COMMONWEALTH OF PENNSYLVANIA

CLAIRTON SLAG, INC.	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF GENERAL SERVICES	:	DOCKET NO. 3531

FINDINGS OF FACT

1. Plaintiff Clairton Slag, Inc., is a Pennsylvania corporation with its principal place of business located at P.O. Box 532, West Elizabeth, Pennsylvania, 15088. Clairton Slag is in the business of, inter alia, the manufacture and supply of certain bituminous materials. (Complaint and Answer ¶1; Stipulation ¶1).

2. Defendant is the Commonwealth of Pennsylvania, Department of General Services, (the "Commonwealth," the "Department" or "DGS") with its offices located in the North Office Building, Harrisburg, Pennsylvania. (Complaint and Answer ¶2).

3. Each year for at least the past 20 years, DGS, in its role as the procurement agency for executive departments of the Commonwealth of Pennsylvania, has advertised for bids on, and entered into, a supply contract for bituminous material (also referred to herein as "asphalt" and/or "asphalt materials") on a statewide basis to be provided to PennDOT maintenance forces for repair and maintenance of state-owned roads. (Stipulation ¶2; Board Finding).

4. DGS administers the bid and award of the SSC on behalf of PennDOT. (Stipulation ¶3; P-Exs. 11, 22, 24; N.T. 69).

5. The primary purpose of the statewide asphalt supply contract ("SSC") is to provide the Pennsylvania Department of Transportation ("PennDOT"), on an ongoing basis, with a convenient source of asphalt material to support road work performed by its maintenance forces. Each SSC typically runs from February 1 of the year effective to January 31 of the next year. The SSC taking effect on February 1, 2001 is referred to herein as the "2001 SSC." The SSC taking effect February 1, 2002 is referred to as the "2002 SSC." (Stipulation ¶3; P-Exs. 11, 22, 24; Board Finding).

6. Each year, DGS selects multiple vendors through its annual bid and award process to supply asphalt to the Commonwealth pursuant to the SSC going into effect that year. DGS entertains bids from a large pool of "qualified" vendors. (Stipulation ¶¶4-5, 7-8; N.T. 61-62, 68-73, 390-391; P-Ex. 22, Sheet B; Board Finding).

7. To be "qualified" the vendor must furnish its asphalt products from a source plant approved by PennDOT (as listed in PennDOT's Bulletin 41) prior to the bid offering. (N.T. 61-62, 390-391; P-Ex. 22, Sheet B; Board Finding).

8. Each SSC is a multiple award contract in which every "qualified" vendor that timely furnishes a responsive bid is awarded participation in the SSC for which it bid. These vendors are then eligible to sell asphalt under that SSC for the year(s) it is effective. (Stipulation ¶5; N.T. 68-73, 247, 390-391; P-Exs. 11, 22, 24, Sheets B, F; Board Finding).

9. Each vendor who has been awarded participation in the SSC in effect for the year is then identified on a list of vendors published with the SSC for that year (i.e. the Contractor List) and has the opportunity to receive orders pursuant to the SSC for that year. (N.T. 71-72; 247; P-Exs. 11, 24).

10. Each SSC provides for the purchase of asphalt from the qualified vendors who have submitted bids thereon and sets forth the criteria to be used for selecting the vendor to supply each order. (P-Exs. 11, 22, 24, Sheets F, G, H, I; Board Finding).

11. Because the date to submit bids for each SSC varied from year to year, DGS typically notified suppliers beforehand each year when to submit their bids. (Stipulation ¶¶7-8; N.T. 69-70).

12. To participate in the SSC, prospective vendors furnish their prices for the various types of paving material through DGS's bid and award process. For each type of material they wish to supply, the vendors submit a price per ton for material to be picked up from the plant and a price per ton with a mileage factor for material to be delivered to PennDOT's worksite. (Stipulation ¶4; Complaint and Answer ¶7; N.T. 97-98; P-Ex. 22, Sheets F, H, I).

13. Each year for at least the past 20 years, DGS has notified prospective bidders that the annual bid and award process was about to take place by directly calling, mailing or faxing notification to entities that were listed on DGS's bidders list. (Stipulation ¶7).

14. Each year for at least the past 20 years, DGS has also advertised the annual bid in the Pennsylvania Bulletin, and, in more recent years, posted notice of the bid on its website. (Stipulation ¶8; Motion for Summary Judgment and Answer ¶8; D-Ex. 2 (Nugent Dep. pp. 8-9)).

15. Clairton Slag is a "qualified" asphalt vendor that maintains a PennDOT approved plant producing asphalt for customer pickup or delivery. (N.T. 60-62; P-Ex. 4).

16. From 1967, Clairton Slag was included on DGS's bidders list and, until 2000, was regularly notified when to submit its bid. (N.T. 60-62; P-Ex. 4).

17. Prior to 2000, Clairton Slag had been providing asphalt materials to the Commonwealth through the SSC's for decades. (Stipulation ¶10).

18. In the Fall of 2000, when the bid and award process for the SSC for calendar year 2001 was taking place, DGS did not notify Clairton Slag of the pending bid and award process for the upcoming year's contract.[1] (Stipulation ¶13; N.T. 85-86).

19. Consequently, Clairton Slag missed the bid deadline and did not provide a bid to DGS as of the date of the bid opening for the 2001 calendar year SSC. (Stipulation ¶14).

20. When Clairton Slag realized that bids had been opened for the 2001 SSC, it raised an objection to the awards and informed DGS that it had not been notified of the bid and award process. (Stipulation ¶15; P-Ex. 12).

21. DGS responded that regardless of the lack of notification, Clairton Slag did not submit a bid and thus could not be included in the 2001 SSC. (N.T. 85-92; 392-393; P-Exs. 13, 15).

22. There is no DGS policy which guarantees that DGS will provide direct notice of a bid to all entities on a bidders list. (Stipulation ¶9).

23. Because Clairton Slag did not submit a bid for the 2001 SSC, it was told by DGS that it was ineligible to participate in that year's contract. (N.T. 85-92; 392-393; P-Exs. 13, 15).

24. Although Clairton Slag sought to be included among vendors eligible to sell asphalt to PennDOT in 2001, DGS only offered Clairton Slag an application to be included on the bidder's list for future SSCs. DGS did not offer to continue to purchase asphalt from Clairton Slag by renewing its prior year's contract. (N.T. 86-90; P-Exs. 12-15; Board Finding).

25. Clairton Slag provided no bituminous material to PennDOT under the 2001 SSC or for the 2001 calendar year. (Stipulation ¶18; N.T. 85-93).

26. In the Fall of 2001, Clairton Slag took steps necessary to submit a bid for the SSC for calendar year 2002. (Stipulation ¶19; P-Ex. 22).

27. Clairton Slag submitted a timely bid for the 2002 SSC. (N.T. 99, 103; P-Ex. 22).

28. Henry Dill, a Clairton Slag employee, hand delivered Clairton Slag's bid on the 2002 SSC to DGS on December 3, 2001 and attended the December 4, 2001 bid opening. (N.T. 99-100).

29. On December 4, 2001, bids were opened for the 2002 SSC. (Stipulation ¶20; N.T. 95, 100).

30. Neither Lane Construction ("Lane") nor Golden Eagle Construction ("Golden Eagle"), who had been bidders and approved suppliers under the 2001 SSC, submitted bids for the 2002 SSC. (Stipulation ¶21).

[1] We recognize it is not entirely accurate to refer to the period covered by the SSC as a "calendar year" since each SSC runs from February 1 to January 31 of the next year. However, we note that little, if any, asphalt is purchased in the month of January so we will adopt the parties' convention of referring to purchases made in the period February 1, 2001 to January 31, 2002 as occurring in "2001" or "calendar year 2001"; purchases made in the period February 1, 2002 to January 31, 2003 as occurring in "2002" or "calendar year 2002"; and so on.

