per square yard, resulting in an adjusted figure of One Hundred Four and 70/100 Dollars (\$104.70) per square yard for actual work done in this category.

#### Proper interest payments

Tennessee Code Annotated Section 66-34-601 provides for the payment of interest, at the rate specified in Tennessee Code Annotated Section 47-14-121, on delinquent payments due pursuant to a contract commencing on the original due date for the payment.

The Prompt Pay Act also provides in Tennessee Code Annotated Section 66-34-602 that a contractor "who has not received payment from an owner" may send notice by registered or certified mail, return receipt requested of its "intent to seek relief provided for within this chapter". If the notified party does not respond to that notice within ten (10) days of its receipt, "giving adequate legal reasons for [the] failure of the notified party to make payment", then the contractor here may pursue legal or equitable relief including extraordinary injunctive relief.<sup>6</sup>

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<sup>6</sup> Claimant could have sought relief before this Commission under Tennessee Code Annotated, Section 9-8-307(a)(1)(L) immediately after March 1, 2006, when Mr. Hall made it clear that the State was not going to approve the SA. This Commission does not have jurisdiction to award equitable relief. However, following appropriate notification under the Prompt Pay Act, SCI could have sought legal and equitable relief in either Chancery or Circuit Court following the State's denial to pay. Purely legal relief could have been earlier sought in the Commission since the Commission does have the power to grant that category of relief but not injunctive or other equitable relief.

In this case, Claimant's attorneys submitted billing records in support of their request for attorney's fees under the Prompt Pay Act. Those records indicate the Claimant first began preparations in connection with the letter provided for in the Prompt Pay Act on July 31, 2008. This is the first indication in this record of Claimant's invocation of the Prompt Pay Act. Theoretically, the procedures set out in Tennessee Code Annotated Section 66-34-602 could have been utilized in late 2005 when Mr. Hall verbally informed Mr. Huskey that the State was not going to pay the Eighty-One Thousand Five Hundred Ninety-Three and 01/100 Dollars (\$81,593.01) adjustment which SCI sought.

It could be argued that Claimant's failure to utilize the procedure set out in Tennessee Code Annotated Section 66-34-602 prior to filing a claim on August 21, 2006, represents a failure to mitigate its damages. However, the provisions of Tennessee Code Annotated Section 66-34-601 appear to mandate that interest "shall accrue" from the date due until the date paid.

Certainly, the State always should have an adequate opportunity to evaluate whether or not any unit price adjustments are valid under the contract. This is only good business practice. But here, the Commission believes and has ruled that the Claimant was due unit price adjustments and that the State breached the terms of the contract - which it drafted - by not paying SCI additional square footage payments when the work done was significantly less than what had been thought necessary.

The Commission FINDS that as of March 1, 2006, the State finally decided, wrongly, in my opinion, no unit price adjustments were called for under the contract.

This being the case, it would also appear to be fair that interest on any unpaid sums for partial and full depth repairs at the rate specified in Tennessee Code Annotated, Section 47-14-121 would begin accruing from that date until the unit price adjustments are actually paid.

Therefore, the Claimant is awarded interest at the rate set out in Tennessee Code Annotated, Section 66-34-601 on the amounts just discussed above for adjustments for full and partial depth repairs. The Claimant is ORDERED to perform this calculation and forward the same to the Commission for inclusion in the Final Judgment in this case.

**Attorney's Fees under the Prompt Pay Act.**

Tennessee Code Annotated, Section 66-34-602(b) provides for payment of reasonable attorney's fees in the event that the Commission finds that the non-prevailing party has acted in bad faith.

Determining whether or not the State acted in bad faith in this case is an extremely serious question since the term itself carries with it a certain derogatory connotation. Nevertheless, the issue of bad faith must be decided

Determining whether or not bad faith has been exhibited by a party is a fact question. *Sunplash Painting, Inc. v. Homestead Village, Inc.*, No. M2002-00853-COA-R3-CV, 2003 WL 22345482, \*2 (Tenn. Ct. App.).

Both parties acknowledge there is very little appellate authority on point in Tennessee, with the exception of *Trinity Industries, Inc. v. McKinnon Bridge Company, Inc.*, *supra*, providing guidance as to what bad faith consists of under the Prompt Pay Act.

Of course, the *Trinity* Court defined the concept as "actions in knowing or in reckless disregard of ... contractual rights". *Id.* at 181.

In this connection, SCI cited *Doe v. Roman Catholic Diocese of Nashville*, *supra*, in an attempt to flesh out the definition of recklessness. The *Doe* Court described a reckless actor as one who intended to act or not to act without a conscious objective or desire to engage in harmful conduct or to cause a harmful result. *Id.* at 38.

Some courts have provided a perspective on bad faith by discussing what constitutes good faith. One Court described "good faith" as "an honest intention to abstain from taking unconscientious advantage of another, even through the forms and technicalities of the law". *Lane v. John Deere Company, supra*, at 140, citing *Warfield Natural Gas Co. v. Allen*, 59 S.W.2d 534, 538 (1933).

Another Court, in a case discussed above, defines bad faith in terms of a dishonest purpose, moral obliquity, conscious wrongdoing, breach of [a] known duty through some ulterior motive or ill will partaking of the nature of fraud. *Proctor v. Kewpee, supra*, at \*6. *Proctor* also described bad faith as involving the actual intent to mislead or deceive another. *Id.* In *Convertino, supra*, at \*2, citing *Trew, supra*, at \*418, the Court defined bad faith as the conscious doing of a wrong because of a dishonest purpose or moral obliquity contemplating a state of mind affirmatively operating with furtive design or ill will.

In this case, the Commission certainly does not detect the presence of outright dishonesty or even worse, moral obliquity, on the part of the State in first approving and then withdrawing its approval of the unit price adjustments on the Henley Street Bridge project.

It is abundantly clear to the Commission that both TDOT and SCI, for valid individual reasons, wanted the Henley Street bridge repair project completed as quickly as possible.

