

**2001 DRAFTING REQUEST**

**Bill**

Received: **01/22/2002**

Received By: **kuesejt**

Wanted: **As time permits**

Identical to LRB:

For: **Steven Foti (608) 266-2401**

By/Representing: **Michael Heifetz**

This file may be shown to any legislator: **NO**

Drafter: **kuesejt**

May Contact: **Claims board**

Addl. Drafters:

Subject: **State Finance - claims agnst st**

Extra Copics:

Submit via email: **NO**

**Pre Topic:**

No specific pre topic given

**Topic:**

James Cape and Sons claim

**Instructions:**

Per claims board report, 12/21/01.

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	kuesejt 03/06/2002	csicilia 03/06/2002		_____			State
/1			jfrantze 03/06/2002	_____	lrb_docadmin 03/06/2002	lrb_docadmin 03/06/2002	

FE Sent For: *At intro*

<END>

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SJ PP 493-494

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17	kuesejt	3/6/02	3/6	3/6			

FE Sent For:

<END>

Jeff -

Please draft as  
claims bill.

Thanks

Mike H.

6-2401

(Rep. Foti)

# GODIN, GERAGHTY & BURATTI, S.C.

ATTORNEYS AT LAW

PHILLIP R. GODIN  
TIMOTHY J. GERAGHTY  
ROBERTA N. BURATTI  
KRISTEN S. PLUISTER

6301 GREEN BAY ROAD  
KENOSHA, WISCONSIN 53142  
TELEPHONE (262) 657-3500  
FACSIMILE (262) 657-1690

January 17, 2002

Thank you for agreeing to assist in having a bill presented to the legislature for payment of the claim asserted by James Cape & Sons Co. Attached are copies of the claim that was submitted to the State of Wisconsin Claims Board and the decision of the Claims Board. The claim was received by the Claims Board on June 4, 2001, and denied on December 7, 2001. The job at issue is Lake Parkway Storm Sewer in Milwaukee County, Project ID # 1300-04-85. Cape submitted the low bid for this project on March 21, 1995. I have also attached a copy of the contract specification addressing use of excavated material, upon which Cape relied in bidding this contract. Please contact me after you have had an opportunity to review this information to advise as to what additional information will be needed. Again, thank you for your assistance.

Sincerely,

GODIN, GERAGHTY & BURATTI, S.C.



Kristen S. Pluister

KSP/jch

STATE OF WISCONSIN CLAIMS BOARD  
CLAIM FOR DAMAGES AGAINST THE STATE



Submit one notarized copy of this form to the Claims Board, P.O. Box 7864, Madison, Wisconsin 53707-7864. Attach proof of loss; copies of all bills, receipts and insurance proceeds; and copies of medical and/or police reports, if applicable. If more space is needed for comments, continue on another page and attach. This information will be sent to the appropriate department or agency. (Please be aware that claim files are considered public records, therefore, any information submitted may be open to public inspection.)

Claimant's Name, Address and Phone Number:



Date(s) of Occurrence:

June 1995 - April 1997

James Cape & Sons Co.  
P.O. Box 044580  
Racine, WI 53401  
(262) 639-2552

State Agency Claim is Against:

Department of Transportation

Statement of Circumstances-Explain how claim arose. Attach additional pages and copies of supporting documentation, as needed.

See attached Statement of Circumstances.

Dollar Amount of Claim. Itemize all losses incurred. Attach copies of all bills and/or receipts to document amount claimed.

\$1,483,781.60. See attached itemization.

If you have insurance coverage, complete the insurance portion of this form, regardless of whether or not you have submitted a claim to your insurance company. Do not request reimbursement for damages paid for or covered by your insurance. If your insurance company wishes to file a claim for reimbursement, they must file on a separate form.

Insurance Coverage on above losses:  yes  no. If yes, state amount of coverage: \$ \_\_\_\_\_ Amount of Deductible: \$ \_\_\_\_\_  
Insurance Company: \_\_\_\_\_

I hereby certify that all statements contained herein and on any attachments hereto are true and that the losses claimed were actually incurred.

