

COMMONWEALTH OF PENNSYLVANIA

IMPACT MANAGEMENT SYSTEMS, INC. : BEFORE THE BOARD OF CLAIMS
: :
VS. : :
: :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF GENERAL SERVICES and :
STATE SYSTEM OF HIGHER EDUCATION, :
WEST CHESTER UNIVERSITY : DOCKET NO. 1368

FINDINGS OF FACT

THE PARTIES

1. Claimant is Impact Management Systems, Inc., (hereinafter referred to as “IMS”), a Pennsylvania corporation incorporated in 1974. (Complaint and Answer; N.T. 717, 854)

2. Respondents are the Commonwealth of Pennsylvania, Department of General Services (hereinafter referred to as “DGS”) and the State System of Higher Education, West Chester University (hereinafter referred to as “WCU” or collectively referred to as “the Commonwealth”). (Complaint and Answer)

3. IMS was originally incorporated by John Stout (“Stout”) and Howard Bozich (“Bozich”) in 1974 as a social work management consulting firm. IMS operated as a social work management company from 1974 through 1979 and was terminated as such in 1979, although the corporate entity known as “IMS” remained in existence. (N.T. 717, 718, 854)

4. IMS operated as an energy services management company during the period from 1982 through 1989. During this period, Stout served as President of IMS and Bozich was the CEO and Treasurer of the company. Both Bozich and Stout have educational backgrounds and employment experience in the area of social work. Bozich and Stout had worked together in various social work occupations for a substantial number of years prior to forming IMS. Although Bozich had some experience in the energy consulting field prior to resurrecting IMS as an energy services management company in 1982, Stout had no such experience. (N.T. 705-717, 847-850, 975-978, 1110, 1111)

5. IMS had limited experience as an energy services management company prior to becoming involved as a bidder in the Commonwealth’s Program which resulted in the instant claim. (N.T. 896, 1114, 1136)

6. DGS served as contracting agent for the Commonwealth of behalf of WCU with respect to the WCU Project. DGS was signatory to the Energy Services Agreement, along with WCU, and had legal authority to act on behalf of the Commonwealth and WCU. (N.T. 38-40, 115)

RFP PHASE I

7. The Commonwealth decided in the early 1980's that it was spending millions of dollars because its buildings were not energy-efficient and due to rising energy costs. Even though there was technology available to the Commonwealth to operate more efficiently, funding constraints limited its ability to implement traditional Projects necessary to reduce energy consumption. The Governor's Energy Council for the Commonwealth formed a task force to develop a program entitled "Third-Party Financing of Energy Conservation Projects at State-Owned Facilities" ("the TPF Program"). The TPF Program was established as a pilot program through which major Energy Improvements would be implemented at six selected Commonwealth facilities, including WCU. The six pilot program facilities were selected in a two-phase procurement process known as RFP Phase I and RFP Phase II, which were put together by the TPF task force and a private firm known as Greeley-Polhemus Group, Inc. (Exhibit R-34, page 1; N.T. 64-71)

8. The Commonwealth issued a Request for Proposals for Phase I of the TPF Program at six selected Commonwealth facilities in June of 1984. Energy firms were invited to submit qualifications and energy savings proposals for each of the six pilot program sites through RFP Phase I. The purpose of the TPF Program was specifically described in Section 1.2 of RFP Phase I as to facilitation of the major improvements at up to six state-owned facilities, without the necessity for capital expenditures on the part of the Commonwealth, in order to provide the greatest costs savings to the Commonwealth at the lowest risk. (Exhibit R-34)

9. RFP Phase I contained a number of various sections that are relevant to the instant claim. Section 4 required each respective energy firm to outline its proposed scope of work regarding each of its Energy Improvement ideas, while Section 4.1 requested that prospective energy firms present proposals related to the 18 specific buildings and dormitories located on the main campus of WCU. Section 2.2.6 (a) provided that all material submitted in response to the request for proposals contemplated by Phase I would become the property of the Commonwealth. Section 2.2.6 (a) through (c) further provided that the Commonwealth had the right to use any ideas or concepts presented in such proposals without compensation to the proposer, unless such materials, ideas or concepts were specifically identified as being "proprietary". (Exhibit R-34; sections 4, 4.1, 2.2.6 (a) through (c))

10. The Commonwealth received proposals in response to RFP Phase I, and certain firms were selected to proceed with the RFP Phase II process. IMS was one of those firms which responded to RFP Phase I and was selected by the Commonwealth to proceed to RFP Phase II with regard to the WCU site. (N.T. 72-74, 87)

RFP PHASE II

11. The Commonwealth subsequently issued the Third-Party Financing Program Request for Proposals Phase II (hereinafter "RFP Phase II"). RFP Phase II, §1.3, stated that the selection of the winning proposal would be primarily based on the value of the cost savings to the

Commonwealth. Section 1.3 also provided that the economic viability of the proposed Energy Improvement Project would be a major factor in the selection of the successful bidder. Section 1.3 additionally indicated that the technical expertise and experience of the bidder would also be important in the selection of the winning proposal. RFP Phase II, §1.2 reiterated the purpose of the TPF Program to implement Energy-Savings Improvements at the six pilot sites without capital expenditures on the part of the Commonwealth. (Exhibit C-2, sections 1.2 , 1.3)

12. In response to RFP Phase II, IMS submitted a proposal for the West Chester Project on or about November 27, 1984. The proposal consisted of a financial portion and a technical portion, and a Technical Proposal was submitted by IMS along with the assistance of Entech Engineering, IMS' subcontractor. Contained within the Technical Proposal was a description of each "Energy Conservation Measure" (hereinafter "ECM"), including the summer boiler shutdown, which was ECM number 2.

13. IMS prepared the Phase II Financial Proposal, and included within the proposal language, was an advisement by IMS to the Governor's Energy Council that it would have complete costs for the Project following a final engineering review. Those costs would be reviewed by the Commonwealth at that time. (Exhibit C-3, §A-2; N.T. 95)

14. RFP Phase II, §1.4 required that each energy firm, in conjunction with preparing and presenting its proposal in response to RFP Phase II, would visit the Commonwealth facility at issue and obtain all relevant information by conducting a thorough energy systems audit. RFP Phase II, §2.3 also reiterated that all materials, concepts or ideas submitted by any prospective energy firm would become the property of the Commonwealth in the absence of a specific designation indicating "proprietary" by a prospective contractor concerning their materials, ideas and concepts. (Exhibit C-2, sections 1.4, 2.3)

15. RFP Phase II, §2.3(b) expressly stated that the Commonwealth would not be liable for any costs incurred prior to the issuance of a contract. (Exhibit C-2, section 2.3(b))

16. A review of the Financial Proposal submitted by IMS indicates that the Claimant represented it could undertake and implement the Energy Improvements contemplated at WCU with no financial risk to the Commonwealth and no cash outlay by the Commonwealth because of IMS' ability to guarantee a majority of the projected savings. IMS' Financial Proposal contemplated that IMS would borrow \$2,671,000.00 to finance the WCU Project from a third-party funding source and the debt would be paid back by IMS over a seven-year period at 11.5% interest per annum. This proposal contemplated that WCU would pay IMS "lease" payments equal to the amount of the debt service over the course of a seven-year lease term. The Financial Proposal submitted by IMS indicated that the total cost of implementing the 25 Energy Conservation Opportunities ("ECOs") identified for the WCU site would total the same amount, i.e. \$2,671,000.00. (Exhibit R-2)

17. According to IMS' Financial Proposal, WCU would generate funds necessary to pay the equipment lease payments to IMS from the money saved through the implementation of the 25

EOCs identified in IMS' Technical Proposal. In IMS' Financial Proposal, at page 2, the projected savings for energy costs at WCU over the seven-year term suggested by IMS equaled \$9,522,481.00. (Exhibits R-2, page 2, R-3)

18. In IMS' Financial Proposal, at page 7, IMS represented that not only would the projected energy savings exceed the equipment lease payments on a year-to-year basis over the course of the seven-year lease term, the savings would also exceed other contemplated costs known as maintenance, monitoring and management fees to be paid to IMS. Accordingly, there would be no need for the Commonwealth to spend additional money to implement the WCU Project. (Exhibit R-2, page 7)

19. IMS' Financial Proposal included schedules representing that WCU would realize net energy cost savings of \$193,006.00 in the first full year of the operation of the Project, after equipment lease payments, maintenance, monitoring and management fees paid to IMS. The net energy cost savings continued to rise each year to the level of \$965,348.00 by the seventh year of the contract. (Exhibit R-2, page 7)

20. With respect to its Technical Proposal, IMS identified Entech as the engineering firm it would use for all technical issues. It represented that Entech was experienced and would provide the technical expertise necessary to implement the 25 ECOs at WCU. In fact, in a document entitled "Entech's Energy Analysis for West Chester University", which was incorporated into IMS' Technical Proposal, the 25 ECOs were identified along with a cover letter dated November 27, 1984. (Exhibit R-3)

21. The Energy Conservation Opportunities identified in the Technical Proposal submitted by IMS and Entech for the WCU Project included the installation of an energy management system, the summer shut-down of WCU's central steam plant, requiring installation of electric chillers and natural gas, off-peak electric hot water heaters in dormitories and other main campus buildings, improvements to the steam pressure, conversion of the South Campus Field House from electric heat and hot water to natural gas heat and hot water, air supply and heat recovery systems in the central steam plant, and conversion and improvement of shower heads, lighting and various other energy equipment located around the campus, to more commonly known cost-effective and energy-efficient models. Some of the ECOs identified by IMS were commonly known Energy Conservation Measures at the time. (Exhibits R-3, appendix I, R-67; N.T. 1400-1402, 1412)

22. IMS' Technical Proposal did not contain any technical design information, drawings or specifications relating to the implementation of the proposed ECOs and at no time did IMS or Entech ever provide the Commonwealth with any technical design information, drawings or specifications relating to the proposed ECOs for WCU. (Exhibit R-3; N.T. 662-665)

23. IMS' Technical Proposal indicated that all equipment and hardware necessary to implement the suggested ECOs were to be purchased on the open market from brand-name equipment vendors preferable to WCU operations' personnel. (Exhibit R-3, page 28)

24. Although IMS' Howard Bozich claims he personally stamped "every page and each copy, each volume, proprietary", neither IMS' Financial Proposal nor its Technical Proposal identified any of the proposed ECOs as "proprietary". (N.T. 1013; Exhibits R-2, R-3, C-3)

25. On March 22, 1985, IMS was selected as the winning bidder for the WCU Project pursuant to the information it provided in its Financial and Technical Proposals submitted in response to RFP Phase II. (Exhibit R-4)

ENERGY SERVICES AGREEMENT

26. Upon being selected as the winning bidder for the WCU Project, IMS began negotiating with WCU concerning the contemplated Energy Services Agreement ("ESA") that was to be entered into between the parties. The negotiations began on or about March 22, 1985, and resulted in the ESA being executed by the parties on November 6, 1986. During the negotiations, IMS represented that the project cost and projected energy savings figures were subject only to final fine-tuning as a consequence of the detailed engineering analysis. (N.T. 285, 286, 294)

27. Accordingly to Gary Ankabrandt, who, at the time the instant claim accrued, was part of the Task Force for the Governor's Energy Council with the Commonwealth of Pennsylvania, charged with the task of developing Requests for Proposals, such as those in the instant claim, at no time prior to the execution of the ESA did IMS contact him and tell him that the projections contained on Page 7 of IMS' Financial Proposal were no longer valid. (N.T. 294)

28. During the ESA negotiations, the Commonwealth's Dr. Joseph Hamil, Vice-President of Fiscal and Administrative Affairs at WCU, expected that IMS would be keeping a watch on the construction costs and watching over the energy costs during the WCU Project. Mr. Hamil testified that he relied "very heavily" on the total projected costs as listed on page 2 of the Financial Proposal, up until the ESA was signed by all parties. He also indicated that he relied very heavily on the numbers contained on Page 7 of IMS' Financial Proposal, again, up until the ESA was executed. (N.T. 461-463)

29. Dr. Hamil also testified that up until the time the ESA was signed on November 6, 1986, IMS never told him that the energy cost production numbers contained on Page 7 of its Financial Proposal were invalid. He also indicated that IMS never told him, up until the time the ESA was signed on November 6, 1986, that the total projected cost of \$2,671,000.00 was invalid. (N.T. 464)

30. Dr. Hamil also stated that he placed "great reliance" at or about the time the ESA was signed in November of 1986, on Preliminary Schedule "N" attached to the Energy Services Agreement, which indicated to Dr. Hamil that the Project would pay for itself. (N.T. 464, 465)

31. Prior to the signing of the ESA, a meeting was held between Claimant and WCU wherein Dr. Joseph Hamil advised Howard Bozich, of IMS, that WCU would not sign the ESA

unless it had very strict language relative to the energy savings insurance guaranty. WCU considered this guaranty to be extremely important in protecting the original intent of the TPF Program relative to the Commonwealth's desire to have no financial risk and no cash outlay. As a consequence of this meeting, the language contained in Section 5.6 of the ESA was developed. Dr. Hamil indicated that he placed "tremendous importance" on Section 5.6 at the time the ESA was executed. (N.T. 457, 458, 1204, 1205)

32. The Energy Services Agreement stated, in Section 1.1, that the Claimant had prepared a complete energy-use audit and conservation plan which had been approved and accepted by the Commonwealth. IMS' program was to include a more detailed engineering analysis to be performed by IMS after the ESA was executed and included all schedules mentioned herein, which, according to the ESA, "are incorporated or will be incorporated herein and made a part hereof which include the specific energy improvements to be made by IMS and the compensation to be paid by the Commonwealth." (Exhibit R-5, section 1.1)

