COMMONWEALTH OF PENNSYLVANIA

DOME CORPORATION OF NORTH AMERICA	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION	:	DOCKET NO. 3293

FINDINGS OF FACT

1. Dome Corporation of North America (ADome@) is a New York corporation with an office at 15 South Park Street, Montclair, New Jersey 07042 engaged in the business of constructing and repairing salt domes for use on highways. (Stipulated Fact para.1)

2. Defendant, Department of Transportation (APennDOT@) is an agency of the Commonwealth of Pennsylvania with its principal office located in Harrisburg, Pennsylvania, 17120. (Complaint)

3. Dome builds salt storage buildings, also called salt domes, and as the holder of the patent on the salt domes, it is the exclusive provider of repairs. (Notes of Transcript [AN.T.@] 10-11; Shields Deposition (Adep.@) at 11)

4. Dome has supplied and repaired salt domes for PennDOT since 1968. (N.T. 11)

5. Stephen Shields is employed by PennDOT as the Transportation Facilities Administrator for Engineering District 4-0 in Lackawanna County with his office in Dunmore, Pennsylvania. (Shields dep. at 5; Ex. P-6)

6. Mr. Shields was the PennDOT engineer in charge of the project to repair the salt dome here at issue. (N.T. 12, 21, 31; Shields dep. at 6)

7. Mr. Shields began his employment with PennDOT in 1987 as a Highway Draftsman Designer and became Transportation Facilities Administrator in May, 1999. (Shields dep. at 5, 25)

8. Mr. Shields= job duties as Transportation Facilities Administrator include Amaintenance, inspection and project management of construction and renovation projects@ of PennDOT facilities. (Shields dep. at 6)

9. Mr. Shields is the inspector in charge of all projects in his area. He inspects the project before repair starts, during construction, signs off on the project and authorizes payment. (Shields dep. at 6-8)

10. Mr. Shields worked on three or four projects with Mr. Jacques Kessous, vice president of Dome before August, 1999 and felt that Dome=s work was Agood.@ (Shields dep. at 9)

11. In August 1999, one of the salt domes owned by PennDOT and located in Clarks Summit was in need of repair. Mr. Shields asked Dome to submit a repair proposal. (N.T. 16-17; Shields dep. at 11)

12. On August 31, 1999, Mr. Kessous went to the job site, inspected the damaged salt dome, and determined what repairs were required. (N.T. 12-14, 16-17; Complaint and Answer at para. 1)

13. On September 2, 1999, Dome submitted a proposal to PennDOT to perform repair work on the salt dome, Project No. 08-FM0084. (N.T. 13-15; Ex. P-1)

14. The proposal provided that Dome would perform the scope of the work as detailed in the proposal for $24,500.00. (N.T. 14-15; Ex. P-1.)

15. On September 24, 1999, Mr. Shields called Dome and advised that PennDOT had agreed to the terms of the proposal and that a purchase order would be issued to cover the work. (Complaint and Answer at para. 3)

16. On October 15, 1999, Dome received the Cost/Pricing Certificate from PennDOT. On October 18, 1999, Dome signed it and returned it to Mr. Shields. (Complaint and Answer at para. 4)

17. On December 20, 1999, Mr. Shields called Dome to find out if Dome had received the service purchase contract from PennDOT and was advised that it had not. (Complaint and Answer at para. 5)

18. Dome finally received the signed service purchase contract from PennDOT on February 11, 2000, five months after the original inspection. (N.T. 17-20; Ex. D-1)

19. The service purchase contract incorporated a thirty page document entitled AStandard Terms and Conditions, STC-271/278A, 7/99" (ASTC@). (N.T. 49; Ex. D-1).

20. Paragraph 28 on page 9 of the STC provides that:

> AThe Contract, including all referenced documents, constitutes the entire agreement between the parties. No agent, representative, employee or officer of either

the Commonwealth or the Contractor has authority to make, or has made, any statement, agreement or representation, oral or written, in connection with the Contract, which in any way can be deemed to modify, add to or detract from, or otherwise change or alter its terms and conditions. No negotiations between the parties, nor any custom or usage, shall be permitted to modify or contradict any terms and conditions of the Contract. No modifications, alterations, changes, or waiver to the Contract or any of its terms shall be valid or binding unless accomplished by a written amendment sign by both parties. All such amendments will be made using the appropriate Commonwealth form.@

(Ex. D-1 at 9)

21. When Dome=s crew arrived at the work site to begin the repairs specified in the service purchase contract, the Dome crew foreman observed additional damage to the salt dome=s structure and recommended that Stephen Shields meet with Jacques Kessous to discuss additional repairs. (N.T. 20, 21; Ex. P- 4)

22. On March 7, 2000, Dome submitted a written proposal to PennDOT offering to repair the additional damage for an additional amount of $15,000.00. (N.T. 24-25; Ex. P-5; Shields dep. at 17-23)

23. It was important to do the additional repair work on the salt dome promptly because of the unique nature of the structure. If too many beams were ripped, the structure would collapse. (N.T. 26-27)

24. In a letter dated March 13, 2000, Mr. Shields wrote to Mr. Kessous on PennDOT letterhead A[a]s per our meeting of March 7, at Clarks Summit, I am authorizing Dome Corp. to proceed with the additional work we discussed. Please return to me, an itemized estimate, in the agreed upon amount of $15,000 along with the enclosed Cost/Price Data Certification.@(N.T. 28-31; Ex. P-6; Shields dep. at 21-23.)

25. Mr. Kessous ordered the Dome crew to proceed to perform all the repair work based upon the written authorization from the Aengineer in charge.@ (N.T. 31)

26. Mr. Kessous relied on Mr. Shields, as PennDOT=s agent, to authorize and direct the work. (N.T. 31)

27. Mr. Kessous had no contact about this job with any other PennDOT employee other than Mr. Shields. (N.T. 31)

28. No one at PennDOT ever directed Dome to stop work. (N.T. 32)

29. Mr. Shields believed at the time that he had the authority to authorize the additional repairs and that he was following proper PennDOT procedures. (Shields dep. at 17-23)

30. Before agreeing to the additional repairs, Mr. Shields checked with Bill Baker, PennDOT=s Lackawanna County Manager in the PennDOT Maintenance Department, who told Mr. Shields PennDOT would be able to fund the additional repairs from its Lackawanna County budget. (N.T. 42-43)

31. Mr. Shields= practice was to get verbal approval for expenditures from Mr. Baker before authorizing repair work. (N.T. 44-45)

