

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

<hr/> AIS CONSTRUCTION COMPANY	:	
6420 Via Real, Suite 6	:	CIVIL ACTION
Carpinteria, CA 93013	:	
	:	
Plaintiff	:	
	:	
v.	:	NO.
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY	:	
a/k/a SEPTA	:	
1234 Market Street	:	
Philadelphia, PA 19107	:	
	:	
Defendant.	:	

COMPLAINT

Plaintiff, AIS Construction Company (“AIS”), by and through its undersigned counsel, hereby files this Complaint against Defendant, Southeastern Pennsylvania Transportation Authority (“SEPTA”), and in support thereof, avers as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff AIS is a corporation organized and existing under the law of the State of California, duly registered in the Commonwealth of Pennsylvania, with its principal place of business located at 6420 Via Real, Suite 6, Carpinteria, CA 93013.
2. Defendant SEPTA is a body corporate and politic exercising the powers of the Commonwealth of Pennsylvania, as an agency and instrumentality thereof, with its principal place of business at 1234 Market Street, Philadelphia, PA 19107.
3. This Court has original jurisdiction over this action pursuant to 28 U.S.C. §1332(a), as the matter of controversy, exclusive of interest and costs, exceeds \$75,000 and is between citizens of different states.

4. Venue is proper in the Eastern District of Pennsylvania by virtue of a contractual provision providing for such venue and the fact that Defendant SEPTA is located in Philadelphia, PA, in accordance with 28 U.S.C. §1391(a).

FACTUAL BACKGROUND

5. On or about May 7, 2009, SEPTA issued a Solicitation for Sealed Bids Number 09-117-JAB (the “SSB”) for a project known as the Gwynedd Cut Stabilization Project (the “Project”).

6. The work on the Project consisted of earthwork, rock removal, rock scaling, rock bolting, installation of high strength wire mesh and shotcrete on the East and West slopes above the approximately 3,100 linear feet of train track that passes through the Gwynedd Cut, located in Gwynedd Township, southeast of Philadelphia, Pennsylvania.

7. The objective of the project was to stabilize the relatively steep banks of the Gwynedd Cut, through which the R-5 Lansdale SEPTA Regional Rail Line operates, minimizing the hazard of falling rock.

8. AIS submitted the lowest responsive and responsible bid for the work for the Project.

9. After reviewing the bids, SEPTA awarded the contract for the work for the Project to AIS.

10. Subsequently, on or about June 26, 2009, SEPTA and AIS entered into an agreement (the “Contract”) whereby AIS agreed to provide the work pursuant to its bid for the Project for a lump sum contract price of \$3,250,083 to be adjusted upward or downward in accordance with the unit price provisions of the Contract. A true and correct copy of the first page and the signature page of the Contract is attached hereto as Exhibit “A.” Because of its

voluminous nature, the entire Contract is not attached. SEPTA has in its possession a full and complete copy of the Contract.

11. Several documents, together with the Contract, constitute the contract documents, including, *inter alia*, special conditions, addenda issued prior to the execution of the Contract, the specifications and the Project drawings (the "Contract Documents"). AIS refers to and incorporates these Contract Documents as if set forth at length herein. Because of their voluminous nature, the Contract Documents are not attached.

12. AIS received a Notice to Proceed from SEPTA on July 1, 2009 and, soon thereafter, AIS mobilized its workforce at the Project and began to diligently execute its obligations under the Contract in a timely and professional manner.

Unit Price Contract

13. Bidders for the Project were asked to submit their bid on two separate forms designated as Schedule A (GC) ("Schedule A") and Schedule B (GC) ("Schedule B").

14. Schedule A listed twelve work items for each of which bidders were required to submit a lump sum price.

15. Schedule B listed fourteen separate work items, for two of which bidders were required to submit lump sum prices and for the remaining twelve items bidders were required to submit unit prices.

16. For each of the twelve items for which a unit price was specified, the Contract also provided the Bidders with and "Estimated Base Quantity." The Estimated Base Quantity for each item was listed in a table on page 2 of the contract drawings which were included within the Contract Documents. A true and correct copy of the table is attached hereto as Exhibit "B."

17. Schedule B of the Contract includes the following statement: "In accordance with

paragraph XIV of the Agreement, the Unit Prices below will be established for determining the amount of increase or decrease for future change requests, separate from the bid, for the following items of work of material.”

18. On Sheet 2 of the contract drawings, below the table containing the Estimated Base Quantities, contains the words “For information only.” See Exhibit “B”.

19. The statements referred to within ¶¶ 18 and 19 above caused AIS to question whether the Contract was truly a unit price contract wherein payment would be made in direct proportion to work performed and materials provided, or, if the unit prices were only considered if a change to the Contract was needed.