31. Lane and Golden Eagle were two of Clairton Slag's main competitors for asphalt sales in its region. (N.T. 100-101).

32. Robert Schaefer is the President of Administration of Clairton Slag. (N.T. 33).

33. At the December 4, 2001 bid opening, Mr. Dill noticed that Lane and Golden Eagle failed to submit bids and informed Mr. Schaefer of this circumstance. (N.T. 100-101).

34. On January 2, 2002, Mr. Schaefer phoned Bonnie Stellfox, a DGS buyer for the SSC, to learn whether any bid protests had been filed and to confirm that Lane and Golden Eagle had not submitted bids prior to the December 4, 2001 bid opening for the 2002 SSC. (N.T. 93, 101-102; P-Ex. 68 (Stellfox Dep. pp. 27-28)).

35. Ms. Stellfox advised Mr. Schaefer that, consistent with the treatment of Clairton Slag a year earlier, those companies missing the bid deadline would not be able to participate in the 2002 SSC. (N.T. 102).

36. Several other vendors in addition to Lane and Golden Eagle also failed to submit timely bids for the 2002 SSC. (Stipulation ¶22; P-Exs. 29, 57).

37. In the days following the December 4, 2001 bid opening, Lane and six other asphalt suppliers contacted DGS to complain that they had not received notice of the bid process for the 2002 SSC. (Stipulation ¶22).

38. DGS investigated the complaints and discovered that Lane and the other six companies were listed as having received a fax notification of the bid. (Stipulation ¶23).

39. The only purported irregularity that DGS discovered was that two companies were listed as having the same fax number and telephone number. However, both of these companies were owned by the same person. (Stipulation ¶24).

40. One of the firms which failed to submit a bid, Golden Eagle, submitted a bid protest on December 13, 2001, and DGS partially responded to that protest through a letter dated December 13, 2001. (Stipulation ¶27; P-Exs. 55, 56).

41. Because of these complaints, even while Ms. Stellfox was assuring Clairton Slag that suppliers that did not submit a timely bid would not be included in the 2002 SSC, other administrators at DGS were deciding to deal with the issue in a different way. (Stipulation ¶¶22-33; N.T. 112-114; P-Exs. 55-58, 68 (Stellfox Dep. pp. 21-28); D-Ex. 2 (Nugent Dep. pp. 16-30)).

42. Ms. Minnich, DGS's Deputy Secretary for Procurement at the time relevant to this matter, acknowledged that, in the event of an issue with the bidding or procurement process, DGS has the option to rebid a contract. (N.T. 501).

43. Although DGS could have rebid the 2002 SSC, it did not. It chose instead to selectively renew the prior year's contract (the 2001 SSC) with seven vendors who had not submitted bids for the 2002 SSC. (Stipulation ¶¶22-33; N.T. 375, 499-501; P-Ex. 68 (Stellfox Dep. pp. 21-28); D-Ex. 2 (Nugent Dep. pp. 16-30)).

44. In late December 2001, DGS decided to renew the previous year's contract (i.e. the 2001 SSC) for Lane and Golden Eagle. (Stipulation ¶25; P-Ex. 58; Board Finding).

45. In addition to Lane and Golden Eagle, DGS decided to renew the 2001 SSC with the following five other companies that failed to submit bids for the 2002 SSC: Meyer Construction Co., Weist Asphalt Products & Paving Inc., Berkholder Paving Division of Martin Reinstein, Inc., Eastern Industries, Inc. and Riverside Materials Inc. (collectively the "Non-Bidding Vendors"). Other than Lane and Golden Eagle, these other companies were not competitors in Clairton Slag's region. (Stipulation ¶25; N.T. 39; P-Exs. 29, 57; Board Finding).

46. By proposing a renewal of the existing 2001 contracts with these seven vendors who had not submitted bids for the 2002 SSC, DGS resolved their bid protests and/or complaints. Joe Nugent of DGS personally contacted all of the firms for this purpose. (Stipulation ¶¶25, 28; P-Exs. 27, 55-58).

47. Lane and Golden Eagle agreed to a renewal of their 2001 SSC. (Stipulation ¶28; P-Ex. 58; Board Finding).

48. On March 11, 2002, Clairton Slag received notice that it would be part of the vendor group participating in the 2002 SSC by way of the published notification of award on the statewide asphalt supply contract. This notification included a listing of all of the vendors which had been awarded supply contracts, and indicated that Lane Construction would be awarded a contract for the 2002 construction season, notwithstanding that it had failed to submit a bid on December 4, 2001. (Stipulation ¶34; N.T. 103-108; P-Ex. 24).

49. This listing also alerted Clairton Slag that some of its competitors that had failed to submit timely bids that year (i.e. Lane and Golden Eagle) were nonetheless included in the 2002 Contractor List appended to the 2002 SSC. (Stipulation ¶34; N.T. 103-105; P-Ex. 24).

50. On March 18, 2002, Clairton Slag filed a letter objecting to the inclusion of Lane on the Contractor List. (P-Ex. 26).

51. By letter dated April 5, 2002, Clairton Slag was informed by DGS that the inclusion of Lane was neither the result of a solicitation of a bid nor the award of a new contract but was, instead, a renewal of an existing contract (i.e. the 2001 SSC). (P-Ex. 27).

52. DGS also indicated in its letter of April 5, 2002, that it did not consider Clairton Slag's letter to raise a bid protest issue and that Clairton Slag had no right to protest the inclusion of Lane and Golden Eagle on the list of approved vendors for the 2002 construction season since this resulted merely from a renewal of their 2001 contracts. (P-Ex. 27).

53. DGS also advised Clairton Slag in the April 5, 2002 letter that, other than the contract period, none of the contract terms (including the "price adjustment provision") for the 2001 contractors were changed in the renewed contracts. (P-Ex. 27; Board Finding).

54. Both Lane and Golden Eagle had been included in the Contractor List for 2002 on the basis of this "renewal" of their 2001 SSC. (P-Exs. 24, 26, 27, 58; Board Finding).

55. On April 11, 2002, Clairton Slag submitted another letter to DGS as a notice of contract claim generated by the circumstances described above. (Stipulation ¶37; P-Ex. 28).

56. On June 17, 2002, Ms. Minnich responded to Clairton Slag's claim letter and explained that its letter was being referred to Joseph W. Nugent, Director of the Bureau of Purchases, as the Contracting Officer. She also explained that DGS's combined renewal and new awards approach was unusual, and would not be used except under rare circumstances. (Stipulation ¶38; P-Ex. 29).

57. By letter of July 9, 2002, DGS's Contracting Officer denied Clairton Slag's claim. In that letter, DGS stated, inter alia, that the 2002 SSC was a multiple award contract and did not represent an exclusive arrangement with Clairton Slag, and that DGS had a right to renew its 2001 SSC with the seven vendors independent of the 2002 SSC. (P-Ex. 30).

58. Clairton Slag thereafter filed the instant claim with this Board on August 6, 2002. (Board Docket, Case No. 3531).

59. The claim filed at this Board was originally comprised of two counts. Count One alleged a breach of contract because DGS failed to notify Clairton Slag of the bid deadline for contract year 2001. Count Two alleged a claim for damages arising from a breach of contract due to PennDOT ordering asphalt materials from vendors not bidding on, nor properly included in, the 2002 SSC. Count One was withdrawn prior to hearing. (Complaint pp. 5-7; Board Docket, Case No. 3531).