J.P. Godin  
Signature of Claimant

5/29/01  
Date

The above-named claimant personally came before me this day and is known to me to be the person who executed the foregoing instrument and acknowledged the same.

G. Jeanne L. Mero  
Notary Public

5/29/01  
Date

Racine County, Wisconsin

My Commission Expires: 10/21/01

**Statement of Circumstances:**

The Department of Transportation awarded James Cape & Sons Co. the contract for the construction of the Lake Parkway Storm Sewer from East Morgan Avenue to Lake Michigan Outfall STH 794. After Cape began performance under the contract, the Department of Transportation notified Cape that, contrary to the way in which Cape had interpreted the contract, the Department would not permit Cape to use excavated material for trench backfill unless the excavated material was granular backfill that met the specifications of Section 209 of the Standard Specifications. Because Cape was not permitted to use excavated material as trench backfill Cape incurred additional costs to complete the project. Additionally, the Department failed to provide Cape with access to the right of way as provided in the contract documents, thereby causing a delay in the completion of the project. Specifically, the Department failed to ensure that existing power lines and railroad tracks were relocated so as to avoid interference with the progress of the project. Cape incurred additional costs as a result of that delay. For additional details, see the accompanying binder of information entitled "Request for Equitable Adjustment to the Wisconsin Department of Transportation."

**Dollar amount of claim:**

Furnish and deliver granular material:	\$357,993.06
Extended performance direct costs:	\$327,519.55
Disposal of excavated material:	\$240,098.12
Extended and unabsorbed overhead:	\$124,697.96
Interest:	\$194,575.52
Additional bond costs:	\$ 4,139.55
Request preparation costs:	\$ 50,000.00
Profit @ 10%:	<u>\$100,942.61</u>
Total claim:	\$1,483,781.60

the claimant's services. The DOA states that the contract did not guarantee that the claimant would receive work for the full 2,000 hours or that she would receive the absolute amount of \$78,000.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

9. West Side Garage, Inc. of Berlin, Wisconsin claims \$2,579.34 for lost value of vehicle allegedly related to an error by DOT employees. The claimant received a 1999 pick up truck in trade, which was appraised for \$18,000. The Wisconsin Vehicle Title was not marked salvage. The claimant states that when it attempted to sell the vehicle, it was discovered that the vehicle had been previously titled in Missouri as salvage and that the salvage brand from the MO title was not carried forward to the new WI title issued by the DOT. The claimant has since sold the vehicle, and claims a loss of \$2,579.34.

The DOT recommends payment of this claim in the amount of \$2,579.34. After conducting an investigation of the claim, the DOT does find negligence on the part of its employee, Nancy Davis, for not carrying forward the Missouri salvage brand and instead issuing a clean Wisconsin title.

The Board concludes the claim should be paid in the amount of \$2,579.34 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Department of Transportation appropriation s. 20.395(5)(c), Stats.

10. James Cape & Sons, Inc. of Racine, Wisconsin claims \$1,483,781.60 for additional construction costs allegedly incurred on a DOT construction project. The claimant alleges that, after they began construction work, the DOT notified them that the DOT would not allow the claimant to use excavated material for trench backfill. The claimant alleges that this is contrary to their interpretation of the contract, which they claim does allow for use of excavated material as backfill. The claimant also alleges that the DOT failed to provide them with access to the right of way, as provided for in the contract, thereby causing a delay in the project. The claimant alleges that the DOT failed to ensure that existing power lines and railroad tracks were relocated so as to avoid any interference with the project, and that the claimant incurred additional costs as a result of the delays.

The DOT requests that this claim be denied. The DOT states that the contract specifications require that trenches be backfilled with granular backfill. The DOT states that the claimant is an experienced state contractor and was well aware that the state always requires the use of granular backfill in such situations. The DOT alleges that specific conversations with the claimant indicate that they were aware that they would need to use granular backfill in the project. The DOT also alleges that at a meeting in April 1995, an employee of the claimant specifically admitted that he bid the project as using granular backfill. The DOT states that the claimant did have access to the right of way and that the contract did not require the DOT to ensure that the existing power lines and railroad tracks be relocated so as to avoid interference with the progress of the project. The DOT states that the contract advised the claimant to contact utilities and required the claimant to utilize applicable and safe construction methods when working around utility lines.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