33. Section 1.2 of the ESA outlined the Preliminary Schedules which had already been prepared, while Section 1.3 of the ESA referenced "final schedules to be prepared". Section 1.3 indicated that ("[a]fter IMS has completed a detailed engineering analysis, based upon its proposal dated November 27, 1984, and this Agreement, which will specifically identify the energy improvements to be made, IMS will develop and prepare final drafts of the schedules referenced in Section 1.2 of this Agreement. The final schedules shall then be submitted to Commonwealth for its review and approval. The parties shall use their best efforts to reach agreement regarding the contents of the schedules. . . .") (Exhibit R-5, sections 1.2, 1.3; Emphasis added)

34. Section 1.3 of the ESA also indicated that: "[i]f the parties can not reach agreement regarding the contents of the schedules, Commonwealth may terminate this Agreement and IMS shall be reimbursed for the reasonable direct costs of the detailed engineering analysis." (Exhibit R-5, section 1.3)

35. Section 1.2 of the ESA states that at the request of the Commonwealth, the Claimant must provide "step-by-step explanation" of details/computations of the Final Schedules prior to approval by the Commonwealth. (Exhibit R-5, section 1.2)

36. Sections 3, 4 and 5 of the ESA stated that the Commonwealth would make equipment lease payments to IMS for a seven-year term pursuant to Preliminary Schedule "N" of the ESA, while Section 2.5 required the Commonwealth to pay IMS certain maintenance, monitoring and management fees as stated in Preliminary Schedules "O" and "P". (Exhibit R-5, sections 3.5, 3, 4, 5)

37. Section 5.6 of the ESA entitled "Savings Guaranties" indicated as follows:

Notwithstanding the provisions above with regard to management and monitoring fees and Equipment operation and maintenance, no such fees will be due and

payable to IMS except from energy dollar savings in excess of Schedule N amounts. Further, Commonwealth's agreement to make Equipment lease payments is conditional upon the issuance of a guaranty by a financially responsible party (insurance company or other entity satisfactory to the Commonwealth) that the energy dollars saved pursuant to the performance of this Agreement by IMS will be no less than the lease payments (Schedule N amounts) required by Section 5.1 above. West Chester University will be designated the loss payee under the guaranty. In the event that, in any given month, savings achieved fall below the debt service payment requirements West Chester University shall have the option of paying the shortfall itself or requiring IMS to immediately make up the shortfall. In the event of a shortfall, payments from the system performance guaranty shall be made to West Chester University only on an annual basis.

(Exhibit R-5, section 5.6)

38. Section 6 of the ESA required IMS to submit drafts of the Final Schedules within ninety days of the execution of the ESA. The schedules were to include completion dates for the various tasks/phases of the work to be performed by IMS as well as installation dates for the equipment. The Commonwealth was then required to use its best efforts to review and either approve or disapprove the drafts within sixty days after receipt. (Exhibit R-5, Section 6)

39. IMS attached to the executed ESA a document identified as Preliminary Schedule "N", thus representing the monthly equipment lease payments to be paid by the Commonwealth which would be based on a project cost of \$2,671,000.00 financed at 11.5% interest per annum over the seven-year term. According to Schedule "N", the Commonwealth's equipment lease payment obligation would be \$46,439.24 per month for 84 months or \$557,271.00 per year over the seven-year term. (Exhibit R-5, Preliminary Schedule "N")

40. Preliminary Schedules "O" and "P" were also attached to the ESA and reflected the Commonwealth's obligation to pay maintenance, monitoring and management fees to IMS equaling \$127,050.00 per year, or a total of \$889,350.00 over the course of the seven-year lease term. Also attached to the ESA was a Preliminary Schedule "C", indicating, in Attachment "B", that WCU would derive energy savings in the first full year of operation through the 25 ECOs identified in the Technical Proposal, in the amount of \$891,728.00. These savings were projected to increase to \$1,179,551.00 in the second full year and increase to \$1,603,515.00 in the seventh full year, for a total projected energy savings of \$9,284,455.00 over the seven-year lease term. (Exhibit R-5, Preliminary Schedules "O" and "P", Schedule "C", attachment "B")

41. According to Preliminary Schedule “C”, attached to the ESA, WCU would derive a net positive energy savings after payment of the equipment lease payments and all maintenance, monitoring and management fees, totaling \$4,196,241.00. (Exhibit R-5, Preliminary Schedule “C”)

42. Paragraph 39 of the ESA entitled “Order of Precedence”, reads as follows:

If any conflicts or discrepancies should arise in the terms and conditions of this Agreement or the interpretation thereof, the language of the Agreement shall be the first point of reference; IMS’ proposal, the second point of reference; and the Request for Proposals, the third point of reference.

(Exhibit R-5, section 39)

43. According to Gary Ankastrand and Dr. Hamil, the Commonwealth gave significant weight and relied upon IMS’ representations contained within its Financial Proposals and the ESA Preliminary Schedules with respect to projected costs, energy savings and the economical benefit of the Project. (N.T. 293, 294, 461-465)

IMS’ LETTER OF MAY 1, 1987

44. On May 1, 1987, IMS submitted a Detailed Engineering Analysis and Proposed Final Schedules to WCU. With its letter of May 1, 1987, IMS advised WCU for the first time that the projected costs of the Project had escalated to \$3,867,820.00 or an increase in cost of \$1,196,820.00. In Preliminary Schedule “N” to the ESA, the project cost was represented by IMS to be \$2,671,000.00. (Exhibits R-5, Preliminary Schedule “N”, C-142; N.T. 473)

45. In its letter of May 1, 1987, directed to Mr. Hamil of WCU, IMS indicated that the project cost had escalated by 44.8%, and that the first year projected energy savings were \$770,571.00, or \$121,157.00 less than the original amount of \$891,728.00 projected by IMS in its Technical Proposal and ESA Preliminary Schedule “C”. (Exhibit R-5, Preliminary Schedule “C”, attachment “B”, C-142)

46. The reasons given by IMS in its letter of May 1, 1987, for the increased costs and the reduced energy savings are as follows:

1.) Elapsed Time: Thirty months have gone by since our first costs were calculated and project costs have risen in that time.

2.) Full Scope Project: Per the University’s request, IMS has presented the full scope project based on our original

proposal list. This list includes some long pay back items which IMS would normally drop from the project given economic considerations.

3.) Expansion of the Energy Management System: The EMS includes additional control monitoring points as well as having the per point cost of the system increase substantially in the past two years.

4.) A new bag house filter system has now been added to ECO 3.

5.) Dual fuel capability has been added to the South Campus heating, including a new double wall oil storage system.

6.) Stadium and tennis court lighting have been upgraded to insure proper light coverage.

7.) Light levels in Lawrence and the Library have been increased to bring the buildings within IES recommended light levels.

(Exhibit C-142)

47. IMS advised WCU, in its letter of May 1, 1987, that it would guarantee 65.11% of the first year projected savings of \$770,571.00 per year, throughout the course of the seven-year lease term. In that regard, the following language appears in IMS' letter of May 1, 1987: "As originally presented in our Audit Report dated November, 1984, IMS proposed to guarantee 65.11 % of the first year projected savings level. IMS will guarantee this same savings percentage which provides for a Guarantee Amount of \$501,727. annually." This guaranty suggested by IMS in their letter of May 1, 1987 was less than the debt service, or lease payments, WCU would be required to pay on the new project cost suggested on the first page of the letter in the amount of \$3,867,820.00. A review of IMS' cover page of November 27, 1984, relative to the Claimant's Financial Proposal indicates IMS agreed to cover "75-85% of the IMS projections" relative to achievement of savings, while the Energy Audit prepared by Entech, submitted also in November of 1984, does not appear to address the insured savings issue. In Section "E" of the Phase II, Volume II Financial Proposal, IMS stated: "Our investors require an insured savings stream level of 85%." The issue was finalized in Section 5.6 of the ESA entitled "Savings Guaranties" wherein the parties agreed that the Commonwealth's agreement to make equipment lease payments was conditional upon the issuance of a guaranty by a financially responsible party (insurance company or other entity satisfactory to the Commonwealth), but the energy dollars saved pursuant to the performance of the agreement by IMS

would not be less than the lease payments. WCU's Dr. Hamil was "shocked" by IMS' proposal to guarantee only 65.11% of the first year projected savings level. (Exhibits C-3, Volume II, cover letter and pg. 21; C-142, R-5, section 5.6; N.T. 1189, 1190, 1204-1229)

48. Subsequent to IMS' letter of May 1, 1987, WCU and IMS continued to negotiate; however, IMS maintained that the guaranty amount would continue to be based on 65.11% of the base year savings. IMS maintained that this percentage was agreed to by Mr. Howard Bozich of IMS and Mr. Hamil of WCU when the University decided to seek its own funding in 1986. However, Section 5.6 of the ESA specifically states that the Commonwealth's agreement to make lease payments is conditional upon the issuance of a guaranty by a financially responsible party (insurance company or other entity satisfactory to the Commonwealth) that the energy dollars saved pursuant to the agreement would be no less than the lease payments set forth in Schedule "N" and required by Section 5.1 of the ESA. Furthermore, Dr. Hamil indicated under oath that he was "surprised" by the 65.11% figure and that IMS' guaranty of only 65.11% was "something new to me." Dr. Hamil also testified that he: "hadn't heard about it. And I didn't understand where it came from or what it meant, but it didn't look good." Dr. Hamil further testified with regard to the guaranty issue that Section 5.6 of the ESA was of tremendous importance to him and that it was a "deal breaker". (Exhibits R-5, section 5.6, R-18, R-21, R-22, R-26; N.T. 1203, 1204)

49. In correspondence to WCU from IMS, dated August 21, 1987, September 4, 1987, September 10, 1987 and September 29, 1987, the parties continued to negotiate, and IMS attempted to explain the guaranty issue, increased costs, lengthening the Project, and possible amendment of the ESA. New schedules were submitted to WCU from IMS with aforementioned correspondence. However, Dr. Hamil was not satisfied with IMS' explanations regarding increased project costs and he felt such costs should have been disclosed during the time the ESA was negotiated. Dr. Hamil also felt that IMS' letter of May 1, 1987, changed the scope of the Project in that some of the ESOs were missing, and he was not satisfied with a number of the changes now being instituted by IMS. (Exhibits R-18, R-21, R-22, R-26; N.T. 1197-1202)

50. Dr. Hamil was also "puzzled" by IMS' letter of May 1, 1987, wherein it is indicated that the projected savings level "increased" from \$723,635.00 to \$770,571.00. Dr. Hamil testified that, according to the Energy Services Agreement, Preliminary Schedule "C", Attachment "B", the first year projected savings were \$891,721.00. (Exhibits R-5, Preliminary Schedule "C", attachment "B", C-142; N.T. 1202, 1203)

51. Dr. Hamil testified that he expected the adjustments to be made through the Final Detailed Engineering Analysis to contain some "small increase in the price" that would perhaps "on the outside. . .be. . .something like 10 to 12 percent", as opposed to the 44.8% increase presented by IMS in its letter of May 1, 1987. (Exhibit R-18; N.T. 1207, 1208)

52. Clyde Fuhrmeister worked for IMS during 1986 and 1987 in their Operations Division performing public sector shared savings. Mr. Fuhrmeister candidly acknowledged that the WCU Project was not as economically viable as it once had been described after IMS submitted a Detailed Engineering Analysis to WCU with its letter of May 1, 1987. (Exhibit C-142; N.T. 530-533, 632)

53. On May 26, 1987, a letter was sent to IMS from WCU outlining many concerns regarding the Final Engineering Analysis and contract schedules which WCU had received in IMS' letter of May 1, 1987. In that letter, from Shari L. Evans, the Energy Manager from WCU, to Mr. John Stout of IMS, WCU questions IMS' explanation relative to the 44.8% increase in project costs, the decrease in first year energy savings, and specific suggestions by IMS for items such as the dual fuel capacity of heating equipment and double wall fuel storage tanks. Also questioned in WCU's letter of May 26, 1987, are various important contract schedules that directly impact the cost and savings of the project. It is apparent, from Ms. Evans' letter of May 26, 1987, that the 65.11% issue came as a surprise. More specifically, Ms. Evans asked, in relationship to the 65.11% savings guaranty, the following questions: "How was the guaranty amount determined?" and "Is the guaranty amount 65.11% of savings annually or just for the first year? Is \$501,727.00 a minimum guarantee amount?" Ms. Evans also lists ten general concerns relative to IMS' letter of May 1, 1987. (Exhibit R-10)

54. IMS' subsequent attempts to present a series of alternative proposals to the Commonwealth were unsuccessful. By letter dated September 2, 1987, WCU advised IMS that it was not satisfied with the scenarios presented on August 10, 1987, and further advised IMS that the original intent of the Project must be restored before the University would proceed. In WCU's letter of September 2, 1987, WCU pointedly asks, regarding IMS' proposal of August 10, 1987 and the guaranteed level of savings, the following questions: "Why is this amount less than the debt service payments? Why is there a guarantee for only 65.11% on the base year savings? In the original proposal, the 'guaranty amount was determined as the debt's percentage of projected savings.' If the achieved savings are less than projected and less than the debt service who will be responsible for the short-fall? According to the original Financial Proposal (11/84) if there are no savings then no payments are made to IMS. What if there are savings but not enough to cover the debt service or if achieved savings are less than the total for debt, management and monitoring fees." (Exhibits R-18, R-20, R-21, R-22, R-26)

55. In its letter of September 4, 1987, IMS indicated that the guaranty amount of \$495,715.00 as contained in IMS' August 10, 1987 letter, was based on "65.11% of the base year MMBTU¹ Savings." Nowhere in Section 5.6 of the ESA does the concept of "MMBTU Savings" appear; rather Section 5.6 of the ESA indicates that IMS would provide a guaranty in terms of "energy dollars saved." IMS' John Stout's attempt to explain this discrepancy focused on