It was certainly commendable and understandable for the State to monitor the expenditure of public dollars in a prudent manner. One would expect no less from their government. On the other hand, SCI no doubt wanted to earn a bonus and avoid an unlimited penalty as provided for in its contract with the State. Additionally, SCI also wanted to be paid for the resources it had lined up for this project based on estimates provided to it by the State of the amount of work necessary to complete the project. Certainly, no business can fail to purchase and allocate resources in a less than

accurate manner. Otherwise, a contractor, such as SCI here, in all probability will not be in business long.

In this case, seven (7) separate TDOT officials, from various levels within the Department, initially approved the SA submitted by SCI. Included within this group were onsite, day in day out engineers Braden and Bane, as well as Mr. Falkenberg, a licensed professional engineer and a thirty (30) year employee of TDOT, his supervisor in Nashville, Mr. Donoho, extremely experienced Region I Director Fred Corum, and at least in May of 2005, the State's Assistant Chief Engineer, Mr. Hall. Mr. Falkenberg not only thought the SA should be paid because it was the right thing to do; he also testified this same type of agreement had been regularly approved by TDOT in the past. He also pointed out that when actual work done by a contractor exceeded one hundred twenty-five percent (125%) of what had been originally estimated, the State had utilized its right under various contracts to seek reductions in unit prices from contractors.

The State, as borne out by the proof, appeared to argue at one point that the nine (9) items comprising the SA should have been allocated to mobilization costs rather than to items of the contract involving full and partial depth repairs where unit price adjustments could be sought. However, this position is not sustainable since, other than the Railroad Insurance costs explicitly provided for in Standard Specification 717.01, there is no proof whatsoever that the contractor had been directed or required by the State, in this contract, to allocate those costs to mobilization costs. Additionally, it is clear to the Commission that allocating the eight (8) other questioned costs to mobilization would have resulted in the Claimant exceeding the State's own requirement that those costs not exceed five percent (5%) of the total contract amount. There is also proof in this record that the State reviewed allocation of mobilization costs when a contract is first let. There is no proof in this record that there were any complaints made to SCI by TDOT at that time regarding allocation

of various items to mobilization costs rather than to the partial and full depth repairs of the bridge.

The State as the drafter of this contract could have specifically included language in the contract, such as it did with regard to the Railroad Insurance, requiring allocation of the eight (8) other contended items of costs to mobilization. This it did not do.

Additionally, the State also has attempted to avoid approval of the SA by creating a conflict between provisions found in Exhibits 2 and 4. However, the Commission FINDS these exhibits to be complementary and not inconsistent. The fact that quantities may vary (see Exhibit 4) blends in very well with the proposition set out in Standard Specification 104.02 (see Exhibit 2) permitting both the contractor and the State to seek adjustments under the contract in the event that quantities of work done are actually under or over the amount of work believed necessary originally.

The Commission also believes the fact that SCI earned the full bonus for early completion of this important job was a motivating factor in the State's decision to deny any unit price adjustment. Certainly, the testimony was that Mr. Hall admitted as much in a conversations described at trial. The State later denied that the bonus issue affected its decision on unit price adjustments. The Commission does not accredit that testimony.

Strangely, two witnesses who might have been able to shed some light on the decision making process here never testified. Mr. Seger who is in charge of bridge construction for TDOT was never called by the State to explain why unit price adjustments were inappropriate in this case even though the testimony was that he agreed with the denial of the adjustments. Even stranger is the fact that the Claimant apparently never deposed or attempted to depose the Commissioner of TDOT himself in order to explain what his handwritten note on Exhibit 8 – "explanation needed" – meant.

Also significant, in this Commission's opinion, is the fact that Mr. Hall himself had actually prepared a computation setting out his opinion as to what SCI would have been due if it was determined that unit price adjustments were warranted. (EX 9.) Circumstantially, this indicates that TDOT had reservations about whether or not it was on sound footing in denying these adjustments.

The Commission affirmatively does not find dishonest purpose, moral obliquity, or a conscious wrongdoing on the part of the State. The State, through its officials, has a duty to act as a good steward of increasingly limited state resources. However, the Commission does find, under the *Trinity Industries, Inc.* decision, that the actions of the State in not paying the SA in this case was "knowing".

The proof is clear that SCI performed a great service in re-opening the Henley Street Bridge in an expeditious fashion. For that professionally done work, it earned a bonus which it was contractually due. However, it was also due a unit price adjustment, under the terms of its contract, since the amount of work which it had to perform was significantly less than what the State had indicated it would be required to do on this job. Preparing to do work of this nature is complex and requires a contractor to shift all manner of resources from other projects to this job. That shift may even include foregoing other opportunities. When the over allocation in this case occurred, the contractor did no more than it was permitted to do under the contract, i.e. seek a unit price adjustment, which the Commission would also note does not include a profit component. (See Standard Specification 104.02.)

The State's eventual declination to pay the unit price adjustments, after prior approval by seven (7) separate experienced road builders – its own employees – rests on a panorama of shifting rationales. This constantly morphing rationale process clearly made the people involved in it uncomfortable since Mr. Hall testified that nobody at TDOT wanted to be the one who gave Mr.

Huskey the final word. If the rejection of the SA was so clear under TDOT's view of the situation, then this Commission does not believe there would have been such hesitation in relaying the final decision to Mr. Huskey. This "knowing" failure to abide by the terms of the contract makes reasonable attorney's fees assessable against the State under Tennessee Code Annotated, Section 66-34-602(d).

The issue then becomes what amount of fees is due the Claimant.

The determination of the reasonableness of attorney's fees is within the Commissioner's discretion. The burden of proving reasonableness is on the party seeking such fees. The usual method of carrying such a burden is to tender an affidavit from the lawyer who actually provided the services. The Court itself may also draw on its own knowledge of the case as well its knowledge of fees payable for legal services. *Wright v. Wright*, No. M2007-00378-COA-R3-CV, 2007 WL 4340871, \*3 (Tenn. Ct. App.).