11. Michael & Mary Brown of Brookfield, Wisconsin claim \$88.12 for damage to tire allegedly caused by negligence of the DOT. The claimant states that at 10:30 PM on December 8, 2000, he was driving through a construction zone on Greenfield Avenue in Waukesha County. He states that there was a pole-style lane divider bent into his lane, which he had to swerve to avoid and that when he swerved, he hit a large pothole and damaged his tire and rim. The claimant states that he contacted the road contractor in charge of the project and was told that they would not pay the bill. He requests reimbursement for his tire damage.



trench backfill, then it shall be disposed of away from the project area, at no additional cost to the Department.

Subsection 607.3.3 of the standard specifications is supplemented as follows:

The contractor shall use beveled joint pipe sections for connecting into Type 6 manholes where the change in pipe direction is 10 degrees or less. The contractor shall use radius joint pipe sections for connecting into Type 6 manholes where the change in pipe direction is 10 degrees or more.

Subsection 607.3.4 of the standard specifications is supplemented as follows:

All pipe sections required to be watertight, as indicated on the plans, shall use annular rubber or plastic gaskets.

Subsection 607.3.5 of the standard specifications is supplemented as follows:

Storm sewer installed under existing paved driving surfaces shall be backfilled with special granular backfill. Said backfill will be paid for separately under item "Special Granular Backfill."

27. Reinforced Concrete Pipe Storm Sewers.

Subsection 608.1 of the standard specifications is supplemented as follows:

The contractor may choose, at his option, to install portions of the proposed storm sewer through the use of tunnelling methods. If so, such construction shall be in accordance with these specifications.

The contractor is cautioned against using "open-cut" installation methods for placing the proposed storm sewer at approximate Station 240"IA"+00, where it crosses under the ISP. Tunnelling or jacking the sewer pipe is the recommended method of installation to pass beneath the ISP. Under any technique, the contractor is responsible for supporting and protecting the ISP and its cathodic protection system at all times.

Subsurface investigations have been made and soil borings are as shown on the plans. The contractor is advised that reports entitled "Geotechnical Investigation - Lake Arterial" and "Supplemental Subsurface Exploration and Engineering Analysis - Storm Sewer Tunnel" are available from the Department by contacting Mr. Thomas Longtin at the Wisconsin Department

Prior to any water from the dewatering system being discharged into a local ditch system or sewer system, it shall be pumped or drained to a sediment basin approved by the engineer. The contractor shall be required to obtain any permits necessary to discharge water from the sediment basin(s) into the local sewer system. Such permits shall be presented to the engineer.

Any requirements and costs for such permit use shall be the responsibility of the contractor. All applicable legislative statutes, judiciary decisions, and regulations of the State of Wisconsin shall be followed.

The contractor shall not cause flooding by overloading or blocking the flow in the drainage facilities, and shall leave the facilities unrestricted and as clean as originally found. Any damage to facilities as a result of the contractor's operations shall be repaired or restored as directed by the engineer or the authority having jurisdiction, at the contractor's expense.

Discharge from sediment basins shall be essentially clear and shall not cause siltation or flooding in any existing drainage ditch or sewer.

The contractor, as directed by the engineer, is responsible for seasonally draining the storm sewer system to prevent damage from freeze/thaw conditions for the duration of the contract.

26. Storm Sewers.

Subsection 607.3.1 of the standard specifications is supplemented as follows:

During storm sewer installation, the contractor may excavate material which has the potential to be considered a solid waste or a hazardous waste as identified under the article "Environmental Work."

The contractor shall notify the engineer immediately upon excavation of materials that may be considered hazardous waste or solid waste. At the engineer's direction, the contractor shall segregate, stockpile (in 20 cubic yard piles), and cover with plastic the material, at an area designated by the engineer within the project work area.