¹ Howard Bozich of IMS explained the acronym "MMBTU" as either a "million BTUs" or "a lot of BTUs" . . . or an increment of BTUs "times something." (N.T. 1018, 1019)

uncontrollable factors such as inflation and fuel costs. Mr. Stout also refused to acknowledge the difference between “MMBTU Savings” and “Dollars Savings” at the time of trial, despite the fact that Section 1.04 of IMS’ proposed amendment to the ESA specifically delineated a change in the insurance industry from “insuring dollars to insuring BTUs of savings.” (Exhibits R-5, Section 5.6, R-21, R-26, amendment to ESA, pg.1; N.T. 903-905)

56. WCU’s Dr. Joseph Hamil testified that the change from energy dollar savings to “MMBTU Savings” was a “change from anything that I had seen up to that point”, in reference to IMS’ letter of September 4, 1987. Dr. Hamil also stated, with respect to IMS’ letter of September 4, 1987, that the letter did not talk about covering the full amount of the debt service and did not talk in dollars. Dr. Hamil felt that the MMBTU Savings were completely different and a complete change and not in agreement with Section 5.6 of the ESA. (N.T. 1222-1224; Exhibit R-21)

57. IMS also advised WCU in its letter of September 4, 1987, that Juran & Moody, the proposed funding source, was working on a “draft amendment” to the ESA. (Exhibit R-21)

58. On September 23, 1987, IMS submitted final drafts of the ESA Schedules and additional financial scenarios to WCU. IMS’ final drafts and additional financial scenarios were still contradictory to the original language of Section 5.6 of the ESA in that they continued to reflect debt services (i.e. equipment lease payments) exceeding the guaranteed energy savings. (Exhibits R-5, section 5.6, R-25, attachments, Draft Schedule “C”, page 3)

59. On September 29, 1987, IMS submitted substitute Schedules “C” and “N”, Financial Spreadsheets and a proposed Amendment to the Energy Services Agreement. The substitute Schedule “C” and “N”, Financial Spreadsheets, reflect a debt service (i.e. equipment lease payments) again in excess of the guaranteed energy savings as set forth in Section 5.6 of the original Energy Services Agreement. (Exhibit R-5, section 5.6, R-26)

PROPOSED AMENDMENT OF THE ESA

60. IMS, in its letter dated September 29, 1987, also submitted to WCU a proposed Amendment to the Energy Services Agreement and in the proposed Amendment, Section 5.6 contained no energy savings guaranty language concerning WCU’s financial obligation to make equipment lease payments. Section 5.6 of the proposed ESA Amendment was significantly different from the language contained in Section 5.6 of the original ESA. (Exhibits R-5, section 5.6, R-26, pg. 4 of proposed Amendment to ESA, section 5.6)

61. Section 5.6 of the proposed ESA Amendment also based the Commonwealth’s obligation to pay maintenance, monitoring and management fees to IMS, upon IMS achieving 65% to 100% of “MMBTU Savings” projected on the final draft Schedule “C”. It appears that IMS’ explanation for this requested change is suggested in Section 1.04 of the proposed Amendment to ESA, wherein, the following language appears: “Subsequent to November 6, 1986, the insurance industry has changed its energy policies from insuring dollars to insuring BTUs of savings.

Therefore, it is necessary to amend the ESA to reflect the change to a performance insurance policy.” (Exhibit R-26; N.T. 908, 909)

62. IMS submitted a financial statement to WCU, at the request of the University, on October 20, 1987, for the 10-month period ending October 31, 1986. This financial statement indicated that IMS’ financial condition was such that the company had sustained net losses during the first 10 months of 1986, totaling \$1,013,213.00, and its liabilities exceeded its assets. Upon receipt of this financial information for the 10-month period ending October 31, 1986, WCU became concerned relative to IMS’ ability to perform under the terms of the ESA and on October 21, 1987, WCU advised IMS that it was rejecting the documents, including the proposed ESA Amendment, Schedule “C”, Scenario 3, dated September 26, 1987, and the final draft ESA Schedules “C”, “M”, “N”, “O” and “P”, dated September 29, 1987, because they were inconsistent with the original ESA. (Exhibits R-27, R-36; N.T. 1252-1254)

63. WCU, in an effort to salvage the Project with IMS, submitted to IMS a counterproposal draft Schedule “C” for IMS’ consideration which IMS rejected. (Exhibits R-36, C-90; N.T. 1246, 1247)

64. WCU’s Dr. Hamil received a copy of a letter from IMS’ proposed funding source, Juran & Moody, on December 10, 1987, indicating that IMS’ prior representations constituted “naive and wishful thinking.” (Exhibit R-37; N.T. 1263, 1264)

65. Subsequent negotiations between IMS and WCU did not yield a project that could be implemented so as to provide the type of economic benefit contemplated by the original ESA without cash outlay and with no financial risk to the Commonwealth. IMS, subsequent to its letter of May 1, 1987, did not procure an energy savings guaranty acceptable to the Commonwealth that would guarantee the dollar amount of the debt service (equipment lease payments). (N.T. 1209-1241, 1264, 1265)

66. IMS illustrated either an unwillingness or inability to obtain an insurance policy naming WCU as loss payee and IMS indicated that it could not obtain the required insurance binder until after the equipment was installed. (N.T. 1251-1256)

IMS/ENTECH RELATIONSHIP

67. Entech Engineering Associates of Reading, Pennsylvania was identified by IMS as the engineering firm that would be utilized for all technical issues. Entech began operating in 1980 and originally became involved in energy savings projects and energy use audits. IMS did not have in-house engineering expertise and formed a relationship with Entech in the early 1980's. (Exhibit R-3; N.T. 1391-1394)

68. Although IMS reviewed Entech's work, Entech prepared the preliminary engineering analysis with respect to the WCU Project. It was Entech that identified all 25 ECO's that appeared in the analysis, including the summer boiler shutdown. These facts were established by William M. McMahon, Jr., a professional engineer and founding partner of Entech Engineering. (N.T. 1388, 1390, 1397-1400)

69. Mr. McMahon testified that the summer boiler shutdown ECO was a concept that was being used in the energy industry at the time the Technical Proposal was prepared by Entech for the WCU Project. This concept had been used by Entech at other prior projects and Entech, according to Mr. McMahon, did not consider the energy conservation idea relative to summer boiler shutdown to be "proprietary". (Exhibit R-67; N.T. 1401-1403, 1412)

70. IMS submitted a detailed engineering analysis prepared by Entech to WCU. IMS and Entech reached an agreement, well after the services had been performed by Entech, regarding payment by IMS for Entech's work. According to that agreement, IMS was to pay Entech \$70,000 for its preparation of the detailed engineering analysis relative to the WCU Project. IMS paid Entech \$14,000 on March 27, 1987; however, IMS never paid Entech the additional \$56,000 owed for the work performed. Mr. McMahon testified the original agreement with IMS was for Entech to be paid \$75,000 of which \$19,000 was paid. Both IMS and Entech agree \$56,000 was due Entech and not paid. Entech wrote the \$56,000 off in April, 1988. (Exhibit R-51, R-53, R-54; N.T. 1405-1410)

71. John Stout of IMS acknowledged that he terminated the relationship with Entech in the Fall of 1987. IMS notified the Commonwealth of Entech's dismissal on January 14, 1988 in a letter from IMS directed to Lamar E. Shomper of the Department of General Services. (Exhibit R-31; N.T. 772-774, 916)

72. Although John Stout of IMS testified that Entech was terminated due to what IMS perceived to be problems with Entech's work product, and that IMS notified Entech of those problems, William McMahon of Entech testified that IMS never notified Entech of any dissatisfaction with Entech's performance on the WCU Project. (N.T. 772-775, 1411)

73. Although John Stout of IMS testified that he met with representatives of Entech at their Reading, Pennsylvania office when he terminated Entech's relationship with IMS, Mr. William McMahon of Entech could recall no such meeting. (N.T. 772, 1411, 1412)

COMMONWEALTH'S TERMINATION OF IMS

74. The Commonwealth, through the Department of General Services, issued a Notice of Default letter to IMS regarding the WCU Project on or about December 30, 1987. The letter, which was signed by Lamar E. Shomper of DGS, and was directed to Howard T. Bozich, referenced Section 5.6 of the Energy Services Agreement and IMS' inability to provide the Commonwealth with a savings guaranty insuring that the energy dollars saved would be no less than the lease payments. Mr. Shomper's letter also referenced 1.3 of the ESA and indicated that the Commonwealth felt IMS

did not use its best efforts with regard to the contents of Schedule “C”, “M” and “N”. Mr. Shomper also referenced the fact that, although the Commonwealth had never been formally notified, the Commonwealth was aware of the fact that IMS had discontinued its use of Entech for the WCU Project. Mr. Shomper’s default letter of December 30, 1987, informed IMS that such events constituted default and had to be corrected within thirty days of the notice from the Commonwealth. (Exhibit R-28)

75. IMS was required to correct or cure the noted deficiencies outlined in the Commonwealth’s default letter of December 30, 1987, within thirty days pursuant to Section 20.2(v) of the ESA. The default letter was re-mailed by DGS to IMS via certified mail, as required by the terms of the ESA on January 13, 1988. (Exhibit R-5, section 20.2(v), R-49)

76. On February 26, 1988, IMS sent the Commonwealth a letter indicating that IMS was in a position to offer a full eight-year debt service guaranty, which would be a corporate guaranty, from a “very substantial firm.” IMS indicated in its letter of February 26, 1988, to the Commonwealth, that prior to proceeding, IMS felt that West Chester needed to demonstrate good faith by forwarding a letter regarding their intent and a check for \$25,000. The letter was signed by John L. Stout, President of IMS. (Exhibit R-32)

77. On March 23, 1988, IMS advised the Commonwealth that it would be able to provide a corporate guaranty from a construction contractor, H & H Construction Group, Inc., regarding the debt service, assuming WCU’s willingness to agree to certain inflation and deflation rates. In that letter, IMS proposed that H & H Construction would be responsible for maintenance of the equipment and construct the Project, while Durrant Engineering Company would perform the design work and be responsible for monitoring the Project. IMS indicated in the letter that it would stay involved with the Project as a “project developer” and “local representative”. (Exhibit R-41)

78. WCU rejected IMS’ proposal of March 23, 1988, which had been sent well in excess of the thirty day requirement contemplated by the ESA, because, according to Dr. Hamil of WCU, it involved IMS in a different role from that which was contemplated by the original Energy Services Agreement. Dr. Hamil indicated that, after reviewing H & H Group’s financial statement, that the statement was not audited and the net worth was not nearly enough to cover the lease payments with respect to the WCU Project. Dr. Hamil also had concerns regarding H & H Group’s geographical location relative to West Chester University, and had further concerns regarding Durrant Engineering, also a midwestern organization who had not done any work on the east coast. Dr. Hamil testified that he did not consider the Durrant issues a major problem, but he considered the H & H Group’s concerns sufficient that the proposal was unacceptable. (N.T. 1259-1261)

79. The Commonwealth, on April 19, 1988, acting through the Department of General Services, issued a letter to IMS terminating the ESA pursuant to Section 22 of that agreement, due to IMS’ failure to cure or correct its failure to perform in accordance with the terms and agreements

of the ESA, as described in the Commonwealth's notice of default letter, originally dated December 30, 1987. The Commonwealth's letter of April 19, 1988, was signed by Lamar E. Shomper, Director of DGS's Bureau of Purchases. (Exhibit R-42)

IMS' COMPLAINT

80. This action originated with the filing of a complaint before this Board on May 8, 1989. (Complaint)

81. In its complaint, IMS alleged that the Commonwealth wrongfully terminated the ESA and IMS was entitled to consequential damages approximating \$950,000 and that the Commonwealth did not properly terminate the ESA and IMS was entitled to \$386,405 for the direct costs of its detailed engineering analysis pursuant to ESA Section 1.3. (Complaint)

82. IMS did not present any additional damage claims including a claim for any alleged loss of proprietary information. (Complaint)

83. At no time did IMS ever amend its complaint to include any additional claims, including a claim for any alleged loss of proprietary information, nor did IMS ever request leave to amend its complaint for any such alleged losses. (Record)

THE COMMONWEALTH'S EXPERT WITNESS

84. At the time of trial, the Commonwealth presented David Birr, an engineer with more than twenty years experience in the energy consulting business. Mr. Birr is currently the President of Synchronous Energy Solutions. Mr. Birr has assisted in the preparation of RFP's on behalf of owners, assisted in the negotiation of specific technical schedules appended to contracts and has monitored the performance of vendors during an energy performance contract. He has served as an arbitrator for contract disputes involving energy performance contracts and has negotiated the technical and financial terms of energy savings guarantee language. Mr. Birr has spoken all over the country regarding energy performance contracts. Mr. Birr was presented by the Commonwealth as an expert in the area of energy services contracts. (Exhibit R-88; N.T. 1466-1489)

85. Mr. Birr testified that he reviewed the correspondence between IMS and the University over an approximate period of two years, reviewed the proposals prepared by IMS in response to the RFP's sent out by WCU and reviewed the Energy Services Agreement between the parties and the associated proposed schedules at various points in time. Mr. Birr also reviewed the exhibits that were prepared by the Commonwealth and sat through the trial and heard the testimony of the various witnesses presented to the Board. Mr. Birr also read the depositions of John Stout, Howard Bozich and Terry Singer. (N.T. 1491, 1492)

86. Mr. Birr testified that he reviewed the Financial Proposal submitted to IMS in response to the RFP that had been sent out by the Commonwealth, specifically the financial data

contained in Table B-1 and the list of particular ECO's and the amount of savings associated with those ECO's in dollar terms. Mr. Birr testified that on Page 15 of Table 2, in IMS' Financial Proposal, there is an indication that the estimated installation, labor and material costs, combined with IMS' soft costs, add up to a projection of \$2,671,000. Mr. Birr considered this to be the offer of cost of the Project in response to the RFP. (Exhibit R-2; N.T. 1499-1501)