20. AIS would not have bid on the Project if it were not a unit price contract.

21. In order to confirm that the Contract was a unit price contract, prior to submission of its bid, AIS sought clarification and submitted the following written questions; “When does the unit prices in Schedule A come into effect? Is it after the base quantities on page 2 of the plans are reached or are you expecting a credit if they are not reached?” A true and correct copy of the applicable portion of Addendum #1 which incorporates the Answer to Bidders’ Question as part of the Contract, along with a true and correct copy of the Answer to Bidders’ Question is attached hereto as Exhibit “C”.

22. SEPTA’s written answer stated: “SEPTA does not see a need to change the BF-2 pages (Schedules A and B). SEPTA will monitor the quantities in the field and based on the contract will expect a credit if the engineered quantities are not used and **will pay an extra if the quantities are exceeded.**” (emphasis added) See Exhibit “C.”

23. SEPTA’s answer confirmed that the contract was a unit price contract for which the contract price would be increased or decreased by multiplying the unit price of unit priced

items of work by the number of units by which the quantities were either less than or in excess of specific base quantities provided for by the Contract.

24. Various provisions of the Contract confirm that the quantities of unit priced items of work were unknown at the time of contract execution and that SEPTA intended the contract price for those items of work for which unit prices were specified would be determined by multiplying unit prices by the amounts by which unit priced items of work exceeded or were less than specific base quantities provided for in the Contract.

25. General Note No. 16 on Sheet 2 of the contract drawings states: "Specific work limits for rock and soil stabilization are presented based upon preliminary inspection. Final quantities, methods and limits are subject to change based upon the contractor's submissions and conditions encountered in the field as work progresses. Final project limits are subject to engineer's approval." A true and correct copy of the General Notes from Sheet 2 of the contract drawings is attached hereto as Exhibit "D."

26. Section 02229.1.4B.6 of the special provisions of the Contract states: "As built quantities are subject to site conditions encountered during construction, and may result encounter [sic] as much as 50% variation from quantities shown on the contract drawings." A true and correct copy of Section 02229.1.4B.6 of the special provisions of the Contract is attached hereto as Exhibit "E".

Wire Mesh Drapery

27. Item 12 of Schedule B is "Wire Mesh Drapery" for which AIS bid and SEPTA accepted a unit price of \$8.41 per square foot.

28. Wire Mesh Drapery consists of pre-fabricated sheets of mesh made up of interlocking 3 mm diameter steel wire, single twisted into rhomboidal meshes.

29. The Contract's Estimated Base Quantity of Wire Mesh Drapery is 107,374 square feet.

30. AIS actually installed 329,072 square feet of Wire Mesh Drapery.

31. SEPTA acknowledged, agreed and accepted the fact the AIS installed 329,072 square feet of Wire Mesh Drapery.

32. On or about May 27, 2010, AIS submitted to SEPTA a request for compensation in the amount of \$1,136,108.79 which represents the additional 221,698 square feet of Wire Mesh Drapery installed above and beyond the Estimated Base Quantity. A true and correct copy of AIS' May 27, 2010 request for compensation is attached hereto as Exhibit "F".

33. After the submission of AIS' May 27, 2010 request for compensation, AIS adjusted its claim amount to accurately reflect credits for materials underutilized on the Project. As a result, AIS is due an additional \$1,020,299.29 for the additional work which it performed and SEPTA accepted.

34. Despite the admission by SEPTA that (1) the amount paid for quantities of unit priced items of work in excess of the Estimated Base Quantities would be determined by multiplying the unit price by the number of units by which the Estimated Base Quantities were exceeded, (2) AIS was required to install 221,671 square feet of Wire Mesh Drapery in excess of the Estimated Base Quantity, and (3) AIS satisfactorily and necessarily installed 221,671 additional square feet of Wire Mesh Drapery, SEPTA has failed and refused to remit payment to AIS.

35. Nonetheless, as evidence of its good faith, AIS continued to execute its obligations under the Contract in a timely and professional manner and achieved Substantial Completion on June 18, 2010.

Additional Work

36. AIS not only continued to execute its obligations under the base Contract in a timely and professional manner, AIS proceeded with additional and extra work requested by SEPTA.

37. After some significant storm damage occurred in the area of the job site, SEPTA requested that AIS perform repair work.

38. After negotiating the scope of work and price of \$108,095, AIS performed the storm damage repair work at SEPTA's direction.

39. Despite AIS' performance and SEPTA's direction, SEPTA has failed and refused to execute a formal change order and remit payment to AIS.