Purchases from Eligible Vendors Properly Listed Under the 2002 SSC

60. Clairton Slag has also asserted, during hearing, an additional claim for damages resulting from purchases of asphalt materials from vendors who submitted timely bids for, and were properly included in, the 2002 SSC, but which purchases Clairton Slag alleges were improperly diverted from it to these other vendors in contravention of the vendor selection terms of the 2002 SSC (this portion of its claim is sometimes referred to herein as the "Second Issue"). (N.T. 207-232, 440-441).

61. Clairton Slag first learned of this Second Issue during formal discovery well after its complaint had been filed with the Board. (N.T. 207-211; Board Finding).

62. The allegations of the April 11, 2002 claim letter to DGS and the complaint to the Board are limited to the assertion that the contract was breached by PennDOT's award of purchase orders to vendors who failed to submit bids for the 2002 SSC. (Complaint; P-Ex. 28).

63. Neither Clairton Slag's claim submitted to the DGS Contracting Officer nor its complaint at the Board alleges a claim based on orders for asphalt being improperly placed with vendors who submitted timely bids for, and were properly included in, the 2002 SSC. (Complaint; P-Ex. 28; Board Finding).

64. Clairton Slag did not raise the Second Issue (respecting asphalt orders due to Clairton Slag being improperly placed with other vendors properly participating in the 2002 SSC) in its claim to DGS or in its complaint to the Board. (Findings of Fact, i.e. "F.O.F." 60-63; Board Finding).

65. The rebuttal report of Clairton Slag's expert witness on damages addressed the Second Issue of improper orders from vendors properly included in the 2002 SSC and itemized the related damages. (P-Ex. 54).

66. Clairton Slag's expert rebuttal report was attached to the amended pre-trial statement of Plaintiff Clairton Slag that was filed with the Board on January 19, 2007 and certified as hand delivered to DGS on that date. (Amended Pre-trial Statement of Plaintiff Clairton Slag, Board Docket Case No. 3531).

67. Clairton Slag first raised the Second Issue to the Board at the time of hearing which occurred during the period of February 20-22, 2007. (Board Finding).

68. This Second Issue (respecting asphalt orders improperly diverted from Clairton Slag to other vendors properly listed on the 2002 SSC) was raised by Clairton Slag's counsel in his opening statement and was also raised by Robert Schaeffer, President of Administration of Clairton Slag, who presented extensive evidence on this Second Issue during the first and second day of hearing in this matter. (N.T. 17-18, 165-166, 209-211).

69. DGS objected to the taking of evidence on the damages relating to this Second Issue for the first time at the conclusion of two full days of hearing, just before the end of Plaintiff's case presentation. (N.T. 441-443).

70. Specifically, DGS objected to the testimony of Scott Staub, Clairton Slag's accounting expert, as he began to testify as to the damages relating to this Second Issue. DGS stated its objection on the basis that this portion of the claim was not part of Clairton Slag's complaint, and that it was, "not properly before the Board and therefore lacking jurisdiction, its obviously not relevant." DGS did not, however, object to the admission of Mr. Staub's expert report, nor to any other evidence offered by Clairton Slag on this Second Issue at any other time during hearing. (N.T. 441-443, 470-471; Board Finding).

71. At the time of DGS's objection, Clairton Slag responded, inter alia, that the Second Issue was not discovered until after formal discovery in this case began, but asserted that a fair reading of the complaint and claim letter would include this aspect of the claim. (N.T. 441-443).

72. The Board deferred ruling on the objection until briefed by the parties' post-hearing and allowed the testimony to continue. (N.T. 441-443; Board Finding).

73. In their post-hearing briefs, both parties fundamentally reiterate their same arguments regarding admissibility. Clairton Slag further argues that the addition of the Second Issue was not a surprise to DGS, did not create a material variance from the pleadings, and that DGS waived objection to the introduction of evidence on, and pursuit of, the Second Issue at the Board by its delay in voicing its objections thereto. In addition to its earlier arguments, DGS asserted, inter alia, that Clairton Slag failed to raise the Second Issue with the Department before asserting it at the Board and that it failed to raise this Second Issue within the six month time limit as additional bases to assert lack of Board jurisdiction over this Second Issue and therefore lack of relevance to the testimony. (Plaintiff's Post-Hearing Brief p. 57; Defendant's Post-Hearing Brief pp. 16-19; Plaintiff's Reply Brief pp. 28-33; N.T. 441-443).

Purchases from Vendors Not Bidding on the 2002 SSC

74. As noted above, the claim filed at this Board was originally comprised of two counts. Count One was withdrawn prior to hearing. Count Two alleged a breach of contract due to PennDOT ordering asphalt materials from vendors not bidding on, nor properly included in, the 2002 SSC. (Complaint pp. 5-7, Board Docket Case No. 3531).

75. Clairton Slag supplies asphalt materials to two PennDOT Engineering Districts, Engineering District 12-0 and 11-0. Within those Engineering Districts, Clairton Slag has submitted a claim for lost profits on materials purchased from Lane and Golden Eagle by Maintenance District 12-4 (Washington County) and Maintenance District 11-1 (Allegheny County). Clairton Slag claims damages for asphalt purchases improperly placed with Lane and Golden Eagle in two categories: "F.O.B. Source" (i.e. materials to be picked up at the plant by PennDOT) and "F.O.B. Destination" (i.e. materials to be delivered to the job site by the vendor). (Complaint pp. 5-7; N.T. 206-211, 228; P-Exs. 37, 40-45, 48-49, 54).

76. Clairton Slag alleges that orders for asphalt materials to be picked up at plants (F.O.B. Source) placed with Lane and Golden Eagle in 2002 and 2003 totaled 87,974 tons of asphalt.[2] Clairton Slag further alleges that all 87,974 tons of asphalt in the F.O.B. Source category lost to Lane and Golden Eagle in 2002 and 2003 should have been placed with Clairton Slag based on the allocation criteria in the 2002 SSC. (N.T. 206, 228; P-Exs. 37, 40-45, 54).

77. Clairton Slag also alleges that three orders for materials delivered to work sites (F.O.B. Destination) by Lane and Golden Eagle (as vendors not properly on the 2002 SSC) should have been directed to it by the terms of the 2002 SSC because Clairton Slag offered the lowest responsible cost. These orders totaled 2,451 tons of asphalt. (P-Exs. 37, 48-49, 54; N.T. 206, 228).

78. In support of its claim, Clairton Slag first argues that the 2002 SSC was a "requirements contract" which obligated the Commonwealth to purchase all its asphalt needs through the 2002 SSC for the years it was effective (i.e. 2002 and, by renewal, 2003). It further claims that the Commonwealth breached the 2002 SSC for all purchases of asphalt made by PennDOT from Lane and Golden Eagle during 2002 and 2003 because these two vendors did not bid on, nor were they properly included in, the 2002 SSC. (Complaint pp. 5-7; Plaintiff's Post-Hearing Brief pp. 12-16; Plaintiff's Reply Brief pp. 1-8; N.T. 12-13).

79. The 2002 SSC, in Sheet A thereof, provides, in relevant part, as follows:

> **ESTIMATED QUANTITIES:** It shall be understood and agreed that any quantities listed in the proposal are estimated only and may be increased or decreased in accordance with the actual requirements of the Commonwealth, and that the Commonwealth in accepting any bid or portion thereof, contracts only and agrees to purchase only the supplies, equipment, and materials in such quantities as represent the actual requirements of the Commonwealth.

[2] DGS attempted to renew the 2002 SSC with all participating vendors for use in the 2003 construction season and did so successfully with all but four who declined to renew. The propriety of this renewal has not been contested nor raised in issue by the parties. The propriety and efficacy of DGS's selective renewal of the 2001 SSC, however, is very much contested and is addressed below.