32. Before authorizing the additional repairs, Mr. Shields discussed them with PennDOT Regional Manager, Todd Garrison. (N.T. 21-24)

33. Prior to May 2000, Mr. Shields never received any formal training from PennDOT in contracting procedures. (N.T. 27)

34. PennDOT did not provide Mr. Shields with any manual setting forth contracting procedures and he does not believe there was one in effect in early 2000. (N.T. 56)

35. PennDOT introduced no witness testimony, no procedure manual and no form for contract amendments into the hearing record that set forth any alternative, acceptable contract amendment procedures. (Board Finding)

36. At the time Mr. Shields wrote the March 13, 2000, letter authorizing Dome to proceed with the additional repairs, Mr. Shields believed he was acting within his actual authority. (N.T. 23)

37. Prior to May, 2000, Mr. Shields had no notice from anyone at PennDOT that he had not followed proper procedures in authorizing the additional repairs. (N.T. 23, 54-55)

38. PennDOT introduced no evidence into the record identifying anyone other than Mr. Shields as the person authorized to sign the contract amendment. (Board Finding)

39. PennDOT introduced no evidence into the record indicating that Mr. Shields was not a person authorized to sign a contract amendment. (Board Finding)

40. On March 13, 2000, Dome sent PennDOT the itemized breakdown of the costs for the additional repairs and the Cost/Pricing Certification requested by Mr. Shields. (N.T. 35-36; Ex. P-7)

41. Dome performed the additional repairs at the same time it performed the repairs under the initial service purchase contract. (N.T. 31)

42. As Transportation Facilities Administrator, Mr. Shields was authorized to review the project after the repairs were completed and determine whether the work was satisfactory and whether the contractor would be paid. (N.T. 8)

43. On April 2, 2000, Mr. Shields signed a Facility Administrator Evaluation form certifying that all the dome repairs were completed in a satisfactory manner. (Ex. P-9; Shields dep. at 34)

44. Dome fully and satisfactorily completed the work detailed in the service purchase contract 08-FM0084 and the additional work contained in the March 7, 2000 letter, as indicated by the inspection checklist. (N.T. 36-37; Stipulated Fact Para. 9; Exs. P- 8, P-9.)

45. On April 3, 2000, upon completion of the job, Dome submitted a final invoice for $39,500.00 to PennDOT for payment. (N.T. 38; Ex. P-10)

46. Upon completion of the work, Dome submitted Invoice No. 00-1853 to PennDOT requesting payment in the amount of $24,500.00 for the work detailed in the service purchase contract, as well as payment in the amount of $15,000.00 for the additional repair work agreed to by the parties. (N.T. 37-38; Ex. P-10.)

47. On April 13, 2000, Mr. Shields signed the Inspection Checklist indicating that Aall construction including change orders, if any, are complete per project specifications@ and approved the work for A100% payment.@ (N.T. 36; Ex. P-8)

48. PennDOT never cited any deficiencies with the repair work that Dome performed. (Exs. P-8, P-9)

49. Dome received payment from PennDOT in the amount of $24,500.00 but was denied payment of $15,000.00 for the additional repairs. (Ex. P-11)

50. Dome filed a complaint with the Board of Claims on October 30, 2000, seeking damages for the additional repairs. (Board Docket)

51. Plaintiff took Mr. Shields= deposition on June 13, 2002. (Shields dep.)

52. In its pretrial statement filed November 12, 2002, Dome listed Mr. Shields as a trial witness. (Pl. Pretrial Statement)

53. On January 4, 2003, the day before the hearing, plaintiff sent PennDOT a Anotice to attend@ for Mr. Shields. (N.T. 9)

54. Mr. Shields was still employed by PennDOT on January 5, 2003, and he did not attend the

hearing. (N.T. 9-10; Def. Motion to Quash, para.4)

55. At the hearing, PennDOT made a motion to quash plaintiff=s Anotice to attend@ and the motion was granted by the Panel. (N.T. 9)

56. In its motion to quash, PennDOT stated that AMr. Shields is located in Dunmore, Lackawanna County and otherwise scheduled on Commonwealth business and is not available.@ (Def. Motion to Quash, para. 4)

57. At the hearing, PennDOT=s counsel stated that Mr. Shields was unavailable to testify. (N.T. 9)

58. Dunmore, Pennsylvania is more than 100 miles from the location of the hearing at 200 North Third Street, Harrisburg, Pennsylvania. (www. Indo.com/distance)

59. Plaintiff=s Trial Brief submitted prior to hearing requested interest, penalties and reasonable attorney fees and cited statutory authority for awarding them. (Pl. T.B. 15)

60. At the beginning of the hearing, plaintiff requested Apayment of the actual contract balance, as well as interest and penalties, and attorney fees specifically authorized by the Procurement Code@ without objection from defendant. (N.T. 8)

61. At the hearing, plaintiff introduced Exhibit P-12 and it was identified by the witness, Mr. Kessous, as a summary of Dome=s damages. Exhibit P-12 entitled ASummary of Damages@ shows plaintiff requesting attorney fees of $4,682.89 that were incurred up to January 1, 2003. (N.T. at 42-43)

62. At the hearing, Exhibit P-12 was received into evidence. PennDOT stated it had no objection. (N.T. 53)

63. Plaintiff incurred $4,682.89 of attorneys= fees in connection with this case by January 1, 2003. (Ex. P-12)

64. Attorneys for plaintiff entered this case on March 6, 2002, and, in addition to presenting this matter at hearing, participated in discovery, corresponded with the Board, prepared and submitted a Pre-Trial Statement, a Trial Brief and Proposed Findings of Fact and Conclusions of Law and Brief in Support thereof. (N.T. 1-58; Board Docket and Record of Filings)

65. PennDOT was apprised of plaintiff=s request for penalties and attorneys= fees prior to hearing. PennDOT did not address the issue of penalties or attorneys= fees at hearing or in any of its submissions. (Board Finding)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the subject matter of this action. 72 P.S. ' 4651-4.

2. The Board of Claims has personal jurisdiction over the parties.

3. The Board concludes that the testimony of Jacques Kessous is credible and persuasive on all mattters about which he testified.

4. The deposition testimony of Mr. Shields is admissible into the hearing record pursuant to the provisions of Rule 4020 (a) (3) (b) of the Pennsylvania Rules of Civil Procedure (Pa. R.C.P.) and because he was unavailable to testify at the hearing.

