

COMMONWEALTH OF PENNSYLVANIA

LOHRMANN ENGINEERS, INC. : BEFORE THE BOARD OF CLAIMS  
 :  
VS. :  
 :  
COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF TRANSPORTATION : DOCKET NO. 1609

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**FINDINGS OF FACT**

1. Plaintiff, Lohrmann Engineers, Inc., (hereinafter referred to as “Lohrmann” or “Claimant”) is a Pennsylvania Corporation with its principal place of business located at P.O. Box 11054, Pittsburgh, Pennsylvania 15237. (Complaint and Answer)

2. The Defendant, Commonwealth of Pennsylvania, Department of Transportation, (hereinafter referred to as “DOT” or “the Department”) is an executive Department of the Commonwealth of Pennsylvania with principal offices located at 555 Forum Place, Harrisburg, Pennsylvania 17101. (Complaint and Answer)

3. The parties entered into an agreement designated by PennDOT as Agreement No. 125055 on or about November 21, 1988. (Defendant Exhibit No. 1)

4. The agreement between Lohrmann and the Department required Lohrmann to furnish all engineering and related services for the structural bridge crossing Conrail railroad tracks on S.R. 1040, Section C10, located in Westmoreland County, Pennsylvania. (Complaint and Answer)

5. Lohrmann filed a claim with this Board on January 29, 1992, in the amount of \$41,643.12. Lohrmann claimed two unpaid project estimates, an increase in the contractual overhead rate, and compensation for additional hours worked and close-out costs. (Complaint)

6. A hearing was held before the Western Panel of this Board on March 23 and 24, 1994. The Panel Report and recommendation was filed with the Board on April 14, 1995 and the Board rendered an Opinion and Order on September 18, 1995. The Board awarded Lohrmann \$17,084.38. (Original Record)

7. The Department filed a timely appeal of the Board’s decision and on June 14, 1996, the Commonwealth Court handed down an Opinion and Order reading as follows:

## ORDER

Now, June 14, 1996, we affirm the Board of Claims' determination that Lohrmann Engineers, Inc. met its burden of proof justifying an increase in the project overhead rate. The Board of Claims' determination is, however, reversed to the extent that it increased Lohrmann Engineers, Inc.'s overhead rate to 120%.

We remand this matter to the Board with the direction that it receive additional evidence regarding Lohrmann Engineers, Inc.'s overhead rates during the course of the project, specifically for the years 1988, 1989, 1990 and 1991 and any additional evidence which supports the increase in Lohrmann Engineers, Inc.'s overhead rate for the work it completed which went beyond the scope of the work encompassed in the contract. Upon receipt of such evidence, the Board of Claims may proceed to calculate the overhead rate that will compensate Lohrmann Engineers, Inc. for the Department of Transportation's breach of the contract not to exceed 120%.

Jurisdiction relinquished.

(Record)

8. The Commonwealth Court, in its Opinion, also stated:

. . . [W]e believe the Board erred by increasing LEI's overhead rate for the entire contract period. LEI and DOT contracted for an 83% overhead rate. That portion of the work completed by LEI that was within the scope of the work envisioned by the parties when they executed the contract should remain subject to the 83% overhead rate. However, the work LEI was forced to complete which extended beyond the scope of the work detailed in the contract should be subject to an increased overhead rate not to exceed 120%.

(Record/Commonwealth Court Opinion pg. 6)

9. Pursuant to the above-mentioned Commonwealth Court Order, the Western Panel of the Board conducted a hearing on September 26, 1996, to receive additional evidence regarding Lohrmann's overhead rates during the course of the project, specifically for the years 1988, 1989, 1990 and 1991. (Record/Transcript of September 26, 1996)

10. The original Findings of Fact, Conclusions of Law and Order of this Board of September 18, 1995 are incorporated to these Findings of Fact, Conclusions of Law and Order by reference. (Record)

11. Lohrmann introduced three exhibits before the Western Panel at the hearing held on September 26, 1996, to support his Claim, which had been remanded with instructions from Commonwealth Court. Those exhibits were:

- |           |   |
|-----------|---|
| Exhibit A | Subpart 1-15.2 of the Federal Procurement Regulations   |
| Exhibit B | General & Administrative Overhead Computation for Lohrmann Engineers, Inc. for the fiscal years 1988, 1989, 1990 and 1991 |
| Exhibit C | Copies of minutes of the Board of Directors meeting dated January 3, 1989 and memo to files dated January 2, 1990         |

(N.T. 28-32, 34-38, 40, 41; Exhibits P-A, P-B, P-C)

12. The first exhibit introduced by the Claimant was reportedly tendered to justify the reasonableness of an award of 120% overhead; however, Mr. Lohrmann never explained the relevance of the document. An objection to the relevance of the document was tendered by DOT and although the Western Panel admitted the document, it is of limited value to the Claimant. (N.T. 29-32; Exhibit P-A)

13. The second exhibit tendered by the Claimant was a list of general administrative overhead computations for the fiscal years 1988, 1989, 1990 and 1991. While these computations, collectively marked as "Exhibit B" would have been very helpful to Lohrmann's claim for additional overhead expense, the Western Panel, per Attorney Campedel, sustained an objection to the Exhibit on the basis that there was no foundation for the document. Unfortunately for the Claimant, he failed to bring any corresponding support documentation and simply presented the summary of other documents, which were not produced at the time of the hearing. (N.T. 34-39; Exhibit P-B)

14. The calculations in the Claimant's Exhibit B were not audited. (N.T. 36)

15. The final Exhibit tendered by Lohrmann was a copy of minutes from a Board of Directors meeting of Lohrmann Engineers, Inc. dated January 3, 1989 and file memo indicating the rate of pay to Mr. Manfred Lohrmann, dated July 2, 1990. These two pages were collectively marked as Exhibit C and were tendered to support the salary rate of the officers of the corporation. (N.T. 39-41; Exhibit P-C)

16. No additional documentation whatsoever was entered into evidence by the Claimant to support its claim for additional overhead, nor did Mr. Lohrmann offer anything additional by way of testimony on behalf of the Claimant. (N.T. 41, 44)

17. The Department concedes the Claimant is due the \$6,444.49. (N.T. 17, 46)

18. The Department agreed that they were willing to pay a 120 percent overhead rate on additional work. The breakdown of what the Commonwealth was willing to pay was explained by their attorney as follows:

ATTORNEY SCHULTZ:

According to my calculations what we would agree with is the supplement A overhead adjustment of 37 percent, which in the Board's opinion was \$1,217.97. The supplement B overhead adjustment of 37 percent which is in the Board's opinion was \$1,011.86, the additional hours worked beyond supplement B was \$1,343.60, the overhead adjustment for those additional hours, 120 percent, which is \$1,612.32 and the contract closing costs of \$1,258.74. According to my arithmetic that adds up to \$6,444.49. . . .

ATTORNEY CAMPEDEL:

So you're disputing - those are the amounts you're agreeable to?

ATTORNEY SCHULTZ:

That's correct.

(N.T. 17, 46, 48)

19. The Board's award to Lohrmann for compensation attributable to the additional hours claimed by Lohrmann for work performed from February 1991 to July 1991 was not reversed by the Commonwealth Court and as such stands as part of the original award. (Record/Opinion of the Commonwealth Court of Pennsylvania filed June 14, 1996)

### 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. This matter comes before the Board on remand from the Commonwealth Court of Pennsylvania at No. 2661 C.D. 1995 per the Order of the Honorable Samuel L. Rodgers, Senior Judge, dated June 14, 1996, wherein the Board was required to receive additional evidence regarding Lohrmann Engineers, Inc.'s overhead rates during the course of the project, specifically for the years 1988, 1989, 1990 and 1991, along with any additional evidence which supports the increase in Lohrmann Engineers, Inc.'s overhead rate for the work it completed which went beyond the scope of the work encompassed in the contract.

4. Claimant's Exhibit A has no probative value whatsoever with respect to the issue before the Board.

5. The Claimant's Exhibit "B," which was a summary of the general and administrative overhead computations for the Fiscal Years 1988, 1989, 1990 and 1991 were not admitted into evidence due to the fact that the summaries were offered with no corresponding backup documentation whatsoever. Mr. Lohrmann acknowledged that Exhibit "B" had not been audited; thus, no accountant could have been offered to explain the calculations and the Board concurs in the Western Panel's refusal to admit Exhibit "B" into evidence and affirms that evidentiary ruling.