> The Commonwealth reserves the right to purchase items covered by this contract from another source if the price is lower than the contract price.

(P-Ex. 24, Sheet A).

80. Although DGS reserved the right to purchase paving materials outside the 2002 SSC, it did not specify a procedure for doing so in the 2002 SSC. (P-Ex. 24, Sheet A; Board Finding).

81. The 2002 SSC included the following provision requiring compliance with federal and state laws:

> All contractors shall comply with the federal and state laws and regulations and obtain all federal and state approvals and permits that allow the materials offered by the contractor to be sold and used for the Commonwealth's required use.

(P-Ex. 24, Sheet I).

82. It was reasonable for Clairton Slag to expect that the Commonwealth, as well as the vendors, would comply with applicable state and federal law in performing their contractual obligations under the 2002 SSC. (P-Exs. 22, 24; Board Finding).

83. The Commonwealth Procurement Code found at 62 Pa.C.S. § 101 et seq. (hereinafter the "Procurement Code") has been in effect since 1998 to present. 62 Pa.C.S. § 101 et seq. (Board Finding).

84. The Pennsylvania Uniform Commercial Code found at 13 Pa.C.S. §1101 et seq. (hereinafter the "PUCC") has been in effect from 1980 to present. 13 Pa.C.S. §1101 et seq. (Board Finding).

85. The bituminous or asphalt materials that are the subject of this case are moveable, manufactured products that are not real estate, attached to real estate when purchased, money, investment securities or choses in action. (Board Finding).

86. As a party to the 2002 SSC, Clairton Slag had the reasonable expectation that any purchases of asphalt made by the Commonwealth from sources outside the 2002 SSC would be done in compliance with the requirements of applicable Pennsylvania laws. (P-Exs. 22, 24; Board Finding).

87. Donald Vega, Roadway Coordinator for PennDOT in Washington County, Maintenance District 12-4, testified that, in his district, PennDOT ordered asphalt for roadway maintenance only by using a computer program loaded with information for vendors on the applicable SSC. He believed that if vendors were not included in the statewide listing (i.e. the Contractor List attached to the SSC) that he could not order from them. (N.T. 294-296, 301-303).

88. Phillip Troiani, Roadway Coordinator for Allegheny County Maintenance District 11-1 during 2002, testified that his office ordered only from vendors under the SSC. He also testified that he knew he could go outside of the SSC's to purchase asphalt if he had a big job and if he thought he would get lower prices by putting the job out for a new bid, but that he did not do so. (N.T. 320-321).

89. DGS did not conduct any bid invitations, request for proposals or engage in any competitive sealed bid process separate and apart from the 2002 SSC for asphalt purchases made from Lane and Golden Eagle in 2002 or 2003. (N.T. 321, 379-380, 383-384; F.O.F. 30-54, 87-88; Board Finding).

90. With the sole exception of evidence proffered by DGS to support its argument that it purchased asphalt from Lane and Golden Eagle in 2002 and 2003 pursuant to a renewal of the 2001 SSC, the case record establishes that DGS did not attempt to utilize any exception to the competitive sealed bid process prescribed by the Procurement Code for these 2002 and 2003 asphalt purchases from Lane and Golden Eagle. (Stipulation ¶¶20-45; N.T. 321, 379-380, 383-384; F.O.F. 30-54, 87-89; Board Finding).

91. In attempting to renew the 2001 SSC for use in 2002, DGS relied on the Option to Renew clause in the 2001 SSC. The clause states, in relevant part, as follows:

> Option To Renew: The contract(s) or any part of the contract(s) may be renewed for an additional three (3) one (1) year terms by mutual agreement between the Commonwealth and the Contractor(s). If the Contract(s) is/are renewed the same terms and conditions shall apply. If this contract(s) is/are renewed for additional year(s), a new performance bond or a rider supplementing the original bond will be required for the extended period.

(P-Exs. 11, Sheet L, 58; F.O.F. 30-54; Board Finding).

92. DGS did not offer, nor attempt, to renew the 2001 SSC with all the qualified vendors initially awarded participation in the 2001 SSC and eligible to make sales thereunder. DGS only offered to renew the 2001 SSC with Lane, Golden Eagle and four or five other vendors for use in 2002. (Stipulation ¶¶25-33; F.O.F. 30-54; Board Finding).

93. DGS chose to renew its 2001 SSC for a second year with only a select portion of the qualified vendors who submitted bids on, and were initially included in, the 2001 SSC for its first year rather than offer a renewal to all such vendors. (Stipulation ¶¶25-33; F.O.F. 30-54; Board Finding).

94. The 2001 SSC was a multiple award contract that, by its terms and by DGS practice, was to be awarded to all qualified vendors (i.e. vendors with PennDOT approved source plants) who timely submitted responsive bids to DGS. (P-Ex. 11; F.O.F. 5-10; Board Finding).

95. The "AWARD" section of the 2001 SSC at Sheet F states, in relevant part, that, "a contract award will be to each qualified contractor source bid." This language mirrors language typically in the bid documents for the SSC's as well. (P-Exs. 11, 22, 24, Sheet F; F.O.F. 5-10; Board Finding).

96. DGS appears to suggest to the Board that the initial sentence in the Option to Renew clause in the 2001 SSC allows DGS not only the option of renewing any part of the 2001 SSC (such as for one or more of the many types of asphalt material identified) but also the option to renew the 2001 SSC with one or any portion of the qualified vendors who timely submitted bids thereon and were initially awarded participation in the 2001 SSC under the authority of the multiple award contract provision of the Procurement Code at Section 517. (Defendant's Post-Hearing Brief pp. 10-12; F.O.F. 30-54; Board Finding).

97. Clairton Slag, on the other hand, suggests that such a reading of the Option to Renew clause is inappropriate and in error because such a selective renewal with only a portion of the vendors originally awarded participation in the 2001 SSC would allow DGS to improperly circumvent the requirement of the Procurement Code that multiple award contracts be awarded to each qualified contractor who bids thereon in subsequent years by mere renewal with vendors favored by DGS. (Plaintiff's Post-Hearing Brief pp. 16-18; Plaintiff's Reply Brief pp. 17-19; N.T. 11-12; Board Finding).

98. Some DGS employees also expressed doubt or uncertainty that an SSC could be properly renewed for a subsequent year with only a portion of the qualified vendors who initially bid on, and were awarded participation in, that SSC in the first year. (N.T. 146-151, 364-367; P-Exs. 63, 68 (Stellfox Dep. pp. 23-26); Board Finding).

99. We find that there is ambiguity and uncertainty in the language of the first sentence of the Option to Renew in the 2001 SSC. Specifically, it is unclear if the sentence is intended to provide for renewal of any part of the contract (e.g. for supply of only one or a few types of bituminous material without renewing all asphalt categories) with all qualified participating vendors or for renewal of some or all of the contract provisions with only some selected portion of the original qualified participating vendors. (P-Ex. 11, Sheets F, L; F.O.F. 91-98; Board Finding).

100. We find that DGS's reading of the first sentence in the Option to Renew clause in the 2001 SSC (as allowing DGS to selectively renew the 2001 SSC with only one or a portion of the qualified vendors originally participating in the contract) would be in conflict with the contract's "AWARD" provision which states that it will be awarded to each qualified vendor who bids thereon. That is to say, DGS's reading of the first sentence of the Option to Renew clause would allow DGS, by renewing the contract for a second or third year, to completely contradict and eviscerate the "AWARD" provision mandate (which mirrors that found at 62 Pa.C.S. § 517(e)(3)) requiring an award to all qualified vendors who bid on the 2001 SCC. DGS's reading would also effectively change the "AWARD" term of the 2001 SSC in the renewal period(s) in contravention of the second sentence in the Option to Renew clause. (P-Ex. 11, Sheets F, L; F.O.F. 91-99; Board Finding).