5. The Board concludes that the deposition testimony of Mr. Shields is credible and persuasive regarding his lack of training by PennDOT, his reporting to other PennDOT personnel that the additional repairs were necessary, his statements that other PennDOT personnel acquiesced in and/or approved the expenditure of $15,000.00 for the additional repairs, his authorization to Dome to proceed with the additional repairs, his good faith belief that PennDOT would pay Dome $15,000.00 for those repairs, his belief that he had followed the proper PennDOT procedures in authorizing the additional repairs, his assessment that Dome had performed all the work in a satisfactory manner, and his authorization of payment.

6. If the Board had not admitted the deposition testimony of Mr. Shields into the hearing record, the result in this case would have been the same.

7. In its complaint, the plaintiff states facts sufficient to plead causes of action both in contract and quasi contract.

8. The parties did not vary the terms of the original written contract, but agreed to an amendment to cover the additional repair work.

9. There is an enforceable contract amendment for the additional repairs because the required elements of an offer, acceptance and consideration are present.

10. The letters signed by Dome=s representatives marked Exs. P-5 and P-7 and the letter signed by Mr. Shields marked at Ex. P-6 set forth all the terms of the parties= agreement and taken together are sufficient to constitute a valid written contract amendment.

11. Mr. Shields is the agent of PennDOT who acted with apparent authority when he agreed to amend the contract with Dome.

12. Mr. Shields is the agent of PennDOT who acted with actual authority when he agreed to amend the contract with Dome.

13. Dome reasonably relied on the written authorization signed by Mr. Shields as PennDOT=s promise to pay for the additional repair work.

14. The written contract amendment marked as Exs. P-5, P-6 and P-7 meets the requirements of Paragraph 28 of the STC.

15. Mr. Shields acted in good faith when he authorized Dome to perform the additional repair work and agreed that PennDOT would pay $15,000.00 for it.

16. PennDOT has the burden of proving its defenses to the validity of the contract amendment for the additional repairs.

17. PennDOT failed to meet its burden of proving any defense to the validity of the contract amendment for the additional repairs.

18. PennDOT=s failure to submit the contract amendment to the Attorney General and/or General Counsel for review for form and legality does not make the amendment ineffective.

19. Dome reasonably relied on the authority and/or apparent authority of Mr. Shields to bind the Commonwealth to pay for the additional repairs.

20. PennDOT is obligated to pay Dome $15,000.00 for breach of their written amendment for the additional repairs.

21. If no valid written contract amendment were found to exist in this case, Dome is entitled to recover its damages under quasi contract doctrines.

22. The Board has equity jurisdiction to decide this case under quasi contract.

23. The 1998 amendments to the Procurement Code did not deprive the Board of its quasi contract jurisdiction.

24. Two quasi contract doctrines are quantum meruit and promissory estoppel.

25. If no valid contract amendment were found to exist in this case, Dome is entitled to an award of $15,000.00 for the additional repairs under the theory of quantum meruit because PennDOT was unjustly enriched by that amount.

26. If no valid contract amendment were found to exist in this case, Dome is entitled to an award of $15,000.00 under the theory of promissory estoppel because Dome was induced to perform the additional repairs by the promise of payment. Dome reasonably relied on the promises and injustice can only be avoided by enforcement of the promise.

27. Plaintiff is awarded interest on $15,000.00 at the statutory rate of six percent (6%) from April 3, 2000, the date the claim was filed with the contracting officer.

28. When PennDOT failed to notify Dome of any deficiencies in the additional repair work and when PennDOT failed to pay Dome for the additional repairs, PennDOT withheld payment of a good faith claim under 62 Pa.C.S.A. ' 3934.

29. If payment for services is withheld in bad faith, 62 Pa.C.S.A. ' 3935 authorizes the Board to award a penalty and attorney fees.

30. Under 62 Pa.C.S.A. '' 3935(a) and (b), payments are withheld in bad faith if the withholding is arbitrary or vexatious.

31. PennDOT=s conduct in withholding payment for the additional repairs was arbitrary when it refused to pay for services its agent had authorized, that it knew were valuable and that it knew were performed in a satisfactory manner.

32. PennDOT=s conduct in withholding payment for the additional repairs was arbitrary when it failed to pay despite the fact that the parties had executed a signed valid contract amendment evidenced by Exs. P-5, P-6 and P-7.

33. PennDOT=s conduct in withholding payment for the additional repairs was arbitrary when it used the repaired salt dome for its operations.

34. PennDOT=s conduct in withholding payment for the additional repairs was arbitrary when it placed Mr. Shields in the position of Facilities Manager, had him act on behalf of PennDOT in interfacing with the contractor, failed to train him in whatever procedures PennDOT desired to require for contract amendments, and then disavowed his good faith acts of amending the contract to get the salt dome fixed.

35. PennDOT=s conduct in withholding payment for the additional repairs was vexatious because it caused Dome to have to hire an attorney and pursue this small claim through the entire litigation process when it knew or should have known that it had no meritorious defense to payment and failed to present one at hearing.

36. Because PennDOT=s conduct in withholding payment for the additional repairs is found to be in bad faith under 62 Pa.C.S.A. ' 3935(a), the Board awards a penalty of 1% per month on the

$15,000.00 starting on April 3, 2000.

37. Because PennDOT acted in bad faith in this matter under 62 Pa. C.S.A. ' 3935(b), the Board awards attorney fees in the amount of $4,682.89, the amount documented by plaintiff in it=s filings with the Board and which the Board finds to be reasonable for the documented legal services rendered in the case entire.

OPINION

A Panel hearing of this matter was held on January 15, 2003. The Panel report has been submitted and reviewed.

The claim in this action was filed on October 30, 2000, by plaintiff, Dome Corporation of North America (ADome@). Plaintiff demanded judgment against the Commonwealth of Pennsylvania, Department of Transportation (APennDOT@) for damages of $15,000.00. On November 30, 2000, PennDOT filed preliminary objections which were overruled. On June 11, 2001, PennDOT filed an answer and new matter, and on June 22, 2001, Dome replied. A period of discovery followed. The Panel hearing of the matter was held on January 15, 2003. Dome filed a post hearing brief and proposed findings of fact and conclusions of law on March 5, 2003 and PennDOT filed its post hearing brief and proposed findings of fact and conclusions of law on April 4, 2003. On May 8, 2003, the Panel filed its report with the Board.