87. Mr. Birr also reviewed the projected savings contained in IMS' Financial Proposal, and, as indicated on Page 7 of the Proposal, what the projections are in regard to the total benefits to WCU. Mr. Birr testified that he reviewed the Financial Proposal in its entirety to make certain that he understood the projected cash flows for the Project. (Exhibit R-2; N.T. 1501-1503)

88. Mr. Birr testified that his review of the Financial Proposal submitted by IMS to WCU indicated that the Proposal appeared to be a "financially attractive proposal to the University based on the cost and savings estimates that appear in these documents." (Exhibit R-4; N.T. 1504)

89. Mr. Birr also reviewed the Energy Services Agreement in its entirety to make sure he understood how the various provisions interrelated and interconnected to each other. Mr. Birr focused on areas which he thought to be related to the instant controversy, since this Project did not go forward, such as the guaranty language contained in the ESA and Schedules "C", "M", "N", "O" and "P", as they relate to the financial terms of the Agreement between the parties. (N.T. 1505)

90. Mr. Birr testified that Preliminary Schedule "N", to the ESA, indicated a seven-year performance contract, with a principal amount of costs totalling \$2,671,000, the same amount provided in the original proposal transmitted to the University in 1984. With respect to the amount contained on Schedule "N", Mr. Birr testified that it would have been very appropriate for IMS to disclose to the University, prior to signing the ESA in November of 1986, if they had information that the numbers contained on Schedule "N" were no longer accurate. (Exhibit R-5, Preliminary Schedule "N"; N.T. 1506-1508)

91. Mr. Birr also testified that he reviewed Preliminary Schedule "C", attachment B, to the ESA, which illustrated the projected savings shares spreadsheet. Mr. Birr noted that the information contained on Schedule "C" appeared to be identical, or nearly identical, to the information contained on IMS' Financial Proposal. (Exhibit R-5, R-2; N.T. 1508-1510)

92. Mr. Birr also reviewed Section 5.6 of the ESA and concluded that WCU negotiated what he considered to be a "fairly protective guarantee that minimized their financial risk." Mr. Birr testified that, under Section 5.6 of the ESA, WCU's agreement to make equipment lease payments was conditional upon the issuance of a guaranty by a financially responsible party, and that the energy dollars saved pursuant to the performance of the agreement would be no less than the lease payment's Schedule "N" amounts. Mr. Birr stated that this language was similar to many contracts that he had seen and that under such language, WCU was obligated to make payments only if the energy savings were in excess of their exposure on the lease. (Exhibit R-5; N.T. 1510-1512)

93. With respect to the maintenance and monitoring fees, Mr. Birr testified that Section 5.6 also resulted in WCU having no obligation to make payment for such fees if the projected savings fell below the debt service, since IMS' fees were a contingent fee based upon their performance. (N.T. 1513)

94. Mr. Birr also testified that Section 1.3 of the ESA was relevant because that Section indicates that IMS' Final Schedules, in order to consummate the contract in its entirety, would have to be agreed to and that the parties would use their best efforts to reach agreements regarding the contents of the schedules. Mr. Birr opined that with that type of language, you really do not have a "complete agreement" between the parties or a "complete meeting of the minds", until there is a final agreement on the technical schedules, because those technical schedules really contain the financial essence of the agreement. (N.T. 1514, 1515)

95. Mr. Birr further opined that West Chester University, even though it had entered into the ESA, was not committed to accepting the financial terms of the deal. Mr. Birr believed that the ESA only committed WCU to negotiate in good faith and to try to reach an agreement on the financial terms of the deal, as set forth, for example, in Schedules "C", "M", "N", "O" and "P". (N.T. 1515)

96. Mr. Birr testified and noted that the last sentence of Section 1.3 indicates that in the event the parties can not reach an agreement regarding the contents of the schedules, the Commonwealth may terminate the Agreement and that IMS would be reimbursed for the reasonable direct costs of a detailed engineering analysis. (N.T. 1516)

97. Mr. Birr also testified that Section 20.2 of the ESA was important because it prohibits IMS from making any false or misleading, in any material respect, representation and he believed that the original proposal costs and savings projections presented by IMS were, at a minimum, misleading because they were later modified on May 1, 1987 by IMS. In that regard, Mr. Birr testified that a 44.8 percent increase in the total projected costs, as outlined in IMS' letter of May 1, 1987, would shock him if he had been acting as the owner's representative and had just entered into an agreement six months earlier. (N.T. 1521-1523)

98. Mr. Birr opined that a 44.8 percent cost increase without very detailed documentation to support and substantiate the reasons for the cost increases, especially when discussing the total project costs, would certainly be "atypical". Of further concern to Mr. Birr was the fact that the May 1, 1987 letter from IMS also indicated "massive increases" in the soft costs of the Project, e.g. costs associated with engineering, project development, financing costs, performance insurance, construction management and overhead, all of which are often negotiated. (Exhibit R-93; N.T. 1523-1524)

99. Mr. Birr testified that he agreed in principal that preliminary estimates require some revision and that such revision is customary; however, he described the percentage of revision contemplated by IMS, with an increase of total project costs of 44.8 percent as "shocking". He

opined that such an increase was not customary, especially when the essential scope, the technical scope of the Project, had not been substantially altered. Mr. Birr noted that there really were not any substantive technical massive project scope changes that would have justified the level of cost increase outlined by IMS in its letter of May 1, 1987. He also testified that the University properly requested a detailed documentation to support IMS' proposed increase in the project cost and stated that he never found anything that would constitute a satisfactory explanation for a total project increase in costs of \$1,196,000 plus dollars. (N.T. 1530, 1531)

100. Mr. Birr also noted that the decrease in savings outlined in IMS' letter of May 1, 1987, diminished the value of the ESA with regard to WCU and that it was not normal or customary to expect such changes. (N.T. 1532)

101. Mr. Birr also considered the amount of time that had passed between IMS' initial submission of Preliminary Schedules and their letter of May 1, 1987, and opined that he would expect to see some changes due to inflation; however, there was no documentation submitted by IMS regarding any inflation index that was being referenced. He indicated there was no supporting information regarding labor costs, no identification of the specific parts of the Project to which the inflation might apply and no indication as to whether the inflation applied only to hard costs, soft costs, or some portion of either. Mr. Birr did not feel that IMS satisfactorily explained their increased costs attributable generally to inflation, and, in fact, when he checked inflation statistics, he did not find inflation to be a persuasive reason for the increases contemplated by IMS. Mr. Birr also pointed out that if IMS was aware inflation had effected their labor and material costs, or were likely to do so, they had a duty to disclose that fact to WCU when they entered into the ESA in November of 1986. (N.T. 1534-1536)

102. Mr. Birr also felt IMS' explanation, contained in Paragraph 2 of the May 1, 1987 letter, regarding a "Full Scope Project" to be "puzzling." Mr. Birr testified that IMS' original proposal was a Full Scope Project proposal and that IMS' recommendation that the University drop certain items, or ECO's, from the Project, should decrease the project costs, not increase it. Mr. Birr felt IMS' logic in this regard was "counterintuitive." (N.T. 1538)

103. Mr. Birr also considered Paragraphs 3, 4 and 5 of IMS' letter of May 1, 1987, and opined that the logic supporting these paragraphs did not provide an adequate justification for the level of cost increase suggested by IMS. Similarly, Paragraph 6 and 7 of IMS' May 1, 1987, letter, would have resulted in a trivial impact relative to the magnitude of cost increase suggested by IMS. (N.T. 1538-1541)

104. Mr. Birr also opined that the cost changes submitted by the Claimant (Exhibit C-165) were not entirely accurate. He testified that certain recommendations, such as the dual fuel in the south campus, and the baghouse, were not recommendations from WCU, but rather IMS' recommendations to the owner for an increase in the scope of the Project. Mr. Birr also felt that a

credit should have been tendered to WCU for ECO Number 4 and ECO Number 10, necessitating corrections of \$142,040 to IMS' calculations regarding so-called owner scope increases. (Exhibit C-165, Exhibit R-94; N.T. 1543-1546)

105. Upon reviewing and correcting IMS' calculations utilized to support their project cost increases, Mr. Birr opined, considering the actual inflation rate, that a reasonable revised project cost would be \$2,971,319. Such an increase in the project cost would have resulted in a percentage increase of approximately 11.25 percent, according to Mr. Birr. (Exhibit C-165, Exhibit R-94, Exhibit C-166, Exhibit R-95; N.T. 1547-1551)

106. Mr. Birr also considered the exchange of correspondence between IMS and WCU, following IMS' letter of May 1, 1987, and concluded that there was a significant level of effort extended to try to come to a meeting of the minds on the financial particulars of the deal. Mr. Birr noted that there were efforts to reduce the project costs in various ways by amending the scope of the Project, and that there were efforts to consider financing in alternative ways to change the financial aspects of the Project. He also stated that there were efforts by IMS to alter the guaranty terms of the Project and to amend the guaranty terms of the Project in order to make the Project financially viable. (Exhibits R-21, R-25 and R-26; N.T. 1551, 1552)

107. Mr. Birr also reviewed the proposed amendment to the Energy Services Agreement and determined that the amendment was not nearly as strong as the original savings guaranty offered by IMS and accepted by WCU in the original ESA, thereby exposing the University to a greater degree of risk than the original guarantee provision. (Exhibit R-5, R-26; N.T. 1555-1557)

108. Mr. Birr also testified that IMS' claim for engineering fees totaling \$386,406 was "completely unreasonable" in terms of detailed engineering fees customarily associated with an Energy Services Contract of the nature entered into between WCU and IMS. Mr. Birr pointed out that IMS, in their Financial Proposal, listed, under engineering fees, \$55,000 for preliminary audit, \$35,000 for final audit, and \$105,982 for drawings and specifications. After reviewing all of the documents in the case and listening to all the testimony, Mr. Birr opined that IMS admitted that there were no detailed drawings and specifications ever presented to the University at any time. He further noted that the University had no cost liability for the original proposal because it is made very clear in the RFP that costs incurred prior to the execution of the contract were not the responsibility of the University. Mr. Birr also indicated that, pursuant to Section 1.3 of the ESA, he expected to see a detailed accounting of the time actually spent related to the direct engineering analysis and costs of the Project; however, he did not find supporting documentation regarding detailed engineering analysis because the vast majority of hours and tasks were not performed by engineers. (Exhibit R-2, R-5, R-33; N.T. 1557-1565)

109. Mr. Birr also found the portion of IMS' claim for engineering fees in the amount of \$386,406, as it related to Entech Engineering, as problematic as well. Although there was a figure of \$95,000 associated with Entech Engineering, Mr. Birr could not determine how that figure related to the earlier revealed costs of \$35,000 for the detailed engineering analysis. He also noted that a

number of the tasks were undertaken in 1984 and 1985, well before the contract was executed in 1986, and he could not understand how those costs were relevant to the preparation of a detailed engineering analysis which would have occurred after the signing of the ESA in November of 1986. (Exhibit R-33; N.T. 1566, 1567)

110. Mr. Birr also testified that the concept of a summer boiler shutdown was a “common idea” and it was current in the industry long before IMS ever introduced it to WCU. He testified that this idea was certainly not a patented idea and does not meet the test for proprietary ideas submitted by energy services companies. (N.T. 1568, 1569)

ENTECH’S WILLIAM M. MCMAHON, JR.

111. The Commonwealth also called William M. McMahon, Jr., a practicing engineer of 33 years. Mr. McMahon also has a Masters in business administration and has worked as a contract administrator on projects, a costs engineer for nuclear and other energy projects and was a partner in the firm of Entech Engineering at the time the instant claim arose. (N.T. 1387-1390)

112. Mr. McMahon explained that Entech Engineering began doing energy studies in elementary schools, municipalities and school districts. Entech later became involved in studying energy use at nursing homes, retirement villages, county homes and eventually colleges. The company moved on in the energy field performing work for universities and hospitals, and in the mid 1980's became involved in designing boiler projects and lighting projects and also began doing studies concerning heating, ventilation and air conditioning supplies. (N.T. 1391, 1392)

113. Mr. McMahon testified that IMS and Entech first became involved on a Project known as the Delaware Technical and Community College in Delaware. Entech performed the feasibility study for IMS and subsequently provided engineering services for the design. Mr. McMahon also acknowledged that Entech was aware of the Commonwealth’s third-party financing pilot program coming out for public bidding or public qualifications in 1984. (N.T. 1394, 1395)

114. Mr. McMahon testified, with regard to the Commonwealth’s third-party financing pilot program, that Entech would not normally become involved by itself in such a program because the scope of the Project involved financing in areas that Entech did not normally enter. Mr. McMahon also testified that, with respect to the Commonwealth’s program, that IMS expressed its interest in the Project and that IMS and Entech worked together to respond to the RFP although IMS did most of the paperwork. (N.T. 1395, 1396)

115. Mr. McMahon testified that Entech’s role was very clearly identified early on in the Project with regard to West Chester University. He stated that Entech would be the engineering firm that would perform the analysis, preliminary analysis and if the Project subsequently proceeded, Entech would perform the detailed analysis and detailed engineering work necessary to go out and bring in competitive contractor bids. Mr. McMahon confirmed the fact that Entech Engineering

performed the preliminary analysis relative to West Chester University. He acknowledged that IMS provided “a review” of the preliminary analysis; however, the preparation of the report was the kind of work that Entech normally did themselves. Mr. McMahon stated that Entech did not request or require any assistance in the preparation of such a report. (N.T. 1397-1400)

116. Mr. McMahon acknowledged that the ECO relative to the summer shutdown of the central steam plant was something Entech would normally consider for a project like WCU. Entech had made similar recommendations for other institutions, such as Jesuit Novitiate, Muhlenberg College and Kutztown University. Mr. McMahon testified that IMS was not involved with Entech on the Jesuit Novitiate Project, the Muhlenberg College Project or the Kutztown University Project and that IMS did not assist Entech in identifying the summer shutdown of the central steam plant ECO for the WCU Project. (N.T. 1401, 1402)