The factors to be considered in determining the reasonableness of a fee generally have been understood for a number of years. See *Connors v. Connors*, 549 S.W.2d 672 (Tenn. 1980) and *Lee v. Lee*, No. E2006-00599-COA-R3-CV, 2007 WL 516401, \*5 (Tenn. Ct. App.). Rule 1.5 of the Rules of Professional Conduct for attorneys found in Article XV of the Rules of the Supreme Court, Chapter 1, sets out ten (10) factors which provide definite guidelines in the determination of the reasonableness of fees. Those guidelines are as follows:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the

- client;
- (7) the experience, reputation, and ability of a lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charged; and
- (10) whether the fee agreement is in writing.

In this case, the Claimant's attorneys, up through October 24, 2008, have billed their client Fifty-Seven Thousand One Hundred Fifty Dollars (\$57,150.00) for services rendered since December 28, 2006.

The lawyering in this case on both sides has been exemplary. The Claimant's attorneys work for a leading law firm in Knoxville, Tennessee, and their presentation of this case was organized, concise, and to the point. Counsel for the State, Mr. Holt, likewise presented the State's case in a very able manner. Mr. Holt is an experienced trial lawyer who has been known to this Commissioner for many years. The fact that Claimant's attorneys were litigating against Mr. Holt indicates that they faced a formidable task in the preparation for and trial of this case.

Both during the pretrial procedures and the trial of this matter, counsel for both parties conducted themselves with restraint, professionalism, and courtesy.

The Commission has undertaken a meticulous review of the billing records attached to Mr. Noell's Affidavit.

This is a case which initially involved a claim for "only" Eighty-One Thousand Five Hundred Ninety-Three and 01/100 Dollars (\$81,593.01). Mr. Noell's Affidavit indicates that no less than three attorneys and three paralegals or perhaps law students were involved in handling this matter for the Claimant. As just stated, this case initially involved slightly over Eighty-One Thousand Dollars (\$81,000.00). Frankly, the Commissioner wonders why so much legal talent was necessary in order to adequately handle such a relatively modest claim. Nevertheless, this Commission has reviewed

every entry in the Affidavits filed by Mr. Noell and finds there was very little duplication of effort in appropriately preparing and trying this case.

The result obtained by Claimant's counsel for the client has obviously been excellent. Counsel's recognition and utilization of the Prompt Pay Act on behalf of their client represents insightful legal work. Other contract cases which have been brought before the Commission have not included, in many instances, a Prompt Pay Act allegation. The resort to that Act represents good "lawyering".

Additionally, Mr. Noell made a good point in his closing argument. He stated that unless cases like this, involving a relatively small amount of money, are litigated vigorously, the State might perhaps be tempted in the future to deny payment of supplemental agreements (SAs) since the cost of litigating small claims would drive contractors away from any effort to vindicate valid contractual rights.

In order to pursue and prove the merits of its position in this breach of contract case, SCI was willing to engage quality legal talent to press its claim. The amount of its recovery should not be reduced because of legal expenses.

Therefore, the Commission ORDERS payment of attorney's fees to SCI, with the exception of those entries highlighted in yellow on Claimant's counsel's billing statements attached hereto as Exhibit 3. A review of the billing records leads the undersigned to conclude that there may have been some arguable duplication of effort in some instances.

Therefore, for the reasons set forth in this Decision, the Claimant is awarded unit price adjustments for the partial and full depth repairs on the Henley Street Bridge in the amounts set out herein; interest on that judgment, compounded beginning from March 1, 2006, to the date of this Decision; and attorney's fees as set out above and computed utilizing Exhibit 3 attached hereto.

Claimant's counsel is directed to prepare a Final Judgment consistent with the Commission's earlier bench decision and this Decision. That Judgment may incorporate by reference those two rulings by the undersigned.

ENTERED this the 23 day of January, 2009.

  
William O. Shults, Commissioner  
P.O. Box 960  
Newport, TN 37822-0960

**CERTIFICATE OF SERVICE**

I certify that a true and exact copy of the foregoing Final Judgment has been forwarded to:

Robert P. Noell, Esq.  
Meghan H. Morgan, Esq.  
Wolf, McClaine, Bright, Allen,  
& Carpenter, PLLC  
P.O. Box 900  
Knoxville, TN 37901-0900

Greg Holt, Esq.  
Office of the Attorney General  
P.O. Box 20207  
Nashville, TN 37202-0207

this the 23 day of January, 2009.

  
Marsha Richeson, Administrative Clerk

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE  
EASTERN GRAND DIVISION

SOUTHERN CONSTRUCTORS, INC. )  
 )  
 Claimant, )  
 )  
 vs. )  
 )  
 STATE OF TENNESSEE, )  
 )  
 Defendant. )

Claim No. 20070225  
 Regular Docket

FILED	_____
DOCKETED	_____
C/S - COMM	_____
DCA	_____
AG	_____
ALJ	_____
FEE PAID	_____
NOTICE SENT	_____
FILED	_____

FINAL JUDGMENT

The trial of this matter was held on the 24th day of September, 2008, before <sup>s WDS</sup> Commissioner William O. Shultz, the Commissioner in the Claims Commission of the State of Tennessee, Eastern Grand Division. For the reasons more fully set forth in the Decision Regarding Amounts of Unit Price Adjustments, Interest, and Attorneys' Fees, which is attached hereto as Exhibit 1, incorporated, and made apart of this Final Judgment, the Commissioner finds that Claimant Southern Constructors, Inc. ("Claimant") is entitled to One Hundred Twenty-Three Thousand Twenty-Three Dollars and Fifty-Eight Cents (\$123,023.58) from the State of Tennessee. It is, therefore, **ORDERED, ADJUDGED, AND DECREED:**

1. That Judgment is awarded in favor of Claimant and against the State of Tennessee in the amount of Fifty-Seven Thousand Four Hundred and Thirteen Dollars and Fifty-Five (\$57,413.55), representing the unit price adjustment for full and partial depth repair items;

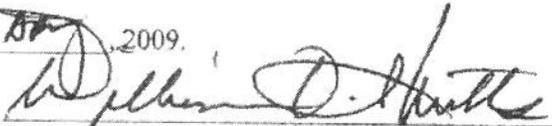
2. That Claimant is awarded Seventeen Thousand Eight Hundred Forty-Six Dollars and Three Cents (\$17,846.03) in interest from March 1, 2006 pursuant to Tennessee Code Annotated §§ 66-34-101, *et seq.*;

3. That Claimant is awarded attorney's fees in the amount of Forty-Seven Thousand Seven Hundred and Sixty Four Dollars and No Cents (\$47,764.00) pursuant to Tennessee Code Annotated §§ 66-34-101, *et seq.*; and

4. That Claimant shall be entitled to post judgment interest pursuant to Tennessee Code Annotated § 47-14-121, § 47-14-122 and § 9-8-307(d) at a rate of Ten Percent (10%) per annum that shall begin accruing thirty (30) days after this Final Judgment is entered.