101. Additionally, DGS's expansive interpretation of the first sentence of the Option to Renew clause, which would allow it to selectively renew a multiple award public contract such as the 2001 SSC with only a few vendors for a subsequent term, would create a device potentially promotive of favoritism, unfairness, improper influence and/or corruption by allowing arbitrary selection of contractors in such renewal periods. (P-Ex. 11, Sheets F, L; F.O.F. 30-54, 91-100; Board Finding).

102. Clairton Slag's reading of the Option to Renew clause in the 2001 SSC, particularly the first sentence, as allowing renewal of portions of the contract but only if offered to all qualified vendors originally participating in the 2001 SSC is consistent with: the "AWARD" provision requiring an award of participation to all qualified vendors who submitted bids; the second sentence of the Option to Renew clause which allows renewal only on the same terms and conditions; and with the literal language of 62 Pa.C.S. § 517(e)(3). (P-Ex. 11, Sheets F, L; F.O.F. 91-101; Board Finding).

103. The Option to Renew clause in the 2001 SSC, particularly the first sentence, allows renewal of portions of the 2001 SSC, but only if offered to all qualified vendors originally participating in the 2001 SSC. (P-Ex. 11, Sheets F, L; F.O.F. 91-102; Board Finding).

104. The Option to Renew clause provides that the 2001 SSC may be renewed but that such renewal must be on the same terms and conditions. (N.T. 364-368; P-Ex. 11, Sheet L).

105. In attempting to renew the 2001 SSC for the seven Non-Bidding Vendors (including Lane and Golden Eagle) for use in 2002, DGS also changed the asphalt base price in the asphalt price index for Zone 3 (the zone applicable to Clairton Slag, Lane and Golden Eagle) from $182.00 to $147.00. (Stipulation ¶45; Board Finding).

106. The asphalt price index is employed in the SSCs to adjust the bid price of the participating vendors in relation to the unpredictable price fluctuations of the asphalt cement (also referred to as liquid asphalt) needed to make the bituminous paving materials supplied to the Commonwealth over the year that the SSC is in effect. (Stipulation ¶6; N.T. 118-119; P-Exs. 11, 22, 24, 35).

107. Asphalt is produced using two main components: stone and asphalt cement, the latter of which is a binding agent. (N.T. 45).

108. Asphalt cement is the most expensive component of asphalt production, and the price of asphalt cement fluctuates greatly. (N.T. 63).

109. The asphalt price index (hereinafter the "index") utilizes a base price for asphalt cement in three zones across the state. Clairton Slag, Lane and Golden Eagle are located within Zone 3. (N.T. 118-119; P-Exs. 11, 22, 24, Sheets C, D; P-Ex. 35).

110. The asphalt base price component of the index is stated up front each year in the SSC for each of three zones. Once the SSC becomes effective, the price for asphalt cement is then calculated monthly for each zone by averaging representative pricing. This "monthly price" is divided by the asphalt base price set by the SSC for the year to produce the index ratio. If this index ratio or fraction is less than .90 or greater than 1.10, the vendor's bid pricing is adjusted up or down by applying the difference according to the percentage bitumen in the particular product. When the "monthly price" of asphalt cement fluctuates significantly, this has the effect of lowering the amount paid to the vendor for the asphalt supplied if the monthly cost of asphalt cement is below the asphalt base price and raising the amount paid to the vendor if the monthly price of asphalt cement is above the asphalt base price. (Stipulation ¶6; N.T. 127; P-Exs. 11, 22, 24, Sheets C, D; P-Exs. 35-36; Board Finding).

111. The asphalt base price in the asphalt price index for Zone 3 was $182.00 in the 2001 SSC. (N.T. 121-122, 170; P-Ex. 11, Sheet D).

112. The asphalt base price in the asphalt price index for Zone 3 was $147.00 for the 2002 SSC. (N.T. 123-124, 201; P-Ex. 24, Sheet C).

113. Rather than keeping the asphalt base price term the same as it was in the 2001 SSC, DGS changed this asphalt base price term when it sought to renew the 2001 SSC for Lane and Golden Eagle for use in 2002. (Stipulation ¶¶30, 31, 45; N.T. 115, 167-170; P-Exs. 58, 59-61).

114. Lawrence Ligon, as a Management Analyst II for PennDOT during this time, coordinated the Statewide Asphalt Supply Contract for PennDOT and served as the primary liaison on the contract between PennDOT and Department of General Services. (N.T. 353-356).

115. Mr. Ligon testified that renewing the 2001 contracts using the 2002 asphalt base price in the index saved DGS money by avoiding a total rebid and simplifying the administration of the contracts. (N.T. 379-380).

116. DGS substituted the new asphalt base price into the 2001 SSC in its attempted renewal of the 2001 SSC for Lane and Golden Eagle. (N.T. 117-123; P-Exs. 58-61, 68, 69; F.O.F. 44-54, 105-115, 117-124; Board Finding).

117. When DGS "offered" Lane, Golden Eagle, and five other companies the option of renewing their contracts after the 2002 bids were opened, the bid prices submitted by other vendors had already been made public. Therefore, in choosing whether to renew, Lane and the others had the advantage of knowing their competitors' pricing. (Stipulation ¶26; N.T. 115-117).

118. DGS indicated in writing that it was "interested" in renewing the 2001 SSC for 2002 to Lane and Golden Eagle on December 21, 2001. It further appears that written confirmation of concurrence in such a renewal was returned by Lane on or about the same day and by Golden Eagle on or about December 24, 2001. (Stipulation 28 at Ex. D; P-Ex. 58).

119. On January 4, 2002, DGS requested in writing that Lane, Golden Eagle and other Non-Bidding Vendors agree to a change in the asphalt base price from the $182.00 provided for in the 2001 SSC to $147.00, the same amount of the asphalt base price provided for in the 2002 SSC for Zone 3. (N.T. 115; P-Ex. 59).

120. Lane and Golden Eagle, among others, agreed to the requested reduction in the asphalt base price proposed by DGS. (Stipulation ¶¶30, 31; P-Exs. 59- 61).

121. The reduction in the asphalt base price actually resulted in a financial benefit to Lane and Golden Eagle, not DGS, in that this substitution of a lower asphalt base price functioned to pay Lane and Golden Eagle a higher price when asphalt cement prices fluctuated outside the specified range of .90 to 1.10 of the base price. That is, when any one of the variable monthly prices in 2002 are divided by the $147.00 base price, it results in a higher ratio then if the monthly price were to be divided by the $182.00 base price. Thus, when this lower asphalt base price ($147) is factored into the price index, it results generally in a higher price paid to the vendor for asphalt than if the 2001 base price ($182) were used. (N.T. 167-170; P-Exs. 11, 24, Sheets C, D; P-Exs. 35, 36; Board Finding).

122. DGS and the "renewing" vendors (including Lane and Golden Eagle) changed the asphalt base price term in their 2001 contract and made it more desirable for Lane and Golden Eagle to compete with the vendors such as Clairton Slag properly on the 2002 SSC by assuring Lane and Golden Eagle that they would get the higher 2002 multiplier applied to their 2001 bid prices. (N.T. 114-115, 167-170; F.O.F. 44-54, 105-121; Board Finding).

123. The price ultimately paid to the vendors for the asphalt purchased by DGS was certainly material to their contract. Accordingly, while this attempted renewal with adjustment to the asphalt base price may have been expedient for DGS, it resulted in a material change to the 2001 SSC contract terms. (N.T. 115-120; F.O.F. 41-54, 105-122; Board Finding).