117. Mr. McMahon testified that Entech did not consider the concept of the summer shutdown ECO at the West Chester University Project, to be a proprietary concept. He stated that it was a “pretty common logic thing” that if you shut something off you are going to be able to save whatever energy that it is using, although the suggestion for WCU was unique to WCU. (N.T. 1403, 1434, 1435)

118. Mr. McMahon also testified that Entech performed detailed engineering analysis for IMS relative to the West Chester University Project. That work was totally prepared by people that were employed by Entech, according to Mr. McMahon. Mr. McMahon also acknowledged that the detailed energy analysis that Entech sent to IMS was the same detailed energy analysis that IMS submitted to WCU. (Exhibit R-51, R-52; N.T. 1405-1407)

119. Mr. McMahon established that Entech was paid \$14,000 out of the \$75,000 agreed to by IMS for the work that Entech performed on the detailed engineering analysis for the WCU Project. An additional \$5,000 was paid to Entech at the beginning of the Project, according to Mr. McMahon. Entech was never paid the remaining \$56,000 balance and wrote off the debt in April of 1988. (Exhibits R-53, R-54; N.T. 1408-1410)

120. Mr. McMahon testified that IMS never provided any notice to Entech that the work performed by Entech, on either the preliminary audit or the detailed engineering analysis for the WCU Project was not satisfactory to IMS. (N.T. 1411)

121. Mr. McMahon also candidly acknowledged, under cross-examination, that Entech made recommendations, not only for scope changes that had been requested by WCU, but also scope changes that had been required or recommended because of changes in environmental regulations which had been enacted subsequent to Entech’s original work and its detailed engineering analysis. (N.T. 1449-1451)

122. Mr. McMahon also acknowledged under cross-examination that the various schedules that were attached to Entech's detailed engineering analysis were prepared by IMS. (N.T. 1459, 1460)

TESTIMONY OF THOMAS C. WETZEL

123. The Commonwealth introduced a self-employed certified public accountant, Thomas C. Wetzel, as an expert witness regarding IMS' damages. Mr. Wetzel belongs to a firm employing five other certified public accountants and his firm provides accounting, auditing, tax management advisory services to approximately 150 corporations, partnerships and trusts. Mr. Wetzel's firm prepares approximately 250 individual income tax returns each year. Mr. Wetzel has been in public accounting for 31 years and he sat for his CPA examination in 1969 and passed the examination at that time. Mr. Wetzel has testified as an expert witness in a number of cases, most of which were in Dauphin County, Pennsylvania, at the Court of Common Pleas level. Mr. Wetzel was accepted by the Board as an expert witness. (N.T. 1687-1693, 1699)

124. In preparing for his testimony at the time of trial, Mr. Wetzel reviewed the 1983 financial statement of Impact Management Systems and testified that in 1983 IMS had shown a net loss of \$222,523. Mr. Wetzel also reviewed IMS' financial statement for the year ending December 31, 1984, which indicated that the company lost \$443,946 in 1984. Mr. Wetzel's review of IMS' financial statements for the year ending December 31, 1985, indicated that the current assets of IMS on December 31, 1985 were \$941,370 and current liabilities of the company on that date were \$1,738,901, nearly twice the asset number. (Exhibit R-63, R-64, R-72; N.T. 1700-1706)

125. Mr. Wetzel testified, with regard to his review of IMS' financial statements for the years 1983, 1984 and 1985, that the company was in financial difficulty. Mr. Wetzel stated that for the year ending December 31, 1985, IMS showed a net loss of \$430,043, which, when added to the losses from 1983 and 1984, brought an accumulated deficit of \$1,112,956. (N.T. 1706, 1707)

126. Mr. Wetzel testified, with regard to IMS' financial statement dated October 31, 1986, that he was very concerned about that particular statement because it was not audited. Mr. Wetzel was also concerned about the timing of the financial statement in that it came just prior to the execution of the ESA between IMS and WCU. Mr. Wetzel explained that financial statements that are not subject to a full audit are performed at a level of accounting service that is a step below an audited financial statement, i.e., the accountants are basically relying on representations made by management to it in the formulation of the financial statement and there is no third-party confirmation of any of the numbers. Mr. Wetzel pointed out that IMS had changed the level of service that it had engaged its accountants to perform. (Exhibit R-65; N.T. 1707-1710)

127. Mr. Wetzel also noted language that was in IMS' financial statement dated October 31, 1986, prepared by Ernst and Whinney, to the effect that IMS' continued operation was dependent upon future profitable results. The report also contained language regarding the lack of

adjustments relating to recoverability and classification of recorded asset amounts or amounts in classification of liabilities that might be necessary should the company be unable to continue in existence. Mr. Wetzel pointed out that that type of language is including in financial statements when the accountant reviewing the financial statements or auditing the financial statements feels that without a substantial reorganization, restructuring or the injection of additional capital, the company will not be existence for the next year. (Exhibit R-65; N.T. 1711)

128. Mr. Wetzel further pointed out that as of October 31, 1986, the reported total current assets of IMS were \$319,294, while the total current liabilities as of that same date were \$1,104,057, and that the current liabilities were approximately three and one half times of the current assets. He stated that when adding the losses incurred in the 10-month period in 1986 to the prior periods dating back to 1982, the company had lost a total of \$2,102,466. (N.T. 1713, 1714)

129. Mr. Wetzel also testified that as of October 31, 1986, IMS converted approximately \$1,789,000 of notes payable and payables on shared savings due to Governmental Financial Services, Inc., into 17,890 shares of cumulative preferred stock, \$100 par value, paying dividends quarterly at a rate of 12 percent per annum. No gain or loss accrued on that transaction. Mr. Wetzel concluded that IMS needed to do something like this in order to reduce the liabilities that had shown up on its balance sheet; however, he could not see how that act would really help the company to operate because of the significant obligation that it had made with regard to having to pay dividends at a 12 percent rate on approximately \$1.7 million worth of preferred stock. (N.T. 1715, 1716)

130. Mr. Wetzel opined that IMS, given its financial condition, would not have been able to provide the services and remain in existence long enough under the West Chester University Contract to realize any profits from that engagement. Mr. Wetzel further opined, given his review of IMS' letter of May 1, 1987, that the company would not have been entitled to any management or monitoring fees under the WCU Contract until at least 1990. He indicated, in his professional opinion, that the company could not continue in business until 1990 would arrive and that the WCU Contract would not have provided sufficient cash flow, standing alone, to keep IMS in business. (N.T. 1721, 1722)

131. With respect to IMS' claim regarding loss profits, Mr. Wetzel opined that IMS had insufficient working capital to develop proposals for new business, with or without the West Chester University Contract. He also testified that the limited income potential in the years following the execution of the ESA with WCU did not appear to be sufficient to provide IMS with the needed working capital. (N.T. 1722, 1723)

132. Under cross-examination, Mr. Wetzel noted that he reviewed IMS' Pennsylvania Corporate Tax Return, Federal Corporate Tax Returns, the company's financial statements, some of the legal pleadings and the interrogatories or depositions relative to information provided by Mr. Bozich and Mr. Stout. Mr. Wetzel also reviewed the financial proposals submitted by IMS to WCU, the RFP, the Energy Services Agreement, and the letter dated May 1, 1987, from IMS to WCU. (N.T. 1726, 1727)

133. Mr. Wetzel acknowledged, under cross-examination, that he was not requested to compare the financial records of IMS with the financial statements or records of any other energy services companies. He further acknowledged that he was aware that energy services companies like IMS deal in long-term contracts and, in this particular case, the receivables of IMS were tied into shared savings at the WCU Project. (N.T. 1732-1734)

134. During cross-examination, Mr. Wetzel was asked by counsel for the Plaintiff whether or not the WCU Contract was the “straw that broke the camel’s back” with respect to IMS. Mr. Wetzel responded by stating that he could not see enough profitability in the West Chester Contract to save IMS. (N.T. 1743, 1744)

IMS’ DAMAGES

135. In its Complaint, IMS, in Count I and Count II, claims damages due as a result of the Commonwealth’s alleged breach. In Count I, at Paragraph 16, IMS avers as follows: “Termination of the Agreement by DGS and WCU was wrongful and IMS is entitled to all damages which have resulted from the wrongful termination, including but not limited to all direct and indirect costs of performance, loss of anticipated profit, loss of business reputation and loss of other business opportunities and contracts.” In Count II of the Complaint, IMS avers, at Paragraph 22, as follows: “To date, IMS has incurred costs in the sum of Three hundred eighty-six thousand four hundred five dollars (\$386,405.00) in performance of engineering services on behalf of DGS and WCU.” (Complaint, paras. 16 and 22)

136. Paragraph 19 of the Complaint, at Count II, reads as follows: “Section 1.3 of the Agreement provided that DGS and WCU would reimburse IMS for its direct costs of preparing the required engineering analysis should the parties be unable to reach agreement with respect to the Schedules applicable to the Equipment which was subject to installation and lease under the Agreement.” Although the Commonwealth initially denies the averments of Paragraph 19 of the Claimant’s Complaint, in its Answer, at Paragraph 19, the Commonwealth indicates, in relevant part, as follows: “. . .Section 1.3 provides: ‘If the parties can not reach agreement regarding the contents of the schedules, Commonwealth may terminate this Agreement and IMS shall be reimbursed for the reasonable direct costs of the detailed engineering analysis.’” (Complaint, para. 19; Answer, para. 19)

137. On July 30, 1997, this Board granted IMS’ Motion for Summary Judgment as to Count II of the Complaint, with respect to liability and denied the Motion for Summary Judgment as to Count II as to damages. (Record)

138. On October 28, 1997, this Board entered an Order denying the Commonwealth’s Motion for Reconsideration of the Board’s Opinion and Order Regarding Parties’ Cross Motions for Summary Judgment.

139. At no time prior to the closing of the case at trial, did IMS ever request leave to amend its Complaint regarding any additional claims for alleged loss of proprietary information. The docket also reveals that IMS never amended its Complaint to include such a claim. (Record)

140. IMS claims they are entitled to direct costs of \$192,000, formulated by IMS looking at the amount of work that was completed and comparing it against the amount of work that would have been their fee at the time the Project was performed, utilizing the estimated project cost of \$3,490,000. These figures were also prepared in conjunction with the schedules submitted to WCU by IMS on September 29, 1987. (Exhibit C-3, Table B-2, Exhibit C-85, C-130, C-173; N.T. 1087, 1088)

141. IMS also claims “indirect costs” in the amount of \$194,872, representing an “estimated” percentage of completion of various development tasks identified in Table B-2 of the Phase II Proposal and again revised to fit the final project costs estimated at \$3,490,000. These figures were also prepared in conjunction with the schedules submitted to WCU by IMS on September 29, 1987. (Exhibit C-3, C-85, C-131, C-173; N.T. 1087-1091)

142. IMS also claimed “loss of profit” in the amount of \$386,782, reflecting a 23% profit on monitoring and maintenance fees for the term of the Contract. This figure is also based upon an estimated project costs of \$3,490,000 and schedules submitted on September 29, 1987 to WCU by IMS. IMS, at trial, could not locate the November 4, 1987 Schedule utilized in the preparation of their Exhibit C-132. (Exhibit C-85, C-132; N.T. 1091, 1092)

143. IMS also tendered a claim in the amount of \$126,426. relating to “loss of other business” and argued that IMS had a number of other contracts that had been installed. IMS argued that they were entitled to this amount which reflected a percentage of the expected profits from those contracts. IMS claims that due to the WCU Project, they were no longer able to maintain a staff and provide the maintenance and monitoring on those other Projects. (Exhibit C-133, C-134; N.T. 1095-1097)

144. IMS also claimed damages in the amount of \$50,000 relative to “loss of contracts” and argues that IMS had received a number of awards on various projects for maintenance and monitoring fees. Although IMS estimated a profit totaling \$275,000, they “arbitrarily” reduced the claim to \$50,000 because there was a possibility that some of the projects could have been bought out over time. (Exhibit C-133; N.T. 1106-1108)

ENGINEERING FEES DAMAGES

145. John Stout testified on behalf of IMS regarding its claim for engineering fees. Mr. Stout prepared an “invoice” which he testified reflected a “compilation of the work that IMS had, in part, put into this contract up to that point.” (N.T. 826, 827; Exhibit C-100)

146. Mr. Stout explained that in preparing IMS' invoice regarding engineering costs, he went back to each of the employees involved in the Project and had them review their respective calendars and notes so that they could give him an hourly tally of how many hours they invested in the Project. (N.T. 827, Exhibit C-173)

147. Mr. Stout further explained that the employees involved were Ann Bassett, Clyde Fuhrmeister, John Stout, Howard Bozich, Roy Cameron, Dileep Champaneria and Firquan Siddiqi. Mr. Stout explained that the notations "CS" and "HC" were clerical personnel and that the aforementioned list were the employees involved during 1987. The same list was utilized for work performed in 1986, except for the fact that the notation "VZ" appeared, which was Virginia Zon, and that the notation "VR" appeared and that although the notation "VR" appeared during the 1985 time, Mr. Stout could not remember that particular employee's married name. (N.T. 828; Exhibit C-100)

148. Mr. Stout also explained that "Invoice 1304" in the amount of \$386,405.00 included a claim for the use of in-house and out-house computers utilized to perform calculations and sales consultant fees for personnel involved in the sale of the contract. Although Mr. Stout claimed that members of IMS' staff performed services with respect to the "Engineering Analysis" he could not recall what work was performed and simply referred to a sales person as a "kind of technician". (N.T. 829, 830; Exhibit C-100, C-173)