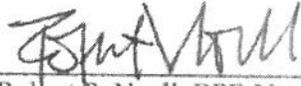
5. That costs be taxed to the State for which execution may issue if necessary.

ENTER this 9<sup>th</sup> day of February, 2009.

  
William O. Shults, Commissioner  
Eastern Division Claims Commissioner

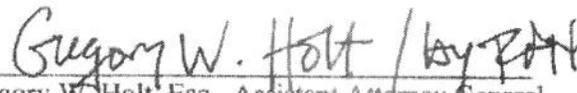
**APPROVED FOR ENTRY:**

WOOLF, McCLANE, BRIGHT,  
ALLEN & CARPENTER, PLLC

By:   
Robert P. Noell, BPR No. 020231  
Meghan H. Morgan, BPR No. 024619

Post Office Box 900  
Knoxville, Tennessee 37901-0900  
(865) 215-1000

*Attorneys for Claimant*

  
Gregory W. Holt, Esq., Assistant Attorney General  
Office of the Attorney General  
Civil Rights and Claims Division  
P.O. Box 20207  
Nashville, TN 37202-0207

*Attorneys for Defendant*

**CERTIFICATE**

I certify that a true and exact copy of the foregoing Order has been transmitted to the following:

**Robert P. Noell, Esq.  
Meghan H. Morgan, Esq.  
P.O. Box 900  
Knoxville, TN 37901-0900**

**Greg Holt, Esq.  
Office of the Attorney General  
P.O. Box 20207  
Nashville, TN 37202-0207**

This the 19 day of February, 2009.

  
Marsha Richeson, Administrative Clerk

Exhibit 2

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IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE  
EASTERN GRAND DIVISION

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KAY & KAY CONTRACTING, LLC,

Claimant,

v.

STATE OF TENNESSEE,

Defendant.

}  
}  
}  
} Claims Commission No. 20081364  
} Regular Docket  
}  
}

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ORDER DENYING PARTIES' MOTIONS  
FOR PARTIAL SUMMARY JUDGMENT

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THIS CAUSE came on to be heard before the undersigned, Commissioner of the Eastern Division of the Tennessee Claims Commission ("the Commission"), on July 28, 2011.

The parties are before the Commission with their respective motions for partial summary judgment. Those motions address whether or not the State owes Kay & Kay an additional One Hundred Ninety-Nine Thousand Seven Hundred Forty-Six and 63/100 Dollars (\$199,746.63) for road and drainage excavation and grade work done pursuant to Contract CNB233.

**Standards for Granting or Denying Motions for Summary Judgment.**

This is a breach of contract case. The element of damage dealt with in these motions is of course the additional sum Kay and Kay claims it is owed for excavation work performed by subcontractor Whitley County Stone.

In order to establish a breach claim, the Claimant must prove the existence of an enforceable contract, non-performance under that contract amounting to a breach by the State, and resultant

damages. *Ingram v. Cendant Mobility Financial Corporation*, 215 S.W.3d 367, 374 (Tenn. Ct. App. 2006).

The Tennessee Supreme Court recently has been extremely active in clarifying in this state the standards and processes which must be used when parties file motions for summary judgment. (See *Hannan v. Alltel*, 270 S.W.3d 1 (Tenn. 2008); *Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76 (Tenn. 2008); see also *Gossett v. Tractor Supply Co., Inc.*, 320 S.W.3d 777 (Tenn. 2010).)<sup>1</sup>

Summary judgment is of course warranted “when the moving party can show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law”. *Hannan* at p. 4, citing Tenn. R. Civ. P. 56.04 and *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993).

However, parties to an action may have different burdens of production in summary judgment proceedings, depending on whether or not they bear the burden of proof at trial.

For example, in *Hannan*, the Court held that a moving party which did not bear the ultimate burden of proof at trial could shift the burden of production to a non-movant by either affirmatively negating an essential element of a non-movant’s claim or by showing that the non-movant could not prove an essential element of its claim at trial. If the non-movant could not rebut the movant’s showing, then its claim can be dismissed.

On the other hand, the Court went on to describe the method by which a party bearing the burden of proof at trial could shift the burden of production (on summary judgment) to the non-moving party. In that situation, the Court held that “a plaintiff who file[s] a Motion for Partial Summary Judgment on an element of his or her claim shifts the burden [of production] by alleging undisputed facts that show the existence of that element [which] entitles the [claimant] to summary

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<sup>1</sup> Recent legislation affecting summary judgment practice [Tenn. Code Ann. § 20-16-101] does not apply in this case since it applies only to cases filed on or after July 1, 2011.

judgment as a matter of law.” *Hannan* at 9, n6. If the non-movant can not rebut those facts, then the movant is entitled to judgment as a matter of law.

More recently, in *Martin*, in further explicating its holdings in *Hannan*, the Court described in some detail the process which the parties must follow when motions for summary judgment are filed:

The moving party is entitled to summary judgment only if the ‘pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law.’ Tenn. R. Civ. P. 56.04; *accord Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn.2000). The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn.1993). Accordingly, a properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn.2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn.1998). If the moving party fails to make this showing, then ‘the non-movant’s burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails.’ *McCarley*, 960 S.W.2d at 588; *accord Staples*, 15 S.W.3d at 88.