124. We do not find DGS's assertion that the 2001 SSC was first renewed without any changes and that voluntary price adjustments and a change to the asphalt base price were later offered as a separate transaction to be credible. To the contrary, the Board finds these two issues to be part of one overall, negotiated transaction. Among other things, we note: DGS personnel were discussing the renewal option together with a price adjustment for these vendors on the 2001 SSC as early as December 20, 2001 when the idea of renewal first came up; DGS couched its December 21, 2001 writing as an indication of "interest in exercising its Option to Renew" rather than as an explicit exercise of said "option"; the Board has not been provided with evidence of an express exercise by DGS of its option to renew the 2001 SSC prior to agreement on the asphalt base price reduction (similar to Change Number 21 for the 2002 SSC renewal); there is no evidence of DGS's decision to include Lane and Golden Eagle in the 2002 Contractors List until publication of same in or about March of 2002. (P-Exs. 59-61, 68 (Stellfox Dep. pp. 22-27), 69; F.O.F.41-54, 105-123; Board Finding).

125. DGS did not renew the 2001 contracts of Lane and Golden Eagle on the same terms and conditions. (Stipulation ¶¶30, 31, 45; P-Ex. 11, Sheet L, 59-61; F.O.F. 105-124; Board Finding).

126. Lane and Golden Eagle neither bid on the 2002 SSC nor had their 2001 SSC renewed without a material change in terms. Moreover, DGS did not engage in any other bidding process (or identify any exception from same) under the existing Procurement Code for its 2002 and 2003 asphalt purchases from Lane and or Golden Eagle. (F.O.F. 30, 41-54, 87-90, 114-119; Board Finding).

127. In October 2002, DGS attempted to renew the 2002 SSC with all vendors participating therein for use in 2003. (N.T. 147-151; P-Ex. 33).

128. Through Change Order #21, dated December 18, 2002, DGS renewed the 2002 SSC for use in 2003 with all but four vendors then on the 2002 SSC. (P-Ex. 34).

129. The following four vendors chose not to renew their 2002 contract for 2003: Stillwater Asphalt, Inc.; Foster Grading Company; Hanson Aggregated PMA, Inc.; and Latrobe Construction Company. (P-Ex. 34).

130. There was no change to the asphalt base price made in renewing the 2002 SSC for use in 2003. (N.T. 147-151; P-Exs. 24, 33, 34).

131. DGS apparently intended to include Lane and Golden Eagle in the renewal of the 2002 SSC for use in 2003. (P-Ex. 34).

132. Lane and Golden Eagle remained on the Contractor List to supply asphalt for 2003. (N.T. 147; P-Ex. 24, Contractor List pp. 3, 7, P-Ex. 34).

133. Change Order #21, which purports to renew the 2002 SSC, makes no reference to a renewal of Lane and Golden Eagle's 2001 contracts. Any attempt to renew the 2001 SSC for Lane and Golden Eagle for use in 2003 (with the 2002 asphalt base price) would still contain a material change in terms to the Lane and Golden Eagle contract and perpetuate the selective renewal of the 2001 SSC. (P-Exs. 34, 58-61; F.O.F. 105-125; Board Finding).

134. PennDOT placed orders for asphalt with Lane and Golden Eagle as well as Clairton Slag and other suppliers during 2002 and 2003. (N.T. 197-198; P-Exs. 39-45, 54; F.O.F. 54, 74-77, 114-120, 127-131; Board Finding).

135. To the extent the Commonwealth purchased asphalt from Lane and Golden Eagle in 2002 and 2003, it diverted business from other vendors properly on the 2002 SSC, including Clairton Slag. (N.T. 197-198; P-Exs. 39-45, 54; F.O.F. 54, 74-77, 114-120, 127-131; Board Finding).

136. To the extent the Commonwealth purchased asphalt from Lane and Golden Eagle in 2002 and 2003, it diverted business from Clairton Slag and other qualified vendors who submitted timely bids on the 2002 SSC who were available to service Maintenance Districts 11-1 in Allegheny County and Maintenance District 12-4 in Washington County. (N.T. 197-198; P-Exs. 39-45, 54; F.O.F. 54, 74-77, 114-120, 127-131; Board Finding).

Damages

137. To establish the damages it incurred in the form of lost profits on asphalt sales diverted to Lane and Golden Eagle in 2002 and 2003, Clairton Slag must first establish the total quantity of lost business sent to Lane and Golden Eagle in this period and then identify the portion of this lost business it should have received under the terms of the 2002 SSC. Once its proper portion of the lost asphalt sales business is identified, it must then provide a series of calculations (with evidential support) reasonably identifying its expected gross revenue on the sales of the asphalt minus its total costs to produce these sales to arrive at its anticipated lost profits on the misdirected sales. Clairton Slag acknowledges this by way of its own extensive data collection and damage calculations. (N.T. 13, 18, 155-159,194-209,214-229; P-Exs. 37-54; Board Finding).

138. For all but a small segment of its overall claim, however, Clairton Slag fails to establish with reasonable certainty what portion of the total asphalt sales lost to Lane and Golden Eagle in 2002 and 2003 should have been allocated to Clairton Slag under the terms of the 2002 SSC. (P-Exs. 52-54; F.O.F. 137, 139-184; Board Finding).

139. The 2002 SSC provided for asphalt purchases of two basic types: "F.O.B. Source" and "F.O.B. Destination/Department Paver" (also referred to herein as "F.O.B. Destination"). "F.O.B. Source" means that the materials are to be picked up from the vendor's location by PennDOT's trucks. "F.O.B. Destination" means the materials are to be delivered by vendors to PennDOT's work sites. (P-Ex. 22, Sheets F, I).

140. In responding to DGS's request for proposals, bidders provided separate prices for "F.O.B. Source" and "F.O.B. Destination" materials (with the latter price identifying mileage factors to be included in the cost). (N.T. 73-74; P-Ex. 22).

141. The bid prices for both types of orders from all qualified vendors who submitted timely bids on the 2002 SSC were then incorporated into the Contractor List that was provided to each vendor, along with a copy of the 2002 SSC executed by DGS. (N.T. 107; P-Ex. 24).

142. This Contractor List was also distributed to PennDOT offices across the Commonwealth. (P-Ex. 24).

143. Other than Lane and Golden Eagle, Clairton Slag had three competitors in the 11-1 and 12-4 Maintenance Districts. These three were qualified vendors who had timely bid on, and were properly included in, the 2002 SSC: Lindy, Better Materials and Marsh Asphalt. (N.T. 208, 209).

144. Clairton Slag's bid price "F.O.B. Source" was lower than that of the other qualified vendors in its area that had submitted timely bids on, and were properly included in, the 2002 SSC (i.e. Lindy, Better Materials and Marsh Asphalt). (N.T. 208-209; P-Exs. 24, 38; Board Finding).

145. Clairton Slag interpreted the language of the 2002 SSC to limit the Commonwealth's vendor selection criteria for "F.O.B. Source" purchases exclusively to the lowest bid price per ton. (N.T. 155-159, 208-209; P-Exs. 37-47, 51).

146. Clairton Slag's damage calculations present the asphalt purchases improperly placed with Lane and Golden Eagle into two categories: "F.O.B. Source" and "F.O.B. Destination." Clairton Slag's evidence establishes that the orders for asphalt materials to be picked up at plants (F.O.B. Source) placed with Lane and Golden Eagle in 2002 and 2003 totaled 87,974 tons of asphalt. (N.T. 194-209, 214-229; P-Exs. 37-47, 48).