Admissibility of Mr. Shields= Deposition

Before addressing the merits of the claim, the Board will rule on an evidentiary issue that was presented at the hearing. That issue is whether the deposition of a PennDOT employee, Stephen Shields, is admissible testimony into the hearing record. Plaintiff moved to admit it, PennDOT objected and the Panel reserved ruling.

Plaintiff took the deposition of Mr. Shields on June 13, 2002. He is employed by PennDOT as the

Transportation Facilities Administrator for Engineering District 4-0 in Lackawanna County. His PennDOT office is in that county in Dunmore, PA. Mr. Shields testified that he requested that Dome repair the salt dome located at Clarks Summit, he agreed to the amount of $15,000.00 as the cost of the additional repair work, he authorized Dome to proceed with the repairs that were in addition to those in the initial written contract, and he believed at the time that the proper procedures had been followed so that Dome would be paid for all its services. Dep. at 17-23.

In the parties=pretrial statements filed on November 12, 2002, Dome listed Mr. Shields as a trial witness but PennDOT did not. On January 14, 2003, the day before the hearing, plaintiff sent by FAX a notice to PennDOT requesting that Mr. Shields be present to testify at the hearing pursuant to Rule 234.4 of the Pennsylvania Rules of Civil Procedure (APa. R.C.P.@). The plaintiff did not serve any subpoena on Mr. Shields. Mr. Shields did not attend the hearing, and PennDOT=s counsel made a motion to quash the notice to attend. That motion was granted by the Panel. During the argument about Mr. Shields=attendance at the hearing, defendant=s counsel represented that A...[h]e is unavailable to testify.@ N.T. 9. In its written motion to quash, defendant also stated that, AMr. Shields is located in Dunmore, Lackawanna County and otherwise scheduled on Commonwealth business and is not available.@ Motion to Quash, para. 4. Because of these clear and unequivocal representations by the defendant, plaintiff does not have to present any further evidence to prove that Mr. Shields was unavailable to testify or that he was working in Lackawanna County at the time of the hearing. These facts are admitted on the record and are not in dispute.

Pa. R.C.P. 4020 sets forth the conditions under which a deposition may be introduced at trial. Defendant argues that the Shields= deposition is not admissible under Rule 4020(a)(3)(d) because plaintiff failed to issue any subpoena for Mr. Shields. The Board agrees with defendant=s interpretation of Rule 4020(a)(3)(d), but notes that an alternative section, Rule 4020(a)(3)(b), will allow the deposition to be introduced. That rule provides:

> A(a) At the trial, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had notice thereof if required, in accordance with one of the following provisions:
> ...
> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds
> ...
> (b) <u>that the witness is at a greater distance than one hundred miles from the place of trial</u> or is outside the Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition...
> (Emphasis added.)

There is no evidence in the record nor any allegation made that Mr. Shields= absence from the hearing was procured by the plaintiff.

In <u>Riggi v. Control Construction Corp.</u>, 537 Pa. 162, 642 A.2d 451 (1994), the Pennsylvania Supreme Court granted a motion to admit the deposition testimony of a witness under Rule 4020(a)(3)(b) because it found the witness was unavailable. At the time of trial, the witness was in Atlanta, Georgia, which was more than 100 miles from the place of trial in Greene County, Pennsylvania making the man=s deposition admissible.

The record is clear from Mr. Shields= deposition, the argument at the hearing, and the representations made by the defendant=s counsel in its motion to quash that Mr. Shields was living and

working in Lackawanna County at the time of the hearing. The Board takes judicial notice of the fact that Dunmore, Lackawanna County is more than 100 miles from the site of the hearing in Harrisburg. Therefore, applying Rule 4020(a)(3)(b), the Board finds that the deposition of Mr. Shields is admissible into the hearing record. The Board further finds, after a review of the live testimony presented at the hearing, that the result in this matter would have been the same even if the Board had not permitted the admission of Mr. Shields= testimony.

Summary of the Facts

The plaintiff claims it is owed $15,000.00 for the additional repairs it made to the salt dome in Lackawanna County. No facts are in dispute. PennDOT presented no witnesses at the hearing. Plaintiff called Mr. Jacques Kessous, Vice President of Dome, to testify about the relevant events. The deposition testimony of Mr. Shields is in accord with the testimony of Mr. Kessous on all major points. PennDOT, however, still disputes whether it has any legal obligation to pay plaintiff.

In August 1999, Mr. Shields called Mr. Kessous at Dome and asked him to come out and inspect some damage which had been done to a salt dome at Clarks Summit. Dome Corporation has a patent on the design of the salt domes and is the only vendor qualified to repair them, therefore no competitive bidding for the repairs was required. Dome had done construction and repairs on PennDOT=s salt domes under Mr. Shields= direction several times before August 1999, and also has performed work for PennDOT since this dispute arose.

Mr. Kessous went to the job site on August 31, 1999, inspected the damage and then submitted his findings to Mr. Shields on September 2, 1999 in a letter. Ex. P-1. The letter quoted $24,500.00 to repair the dome. On September 24, 1999, Mr. Shields called Dome and advised that a purchase order would be

issued to cover the work. On October 15, 1999, Dome received the Cost/Pricing Certificate and on October 18, 1999, Dome returned it to Mr. Shields. On December 20, 1999, Mr. Shields called Dome to find out if Dome had received the service contract for the repair work and was told Dome had not. On December 27, 1999, Dome received the Service Bid/Contract # 08-FM0084, and it was sent to Dome=s office in Saginaw, Michigan, signed, and returned to PennDOT for signature.

On February 4, 2000, Dome had still not received the fully executed Service/Bid Contract from PennDOT, but it was advised that the contract would be executed shortly. At that point, Dome advised its crew coordinator to include this work in the construction schedule. On February 11, 2000, Dome finally received the fully executed Service/Bid Contract for $24,500.00. Exs. P-3; D-1. This was five months after the original inspection.

PennDOT had attached to the contract a 12 page single-spaced form document called AStandard Contract Terms and Conditions for Services.@ (ASTC@). Ex. D-1. On page 9 is Paragraph 28 entitled. AIntegration@ which provides that:

> AThe Contract, including all referenced documents, constitutes the entire agreement between the parties. No agent, representative, employee or officer of either the Commonwealth or the Contractor has authority to make, or has made, any statement, agreement or representation, oral or written, in connection with the Contract, which in any way can be deemed to modify, add to or detract from, or otherwise change or alter its terms and conditions. No negotiations between the parties, nor any custom or usage, shall be permitted to modify or contradict any of the terms and conditions of the Contract. No modifications, alterations, changes or waiver to the Contract or any of its terms shall be valid or binding unless accomplished by a written amendment signed by both parties. All such amendments will be made using the appropriate Commonwealth form.@ (Emphasis added.)