The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1) affirmatively negating an essential element of the nonmoving party’s claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publ’g Co.*, 270 S.W.3d 1, 5 (Tenn.2008); *see also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n. 5. Both methods require something more than an assertion that the nonmoving party has no evidence. *Byrd*, 847 S.W.2d at 215. Similarly, the presentation of evidence that raises doubts about the nonmoving party’s ability to prove his or her claim is also insufficient. *McCarley*, 960 S.W.2d at 588. The moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party’s claim or shows that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan*, 270 S.W.3d at 5. We have held that to negate an essential element of the claim, the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party. *See Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn.2004). If the moving party is unable

to make the required showing, then its motion for summary judgment will fail. *Byrd*, 847 S.W.2d at 215.

If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:

(1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06. *McCarley*, 960 S.W.2d at 588; accord *Byrd*, 847 S.W.2d at 215 n. 6. The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *McCarley*, 960 S.W.2d at 588. 'A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed.' *Byrd*, 847 S.W.2d at 215. A disputed fact presents a genuine issue if 'a reasonable jury' could legitimately resolve that fact in favor of one side or the other.

Before its decisions in *Hannan* and *Martin*, the Supreme Court in *Byrd* set out language defining just what constitutes a genuine issue of material fact which would preclude the grant of a motion for summary judgment. The Court wrote there that:

The Court is simply to overrule the motion where a genuine dispute exists as to any material fact. ... The phrase 'genuine issue' contained in Rule 56.03 refers to genuine factual issues and does not include issues involving legal conclusions to be drawn from the facts. ... The critical focus is limited to facts deemed 'material', ... which is to say those facts that must be decided in order to resolve the substantive claim or defense at which the motion is directed. (Citations omitted.) *Id.* at 211.

The Court went on to state in that same case, at 214, as follows:

A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed. Therefore, when confronted with a disputed fact, the court must examine the elements of the claim or defense at issue in the motion to determine whether the resolution of that fact will affect the disposition of any of those claims or defenses. By this process, courts and litigants

can ascertain which issues are dispositive of the case, thus rendering other disputed facts immaterial.

Justice Koch, prior to the decisions in *Hannan* and *Martin*, in *Wilson v. Rubin*, 104 S.W.3d 39 (Tenn. Ct. App. 2002), described what constitutes material, disputed facts. There, he wrote the following:

For a question of fact to exist, reasonable minds must be able to differ over whether some alleged occurrence or event did or did not happen or whether a particular condition did or did not exist. ... If reasonable minds could justifiably reach different conclusions based on the evidence at hand, then a genuine question of fact exists. ... If, on the other hand, the evidence and the inferences to be reasonably drawn from the evidence would permit a reasonable person to reach only one conclusion, then there are no material factual disputes and the question can be disposed of as a matter of law. (Internal citations omitted). *Id.* at 47-48.

Further, “[t]he mere existence of a scintilla of evidence in support of the [non-moving party’s] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].” *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-55, 106 S.Ct. 2505, 2511-13, 91 L.Ed.2d 2002 (1996).

In evaluating the materials tendered by the movant in a summary judgment motion, the Commission must view the tendered evidence favorably to the non-moving party and allow all reasonable inferences from those materials in favor of that party while discarding all countervailing evidence. *Byrd v. Hall* at 210. (See also *White v. Bi-Lo, LLC*, No. M2007-02698-COA-R3-CV, 2008 Tenn. App. LEXIS 573 at \*5.)

Once a movant (Kay and Kay here) who bears the burden of proof at trial establishes its position that there are no material, disputed facts outstanding in a particular case, then the burden becomes that of the non-moving party to show that issues of material fact still exist. See *Hannan* and *Martin, supra*. On the other hand, the defendant here will prevail on its Motion for Partial Summary

Judgment if it negates an essential element of Kay and Kay's claim or establishes that an essential element of that claim – involving the excavation payment issue – cannot be shown at trial.

At this point in this case, the Commission is called upon to apply the Supreme Court's holdings in *Hannan* and *Martin* to both parties' motions for partial summary judgment.

**Relevant Provisions From Contract CNB223 and  
Prior Appellate Decision In Case.**

Interpreting this contract requires an intense review of various documents, provisions of which the Commission will set out in this Order.

First, page 1 of the Proposal made to the Tennessee Department of Transportation contains, in part, the following wording:

By submitting this Proposal, the undersigned bidder represents that it has carefully examined the site of the work described herein, has become familiar with local conditions, and the character and extent of the work; has carefully examined the Plans, the Standard Specifications for Road and Bridge Construction (March 1, 1995) adopted by the State of Tennessee, Department of Transportation, with subsequent revisions which are acknowledged to be a part of this Proposal, the Special Provisions, the Proposal Form, the Form of Contract, and the Form of Contract Payment and Performance Bond; and thoroughly understands their stipulations, requirements, and provisions. ...

By submitting this Proposal, the undersigned bidder agrees to provide all necessary equipment, tools, labor, incidentals, and other means of construction, to do all the work, and furnish all materials of the specified requirements which are necessary to complete the work in accordance with Plans and the Specifications, and agrees to accept as payment in full therefore the unit prices for the various items described in the Specifications that are set forth in this Proposal. The bidder understands that the quantities of work specified are approximate only and are subject to increase or decrease and that any such increase or decrease will not affect the unit prices set forth in the Proposal.

Page 7 of the Proposal for Contract for CNB233 provides, in part, as follows:

In consideration of the agreements herein contained, to be performed by the parties hereto and of the payments hereafter agreed to be made, it is mutually agreed by both parties that:

- 1) The contract between the parties consists of the following

- 'Contract Documents' all of which constitute one instrument
- (b) The Proposal [of Kay & Kay Contracting, LLC]
  - (e) The Tennessee Department of Transportation Standard Specifications for Road and Bridge Construction, March 1, 1995, Edition (hereinafter referred to as the '1995 Standard Specifications')
  - (k) The Contract Plans....

Paragraph 2, found on that same page, provides in pertinent part as follows:

The Contract Documents are intended to be complementary and to describe and provide for complete work. Requirements in one of these are as binding as if occurring in all of them. In case of discrepancy, Supplemental Specifications will govern over the 1995 Standard Specifications; the Contract Plans will govern over both Supplemental and Standard Specifications, and Special Provisions will govern over both Plans and Specifications.