149. Mr. Stout further explained that included in their claim for engineering fees was \$95,000 for Entech Engineering representing money IMS owed Entech for work they had performed on the Contract. Mr. Stout explained that IMS had a contract with Entech for \$70,000 for the analysis part of the task and the additional \$25,000 was owed for pre-feasibility tasks that were performed in response to the Phase II RFP. (N.T. 830, 831; Exhibit C-30)

150. Mr. Stout explained that the rates charged for the various employees that comprised the claim summarized by Invoice 1304 ranged from \$25 for clerical help, to \$150 for attorney Roy Cameron. He indicated that the rates charged were "market rates" although the only comparison noted was that of his attorney with other law firms. Mr. Stout also testified that he felt Mr. Bozich and himself were both worth \$100 per hour because, by that time, both of them had gained "some stature in the industry running one of the better known energy conservation companies in the country and we determined that that's what our time was worth." (N.T. 831, 832; Exhibit C-30)

151. Mr. Stout testified that the only change he would make with respect to Exhibit 100 was to "tack on interest" over the period of his claim. (N.T. 833; Exhibit C-30)

TESTIMONY OF HOWARD BOZICH

152. Howard Bozich testified on behalf of the Claimant. Mr. Bozich stated that he had experience on behalf of IMS with respect to the "guaranty issue" on prior projects and that he had worked closely with the insurance company to actually develop a lot of the terms and conditions that they used in the industry. (N.T. 1000, 1001)

153. Mr. Bozich testified that Chubb, and a local agent, Republic, Hogg, Robinson, were the exclusive agents for such policies in the country. Mr. Bozich testified that, with respect to the guaranty issue language, the policy through Chubb and the local agent was the only policy available. (N.T. 1001)

154. Mr. Bozich testified that he was the individual at IMS that originated contacts with groups that would provide financing for IMS' projects. Mr. Bozich was involved in marketing, getting on bidding lists and being an industry spokes person for selling long-term energy contracts as a good idea. (N.T. 1003, 1004)

155. Mr. Bozich acknowledged that it was IMS' intention to provide costs savings to the Commonwealth at the lowest risk for all parties and that he understood the Commonwealth's intention as stated in the RFP. Mr. Bozich further acknowledged that there was no change with respect to the intention of the Commonwealth between Phase I and Phase II with regard to the WCU Project. (N.T. 1005-1007)

156. Mr. Bozich testified that in 1985, oil prices collapsed and IMS was impacted in terms of the performance of energy service contracts. He explained that the collapse drove down the price of energy across the board and slowed increases in other energy prices, and it affected all conservation projects that were either in the ground or proposed because this was something that was OPEC driven, not customer driven or industry driven. He further explained that the federal government then passed three forms of legislation that allowed for energy performance contracts extending the terms of such contract because the pay backs would be longer. (N.T. 1031, 1032)

157. Mr. Bozich also discussed the "guaranty issue". He acknowledged that he was designated to explain the guaranty issue to WCU by IMS and attended a number of meetings concerning this issue. Mr. Bozich acknowledged that WCU continued to have concerns about the insurance guaranty and wanted additional comfort that there would be additional guaranties above and beyond what IMS was offering. (N.T. 1037-1040)

158. Mr. Bozich acknowledged that the language that appears in Section 5.6 of the ESA was consistent with his understanding of what he discussed with the Commonwealth. (N.T. 1042)

159. Mr. Bozich testified that because energy prices went down, after the debt service was taken out of the savings, there was not as much money left over. He indicated that there was not as much money being saved even though the amount of energy being saved was pretty much the same. Since IMS had to maintain and monitor the Project, there was less money left over for the University, not because of anything IMS did wrong or because IMS tried to change the Project in any way, but because both the savings projections and construction costs changed in the "wrong directions for the project". (N.T. 1058, 1059)

160. Mr. Bozich also explained the various tables attached to the ESA and IMS' financial proposal. However, when the 65% guaranty level issue was addressed, Mr. Bozich testified that the 65% number was derived from the "understanding that we had with the University, Mr. Hamil, that he may quite possibly choose to finance the Project at five years." (N.T. 1049-1065)

161. Mr. Bozich opined that BTU Savings were not really different from the language which appeared in Section 5.6 of the ESA. He testified that the insurance company was not going to pay out a big hit if there was a total collapse of energy prices and, in fact, the Project was working. He indicated the insurance company wanted to have a policy that basically covered the performance of the equipment and they wanted to insure it on a BTU level because that is what they were saving, energy units rather than world price dollars. Mr. Bozich opined that "everything was connected to MMBTUs." (N.T. 1073)

THE COMMONWEALTH'S COUNTERCLAIM

162. The Commonwealth's Counterclaim was explained by WCU's Dr. Hamil. The Counterclaim, totaling \$4,325,911.00 was calculated from the Energy Services Agreement and represented the amount of money that is in the Agreement that IMS said would accrue to the University in the seven-year term of the Contract. (N.T. 1266, 1277; Exhibit R-85)

163. Dr. Hamil explained that if you total the amounts contemplated by IMS' financial proposal on an annual basis, the amount calculated equals the Counterclaim. Dr. Hamil explained that if WCU had proceeded with the Contract, as they wanted to, they would have accrued the amount contemplated by the Counterclaim according to the financial proposal that was made by IMS. (N.T. 1267, 1268; Exhibit R-85)

164. Under cross-examination, Dr. Hamil acknowledged that WCU's Counterclaim was based on IMS' Phase II proposal, from 1984, even though the ESA wasn't executed until 1986. (N.T. 1365)

165. Dr. Hamil further acknowledged that although WCU's Counterclaim was based on IMS' 1984 Phase II proposal, IMS' energy analysis was not provided until 1987. Dr. Hamil stated that "[m]any factors had influence on those numbers." (N.T. 1365)

166. Dr. Hamil also acknowledged that WCU's Counterclaim included maintenance savings which were supposed to accrue to the Commonwealth, although Dr. Hamil could not recall WCU ever proposing to share those maintenance savings with IMS to assist in making the Project work. (N.T. 1367)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the subject matter of the Claim, as the Board has exclusive jurisdiction to hear and determine all claims against the Commonwealth which, prior to 1978, were to be adjusted and settled by the Auditor General and the State Treasurer under the Fiscal Code. **72 P.S. §4651-1 through 10.**
2. The Board of Claims has jurisdiction over the parties. **72 P.S. §4651-1 through 10.**
3. Although the parties executed the ESA, which was an agreement whereby the parties agreed to use their best efforts to consummate a contract, they never agreed upon the critical schedules which were to be part and parcel of the Agreement and would have constituted an actual contract. Accordingly, the Board finds that there was no meeting of the minds as between IMS and WCU, regarding the schedules, and therefore, no final contract was consummated between the parties.
4. IMS never provided WCU with a proposal that satisfied the guaranty language set forth in Section 5.6 of the ESA (“Savings Guaranties”) which called for the issuance of a guaranty by a financially responsible party (insurance company or other entity satisfactory to the Commonwealth) that the energy dollars saved pursuant to the performance of the agreement by IMS would be no less than the lease payments (Schedule N amounts) required.
5. Summary Judgment was granted prior to trial by Chief Administrative Judge David C. Clipper regarding Count II of Plaintiff’s Complaint regarding liability for reimbursement of engineering fees and the Board will make an award regarding those fees.
6. IMS has no entitlement to a proprietary claim against the Defendant since the claim was never properly asserted, nor was it proven to exist through either testimony or evidence. We also do not view IMS’ claim relative to the summer boiler shut-down as proprietary.
7. IMS utilized the projected project cost of \$3,490,000 in conjunction with the schedules submitted on September 29, 1987, neither of which were ever accepted by WCU, in calculating their claim for \$192,000 for “direct costs”. This figure was an “estimate” based upon the time and effort which would have been expended by individuals completing tasks, had the Project gone forward. We view this portion of the claim as being both meritless and based upon conjecture.
8. IMS utilized the projected project cost of \$3,490,000 in conjunction with schedules submitted on September 29, 1987, neither of which were ever accepted by WCU, in calculating their claim for \$194,782 for “indirect costs”. This figure was an “estimate” based upon the time and effort which would have been expended by individuals completing tasks, had the Project gone forward. We also view this portion of the claim as being both meritless and based upon conjecture.

9. IMS utilized the projected project cost of \$3,490,000 in conjunction with schedules dated either November 4, 1987 or September 29, 1987, in calculating their claim for loss profit in the amount of \$386,782. This figure reflected the 23% profit on monitoring and maintenance fees for the term of the Contract. None of the aforementioned figures used in IMS' calculations were agreed upon by WCU and we view this portion of the claim as being both meritless and based upon conjecture.

10. We view the loss of business claim in the amount of \$126,426, based upon other contracts completely unrelated to this case, that IMS failed to complete, as being wholly meritless and having no relationship to the instant claim.

11. We view IMS' claim in the amount of \$50,000 for loss of contracts, related to contracts which have no relationship to the instant case, as being wholly meritless and based upon conjecture.

12. Mr. Stout acknowledged a Notice of Levy dated March 26, 1990, identifying the taxpayer as Impact Management Systems (Exhibit C-145), identifying the total amount due as \$307,571.42. The two taxes identified relate to employer withholding taxes for IMS' employees.

13. Included in IMS' claim for engineering fees are numerous and sundry costs for non-engineering services. In fact, the bulk of IMS' claim for engineering services relates to services performed by personnel at IMS who are not engineers. IMS' attempt to relate such costs to their claim for engineering fees was feeble at best, and wholly without merit.

14. We view the testimony of the Claimant's, John Stout, particularly as it related to IMS' damages, how Entech was dismissed from the Project and the all-important issue of Section 5.6 of the ESA, as less than credible.

15. The Commonwealth was justified in issuing a Notice of Default letter to IMS regarding the WCU Project on or about December 30, 1987 and again on January 13, 1988. Similarly, the Commonwealth was within its rights and justified in terminating the ESA with IMS pursuant to its letter of April 19, 1988, because IMS failed to cure or correct its failure to perform in accordance with the terms of the ESA, as described in the Commonwealth's Notice of Default letter, originally dated December 30, 1987.

16. We view the testimony of the Commonwealth's expert witness, David Birr, as credible and accept Mr. Birr's testimony as true, particularly with regard to his analysis of the Claimant's damages. While it is solely the function of this tribunal to determine whether or not a contract, in any given case exists, we concur with Mr. Birr's analysis in the instant case that there was never a "complete agreement" between the parties, or a "complete meeting of the minds" until a final agreement on the technical schedules had been reached.

17. We accept as true Mr. Birr's testimony that a 44.8% increase, as set forth in IMS' letter to WCU of May 1, 1987, was unreasonable, and without very detailed documentation to support and substantiate the reasons for the cost increases, such an increase was "atypical". We agree with the Commonwealth's witness, David Birr, regarding his opinion that IMS did not satisfactorily explain the increased costs outlined in their letter of May 1, 1987.

18. We find that both parties exerted a significant level of effort in attempting to come to a meeting of the minds relative to the financial particulars of the Project and that both parties used their "best efforts" to attempt to consummate a contract.

19. We concur with the Commonwealth's expert, David Birr, with respect to IMS' presentation of its claim relative to engineering fees. Although the Claimant had secured the liability issue as it pertains to this portion of their claim before trial, they simply did not prove their claim for engineering fees. Illustrative of this fact is the Claimant's Exhibit C-100, much of which represents claims for non-engineering personnel. Even IMS' claim as it pertains to the money owed to Entech was not sufficiently explained by the Claimant.

20. We view the testimony of Entech's William M. McMahon, Jr., as credible and based upon his testimony, will award the Claimant \$56,000 which is the amount of money IMS owes Entech for its services relative to the WCU Project.

21. The Board accepts the testimony of the Commonwealth's witness, Thomas C. Wetzel, as credible. Mr. Wetzel's testimony further substantiates the Commonwealth's justification in terminating the ESA with IMS, in that IMS clearly was in financial difficulty at the time the parties were attempting to consummate the final contract. We also accept Mr. Wetzel's opinion that IMS, given its financial condition, would not have been able to provide the services and remain in existence long enough under the West Chester University Contract to realize any profits from that engagement.

22. We view the testimony of IMS' Howard Bozich, and his efforts to explain IMS' dramatic increase in projected costs and their failure to comply with the guaranty terms of the ESA, as less than credible. Mr. Bozich's testimony with respect to the guaranty level and the ESA simply was contradictory to the clear language contained in Section 5.6 of the ESA. Mr. Bozich failed to persuade this Board that IMS' failure to consummate a contract with WCU was due to factors wholly outside the control of the Claimant.

23. It is apparent to this Board that WCU, in asserting its Counterclaim in excess of \$4.3 million, is attempting to "have it both ways". The Commonwealth can not, on the one hand, allege no contract existed and then, on the other hand, demand the benefits of the contract. We view the Commonwealth's counterclaim as wholly meritless and worthy of summary dismissal.

OPINION

This action was initiated on or about May 8, 1989, by the Claimant, Impact Management Systems, Inc. (hereinafter referred to as “IMS”) with the filing of a Claim in the amount of \$1,336,405. The Respondent, Commonwealth of Pennsylvania, Department of General Services (hereinafter referred to as “DGS” or “the Commonwealth”) filed an Answer, New Matter and a Counterclaim on June 9, 1989. Subsequently, the parties engaged in extensive discovery and over time, attorneys for both parties have come and gone. On May 16, 1996, IMS filed a Motion for Summary Judgment and Proposed Order and on July 12, 1996, the Commonwealth filed its Answer to the Motion along with a Brief in Opposition to the Motion and an extensive Compilation of Exhibits. On August 6, 1996, the Claimant filed its Reply Brief in Support of the Motion for Summary Judgment, and on August 15, 1996, the Commonwealth filed a Sur-Reply Brief in Opposition to the Motion for Summary Judgment. The next day, August 16, 1996, the Commonwealth filed a Cross-Motion for Summary Judgment and/or in the Alternative Cross-Motion for Partial Summary Judgment. Thirty days later, on September 16, 1996, IMS filed an Answer to the Commonwealth’s Cross-Motions.