On March 7, 2000, Dome=s crew foreman arrived on the site to begin the repair work as set forth in the proposal letter dated September 2, 1999, and the contract. He discovered, however, that more

damage had been done to the structure by front end loaders scooping up the salt during the intervening six months. Mr. Shields met with Mr. Kessous on the job site to inspect the additional damage and discuss what additional repairs were required. Mr. Shields requested that Dome submit a formal proposal to cover the cost of the extra work. Dome submitted a proposal that quoted $15,000.00 as the cost of the additional repairs (Ex. P-5), and on March 8, 2000, Mr. Shields called Mr. Kessous and informed him that the $15,000.00 had been approved. Dome would not proceed without written authorization. On March 13, 2000, Mr. Shields faxed Mr. Kessous a letter on PennDOT letterhead authorizing Dome to proceed with the additional repair work. Ex. P-6. Mr. Shields also asked Dome to immediately send him the itemized estimate for the work and the Cost/Pricing Data Certification required for all contracts. Ex. P-6. Dome submitted the requested documents. Ex. P-7.

Dome performed the $24,500.00 repairs and the $15,000.00 additional repairs to the salt dome in a timely and satisfactory manner. Exs. P-8, P-9. PennDOT proceeded to use the repaired dome for salt storage. PennDOT filed no deficiencies regarding any of the work on the project. The uncontradicted evidence in the record is that Mr. Shields held himself out to Dome as having the authority to approve the additional repairs. Mr. Shields states in his deposition that at the time he believed that he was authorized to approve the additional $15,000.00 expenditure and that he had checked with others at PennDOT who were aware of the expenditure and/or who also specifically approved it, including Todd Garrison, PennDOT Regional Manager (N.T. 21, 24) and Bill Baker, PennDOT Lackawanna County Manager in the Maintenance Office (N.T. 42-45). Prior to April 2000, Mr. Shields had received no formal training from PennDOT about contracting procedures or forms or about any specific type of written amendment requirements. Nothing in the record indicates that anyone at PennDOT ever told Dome that Mr. Shields did

not have the authority to approve the additional repairs.

Dome submitted an invoice on April 3, 2000 for $39,500.00 to PennDOT for all the repairs. Ex.P-10. PennDOT paid $24,500.00 and responded by letter dated October 16, 2000, declining to pay the $15,000.00 because A..no amendment was executed before the additional services were performed.@ Ex. P-11.

Contract Claim

The complaint filed in this action by Dome is in letter form and states facts sufficient to plead causes of action for recovery both in contract and quasi contract. Addressing the breach of contract claim first, the Board finds in favor of the plaintiff. Under Pennsylvania case law, there is clearly an enforceable written agreement for the additional repairs. Whether that agreement is called a contract or an amendment to a contract, all the required legal elements of an offer, acceptance and consideration are present. Fahringer v. Strine=s Estate, 420 Pa. 48, 216 A.2d 82 (1966).

The parties already had a fully executed written contract to repair the salt dome for $24,500.00. Because it took five months for PennDOT to execute that contract, additional damage was done to the salt dome. When the parties discovered that damage, they agreed on the need for additional repairs. Dome told PennDOT that they would perform those repairs for $15,000.00 if they were done immediately while the Dome crew was on the site doing the repairs under the first contract. Ex. P- 5. Mr. Shields, as PennDOT=s Engineer and Facilities Administrator, next sent a signed letter on PennDOT letterhead stating that he was A...authorizing Dome to proceed with the additional work we discussed.@ Ex. P- 6. This letter dated March 13, 2000 also confirmed that PennDOT agreed to the price of $15,000.00 for the additional work. This operated as a signed, written acceptance of Dome=s written offer. Ex. P- 6. Mr. Shields also

asked Dome to provide an itemized estimate along with a Cost/Pricing Certification required from all contractors. Jacques Kessous, Vice President of Dome, responded that same day, transmitting to Mr. Shields the itemized estimate and the Cost/Pricing Certification signed by Ross A. Lake, President of Dome. Ex. P- 7. Dome immediately proceeded to perform all the repairs as agreed. There is no dispute that all repairs to the salt dome were found to be satisfactory and were used by PennDOT. The documents signed by Mr. Kessous, Mr. Lake and Mr. Shields on behalf of each party set forth all the terms of their agreement. Taken together these are sufficient to constitute a valid written contract or contract amendment for the additional repairs. Exs. P- 5, P- 6, and P-7. International Milling Co. v. Hachmeister, Inc., 380 Pa. 407, 110 A.2d 186 (1955).

PennDOT cites the case of Commonwealth, Department of Revenue v. On-Point Technology Systems, Inc. 821 A.2d 641 (Pa. Cmwlth. 2003) to support its argument that no contract was formed here. This reliance is misplaced because in On-Point, the court ruled there was no valid contract because the parties had only a Adraft contract@; it contained no signatures and many of the necessary terms like price, quantity and time of delivery had not yet been agreed to. Id. At 648-649. In the case at bar, all terms for the additional repairs were agreed to and both parties signed the letters evidencing their agreement. In fact, there is no issue about agreement on terms. PennDOT only contends that Mr. Shields had no authority to act on behalf of PennDOT when he authorized those repairs.

Based on the factual record in this case, the Board finds that Mr. Shields, as the Engineer in charge of this project and Facilities Manager, had the apparent authority, as well as the actual authority, to amend the contract with Dome. He had apparent authority because he held himself out to Dome as having authority to authorize the additional repairs and the payment. Dome dealt with him previously and had relied on him to direct their work. Once he put his authorization in writing, Dome reasonably believed that it could rely on that writing on PennDOT letterhead as a promise of payment for its work. Also, it reasonably relied on Mr. Shields knowing and using proper procedures for contract amendments.

Mr. Shields thought in good faith that he could authorize the additional repairs for several reasons: 1) he was the PennDOT Engineer in charge of the region; 2) he had checked with other PennDOT managers in Lackawanna County to insure that there was sufficient money to cover the $15,000.00 of additional repairs in the PennDOT county budget; 3) he believed he was acting in the best interests of PennDOT in getting the salt dome repaired while the Dome crew was on the site, thereby having the work done more cheaply than if the Dome crew had to return with all its heavy equipment a second time; and 4) prior to March 2000, PennDOT had provided him with no training in any other procedures, no manual and no notice that he could not authorize the additional work. Mr. Shields acted in good faith and was in no way a rogue employee of PennDOT.