On page of 8 of the actual Contract, is found paragraph 4:

The Department agrees to pay to the Contractor such unit prices for the work actually done as are set out in the accompanying Proposal, in the manner provided for in the 1995 Standard Specifications, Supplemental Specifications, and applicable Special Provisions.

Line item 1270 of Contract CNB233 provided that seven hundred fourteen thousand six hundred thirty-one (714,631) cubic yards of road and drainage excavation work would be performed, under Kay and Kay's proposal, at a cost of Three and 25/100 Dollars (\$3.25) per cubic yard and a total bid amount of Two Million Three Hundred Twenty-Two Thousand Five Hundred Fifty and 75/100 Dollars (\$2,322,550.75).

Plan Sheet 2B, captioned "Estimated Roadway Quantities", used in computing bids on this project indicates, in item 203-01 (Road & Drainage excavation unclassified), that seven hundred fourteen thousand six hundred thirty-one (714,631) cubic yards of material would be moved in the project and refers the user of the document to sheet 2K for an explanation of how that figure was tabulated.

Plan Sheet 2K indicates, under a chart captioned "Estimated Grading Quantities", that seven thousand one hundred eighty-eight (7,188) cubic yards of common excavation material would be moved during the course of the project and that six hundred forty-three thousand four hundred forty-one (643,441) cubic yards of rock would be moved.

In a chart located immediately below that chart is another chart captioned "Estimated Earthwork Quantities". Under Alternate "AA1" a computation is carried out which factors in the "Shrinkage" involved with the common excavation materials as well as the swell involved in excavating and moving six hundred forty-three thousand four hundred forty-one (643,441) cubic yards of rock.

These computations involve factoring in a five percent (5%) shrinkage factor for common materials and a ten percent (10%) swell component involved with excavating and moving the rock.<sup>2</sup>

The instructions to bidders found at page 1 of the Proposal Contract for Contract number CNB233 [which had been revised on November 1, 2002] provided as follows:

Totals let at the opening of the bids are not guaranteed to be correct and no final award of the contract will be made until bids and extensions have been checked and re-checked. (Emphasis Supplied.)

TDOT Standard Specification 105.04 provides as follows:

The contractor shall not take advantage of any error or omission in the Plans or Specifications or of any discrepancy between the Plans, the Specifications, or any other of the Contract documents which may apply. In the event the Contractor discovers any error or discrepancy, he shall immediately call upon the Engineer for his interpretation and decision; such decision shall be final. At the contractor's request, such decision may be had in writing.

<sup>2</sup> This computation, according to the State, was used to determine whether or not a sufficient number of cubic yards of material would be available for use in building embankments on the project. The computation revealed that sixty-six thousand seven hundred seventy-one (66,771) cubic yards of materials would be necessary for that aspect of the project, and that there would be resultant waste materials amounting to six hundred forty-seven thousand eight hundred sixty (647,860) cubic yards.

Standard Specification number 102.03 – Interpretation of Quantities in Bid Schedule, provides as follows:

The quantities appearing in the bid schedule are approximate only and are prepared for the comparison of bids and award of Contract. The Department does not guarantee or assume any responsibility that quantities indicated on the Plans or given in the estimates of quantities and schedule (sic) or prices in the Proposal Form will hold in the construction of the Project and the Contractor shall not plead deception or misunderstanding because of the variation from these quantities or of variation from the location, character, or any other conditions pertaining thereto. Payment to the Contractor will be made only for the actual quantities of work performed and accepted, and materials furnished in accordance with the Contract. The schedule quantities of work to be done and materials to be furnished may each be increased, decreased, or omitted as hereinafter provided under Subsection 104.02. (Emphasis supplied.)

A Supplemental Specification for this Standard Specification dated March 1, 1995, provides that:

The quantities appears on the diskette are approximate only and are prepared for the comparison of bids and award of Contract. The Department does not guarantee or assume any responsibility that quantities indicated on the Plans or given in the computer diskette will hold in the construction of the project and the Contractor shall not plead deception or misunderstanding because of variation from these quantities or of variation from the location, character or any other conditions pertaining thereto.

TDOT Specification number 203.09 – Method of Measurement, provides, as pertinent here, as follows:

Road and Drainage Excavation will be computed by the cubic meter (cubic yard). All accepted excavation, including borrow, shall be measured in its original position by cross sectioning the area excavated. At the option of the Engineer, cross sections may be determined from conventional manual surveys, aerial surveys, or a combination of the two methods. Hauling of excavation and borrow materials shall be considered incidental to the construction and the cost thereof shall be included in the unit price bid for excavation of items except that overhaul of Road and Drainage Excavation (unclassified) or Road and Drainage Excavation (additional material) will be paid for as provided

below. Volumes will be computed from the cross section measures by the average end method.

Finally, TDOT Standard Specification number 203.10 – Basis of Payment, provides, as relevant here, as follows:

The accepted quantities of the items listed below will be paid for at the contract price per unit of measurement for each of the pay items that is listed in the bid schedule.

Item 203 – A1.03, Road and Drainage Excavation (Additional Materials) will be paid for at a rate per cubic meter (cubic yard) equal to 1.2 times the unit price for item PO3-1, Road and Drainage Excavation (Unclassified).

The subcontract between Kay & Kay Contracting, LLC and Whitley County Stone, LLC also contains certain pertinent passages.

Paragraph II provides, in part, that:

It is specifically understood and agreed by Subcontractor that the quantities of items set forth in Paragraph I are estimated quantities only and that the earnings of Subcontractor under this Agreement shall be determined by the quantities of work that are actually allowed and paid to the Contractor by the Owner.

Exhibit A to that Subcontract provided that Whitley County Stone would excavate seven hundred fourteen thousand six hundred thirty-one (714,631) cubic yards of materials at a price of Three and 25/100 Dollars (\$3.25) per cubic yard, for a total of Two Million Three Hundred Twenty-Two Thousand Five Hundred Fifty and 75/100 Dollars (\$2,322,550.75).

Paragraph III (B) of the subcontract provides that “the prime contract, consist[s] of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein, including but not limited to the Conditions of the Contract (General, Special, Supplementary, and Other Conditions), Drawings, Plans, specifications...”.