6. The only other documents submitted by Lohrmann in support of its claim in conjunction with the directive of the Commonwealth Court was two documents, those being minutes of a Board of Directors meeting dated January 3, 1989 and a file memo dated July 2, 1990. These documents also have no probative value as to the issue before the Board.

7. The Commonwealth, per attorney Gerald Schultz, Esquire, agrees that a payment is due the Claimant in the form of an overhead adjustment at 120% in conjunction with additional contract closing costs, totaling \$6,444.49.

8. While the Claimant, Lohrmann Engineers, Inc., may have failed to present admissible evidence to support the theory that it was entitled to an overhead rate in excess of 83%, DOT concedes the payment of \$6,444.49 is due for the following items:

a. Supplement A overhead adjustment - 37%	\$1,217.97
b. Supplement B overhead adjustment - 37%	1,011.86
c. Additional hours worked beyond Supplement B	1,343.60
d. Overhead adjustment for additional hours - 120%	1,612.32
e. Contract closing costs	1,258.74

9. Based upon the concession of the Commonwealth with regard to the above-mentioned adjustments, an award in favor of the Claimant will be made in the amount of \$6,444.49.

10. The items listed in the damages summary in this Board's original Opinion and Order of September 18, 1995, which were not reversed or remanded by the Commonwealth Court must be awarded to the Claimant, in the amount of \$3,998.85.

11. The Board's Findings of Fact are supported by substantial, relevant evidence such as a reasonable mind might accept as adequate to support its Conclusions of Law.

### **OPINION**

This matter comes before the Board of Claims on remand from a Commonwealth Court decision filed at No. 2661 C.D. 1995 per the Order of the Honorable Samuel L. Rodgers, Senior Judge, dated June 14, 1996. In Judge Rodgers's Order, this Board was directed to receive additional evidence regarding Lohrmann Engineers, Inc.'s overhead rates during the course of the project, specifically for the years 1988, 1989, 1990 and 1991, along with any additional evidence which supported the increase in Lohrmann's overhead rate for the work it completed which went beyond the scope of the work encompassed in the contract. In conjunction with that mandate, a

hearing was held before our Western Panel on September 26, 1996. At that time, Lohrmann Engineers, Inc. presented evidence which, of course, was to be submitted in light of the Commonwealth Court's decision and Order of June 14, 1996. The Commonwealth Court's Opinion and Order came in response to an appeal filed by DOT from the Order of this Board entered September 18, 1995, wherein we awarded Lohrmann Engineers, Inc. the amount of Seventeen Thousand Eighty-Four Dollars and Thirty-Eight Cents (\$17,084.38) for overhead adjustments, additional man hours spent, and closing costs, along with the interest at the legal rate of six percent (6%). For the sake of brevity, we will not explain again how we reached damages totaling \$17,084.38; however, suffice it to say the Commonwealth Court agreed with some, but not all, portions of the previously entered Findings of Fact, Conclusions of Law, and the accompanying Opinion and Order. The Commonwealth Court Order of June 14, 1996, held and directed as follows:

#### ORDER

Now, June 14, 1996, we affirm the Board of Claims' determination that Lohrmann Engineers, Inc. met its burden of proof justifying an increase in the project overhead rate. The Board of Claims' determination is, however, reversed to the extent that it increased Lohrmann Engineers, Inc.'s overhead rate to 120%.

We remand this matter to the Board with the direction that it receive additional evidence regarding Lohrmann Engineers, Inc.'s overhead rates during the course of the project, specifically for the years 1988, 1989, 1990 and 1991 and any additional evidence which supports the increase in Lohrmann Engineers, Inc.'s overhead rate for the work it completed which went beyond the scope of the work encompassed in the contract. Upon receipt of such evidence, the Board of Claims may proceed to calculate the

overhead rate that will compensate Lohrmann Engineers, Inc. for the Department of Transportation's breach of the contract not to exceed 120%.

Jurisdiction relinquished.

Mr. Lohrmann, cognizant of the above Order from Commonwealth Court, represented himself *pro se* on September 26, 1996, before the Board of Claims's Western District Panel. Unfortunately, the evidence submitted by Mr. Lohrmann on behalf of his company was inadequate at best. Were it not for the Commonwealth's willingness to concede certain sums due the Claimant, we would have been obligated to reject Lohrmann Engineers, Inc.'s claim for additional overhead up to 120%.