On July 30, 1997, this Board rendered an Opinion and Order whereby IMS’ Motion for Summary Judgment as to Count I of the Complaint was denied, IMS’ Motion for Summary Judgment as to the claim for misappropriation of trade secrets and/or proprietary materials was denied, and IMS’ Motion for Summary Judgment as to Count II of the Complaint was granted as to liability regarding reimbursement of engineering fees, but denied the Motion as to damages. The Opinion and Order also denied the Commonwealth’s Cross-Motion for Summary Judgment and/or Partial Summary Judgment. On August 11, 1997, the Commonwealth filed a Motion for

Reconsideration of this Board's Opinion and Order of July 30, 1997, and on September 10, 1997, the Claimant filed a Response to the Motion for Reconsideration. The parties briefed their respective positions with regard to the Motion for Reconsideration and on October 28, 1997, the Board rendered an Opinion and Order denying DGS' Motion for Reconsideration.

Subsequently, in preparation for trial, Motions in Limine were filed and on May 20, 1998, the Board entered an Order relative to DGS' Motion in Limine to preclude testimony of certain of Claimant's factual and expert witnesses. Hearings began on June 8, 1998 and the case was completed on June 26, 1998. Both parties submitted proposed Findings of Fact, Conclusions of Law and Supporting Briefs. The matter now comes before this Board for decision.

This action stems from a desire on the part of the Commonwealth to operate more efficiently with respect to energy consumption. The Governor's Energy Council for the Commonwealth formed a task force in the early 1980's to develop a program entitled "Third-Party Financing of Energy Conservation Projects at State-Owned Facilities" ("TPF Program"). The TPF Program was established as a pilot program to which major energy improvements would be implemented at six selected Commonwealth facilities, including West Chester University ("WCU"). DGS served as the contracting agent for the Commonwealth on behalf of WCU and DGS was a signatory on an Energy Services Agreement which was eventually entered into between the Commonwealth and the Claimant. The Claimant, IMS, operated as an energy services management company during the period from 1982 through 1989. John Stout served as President of IMS and Howard Bozich was the CEO and Treasurer of the company. Mr. Bozich and Mr. Stout worked together in various social-work occupations for a number of years prior to forming IMS.

The Commonwealth issued a Request for Proposals for Phase I of the TPF Program in June of 1984 at the six selected Commonwealth facilities, which included WCU. Energy firms were invited to submit qualifications and Energy Savings Proposals for each of the six pilot program sites through RFP Phase I. The purpose of the TPF Program was specifically described in Section 1.2 of the RFP Phase I as to facilitation of the major improvements at the state-owned facilities, without the necessity for capital expenditures on the part of the Commonwealth, in order to provide the greatest costs savings to the Commonwealth, at the lowest risk. The Commonwealth received proposals in response to RFP Phase I and certain firms were selected to proceed with the RFP Phase II process. IMS was one of those firms which responded to RFP Phase I and was selected by the Commonwealth to proceed to RFP Phase II with regard to the WCU site.

The Commonwealth subsequently issued the Third-Party Financing Program Request for Proposals Phase II (hereinafter "RFP Phase II"). RFP Phase II reiterated the purpose of the TPF Program, which was to implement Energy-Savings Improvements at the six pilot sites without capital expenditures on the part of the Commonwealth. RFP Phase II also provided that the economic viability of the proposed Energy Improvement Project would be a major factor in the selection of the successful bidder. In response to RFP Phase II, IMS submitted a proposal for the WCU Project on November 27, 1984. The proposal consisted of a financial portion and a technical portion, which was prepared in conjunction with Entech Engineering, IMS' subcontractor. Contained within the Technical Proposal was a description of each Energy Conservation Measure and IMS included within the proposal language which advised the Governor's Energy Council that it would have complete costs for the capital Project following a final engineering review. Those costs would be reviewed by the Commonwealth at that time.

A review of the Financial Proposal which IMS submitted indicates that the Claimant represented it could undertake and implement the energy improvements contemplated at WCU with no financial risk to the Commonwealth and no cash outlay by the Commonwealth. IMS' Financial Proposal indicated that IMS would borrow \$2,671,000 to finance the WCU Project from a third-party funding source and the debt would be paid back by IMS over a seven-year period at 11.5% interest per annum. The proposal also contemplated that WCU would pay IMS "lease" payments equal to the amount of the debt service over the course of a seven-year lease term. The Financial Proposal submitted by IMS indicated the total cost of implementing the 25 energy conservation opportunities identified for the WCU site would total the same amount, i.e. \$2,671,000. Under IMS' Financial Proposal, the college would generate funds necessary to pay the equipment lease payments to IMS from the money saved through the implementation of the 25 energy conservation opportunities identified in IMS' Technical Proposal. IMS' Financial Proposal, at page two, projected savings for energy costs at WCU over the seven-year term at \$9,522,481. IMS' Financial Proposal also represented that not only would the projected energy savings exceed the equipment lease payments on a year-to-year basis over the course of the seven-year lease term, the savings would also exceed other contemplated costs known as maintenance, monitoring and management fees which would be paid to IMS. It was apparent from the Financial Proposal submitted by IMS that there would be no need for the Commonwealth to spend additional money to implement the WCU Project. IMS' Financial Proposal included schedules which indicated net energy costs savings of approximately \$193,000 in the first full year of operation, after equipment lease payments, maintenance, monitoring and management fees paid to IMS and savings which rose to the level of \$965,348 by the seventh year of the contract.

It was apparent from the beginning that Entech would handle all the technical issues for IMS relative to the WCU Project. Entech was represented as being experienced and capable of providing the technical expertise necessary to implement the 25 economic energy conservation opportunities at WCU, which included installation of an energy management system, the summer shut down of WCU's central steam plant, off-peak electric hot water heaters in dormitories and other main campus buildings, improvements to the steam pressure, conversion of the south campus field house from electric heat and hot water to natural gas heat and hot water, air supply and heat recovery systems in the central steam plant, and conversion and improvement of shower heads, lighting and various other energy equipment located around the campus to more commonly known cost-effective and energy efficient models. IMS' Technical Proposal did not contain any technical design information, drawings or specifications relating to the implementation of the proposed energy conservation opportunities and at no time did IMS or Entech ever provide the Commonwealth with any such technical design information. IMS' Technical Proposal indicated that all equipment and hardware necessary to implement the suggested energy conservation opportunities were to be purchased on the open market from brand-name equipment vendors preferable to WCU Operations' Personnel. Although IMS' Howard Bozich claims he personally stamped "every page and each copy, each volume, proprietary", neither IMS' Financial Proposal nor its Technical Proposal identified any of the proposed energy conservation opportunities, as "proprietary". In fact, it was readily apparent to this Board that IMS' claim relative to the alleged loss of proprietary information was neither properly plead nor sufficiently proven.

On March 22, 1985, IMS was selected as the winning bidder for the WCU Project. Upon being selected the winning bidder, IMS began negotiating with WCU concerning an Energy

Services Agreement (“ESA”), that was to be entered into between the parties. The negotiations began on or about March 22, 1985 and resulted in the ESA being executed by the parties on November 6, 1986. During the negotiations, IMS represented that the Project costs and projected energy savings figures were subject only to final fine-tuning as a consequence of the Detailed Engineering Analysis. Suffice it to say that the execution of the Energy Services Agreement, the language contained in the Agreement, and the events subsequent to the Agreement are critical to the instant Claim. Of particular import was Section 5.6 of the ESA entitled “Savings Guaranties” which we will address at length.

During the ESA negotiations, Dr. Joseph Hamil, the Vice-President of Fiscal and Administrative Affairs at WCU, relied very heavily upon the total projected costs as listed on page two of IMS’ Financial Proposal. Dr. Hamil testified during trial that up until the ESA was signed in November, 1986, IMS never told him that the energy costs production numbers contained on page seven of the Financial Proposal were invalid. Dr. Hamil believed that the projected costs, as contained in IMS’ Financial Proposal, would remain somewhere in the vicinity of \$2,671,000. Dr. Hamil stated that he had placed “great reliance” on Preliminary Schedule “N”, which was attached to the ESA and indicated to Dr. Hamil that the Project would pay for itself. Also of great importance to Dr. Hamil was the inclusion of very strict language relative to the energy savings insurance guaranty. Dr. Hamil testified that he advised Mr. Bozich of IMS that WCU would not sign the ESA without such language. Dr. Hamil felt this language was necessary to protect the Commonwealth so that there was no financial risk and no cash outlay relative to the WCU Project. Dr. Hamil indicated that he placed “tremendous importance” on Section 5.6 at the time the ESA was executed.

Section 5.6 of the Energy Services Agreement indicated as follows:

Notwithstanding the provisions above with regard to management and monitoring fees and Equipment operation and maintenance, no such fees will be due and payable to IMS except from energy dollar savings in excess of Schedule N amounts. Further, Commonwealth's agreement to make Equipment lease payments is conditional upon the issuance of a guaranty by a financially responsible party (insurance company or other entity satisfactory to the Commonwealth) that the energy dollars saved pursuant to the performance of this Agreement by IMS will be no less than the lease payments (Schedule N amounts) required by Section 5.1 above. West Chester University will be designated the loss payee under the guaranty. In the event that, in any given month, savings achieved fall below the debt service payment requirements West Chester University shall have the option of paying the shortfall itself or requiring IMS to immediately make up the shortfall. In the event of a shortfall, payments from the system performance guaranty shall be made to West Chester University only on an annual basis.

It is clear IMS was never able to provide the Commonwealth with an energy savings guaranty that satisfied the above language. This issue will also be discussed at length in this Opinion.

Section 1.2 of the ESA outlined the Preliminary Schedules which had already been prepared while Section 1.3 of the ESA referenced "final schedules to be prepared". Section 1.3 of the ESA indicated:

After IMS has completed a detailed engineering analysis, based upon its proposal dated November 27, 1984, and this Agreement, which will specifically identify the energy improvements to be made, IMS will develop and prepare final drafts of the schedules referenced in Section 1.2 of this Agreement. The final schedules shall then be submitted to Commonwealth for its review and approval. The parties shall use their best efforts to reach agreement regarding the contents of the schedules. . . .If the parties

cannot reach agreement regarding the contents of the schedules, Commonwealth may terminate this Agreement and IMS shall be reimbursed for the reasonable direct costs of the detailed engineering analysis.

If this Board were obligated to point to language within a document that would be determinative of the eventual outcome of the instant claim, certainly our focal point would have to be the above-referenced language contained in Sections 5.6 and 1.3 of the ESA. It is readily apparent from the evidence presented by the Commonwealth that both the energy savings guaranties and the original numbers contained on the schedules submitted by IMS, although it was clear to everyone they were estimates, were of great import to WCU. It is also clear, pursuant to Section 1.3 of the ESA that the parties to this claim had an “agreement to agree.” In other words, everyone recognized the fact that the total project costs of \$2,671,000, as indicated on Preliminary Schedule “N” attached to the ESA, was not a hard and fast number; however, the college thought those numbers might be subject to minor, or even moderate change. Instead, IMS, in its letter of May 1, 1987, advised WCU, for the first time since the ESA had been signed, that the Project costs escalated to \$3,867,820. The increase of \$1,196,820 represented a cost escalation of 44.8%, far more than WCU had ever anticipated. Despite a noble effort on the part of both the Claimant and the Respondent, which we believe qualifies as the parties’ “best efforts”, in the final analysis, the parties simply could not reach an agreement regarding the contents of the Schedules and the guaranty language. In essence, IMS and the Commonwealth never moved beyond their “agreement to agree”. This is unfortunate because had the original numbers submitted by IMS to WCU remained constant, and had the energy savings guaranty been satisfied, WCU would have derived a net positive energy savings after payment of equipment lease payments and all maintenance, monitoring and management fees

totaling \$4,196,241. The maintenance, monitoring and management fees to IMS were outlined on Preliminary Schedules “O” and “P” which were also attached to the ESA. Preliminary Schedule “C”, attached to the ESA, illustrated the net positive energy savings to the Commonwealth.

Needless to say, IMS’ letter of May 1, 1987, was not well-received by WCU. The letter outlined dramatically increased costs and decreased savings. Worse yet, IMS advised WCU, in their letter of May 1, 1987, that they could guarantee only 65.11% of the first year projected savings level. These revelations apparently “shocked” WCU’s Dr. Hamil and, although IMS provided specific reasons for the increased costs and reduced energy savings, WCU remained skeptical. The parties began what we believe to be an honest effort to finalize the deal and bring the numbers and guaranty issue to a mutually agreed upon point. This never occurred. In correspondence to WCU from IMS, dated August 21, 1987, September 4, 1987, September 10, 1987 and September 29, 1987, the parties continued to negotiate and IMS attempted to explain the guaranty issue, the increased costs, the lengthening of the Project and possible amendment of the ESA. Also, in a letter dated May 26, 1987, IMS outlined the many concerns it had regarding the Final Engineering Analysis and contract schedules which WCU had received from IMS in their letter of May 1, 1987. Despite letters back and forth, amended schedules, and eventually a proposition by IMS that the ESA be amended, which WCU rejected, the parties simply never came to terms with respect to the Final Schedules and the guaranty language.