PennDOT argues that Mr. Shields had no actual authority to approve the amendment based upon a provision in the original repair contract and upon certain provisions of the Procurement Code. The Board will address each of these arguments.

First, attached to the first repair contract (Exs. P- 2; D-1) is the document entitled AStandard Contract Terms and Conditions for Services@(ASTC@). Under Paragraph 28 of the STC, PennDOT argues

that the plaintiff was put on notice that, A[n]o modifications, alterations, changes, or waiver to the Contract or any of its terms shall be valid or binding unless accomplished by a written amendment signed by both parties. All such amendments will be made using the appropriate Commonwealth form.@ (Emphasis added.) Addressing this provision, the Board finds that the exchange of letters signed by both parties taken together constitute a valid written contract amendment. Therefore, the requirement of a Awritten amendment signed by both parties@ has been met. There was no evidence introduced into the hearing record that contradicts this interpretation. The only issue then is whether that amendment used Athe appropriate Commonwealth form.@ What is the appropriate form? The STC itself is silent and gives no reference. PennDOT introduced no evidence into the hearing record to apprise the Board of what form Paragraph 28 refers to. It could be the same form as the original contract, it could be some other form, or it could be the form of an exchange of signed letters. Dome=s representative and Mr. Shields believed that their exchange of letters was an enforceable form for the agreement at the time it was made. In this case, PennDOT has the burden of proving this defense to the validity of the contract. By introducing no facts, PennDOT has failed to meet that burden. Linn v. Employers Reinsurance Corp., 397 Pa. 153, 153 A.2d 483 (1959). Since PennDOT has failed to provide the Board with evidence that some other form was required, the Board is left with an uncontradicted finding that the form used for the amendment for the additional repairs was Aappropriate@ and is valid and binding under the STC.

PennDOT=s second basis for arguing that the agreement for additional repairs is not enforceable is based on statutory grounds. It argues that certain requirements set forth in the Procurement Code, 62 Pa. C.S. '' 101-2311 were not met. Specifically, PennDOT cites 62 Pa.C.S. ' 103 which defines the term Acontract@ as used in the Code as A...a type of written agreement, regardless of what it is called, for the

procurement or disposal of supplies, services or construction.@ Next, PennDOT quotes Section 543(a), 62 Pa. C.S. ' 543(a), which provides that A[i]rrespective of the type of contract, no contract shall be effective until executed by all necessary Commonwealth officials as provided by law.@ PennDOT asserts that these two sections read together mean that the amendment made for the additional repairs is not Aeffective.@ However, we again note that PennDOT introduced no evidence into the record which defines the identity of Aall necessary Commonwealth officials@ who are required to sign a contract amendment. Is Mr. Shields one of them? The only evidence in the record is provided by plaintiff who introduced Mr. Shields= testimony that he believed at that time that he had the authority to authorize the additional repairs.

In its post-trial brief, PennDOT argues that the language of Section 543(a) which says Aas provided by law@ refers to the Commonwealth Attorneys Act, 71 P.S. '' 204(f) and 301(11). PennDOT Brief, pp 10-11. PennDOT cites these provisions as defining who must Areview and approve@ all Commonwealth contracts in order for them to be enforceable. First, PennDOT misstates the effect of these sections, and second, it fails to cite the case of Department of Commerce v. Casey, 624 A.2d 247 (Pa. Cmwlth. 1993) which nullifies the effect of these statutes in a case such as the one at bar.

Neither Section 204(f) nor 301(11) of the Commonwealth Attorney=s Act identifies who must execute or approve the contract on behalf of the Commonwealth in order to be enforceable. Thus, they are not helpful to PennDOT=s contention that Mr. Shields was not one of the Anecessary Commonwealth officials@ who could sign this contract. The language in Section 204(f) says, A[t]he Attorney General shall review for form and legality, Commonwealth...contracts to be executed by Commonwealth agencies...@ (Emphasis added.) Similarly, Section 301(11) provides that the office of General Counsel shall A[r]eview for form and legality all Commonwealth...contracts to be executed by executive agencies.@

(Emphasis added.) These sections do not state that if the contract is not reviewed it is unenforceable, and both sections are silent about who is required or authorized to sign.

Also, the requirements in these sections of the Commonwealth Attorney=s Act contain requirements placed on the agencies, like PennDOT, not on private contractors who would have no idea whether the Attorney General or the General Counsel has reviewed a contract or not. If a contract is not properly submitted for review by an agency, that is not a bar to enforcement. Department of Commerce v. Casey, supra at 253-254, citing Dixon Contracting Co., Inc. v. Dept. of Environmental Resources, 80 Pa. Cmwlth. 445, 451-52, 474 A.2d 701, 705 (1984). In Casey, the Commonwealth was estopped from claiming that a contract was unenforceable because it had not been reviewed by the Attorney General. The court found that the plaintiff, Mr. Casey, reasonably relied on the authority of those who signed the contract to bind the Commonwealth. In the case at bar, the facts are very similar, and the Board finds that Dome reasonably relied on Mr. Shields= authority or apparent authority to order it to proceed with the work and to bind PennDOT to pay for it.

In summary, the Board concludes, based on the record in this case, that there is a valid, enforceable written contract amendment for the additional repairs under both Pennsylvania case law and under the Procurement Code. No contrary evidence was presented. Thus, PennDOT is obligated to pay Dome $15,000.00 for the additional repairs.

Alternative Quasi Contract Claim

If no valid contract were found to exist here, two additional related doctrines will allow Dome to recover its damages. They are quantum meruit and promissory estoppel. Plaintiff would clearly be entitled

to also prevail under either of these legal theories.

PennDOT presented no real defense to the quasi contract claim. It presented no fact witnesses. It contradicted none of the facts entitling plaintiff to quasi contract recovery. Its sole argument is that A...the Procurement Code has essentially abrogated the application of these equitable theories from applying.@ Def. Brief at 12. PennDOT claims that reading together 62 Pa.C.S. '' 1702, 1712, 543 and 103, and 1 Pa. C.S. ' 2310 leads one to the conclusion that the Procurement Code deprives the Board of quasi contract jurisdiction to decide this case. This argument has been raised by PennDOT in other cases and was rejected. It was also raised and rejected at the preliminary objection phase of this matter. The argument continues to be without legal merit.