The Commonwealth Court's opinion also indicated, with regard to the application of the overhead rates, as follows:

That portion of work completed by LEI that was within the scope of work envisioned by the parties when they executed the contract should remain subject to the 83% overhead rate. However, the work LEI was forced to complete which extended beyond the scope of work detailed in the contract should be subject to an increased overhead rate not to exceed 120%.

This Board's original calculation of damages appeared in the "Damages Summary" portion of our opinion as follows:

1. Part I - 100% Completed	\$16,348.72
2. Part II - 93.4% Completed	\$30,253.46
( $0.934 \times \$32,391.28 = \$30,253.46$ )	
3. Supplement A	\$8,779.08
4. Supplement A Overhead Adjustment - 37%	\$1,217.97
( $0.37 \times \$3,291.80 = \$1,217.97$ )	
5. Supplement B	\$9,407.68



6. Supplement B Overhead Adjustment - 37%	\$1,011.86
(0.37x\$2,734.75=\$1,011.86)	
7. Part I Overhead Adjustment - 37%	\$2,315.25
(0.37x\$6,257.44=\$2,315.25)	
8. Part II Overhead Adjustment - 37%	\$4,325.79
93.4% Completed	
(93.4% of 0.37x\$12,517.48=\$4,325.79)	
9. Additional Hours Worked beyond Supplement B	\$1,343.60
(84.5 hours from Feb. to Jul. 1991)	
10. Overhead Adjustment for Additional Hours - 120%	\$1,612.32
(1.2x\$1,343.60=\$1,612.32)	
11. Contract Closing Costs	<u>\$1,258.74</u>
<b>Amount Due Plaintiff on Contract #125055</b>	<b>\$77,874.47</b>
12. Less Payments Made by PennDOT	<u>(\$60,790.09)</u>
<b>Plaintiff's Damages</b>	<b>\$17,084.38</b>

It was pointed out by Western Panel Member McLaughlin that, at the hearing of September 26, 1996, there was a discrepancy of approximately Three Thousand Nine Hundred Ninety-Eight Dollars and Eighty-Five Cents (\$3,998.85) with regard to the damages summary in relationship to the monies actually paid by PennDOT. The Board's original award gave the Claimant an additional 37% overhead adjustment in the amount of One Thousand Two Hundred Seventeen Dollars and Ninety-Seven Cents (\$1,217.97) for Supplement A, which was calculated using the figure for Supplement A at Eight Thousand Seven Hundred Seventy-Nine Dollars and Eight Cents (\$8,779.08). Similarly, the Board gave an overhead adjustment of an additional 37% in the amount of One Thousand Eleven Dollars and Eighty-Six Cents (\$1,011.86) for Supplement B, utilizing the figure of Nine Thousand Four Hundred Seven Dollars and Sixty-Eight Cents (\$9,407.68) for Supplement B. As pointed out in the Commonwealth's Brief, this resulted in an additional

(\$3,998.85) to the Claimant because the above calculations were determined using 100% of Supplements A and B. The Commonwealth accurately points out that Lohrmann was entitled to only 93.4% of the supplements because Lohrmann failed to prove that it completed more than 93.4% of the work under Part II of the Contract; however, this issue appears nowhere in the memorandum opinion filed in the Commonwealth Court concerning the appeal taken in this matter. As a result, we are obligated to re-award the balance of the original award totaling \$3,998.85. Since the issue was not raised at the Commonwealth Court level by the Commonwealth Court, or at trial after remand, we are obligated to affirm the award. We also will not adjust the overhead calculations resulting from the original figures used in the Board's Damages Summary since the Commonwealth has already acquiesced to an award utilizing the figures originally established in this Board's Opinion and Order of September 18, 1995. Accordingly, the Claimant will be entitled to Three Thousand Nine Hundred Ninety-Eight Dollars and Eighty-Five Cents (\$3,998.85) as part of the Board's original award. The total award payable to the Claimant shall be Ten Thousand Four Hundred Forty-Three Dollars and Thirty-Four Cents (\$10,443.34), broken down as follows: Six Thousand Four Hundred Forty-Four Dollars and Forty-Nine Cents (\$6,444.49) per the stipulation of the Commonwealth that it owes that amount and Three Thousand Nine Hundred Ninety-Eight Dollars and Eighty-Five Cents (\$3,998.85) from the Board's original award. Having established that, we feel that it is appropriate to elaborate further on the issue of damages.