147. Clairton Slag alleges that all 87,974 tons of asphalt in the "F.O.B. Source" category lost to Lane and Golden Eagle in 2002 and 2003 should have been purchased from Clairton Slag based on its understanding that the language of the 2002 SSC to limit the Commonwealth's vendor selection criteria for "F.O.B. Source" purchases exclusively to the lowest bid price per ton. (N.T. 155-159, 194-209; P-Exs. 37-47, 51).

148. The Invitation to Bid documents published by DGS for the 2002 SSC provides, at the top of Sheet H:

> IMPORTANT
>
> Refer to bid conditions for "Delivery Time F.O.B. Destination/Department Paver" for explanation of contract requirement for minimum and maximum time per hour
>
> All references to Department Paving Equipment shall include Department Wideners.
>
> F.O.B. Source Cost/Ton is used to determine the contractor that would be awarded the Purchase Order.
>
> Payment and applicable discounts will be adjusted prices. If a Price Adjustment (excalator/descalator) is in effect at the time of delivery.

(P-Ex. 22, Sheet H (emphasis added)).

149. The provision under the heading "IMPORTANT" appeared in the bid package as one of the terms in the proposed contract which Clairton Slag signed and returned to DGS when it responded to the bid invitation. (P-Ex. 22, Sheet H).

150. This provision was apparently removed from the copy of the 2002 SSC executed by DGS and returned to Clairton Slag with no mention made by DGS of its unilateral removal of this provision at the time. (Compare P-Ex. 22, Sheet H with P-Ex. 24, Sheets F, G).

151. The following paragraph from Sheet F of the Invitation to Bid and of the fully executed 2002 SSC also specifies considerations when picking up asphalt paving material from the source plant:

> **AWARD:** The F.O.B. source cost per ton will be the price the Department of Transportation will pay for bituminous materials purchased "FOB source of supply/loaded on department trucks". A contract award will be to each qualified contractor source bid. After award, the county maintenance manager will issue a field purchase order, on an as needed basis, for loading material in a department truck. The department will normally haul material from the source that represents the lowest responsible cost to the department after taking into consideration length of haul and dead haul. However, in some instances, the department may select the most economic source based upon other considerations such as, but not limited to, differences in haul time due to terrain or urban congestion; length of wait at the source; cooling due to length of haul; crew productivity based on truck availability and haul distance. details of such transactions shall be the responsibility of the county maintenance manager, will be on file in the county, and are subject to review by any awarded contractor on this contract.

(P-Exs. 22, 24, Sheet F).

152. For paving materials to be delivered to the field by the vendors, the following paragraph from Sheet I of the Invitation to Bid and of the fully executed 2002 SSC states:

> **FOB DESTINATION/DEPARTMENT PAVER:** The County Manager is responsible for issuing Field Purchase Orders for material delivered to any specific geographical locations that are reasonably accessible. The Department will place orders in accordance with actual needs. Orders will be generated to the contractor whose prices represent the lowest total cost to the Department for a specific bituminous material at the time of order (see formulas contained in this proposal). Material availability, trucking availability, or other related circumstances affecting timely delivery might be a consideration for contractor selection. details of such transactions are the responsibility of the County Maintenance Manager, on file in the County Office, and are subject to review by any awarded contractor on this contract.

(P-Ex. 22, Sheet I).

153. Although the "F.O.B. Source" and "F.O.B. Destination" provisions differ slightly, both provisions are substantially similar in recognizing that other factors, in addition to bid price per ton, can effect the final total cost to PennDOT (or other purchasing agency) and may be considered in deciding from which vendor on the 2002 SSC any given purchase may be made. (Compare P-Ex. 22, Sheet F with P-Ex. 22, Sheet I; Board Finding).

154. To interpret and understand the vendor selection criteria contained in the 2002 SSC, we consider the "IMPORTANT" provision along with the "AWARD" provision and the "F.O.B. DESTINATION/DEPARTMENT PAVER" provision cited by DGS. (P-Ex. 22, Sheets F, H, I; Board Finding).

155. The "IMPORTANT" provision states only that the "F.O.B. Source Cost/ton" is to be used to determine the contractor that will be awarded the purchase order but does not state that this consideration is to be the sole or exclusive factor that may be considered in selecting same. (P-Ex. 22, Sheet H; Board Finding).

156. The "AWARD" provision, containing vendor selection criteria relating to "F.O.B. Source" purchases, states further that the length of haul and dead (empty) haul to and from the source shall also be considered to determine the vendor with the "lowest responsible cost" to the Commonwealth. It then states that it is the vendor providing the "lowest responsible cost" who will normally be selected to provide the asphalt. (P-Ex. 24, Sheet F).

157. The Board finds that the provisions of the 2002 SSC which set forth criteria to be used for selecting vendors on the contract for "F.O.B. Source" purchases do not state that the bid price per ton is the only factor that may be considered. (P-Ex. 24, Sheet F; Board Finding).

158. The vendor selection provisions relating to "F.O.B. Source" purchases (i.e. the "IMPORTANT" provision and the "AWARD" provision), taken together, provide that not only the lowest bid price per ton but also the length of haul and dead (empty) haul to and from the source determine the vendor with the "lowest responsible cost" to the Commonwealth. They further provide that this vendor will normally be selected to provide the asphalt. (P-Ex. 22, Sheet H, P-Ex. 24, Sheets F, G; Board Finding).

159. The "AWARD" provision provides that the county maintenance manager may also elect to purchase material from another vendor which he determines to be the "most economic source" based on additional considerations such as, but not limited to, differences in haul time due to terrain or urban congestion; length of weight at the source; cooling due to length of haul; crew productivity due to truck availability and haul distance, among other factors. (P-Ex. 24, Sheet F).

160. The literal language of the "IMPORTANT" provision is not in conflict with the subsequent "AWARD" provision which expressly provides for consideration of factors in addition to the bid price per ton to be used in making vendor selection decisions for "F.O.B. Source" purchases under the 2002 SSC. (P-Ex. 22, Sheet H, P-Ex. 24, Sheets F, I; Board Finding).

161. Reading the vendor selection terms in the "IMPORTANT" and "AWARD" provisions together, the Board finds no material ambiguity and concludes that the lowest bid price per ton is one of several factors to be considered by PennDOT in determining the vendor with which to place its asphalt purchase orders in any given situation for "F.O.B. Source" purchases and that it will be the vendor providing the "lowest responsible cost" who will normally be selected to provide the asphalt. (P-Ex. 22, Sheet H, P-Ex. 24, Sheets F, I; Board Finding).

162. To establish that it is entitled to any portion of the "F.O.B. Source" purchases sent to Lane and Golden Eagle in 2002 and 2003, Clairton Slag must establish not only that its bid price per ton was lower than its three other local competitors legitimately on the 2002 SSC (Lindy, Better Materials and Marsh Asphalt), but that the combination of its bid price and the distance to its plant also presented a lower cost to the Commonwealth than anyone of these three competitors properly on the 2002 SSC (i.e. the "lowest responsible cost"). (P-Ex. 22, Sheet F, P-Ex. 24, Sheets F, G; Board Finding).

163. Although Clairton Slag has provided the Board with the tonnage improperly purchased from Lane and Golden Eagle in 2002 and 2003 and the bid price per ton comparisons with Lindy, Better Materials and Marsh Asphalt, it has not provided the Board with any evidence from which we can ascertain the length of haul or dead haul (or the cost associated therewith) among itself, Lindy, Better Materials and Marsh Asphalt for any of the "F.O.B. Source" purchases made from Lane or Golden Eagle in 2002 or 2003. (N.T. 155-159, 194-209; P-Exs. 37-47, 51-54; Board Finding).