For more than fifty years, the Board has had jurisdiction to decide cases under the Fiscal Code and under quasi contract.[1] In the very recent case of Department of General Services v. On-Point Technology Systems, Inc., supra. at 650, the Commonwealth Court reaffirmed this jurisdiction in a footnote:

> A>...the equity jurisdiction of the Board extends to all cases instituted in the form of contract action, namely quasi -contract claims and claims in quantum meruit,= Miller v Department of Environmental Resources, 133 Pa. Cmwlth. 327, 578 A.2d 550, 553 (1990), petition for allowance of appeal denied, 526 Pa. 643, 584 A.2d 324 (1990)...@

In 2000, when this matter was filed, the Board of Claims=jurisdiction was set forth in the Board of

[1]On June 28, 2003, the Board=s jurisdiction was changed by certain amendments to the Procurement Code, but these changes took effect after the filing date of this matter (October 30, 2000) and after the hearing date (January 15, 2003). Thus, these changes are not applicable to this case and were not cited by PennDOT in its argument. See 62 Pa. C.S. '' 1712.1 et. seq.

Claims Act, 72 P.S. '' 4651-1 to 10. Specifically Section 4651-4 granted the Board exclusive jurisdiction to decide contract and Fiscal Code claims against the Commonwealth. No section of the Procurement Code stated that the Board=s Fiscal Code jurisdiction changed. On the contrary, several of the Procurement Code=s 1998 amendments affirmed the jurisdictional status quo by referring to the Board=s power under its original Board of Claims Act, i.e. ABoard of Claims under the exclusive jurisdiction provided in the act of May 20, 1937 (P.L. 728, No. 193)...@ 62 Pa. C.S. ' 1712(a). See also, 62 Pa. C.S. '' 1721 and 1725(a). These sections indicate the Board=s jurisdiction was not changed. No Procurement Code section (prior to the 2003 amendments) stated that the Board=s ability to decide cases under quasi contractual or fiscal code jurisdiction had been removed.

A. Quantum Meruit

Quantum meruit is the equitable remedy to provide restitution for unjust enrichment. It provides a remedy when there is no contract or when a contract has been voided. Quantum meruit requires that the party unjustly enriched by the services of another pay a reasonable amount for those services. Crawford=s Auto Center, Inc. v. Commonwealth, Pennsylvania State Police, 655 A.2d 1064 (Pa. Cmwlth. 1995), reargument denied, appeal denied 542 Pa. 651, 666 A.2d 1059 (1995). In order to establish that a party has been unjustly enriched, plaintiff must establish that a benefit was conferred on the defendant, that the defendant appreciated or had knowledge of the benefit, and that the defendant accepted the benefit under circumstances that make its retention inequitable without payment for the benefit. Correll v. Millville Area School District, 662 A.2d 696 (Pa. Cmwlth. 1995). The facts of the case at bar make it clear that PennDOT was unjustly enriched by the additional repairs that Dome performed. PennDOT received the repair services, accepted the repairs, benefitted from the repairs and was never under the impression that

Dome was making the repairs gratuitously. There is no dispute that the cost of the additional repairs, $15,000.00, is the value of the services PennDOT received. Under the theory of quantum meruit, PennDOT is liable to Dome for damages of $15,000.00.

B. Promissory Estoppel

Under Pennsylvania law, the doctrine of promissory estoppel can also be invoked in situations where the formal requirements of contract formation have not been satisfied and justice would be served by enforcing the promise. Carlson v. Arnot-Ogden Memorial Hospital, 918 F.2d 411 (3rd Cir. 1990). Pennsylvania courts follow the doctrine of promissory estoppel as set forth in Section 90 of the Restatement (Second) of Contracts. Murphy v. Bradley, 133 Pa. Cmwlth 387, 537 A.2d 917 (1988); Lobolito, Inc. V. North Pocono School District, 562 Pa. 380, 755 A.2d 1287 (2000).

Section 90 states:

> AA promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.@

To prove a promissory estoppel a party must show: (1) misleading words, conduct or silence by the party against whom estoppel is asserted; (2) unambiguous proof of reasonable reliance on the misrepresentation by the party seeking to assert the estoppel; and (3) that there is no duty of inquiry on the party asserting the estoppel. Rosen v. Communication Services Group, Inc., 155 F.Supp. 2d 310 (E.D. 2001). An examination of the record in this matter shows that Dome has proven each of these elements. It demonstrated that PennDOT=s conduct, by soliciting a bid for additional repairs and then providing a written conformation to proceed with the work, was clearly misleading if PennDOT had no intention of paying for the additional repairs. Dome proved that it reasonably relied on the words and conduct of PennDOT since it had no notice that Mr. Shields was not an agent and did not have authority to obligate PennDOT to pay for additional repairs. No evidence was presented by PennDOT regarding who it contends had actual

authority to approve the additional repairs or exactly what further documentation it believes was required. Mr. Shields did not put Dome on notice that there was any problem because he testified that he thought he was following the proper PennDOT contracting procedures. PennDOT failed to train Mr. Shields in any procedures other than the ones he followed until months after the repairs had been made and Dome had presented its invoice for payment. These facts in the record support the Board=s finding that Dome=s reliance was reasonable. Thus, the test set forth in Rosen, supra, has been met by Dome, and if there is no valid written contract, it is entitled under a theory of promissory estoppel to recover its damages of $15,000.00.

Interest, Penalties and Attorney Fees

Plaintiff asks for an award of interest, penalties and reasonable attorney fees in addition to the $15,000.00. Ex. P-12 PennDOT failed to address any of these issues in its briefs.

Under prior law, interest on any award for breach of contract was calculated starting on the date when the Commonwealth=s duty to pay arose. Paliotta v. Department of Transportation, 750 A.2d 388, 394 (Pa. Cmwlth. 1999); Department of Transportation v. Anjo, 666 A.2d 753, 760 (Pa. Cmwlth. 1995). The Procurement Code amendments of 1998 added Subchapter E, Section 1751 which addresses the calculation of interest on awards to contractors:

> AInterest on amounts ultimately determined to be due shall be payable at the statutory rate applicable to judgments from the date the claim was filed with the contracting officer. Interest on claims arising out of the provisions of section 1507 act of April 9, 1929 (P.L. 343, No. 176), known as the Fiscal Code, shall be payable as provided therein.@ 62 P.S. ' 1751.