As indicated in the Commonwealth Court Opinion in this matter, the Department, on appeal, did not challenge this Board's conclusions that the Department was responsible for the unreasonable project delays experienced by Lohrmann or that the Department required Lohrmann

to perform work outside the scope of the contract. With that, liability was clearly established for the Claimant with respect to the remand hearing held on September 26, 1996. However, we believe the Claimant “dropped the ball” with regard to the damages issue at the remand hearing. We have seen this scenario occur at hearings conducted before this Board time and time again. In what appears to be a common theme among both large sophisticated contractors as well as much smaller companies, so much attention is paid to the liability issue that the all-important damages issue becomes almost an “afterthought.”

In the instant case, we certainly respect the fact that Mr. Lohrmann, in an effort to save litigation costs, represented himself *pro se* at the hearing of September 26, 1996. However, we must hold Mr. Lohrmann, as we would any claimant, to the same standard with regard to proof of damages. As we have indicated numerous times, the plaintiff in an action for breach of contract has the burden of proving damages resulting from the alleged breach. See Spang and Co. vs. U.S. Steel Corp., 519 Pa. 14, 545 A.2d 861 (1988). While we are cognizant of the fact that Lohrmann did not have to prove damages with mathematical certainty, the loss claimed has to be substantiated by reliable evidence and with a reasonable degree of certainty. Acchione & Canuso, Inc. v. Pa. Department of Transportation, 501 Pa. 337, 461 A.2d 765 (1983); Standard Pipeline Coating Company, Inc. vs. Solomon & Teslovich, Inc., 334 Pa. Super. 367, 496 A.2d 840 (1985); Larry Armbruster & Sons, Inc. vs. Public School Building Authority, 95 Pa. Comwlth. Ct. 310, 505 A.2d 395 (1986). In the case at hand, Mr. Lohrmann introduced three (3) exhibits, two of which were of no probative value and the third (Exhibit P-B) which was not admitted by the panel chairman for obvious evidentiary reasons. The Claimant brought general and administrative overhead

computations for the fiscal years 1988 through 1991; however, the reports were not provided to opposing counsel prior to the hearing of September 26, 1996, nor was any back-up documentation brought to court to substantiate the documents. The fact that the documents were not audited only compounded the problem, since the Claimant had no witness available to explain how the figures were arrived at or whether or not they were accurate. There is little doubt in our mind that the Claimant probably left “money on the table” with regard to remand hearing and the evidence submitted, or lack thereof; however we cannot assume the role of a claimant’s accountant. Accordingly, an appropriate Order will be entered.

**ORDER**

**AND NOW**, this                      day of                      , 1998, the Board of Claims awards the Plaintiff, Lohrmann Engineers, Inc. the sum of Ten Thousand Four Hundred Forty-Three Dollars and Thirty-Four Cents (\$10,443.34), of which Six Thousand Four Hundred Forty-Four Dollars and Forty-Nine Cents (\$6,444.49) was acknowledged to be due and owing by the Commonwealth for overhead adjustments, additional hours worked beyond Supplement B, overhead adjustment for additional hours worked beyond Supplement B, and contract closing costs. Of the total award, Three Thousand Nine Hundred Ninety-Eight Dollars and Eighty-Five Cents (\$3,998.85) is awarded as per the original award in this matter entered September 28, 1995. The total award of \$10,443.34 is awarded along with interest at the legal rate of 6% per annum beginning on the date of the filing of the Claim, January 29, 1992.

Upon receipt of said award, Plaintiff shall forthwith file with the Board of Claims a Praecipe requesting that the matter be marked settled, discontinued and ended with prejudice.

Each party to bear its own costs and attorneys fees.

**BOARD OF CLAIMS**

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David C. Clipper  
Chief Administrative Judge

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

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James W. Harris  
Citizen Member

Opinion Signed

Feb. 27, 1998