40. Further, SEPTA requested that AIS put in place a number of additional anchor bolts in various locations.

41. After negotiating the scope of work and price of \$30,000, AIS performed the anchor bolt work at SEPTA's direction.

42. Despite AIS' performance and SEPTA's direction, SEPTA has failed and refused to execute a formal change order and remit payment to AIS.

COUNT I
BREACH OF CONTRACT

43. The averments set forth in the foregoing paragraphs are incorporated herein by reference as though set forth at length.

44. SEPTA materially breached the Contract by failing and refusing to pay AIS the amount due for the work completed on the Project and in place.

45. SEPTA materially breached the Contract by failing and refusing to pay AIS the

amount due for the additional work performed.

46. SEPTA materially breached the Contract by failing and refusing to pay monies due AIS in a timely manner, and by otherwise failing and refusing to comply with the terms of the Contract.

47. SEPTA materially breached the Contract and violated the duty of good faith and fair dealing by artificially, deliberately, and, in bad faith, failing and refusing to pay monies due AIS in a timely manner.

48. As a direct and proximate result of the artificial, deliberate and bad faith failure and refusal to pay monies due AIS in a timely manner, AIS has suffered damages.

49. As a direct and proximate result of each of SEPTA's breaches of the Contract, AIS has suffered damages in excess of \$1,158,394.29.

50. All conditions precedent have been performed or have occurred.

WHEREFORE, Plaintiff AIS Construction Company demands judgment in its favor and against Southeastern Pennsylvania Transit Authority, for an amount in excess of \$1,158,394.29, plus interest, costs of suit, attorneys' fees, and other such relief as this Court deems just and proper.

COUNT II
PENNSYLVANIA'S CONTRACTOR AND SUBCONTRACTOR PAYMENT ACT

51. The averments set forth in the foregoing paragraphs are incorporated herein by reference as though set forth at length.

52. AIS supplied labor, services, and materials to SEPTA for a construction project located within the Commonwealth of Pennsylvania.

53. Pursuant to Pennsylvania's Contractor and Subcontractor Payment Act, 73 P.S.

§501 *et seq.* (“Payment Act”), AIS is entitled to recover interest at the rate of 1% per month and penalties at the rate of 1% per month on all contract funds being wrongfully withheld by the Authority.

54. Pursuant to the Payment Act, AIS is also entitled to recover its reasonable attorneys’ fees incurred in the institution and maintenance of this suit.

55. AIS has satisfied all conditions precedent to obtain protection under the Payment Act.

56. Therefore, SEPTA’s refusal to pay AIS for the labor, services, and materials AIS provided is wrongful and in violation of the Payment Act, entitling AIS to interest, penalties and attorneys’ fees, which said damages shall continue to accumulate through this litigation.

WHEREFORE, Plaintiff AIS Construction Company demands judgment in its favor and against Southeastern Pennsylvania Transit Authority, for an amount in excess of \$1,158,394.29, plus interest, costs of suit, attorneys’ fees, and other such relief as this Court deems just and proper.

COUNT III
QUANTUM MERUIT

64. The averments set forth in the foregoing paragraphs are incorporated herein by reference as though set forth at length to the extent that they support a recovery based on quantum meruit only.

65. At the request of SEPTA, AIS performed construction work at the Project, for SEPTA’s benefit, fully expecting compensation for the same.

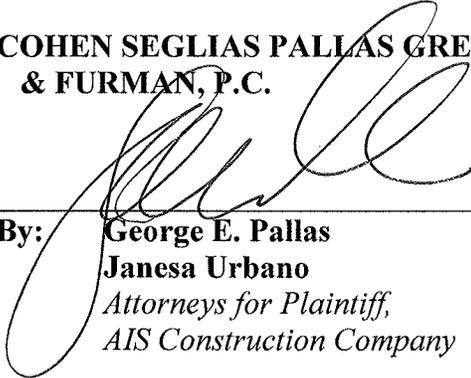
66. SEPTA has not paid AIS for all of the construction activities it performed on the Project.

67. AIS is entitled to the quantum meruit value of the construction activities AIS provided on the Project and for which SEPTA has not paid.

68. The quantum meruit value of the construction activities AIS provided on the Project for which SEPTA has failed and refused to pay is in excess of \$1,158,394.29.

WHEREFORE, Plaintiff AIS Construction Company demands judgment in its favor and against Southeastern Pennsylvania Transit Authority, for an amount in excess of \$1,158,394.29, plus interest, costs of suit, attorneys' fees, and other such relief as this Court deems just and proper.

**COHEN SEGLIAS PALLAS GREENHALL
& FURMAN, P.C.**



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