Section 1507 of the Fiscal Code provides that any agency which acquires property or services from a business and does not make payment shall pay an interest penalty starting on the date the debt was

due to be paid. 72 P.S. ' 1597; Department of Transportation v. Anjo Construction Co., 666 A.2d 750, 760 (Pa. Cmwlth. 1995)(explaining that A[i]nterest is awarded from the date on which the obligation to pay the amount due under the contract arises, usually the date when the contract is fully performed.@). Under any theory of recovery, Dome is entitled to recover interest at the statutory rate of six percent (6%) on its award of $15,000.00 from April 3, 2000, the date that the invoice was submitted to the contracting officer.

Also, Dome requests that the Board award a penalty and attorney fees for withholding payment. Two sections of the Procurement Code define the rights and obligations of the parties to withhold payment for goods or services and to receive an award of a penalty and attorney fees when payment is withheld in bad faith. Because the bad faith standard established for any award of a penalty or attorney fees is the same under these code sections, the Board will address these two awards together.

First, 62 Pa. C.S.A. ' 3934 is entitled, AWithholding of payment for good faith claims@ and it sets forth the conditions under which payment for services may be rightfully withheld by PennDOT. Section 3934 (a) states:

> AThe government agency may withhold payment for deficiency items according to terms of the contract. The government agency shall pay the contractor according to the provisions of this subchapter for all other items which appear on the application for payment and have been satisfactorily completed...@

Next, 62 Pa.C.S.A. ' 3934(b) states:

> AIf a government agency withholds payment from a contractor for a deficiency item, it shall notify the contractor of the deficiency item within the time period specified in the contract or 15 calendar days from the date the application for payment is received...@

PennDOT never notified Dome of any deficiency items in the additional repair work. Under Section 3934,

when PennDOT refused payment, it withheld payment of a good faith claim.

In the next section, 62 Pa.C.S.A. ' 3935 (a), there is a provision for a penalty if payment to the contractor is wrongly withheld. It provides:

> A(a) Penalty. If arbitration or a claim with the Board of Claims...is commenced to recover payment due under this subchapter and it is determined that the government agency...has failed to comply with the payment terms of this subchapter,...the Board of Claims...may award, in addition to other damages due, a penalty equal to 1% per month of the amount that was withheld in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious. An amount shall not be deemed to have been withheld in bad faith to the extent it was withheld pursuant to section 3934 (relating to withholding of payment for good faith claims.).@

Finally, 62 Pa. C.S.A. ' 3935(b) provides for an award of attorney fees using the same bad faith standard:

> AAttorney fees. Notwithstanding any agreement to the contrary, the prevailing party in any proceeding to recover any payment under this subchapter may be awarded a reasonable attorney fee in an amount to be determined by the Board of Claims...together with expenses, if it is determined that the government agency...acted in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious.@

Examining the hearing record, the Board concludes that PennDOT=s conduct was arbitrary when it refused to pay for services which it knew its agent had authorized; it knew were valuable, and it knew were done in an entirely satisfactory manner. PennDOT used the repaired salt dome for its operations without any acknowledgment that it had been unjustly enriched by the services Dome provided. PennDOT further acted in an arbitrary manner because it placed Mr. Shields as the Facilities Manager, in a position where he was directing this contractor and its work, and then disavowed the acts of Mr. Shields in agreeing to amend the contract, authorizing the work and authorizing payment for the work. PennDOT=s excuse for non-

payment is that it had certain requirements for contract amendment which it never communicated to Mr. Shields nor to Dome and which it failed to put in this hearing record. During the hearing in this matter, PennDOT failed to produce any manual showing what Mr. Shields was supposed to do or to explain how PennDOT interpreted the contract language and statutes which refer only in general terms to contracting requirements. PennDOT did not withhold payment lawfully or fairly.

PennDOT acted in a vexatious manner by refusing to pay Dome and causing it to hire an attorney to pursue this small claim and further by refusing to pay right up to the present time. PennDOT compelled Dome to go through the full litigation process before the Board when it knew or should have known that it had no meritorious defense to this claim under contract or quasi contract principles. PennDOT produced not a single factual witness to support its defenses. No one testified that the procedure Mr. Shields followed in executing the contract amendment was wrong. PennDOT failed to lay any factual predicate from which the Board could determine that it had any meritorious defense. Therefore, the Board must conclude that no such defense exists.

Thus, PennDOT=s conduct is found to be arbitrary and vexatious and therefore deemed to be bad faith under 62 Pa. C.S.A. '' 3935(a) and (b). Accordingly, the Board awards a penalty of 1% per month on the $15,000.00 outstanding balance beginning on April 3, 2000. The Board also awards a reasonable attorneys= fee together with expenses in the amount of $4,682.89. This is the amount plaintiff has established that it incurred by evidence submitted without objection, which the

Board finds reasonable in light of the legal services rendered as documented by the record of this case and which the Board, in its discretion, shall apportion to PennDOT.[2]

[2]The Board of Claims is vested with authority to Adispose of all costs of the proceedings by providing for the payment thereof by the Commonwealth or by the Claimant, or by providing that such costs shall be shared by the said parties in such proportions as the board in its discretion shall direct.@ 72 P.S. ' 4651-8 (effective on date of claim) (See also, 62 Pa. C.S.A. ' 1725(e)) Costs include attorneys= fees to the extent attorneys= fees are otherwise authorized by statute. Com. Dept. of Assistance v. Ward, 530 A.2d 145, 149 (Pa. Cmwlth. 1987) See also, Lucchino v. Commonwealth, 809 A.2d 264, 269-70 (Pa. 2002)

ORDER

AND NOW, this 6th day of November, 2003, after hearing, **IT IS ORDERED** and **DECREED** that judgment be entered in favor of plaintiff, Dome Corporation of North America, and against defendant, Commonwealth of Pennsylvania, Department of Transportation, in the sum of Fifteen Thousand Dollars ($15,000.00) with interest thereon at the legal rate of six percent (6%) per annum from April 3, 2000.

IT IS FURTHER ORDERED that plaintiff=s petition for an award of a penalty and attorney fees is **GRANTED.** Defendant shall pay to plaintiff a penalty of one percent (1%) per month on the $15,000.00 calculated from April 3, 2000, to the exit date of this Order, and attorneys= fees in the amount of $4,682.89. Other than the attorneys= fees awarded herein, each party shall bear the remainder of its own costs.

BOARD OF CLAIMS

Jeffrey F. Smith
Chief Administrative Judge

Ronald L. Soder, P.E.
Engineer Member

Opinion Signed

John R. McCarty
Citizen Member