Finally, paragraph III (E) of the subcontract states that,

This Subcontract shall be performed in strict accordance with the

Subcontract Documents and to the satisfaction of the Contractor and Owner. The Subcontractor represents and agrees that it has carefully examined and understands the Subcontract Documents, copies of which have been and remain available for inspection and copying by Subcontractor, that it has investigated the nature, locality, and site of the Project and the conditions and difficulties under which it is to be performed, and that it enters into the Agreement on the basis of its own examination, investigation, and evaluation of all such matters and not in reliance upon any opinions or such matters and not in reliance upon any opinions or representations of Contractor, Owner, or any of their respective officers, agents, servants, or employees.

Finally, the Court of Appeals in its June 25, 2010, Decision in this case said the following:

We also note that our holding does not allow TDOT to escape liability if Subcontractor has a valid claim. The scope of TDOT's contractual liability on this project is controlled by its written contract with Contractor. The contract between Contractor and Subcontractor cannot expand TDOT's liability under the original contract. As noted by the Commission in this case:

The actual work to be performed by [Contractor] is literally contained within the terms of the Prime Contract between the State and [Contractor]. Paragraph 1(b) of the Contract incorporates by reference the Proposal Contract which, in turn, in Item D of the Contract Schedule, at page 10, includes precisely the work ... which [Subcontractor] contends it completed but was not paid in full for doing. *Id.* at 210.

#### **Decision on Motions.**

This dispute has been ongoing for some six years, since the completion of the Project in 2005.

The case involves claims for additional monies by Kay & Kay in connection with several aspects of the project. However, the issue now before the Commission deals with Kay & Kay's claim for an additional One Hundred Ninety-Nine Thousand Seven Hundred Forty-Six and 63/100 Dollars (\$199,746.63) for road and drainage excavation and grade work done as a part of Contract CNB233.

Materials before the Commission at this point reveal that the Contract Schedules for this aspect of the Project provided that 714,631 cubic yards of materials would be removed by Kay & Kay at a price of Three and 25/100 Dollars (\$3.25) per cubic yard. However, at the end of the project, it was

determined that Kay & Kay had actually moved only 653,120 cubic yards of material and consequently, the State has refused to pay Claimant One Hundred Ninety-Nine Thousand Seven Forty-Six and 63/100 Dollars (\$199,746.63) for the additional 61,511 cubic yards of material Claimant alleges it in fact dealt with and has not been paid for so doing.

The State in its filings argues that the amounts set out in the Proposal Bid were approximations only of the actual cubic yards of material to be moved and most importantly that the 714,631 cubic yard figure included on the Bid Schedule was placed there in error and applied only to a separate computation found on Plan Sheet 2K in Chart AA1 which deals with a determination of whether or not sufficient materials will be available on the project to properly back-fill certain areas.

The State also argues forcefully that since it never pays for "swell" on its projects, Kay & Kay must have known this was a mistake in the proposal documents and consequently, under Standard Specification 105.04, had an immediate obligation to bring this error to the State's attention. This is particularly true, the State contends, since Kay and Kay's estimator, Mr. Bowden, had been involved on a similar project in Claiborne County and was well aware that the State never paid for the increased cubic yardage created by the presence of rocks resulting in "swell".

The State goes on to point out that under Standard Specification 105.04, Kay & Kay had an absolute obligation ("shall") to clarify the situation by consulting immediately with the State's engineer.

Because, the State insists, Kay & Kay did not comply with its duties under Standard Specification 105.04, it committed the first material breach of this contract and therefore, is not entitled to recover on its claim.

Kay & Kay argues, on the other hand, that under its contract with the State, the Contract Plans, including Plan Sheets 2B and 2K, as well as the Contract Schedules, control over the more general

provisions of the Standard Specification, and that both the sheets and the schedule led it to believe that it was bidding on an aspect of the project involving 714,631 cubic feet of road and drainage excavation and grade work.

The proof now before the Commission shows that there was a large disparity for this aspect of the work between Kay & Kay's bid of Two Million Three Hundred Twenty-Two Thousand Five Hundred Fifty and 75/100 Dollars (\$2,322,550.75) and the second lowest bid submitted by Wright Brothers Construction of Two Million Nine Hundred Forty-Four Thousand Two Hundred Seventy-Nine and 72/100 Dollars (\$2,944,279.72) and certainly, the highest bid made by Elmo Greer and Sons of Five Million One Hundred Eighty-Eight Thousand Two Hundred Twenty-one and 06/100 Dollars (\$5,188,221.06).

Each of these contractors bid, based in part, on the assumption that road and drainage excavation and grade work would involve 714,631 cubic yards of material. Obviously there was a wide variation among experienced contractors about what it would cost to move the 714,631 cubic yards of rocks and other material on this project. This disparity is indicative of some confusion among the State and the contractors created by the error a contract engineer – Consoer Townsend – made in preparing the bid documents on this project.

The State has invoked the first material breach rule in this case arguing that Kay & Kay knew there was a problem with the specification and since it did not alert the State to this problem, it is not entitled to damages since it incurred them with full knowledge of what it was doing.

However, the first material breach rule would not apply if the State took advantage of the unrealized error made by Kay & Kay on its bid and permitted that contractor to proceed knowing that the bid was lower than it should have been since Kay & Kay assumed that it would be moving greater quantities. (See *Madden Phillips Construction, Inc. v. GGAT Development Corporation*, 315 S.W.3d

800, 812 (Tenn. Ct. App. 2010).)

Kay & Kay implies that by assuming more cubic yards of material were going to be moved by virtue of inclusion of a swell factor, it allocated more resources to that aspect of the project which it not is not being paid for in light of the State's position.

An issue therefore arises as to whether the State was taking advantage of Kay & Kay's bid knowing full well that it had no intention of paying the contractor for the swelled figure, thereby, obtaining the benefit of Kay & Kay's innocent – or perhaps not so innocent – bid figures prepared on the basis of calculations by prepared by its own engineering contractor, Consoer Townsend.