Contracts are enforceable when the parties reach mutual agreement, exchange consideration and have set forth terms of the bargain with sufficient clarity; the agreement is definite if it indicates that the parties intended to make a contract and there is an appropriate basis upon which the Court can fashion a remedy. Biddle v. Johnsonbaugh, 444 Pa. Super 450, 664 A.2d 159

(1995); Johnston the Florist, Inc. vs. TEDCO Const. Corp., 441 Pa. Super 281, 657 A.2d 511 (1995); Greene v. Oliver Realty, Inc., 363 Pa. Super 534, 526 A.2d 1192, appeal denied 536 A.2d 1331 (1987). An agreement is an enforceable contract when the parties intended to conclude a binding agreement and the essential terms of that agreement are certain enough to provide the basis for an appropriate remedy. Linnet v. Hitchcock, 323 Pa. Super 209, 471 A.2d 537 (1984) If the essential terms of an agreement are so uncertain that there is no basis for determining whether the agreement has been kept or broken, there is not an enforceable contract. Id. In order for there to be an enforceable contract, the nature and extent of its obligation must be certain. Halowich v. Amminiti, 190 Pa. Super 314, 154 A.2d 406 (1959) Simply put, for a contract to be enforceable, its terms must be certain, explicit and not vague or indefinite. Potter v. Leitenderger Mach. Co., 166 Pa. Super 31, 70 A.2d 390 (1950) In the instant case, because the parties never came to terms with respect to the final schedules and the guaranty language, it is clear to this Board that the terms of the final agreement between the parties were not sufficiently definite to constitute a contract that could be specifically enforced. We are unpersuaded by the fact that the parties did execute the ESA as we view this as a general agreement to enter into a binding contract. Under Pennsylvania law, evidence of preliminary negotiations or a general agreement to enter a binding contract in the future fail as enforceable contracts because the parties themselves have not come to an agreement on the essential terms of the bargain, and therefore, there is nothing for the Court to enforce. ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659 (3rd Cir. 1998)

The Commonwealth, through DGS, issued a Notice of Default letter to IMS regarding the WCU Project on or about December 30, 1987. The Commonwealth, apparently, realizing that the letter should have been sent via certified mail, as required by the terms of the ESA, re-mailed the

default letter again on January 13, 1988. Pursuant to the terms of the ESA, IMS was required to correct or cure the noted deficiencies outlined in the Commonwealth's default letter. On February 26, 1988, IMS sent the Commonwealth a letter indicating that IMS was in a position to offer a full eight-year debt service guaranty which would be a corporate guaranty from a "very substantial firm". IMS indicated in this letter that prior to proceeding, the Claimant felt that WCU needed to demonstrate "good faith" by forwarding a letter regarding their intent and a check for \$25,000. On March 23, 1988, IMS advised the Commonwealth that it would be able to provide a corporate guaranty from a construction contractor, H & H Construction Group, Inc., regarding the debt service, assuming WCU would be willing to agree to certain inflation and deflation rates. In that letter, IMS proposed that H & H Construction would be responsible for maintenance of the equipment and construct the Project, while Durrant Engineering Company would perform the design work and be responsible for monitoring the Project. IMS indicated it would stay involved in the Project as a "project developer" and "local representative". WCU rejected IMS' proposal of March 23, 1988, which had been sent well in excess of the thirty day requirement for curing default set forth in the ESA. Dr. Hamil of WCU described IMS' role with regard to their March 23, 1988 proposal, as different than that which was originally contemplated by the ESA. Dr. Hamil also indicated that after reviewing H & H Group's financial statement, that the statement had not been audited and the net worth was not nearly enough to cover the lease payments with respect to the WCU Project. The Commonwealth, again through DGS, issued a letter to IMS terminating the ESA on April 19, 1988.

At the trial, the Commonwealth presented David Birr, an engineer with more than twenty years experience in the energy consulting business. Mr. Birr had assisted in the preparation

of RFP's on behalf of owners, assisted in the negotiation of specific technical schedules appended to contracts and has monitored the performance of vendors during an energy performance contract. Mr. Birr served as an arbitrator for contract disputes involving energy performance contracts and has negotiated the technical and financial terms of energy savings guaranty language. He was presented by the Commonwealth as an expert in the area of energy services contracts. Mr. Birr testified that he reviewed the correspondence between IMS and the University over an approximate period of two years, reviewed the proposals prepared by IMS in response to the RFP's sent out by WCU and reviewed the Energy Services Agreement between the parties and the associated proposed schedules at various points in time. He also reviewed the exhibits that were prepared by the Commonwealth and sat through the trial and heard the testimony of the various witnesses presented to the Board. Mr. Birr also read the depositions of a number of individuals. Mr. Birr testified that he felt IMS' Financial Proposal projection of \$2,671,000 in costs was an offer of cost for the Project in response to the RFP. He testified that he reviewed the Financial Proposal in its entirety to make certain that he understood the projected cash flows for the Project. Based upon his review, he found the Financial Proposal submitted by IMS to WCU to be a financially attractive proposal for the University based upon the costs and savings estimates. Mr. Birr also reviewed the ESA and testified that Preliminary Schedule "N", to the ESA, indicated a seven-year performance contract with a principle amount of costs totaling \$2,671,000, the same amount provided in the original proposal transmitted to the University in 1984. In addition, Preliminary Schedule "C", attachment B, to the ESA, also appeared identical, or nearly identical, to the information contained on IMS' Financial Proposal. Mr. Birr also felt that Section 5.6 of the ESA provided a fairly protective guaranty that minimized the Commonwealth's financial risk. Mr. Birr stated that the language in Section 5.6 of

the ESA was similar to many contracts that he had seen and that under such language, WCU was obligated to make payments only if the energy savings were in excess of the exposure on the lease. With respect to the maintenance and monitoring fees, Mr. Birr established that WCU would have no obligation to make payments for such fees if the projected savings fell below the debt service since IMS' fees were a contingent fee based upon their performance.

Mr. Birr also testified relative to Section 1.3 of the ESA. Mr. Birr opined that with that type of language, there really was not a "complete agreement" between the parties or a "complete meeting of the minds", until there was a final agreement on the technical schedules, because those technical schedules really contain the financial essence of the agreement. Mr. Birr also opined that WCU, even though it entered into the ESA, was not committed to accepting the financial terms of the deal. Mr. Birr believed that the ESA only committed WCU to negotiate in good faith and to make an effort to reach an agreement on the financial terms established by the schedules. He also opined that a 44.8% cost increase, without very detailed documentation to support and substantiate the reasons for the cost increases, especially when discussing total project costs, would certainly be "atypical". Mr. Birr also indicated that IMS, in its letter of May 1, 1987, contained massive increases in the soft costs of the Project, i.e. costs associated with engineering, project development, financing costs performance insurance, construction management and overhead, all of which are often negotiated. Mr. Birr testified that he agreed in principle that preliminary estimates require some revision, and that such revision is customary; however, he described an increase of 44.8% as "shocking". Mr. Birr noted that the decrease in savings outlined in IMS' letter of May 1, 1987, diminished the value of the ESA with regard to the WCU Project and that it was not normal or customary to expect such changes. Mr. Birr felt IMS' explanation with

respect to the letter of May 1, 1987, to be “puzzling” and “counterintuitive”. He opined that their logic supporting the increased costs and decreased savings did not provide an adequate justification to WCU. Mr. Birr also questioned IMS’ calculations, further considered the exchange of correspondence and information between the parties and concluded there was a significant level of effort extended to try to come to a meeting of minds on the financial particulars of the deal. Notably, Mr. Birr testified that IMS’ claim for engineering fees, totaling \$386,406 was “completely unreasonable” and he opined IMS’ claim for engineering fees was co-mingled with many tasks undertaken before the ESA was executed and tasks performed by non-engineers. He also opined that the summer boiler shutdown was a “common idea” and it was current in the industry long before IMS ever introduced that idea to WCU. We view Mr. Birr’s testimony as credible and compelling.

The Commonwealth also presented William M. McMahon, Jr., a practicing engineer of thirty-three years. Mr. McMahon also has a Masters’ Degree in Business Administration and had worked as a Contract Administrator on projects, a Costs Engineer for nuclear and other energy projects. Mr. McMahon was a partner in the firm of Entech Engineering at the time the instant claim arose. Mr. McMahon also testified that he did not consider the concept of the summer shutdown energy conservation opportunity to be a proprietary concept. He testified and established that Entech had been paid \$19,000 out of the \$75,000 agreed to by IMS for the work that Entech performed on the Detailed Engineering Analysis for the WCU Project. Entech was never paid the remaining \$56,000 balance and wrote off that debt in April of 1988. Mr. McMahon also testified that IMS never provided any notice to Entech that the work performed by Entech was not satisfactory to IMS. We also accepted Mr. McMahon’s testimony as credible.

The Commonwealth also introduced Thomas C. Wetzel, a self-employed Certified Public Accountant, as an expert witness, regarding IMS' damages. In preparing for his testimony at the time of trial, Mr. Wetzel reviewed the 1983 financial statement of IMS and testified that in 1983 IMS had shown a net loss of \$222,523. Mr. Wetzel also reviewed IMS' financial statement for the year ending December 31, 1984 and testified that the 1984 financial statement indicated that the company lost \$443,946. Mr. Wetzel's review of IMS' financial statements for the year ending December 31, 1985, indicated that the current assets of IMS on December 31, 1985 were \$941,370 and that current liabilities of the company on that date were \$1,738,901, nearly twice the asset number. Mr. Wetzel also testified that IMS' financial statement dated October 31, 1986, was not audited. Mr. Wetzel was concerned about the timing of the financial statement in that it came just prior to the execution of the ESA between IMS and WCU. Mr. Wetzel explained that financial statements not subject to full audit are performed at a level of accounting service that is a step below an audited financial statement and he pointed out that IMS had changed the level of service that it had engaged its accountants to perform from that performed in prior years. Mr. Wetzel also noted that IMS' financial statement dated October 31, 1986, prepared by Ernst and Whinney contained language to the effect that IMS' continued operation was dependent upon future profitable results. Mr. Wetzel pointed out that that type of language is included in financial statements when the accountant reviewing the financial statements or auditing the financial statements feels that without substantial reorganization, restructuring or the injection of additional capital, the company will not be in existence for the next year. According to Mr. Wetzel, as of October 31, 1986, the reported total current assets of IMS were \$319,294, while the total current liabilities as of that same date were

\$1,104,057. He stated that when adding the losses incurred in the ten month period in 1986 to the prior periods, dating back to 1982, the company had lost \$2,102,466.

Mr. Wetzel also testified that as of October 31, 1986, IMS converted approximately \$1,789,000 worth of notes payable and payables on shared savings due to Government Financial Services, Inc., into 17,890 shares of cumulative preferred stock, with a \$100 par value. No gain or loss accrued on that transaction; however, Mr. Wetzel concluded that IMS needed to do something like that in order to reduce the liabilities that it was showing on its balance sheet. Mr. Wetzel opined that IMS, given its financial condition, would not have been able to provide the services and remain in existence long enough under the West Chester University Contract, to realize any profits from that engagement. He further opined, given his review of IMS' letter of May 1, 1987, that the company would not have been entitled to any management or monitoring fees under the WCU Contract, until at least 1990. He indicated, in his professional opinion, that the company could not continue in business until 1990 and that the WCU Contract would not have provided sufficient cash flow, standing alone, to keep IMS in business. The Board also viewed Mr. Wetzel's testimony as credible.

Having concluded, as indicated above, that a final and enforceable contract was never reached between the parties, the issue of damages is really moot; however, we will address the engineering fees issue. Section 1.3 of the ESA provided that if the parties could not reach agreement regarding the contents of the Schedules, the Commonwealth could terminate the Agreement and that IMS would be reimbursed for its direct costs associated in the preparation of the required Detailed Engineering Analysis. Although the Board granted IMS' Motion for Summary Judgment as to Count II of the Complaint with respect to liability on July 30, 1997, IMS never adequately explained its engineering fees claim. Although John Stout, of IMS, testified concerning an "invoice" he prepared

(Exhibit C-100), many of the employees whose time was used to compile the invoice were clerical personnel with no engineering experience. While we are cognizant of the fact that the Claimant did not have to prove damages with mathematical certainty, the claim still must be substantiated by reliable evidence. Acchione & Canuso, Inc. v. Pa Department of Transportation, 501 Pa. 337, 461 A.2d 765 (1983); Standard Pipeline Coating Company, Inc. v. Solomon & Teslovich, Inc., 334 Pa. Super 367, 496 A.2d 840 (1985); Larry Armbruster & Sons, Inc. v. Public School Building Authority, 95 Pa. Cmwlth Ct. 310, 505 A.2d 395 (1986) In the instant case, Mr. Stout explained his invoice included the use of computers utilized to perform calculations, sales consultant fees for personnel involved with the sale of the contract and included both his time, Mr. Bozich's time and remarkably, his attorney at \$150 per hour. This Board was not persuaded by Exhibit C-100 or C-173, or for that matter, Mr. Stout's testimony regarding IMS' claim for engineering fees. We accepted as true the testimony of Entech's William M. McMahon, Jr., who established that Entech was never paid a remaining balance of \$56,000.

Finally, the Commonwealth's Counterclaim, in the amount of \$4,325,911 is viewed by this Board as completely without merit. The Commonwealth can not claim, on the one hand, that no contract existed and they are not obligated to IMS and, on the other hand, demand the benefit of the contract had the savings, as predicted, been realized. Accordingly, an appropriate Order shall be entered.

ORDER

AND NOW, this 6th day of October, 1999, an award in the amount of Fifty-Six Thousand (\$56,000) is hereby made in favor of the Claimant, Impact Management Systems, Inc., and against the Respondent, Commonwealth of Pennsylvania, Department of General Services and the State System of Higher Education, West Chester University. Further, it is hereby **ORDERED** that interest at the statutory rate of six percent (6%) per annum shall be paid from the date the Claim was filed, i.e. May 8, 1989. The Commonwealth's Counterclaim is hereby **DISMISSED**. Each party is to bear its own costs and attorneys' fees.

Upon receipt of said award by the Claimant, the Claimant shall forthwith file with the Board of Claims a Praecipe to mark the case settled and ended with prejudice.

BOARD OF CLAIMS

David C. Clipper
Chief Administrative Judge

Louis G. O'Brien, P.E.
Engineer Member

Opinion Signed
Oct. 6, 1999

James W. Harris
Citizen Member