The Department will perform sampling and soil testing of the stockpiled material. Disposal of the material, if it is found to be a hazardous or solid waste, will be the responsibility of the Department's State-wide Environmental Remediation Contractor. If the material is found not to be a hazardous or solid waste, the contractor shall utilize the material for trench backfill as appropriate. If it cannot be utilized as



State of Wisconsin  
2001 - 2002 LEGISLATURE

LRB-4759/0-1  
JTK.../...  
cjs

WED 1:00

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

*gen cat*  
AN ACT...; relating to: *???* **INS R**

*Analysis by the Legislative Reference Bureau*

**INS A**

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

**INS X**

(END)

2001-2002 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-4759/1ins  
JTK.....

wanted wed 3/6 - 1 PM

INS R

~~AN ACT~~ relating to: the expenditure of \$1,483,781.60 from moneys appropriated to the department of transportation for payment of a claim against the state made by James Cape and Sons Company.

INS X

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

**SECTION 1. Claim against the state.** There is directed to be expended from the appropriation account under section 20.395 (3) (bq), (br) or (bx) of the statutes, or any combination thereof, as determined by the department of transportation, \$1,483,781.60 in payment of a claim against the state made by James Cape and Sons Company, Racine, Wisconsin, to compensate it for the costs of additional work that was not contemplated under its contract with the department of transportation for construction of a storm sewer in Milwaukee County at Lake Parkway during the period from 1995 to 1997 and certain related costs. Acceptance of this payment ~~operates as a full and complete release to~~ this state and its officers, employees and agents from any further liability to the claimant resulting from the performance of this work.

NON STAT  
please use correct component

(END)

releases

INS A

This bill directs expenditure of \$1,483,781.60 from moneys appropriated to the department of transportation (DOT) in payment of a claim made by James Cape and Sons Company against DOT. During the period from 1995 to 1997, the claimant performed work for DOT under contract for the construction of a storm sewer at Lake Parkway from East Morgan Avenue to the Lake Michigan outfall in Milwaukee County. The claimant alleges that it performed additional work on this project and incurred related costs that were not contemplated by its contract with DOT. The costs resulted from DOT's refusal to permit the claimant to use a certain kind of trench backfill and DOT's failure to provide the claimant with access to the project right of way by ensuring relocation of certain power lines and railroad tracks, plus interest and claim preparation costs. DOT alleges that the specifications required the type of backfill that was used on the project and that the contract did not require DOT to ensure that power lines and railroad tracks be relocated. On December 21, 2001, the claims board recommended denial of this claim (see *Senate Journal*, pp. 493-494).

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

A vertical line of scribbles with two larger, more dense scribbles at the bottom, possibly representing initials or a signature.

STET:  
leave every thing  
as originally  
typed



# State of Wisconsin

## LEGISLATIVE REFERENCE BUREAU

100 NORTH HAMILTON STREET  
5TH FLOOR  
MADISON, WI 53701-2037

STEPHEN D. MILLER  
CHIEF

LEGAL SECTION: (608) 266-3561  
LEGAL FAX: (608) 264-6948

March 6, 2002

### MEMORANDUM

To: Representative Foti

From: Jeffery T. Kuesel, Managing Attorney

Re: LRB-4759/1 James Cape and Sons claim

The attached draft was prepared at your request. Please review it carefully to ensure that it is accurate and satisfies your intent. If it does and you would like it jacketed for introduction, please indicate below for which house you would like the draft jacketed and return this memorandum to our office. If you have any questions about jacketing, please call our program assistants at 266-3561. Please allow one day for jacketing.

JACKET FOR ASSEMBLY  JACKET FOR SENATE

If you have any questions concerning the attached draft, or would like to have it redrafted, please contact me at (608) 266-6778 or at the address indicated at the top of this memorandum.

If the last paragraph of the analysis states that a fiscal estimate will be prepared, the LRB will request that it be prepared after the draft is introduced. You may obtain a fiscal estimate on the attached draft before it is introduced by calling our program assistants at 266-3561. Please note that if you have previously requested that a fiscal estimate be prepared on an earlier version of this draft, you will need to call our program assistants in order to obtain a fiscal estimate on this version before it is introduced.

Please call our program assistants at 266-3561 if you have any questions regarding this memorandum.

Jeff -

Please jacket  
for info and  
return to me  
in the GAR room  
As soon as possible

Thanks -  
MHA