The State has pled several new defenses at this late stage of the proceedings. As discussed above, for the first time in its response to Kay & Kay's Motion for Partial Summary Judgment, the State contends that a transpositional error was made in moving the figures from Plan Sheets 2B and 2K to the Contract Schedule. Secondly, the State argues now that Kay & Kay has breached the implied covenant of good faith and fair dealing, and further, that its actions constitute a unilateral modification of the contract. Finally, the State now defends on the basis that inclusion of a swell figure in the Contract Schedule was a patent ambiguity which should have put Kay & Kay on notice that there was a disconnect between their respective understandings of the terms of the contract.

In his Affidavit filed on behalf of Kay & Kay, Mr. Bowden states that he has bid both projects where swell has been excluded and others in which it was included during the bidding process. Surprisingly, he sets out no examples of such instances other than the Claiborne County Project which, indeed, did not factor in a swell computation.

On the other hand, Kay & Kay points out that the issue of an alleged transpositional error never came up during two years of ongoing negotiations and even at the time suit was filed in 2008. The first instance of the State alleging a transpositional mistake was in its recent Response to Kay & Kay's

Motion for Partial Summary Judgment.

However, it is curious that Kay & Kay argues that the covenant of good faith and fair dealing does not apply in the negotiation stage of the contracting process but only during the performance phase of a contract. Looking at that position in the round, the Commission's suspicions are raised as to why the Claimant would take the position that good faith is not expected during the negotiation process particularly in light of Standard Specification 105.40.

The Commission does acknowledge Kay & Kay's argument that the State's assertion of several affirmative defense is woefully late under the provisions of the Tennessee Rules of Civil Procedure, Rules 8 and 12. This litigation, as all Parties must acknowledge, has been either anticipated or ongoing (factoring out the earlier appeal of an issue not in play here) for a significant period of time. Why now, virtually on the cusp of a trial scheduled for October 2011, the State has injected several new defenses into this case is not clear. However, the Commission will not prevent the State from raising those defenses as there is ample time to develop the same before October 18, 19, and 20, 2011, during a discovery process the Parties have advised has not progressed too far.

The Commission believes that there are at least four possible scenarios at play in this case.

First, it is quite conceivable that Kay & Kay's bid was prepared in good faith and that the State simply did not realize that its engineering contractor, Consoer Townsend, had muffed the preparation of the bid specifications documents.

A second possibility is that Kay & Kay knew that the State's bid specifications were flawed and did not ask for a clarification, as it had the right to do, in the hope that it would be paid for moving an additional 61,511 cubic yards of material.

A third possibility is that the State recognized that Kay & Kay had underbid the road drainage excavation and grade work, per cubic yard, and perhaps hoped that it could save Two Hundred

Thousand Dollars (\$200,000.00) on this relatively large project upon the completion of the work.<sup>3</sup>

Finally, it is all together possible that the State was negligent in reviewing the faulty engineering work done by its contract engineer Consoer Townsend, and its failure to monitor that work has resulted in a breach of this contract since it refuses to pay under the arguably defective specifications presented to Kay & Kay.

The facts surrounding each of these scenarios have not been fully developed in the Commission's view, and therefore, remain disputed. Those disputes make it impossible to determine whether a breach of contract by either party has occurred with regard to this particular element of Kay & Kay's claim. Therefore, summary judgment on both parties' motion is not justified under Tennessee Rules of Civil Procedure, Rule 56.04 and the case law discussed above.

The trial on this and all issues involved in this claim will commence at 9:00 o'clock a.m. on October 18, 2011, in the courtroom of the Chancery Court for Campbell County, Tennessee, in Jacksboro, Tennessee, and will continue until all proof has been taken from both parties.

**SO ORDERED** this \_\_\_\_\_ day of August, 2011.

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**William O. Shults, Commissioner**  
P.O. Box 960  
Newport, TN 37822-0960  
(423) 613-4809

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<sup>3</sup> Kay & Kay's bid was accepted by the State on July 22, 2001. However, a new administration was in place at TDOT in January, 2004. Perhaps, and only proof will unravel this query, TDOT had undertaken a re-assessment of all extant contracts when the new administrators took office at TDOT.

**CERTIFICATE OF SERVICE**

I certify that a true and exact copy of the foregoing document has been forwarded to:

**Timothy C. Wills, Esq.  
Bowles, Rice, McDavid,  
Graff & Love, LLP  
333 West Vine Street, Suite 1700  
Lexington, KY 40507-1639**

**Steve McCloud, Esq.  
Office of the Attorney General  
P.O. Box 20207  
Nashville, TN 37202-0207**

This the \_\_\_\_\_ day of August, 2011.

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# Exhibit 3

**SP411C**

**SP411C**

Sheet 2 of 2

all lots that are milled prior to overlay, regardless of initial ride results. **Table 2** applies only to lots that are single lift with an initial Half Car IRI greater than or equal to 80 in/mi. For the purpose of this specification, placement of "Scratch" mixture (C-S mix) will not be considered a lift of mixture to improve smoothness.

**TABLE 1**

411C- Table 1	
Road Profiler Value Half Car IRI (IN/MI)	Percentage paid on bid price of surface items
55 or less	100%
56	99%
57	98%
58	97%
59	96%
60	95%
61	94%
62	93%
63	92%
64	91%
65	90%
66	88%
67	86%
68	84%
69	82%
70	80%
71	77%
72	74%
73	71%
74	68%
75	65%
76	61%
77	57%
78	53%
79	49%
80	45%
Greater than 80	Mill & Inlay

**TABLE 2**

411C- Table 2	
Percent Improvement  % **	Percentage paid on bid price of surface items
30 or more	100%
29	99%
28	98%
27	97%
26	96%
25	95%
24	94%
23	93%
22	92%
21	91%
20	90%
19	88%
18	86%
17	84%
16	82%
15	80%
Less than 15	Mill and Inlay*

\*The mill and inlay shall be the thickness as specified on the plans for the surface layer

\*\*Percent Improvement =  $\frac{\text{Initial Half Car IRI} - \text{Final Half Car IRI}}{\text{Initial Half Car IRI}} \times 100$