164. Based on the evidence provided, the Board cannot reasonably determine how many of these improper "F.O.B Source" purchases from Lane and Golden Eagle in 2002 and 2003 should have properly been allocated to Clairton Slag as providing the "lowest responsible cost" among Clairton Slag and its three local competitors properly on the 2002 SSC. (P-Ex. 24, Sheet F; F.O.F. 137-163; Board Finding).

165. Because the Board cannot reasonably determine how many of the improper "F.O.B Source" purchases from Lane and Golden Eagle in 2002 and 2003 should have properly been allocated to Clairton Slag as providing the "lowest responsible cost" among Clairton Slag and its three local competitors properly on the 2002 SSC, the Board is unable to determine with reasonable certainty the lost profit or damages sustained by Clairton Slag as a result of these improper purchases from Lane and Golden Eagle. (P-Exs. 24, 37-47, 50-54; F.O.F. 137-164; Board Finding).

166. For "F.O.B. Destination/Department Paver" purchases, the 2002 SSC required PennDOT's county maintenance manager to place orders with the vendors whose prices (which include bid price and mileage charges) represented the "lowest total cost to the Department." (N.T. 165; P-Ex. 24, Sheet I).

167. In making a vendor selection for "F.O.B. Destination/Department Paver" purchases, the county maintenance manager could also consider factors such as material availability, trucking availability or other factors and circumstances affecting the timely delivery of such material in addition to the cost per ton delivered. (P-Ex. 24, Sheet I).

168. The criteria of the "lowest responsible cost" for "F.O.B. Source" purchases parallels the "lowest total cost" concept contained in the F.O.B. Destination/Department Paver provision for selecting vendors to deliver asphalt to the work site as they take into account associated trucking costs as well as bid price. (P-Ex. 24, Sheets F, H; Board Finding).

169. The literal language of the "IMPORTANT" provision is not in conflict with the subsequent "AWARD" provision or the "F.O.B. DESTINATION/DEPARTMENT PAVER" provision which expressly provides for consideration of factors other than the bid price (or basic cost) per ton to be used in making individual purchase decisions under the 2002 SSC. (P-Ex. 22, Sheet H, P-Ex. 24, Sheets F, I; Board Finding).

170. The Board finds no inherent conflict in the literal terms of the three vendor selection provisions cited above in Findings of Fact 148, 151 and 152. (F.O.F. 148-169; Board Finding).

171. Reading the three vendor selection provisions together, the Board finds no material ambiguity and concludes that the lowest bid price per ton is one of several factors to be considered by PennDOT in determining the vendor with which to place its asphalt purchase orders in any given situation. (P-Ex. 22, Sheet H, P-Ex. 24, Sheets F, I; Board Finding).

172. In the "F.O.B. Destination/Department Paver" category of claims, Clairton Slag has provided sufficient evidence for the Board to ascertain the portion of asphalt purchase lost to Lane and Golden Eagle in 2002 and 2003 that should have been made from Clairton Slag. (N.T. 214-229; P-Ex. 49; F.O.F. 166-171, 173-180; Board Finding).

173. To identify the instances of improper "F.O.B. destination" purchases from Lane and Golden Eagle that should have been made from Clairton Slag, Mr. Schaefer reviewed MORIS reports, foreman's logs of delivered orders and straight line road diagrams (where necessary) to locate sites to which asphalt materials were delivered. All this data was acquired in discovery from PennDOT. (N.T. 214-229; P-Ex. 49).

174. Mr. Schaefer drove the routes to the various job sites from Clairton Slag's plant and from the plants of Lindy, Better Materials and Marsh Asphalt to measure the mileage for asphalt delivered by Lane and Golden Eagle to PennDOT in Maintenance Districts 11-1 and 12-4 in 2002 and 2003. Using these distances, he calculated what each vendor's total cost to PennDOT for theses materials delivered (bid price per ton plus hauling cost) would have been for Clairton Slag, Lindy, Better Materials and Marsh Asphalt. (N.T. 214-229; P-Ex. 49).

175. Mr. Schaefer found Clairton Slag's total cost to PennDOT for "F.O.B. Destination" purchases from Lane and Golden Eagle in 2002 and 2003 to be the lowest among Clairton Slag, Lindy, Better Materials and Marsh Asphalt on three purchase orders. (N.T. 214-229; P-Ex. 49).

176. Two of the orders were given to Lane (for Sugar Run Road at 920 tons and Taylor Run Road at 326 tons) and one order was given to Golden Eagle (for Justabout Road at 1201 tons). These purchases should have been ordered from Clairton Slag as the lowest total cost vendor after Lane's and Golden Eagle's prices were removed from consideration. Mr. Schaefer then added these amounts for a total tonnage of 2,451 tons of asphalt that should have been allocated to Clairton Slag in the "F.O.B. Destination" category of sales. (N.T. 214-229; P-Ex. 49).

177. Clairton Slag's evidence and calculations for F.O.B. Destination/Department Paver purchases establish that three orders for materials delivered to sites (F.O.B. Destination/Department Paver) by Lane and Golden Eagle in 2002 and 2003 (as improperly included vendors) should have gone to Clairton Slag because it offered the lowest total cost to PennDOT among itself, Lindy, Better Materials and Marsh Asphalt. These orders totaled 2,451 tons of asphalt. (P-Exs. 37, 47, 51; N.T. 206, 228; F.O.F. 166-176; Board Finding).

178. The lost revenue for 2,451 tons of "F.O.B. Destination" asphalt material which should have been ordered from Clairton Slag under the 2002 SSC terms amounted to $65,718.91. The cost to Clairton Slag to produce and deliver the 2,451 tons of delivered asphalt material would have been $49,118.04, resulting in a lost profit margin to Clairton Slag of $16,600.87 on these three F.O.B. Destination sales in 2002 and 2003. (N.T. 214-229, 438-446; P-Exs. 49, 50, 52, 54).

179. Although DGS offered various criticisms, we found no credible and persuasive evidence to counter Mr. Shaeffer's tonnage calculations (which we found to be well-documented) or the profit analysis performed by Mr. Staub for Clairton Slag on these three "F.O.B. Destination" sales (which analysis we found justified and reasonable). (N.T. 509-543; P-Exs. 52-54; F.O.F. 166-178; Board Finding).

180. Based on the evidence provided, the Board finds with reasonable certainty as follows: the lost revenue for 2,451 tons of "F.O.B. Destination" asphalt material which should have been ordered from Clairton Slag under the 2002 SSC terms was $65,718.91; the cost to Clairton Slag to produce and deliver the 2,451 tons of delivered asphalt material would have been $49,118.04; the resulting lost profit to Clairton Slag on these three "F.O.B. Destination" sales in 2002 and 2003 was $16,600.87. (N.T. 214-229, 438-46; P-Exs. 37, 49, 50, 52, 54; Board Finding).

181. By doing these calculations for the "F.O.B. Destination/Department Paver" materials, Clairton Slag demonstrated that it was capable of providing the Board with evidence of the haul length among the competing asphalt source plants of Lindy, Better Materials and Marsh Asphalt to the various PennDOT job sites in Maintenance Districts 11-1 and 12-4 in support of its "F.O.B. Source" allocation calculations had it wished to do so. Thus, we do not find that PennDOT's failure to record purchase "details" as required by the 2002 SSC for "F.O.B. Source" purchase and "F.O.B. Destination" purchases prevented adequate proof of proper allocation of these lost sales and proof of damages in the "F.O.B. Source" category. (N.T. 155-159, 194-209, 214-229; P-Exs. 37-47, 49; F.O.F. 139-145, 166-180; Board Finding).

182. The distances between the PennDOT job sites purchasing "F.O.B. Source" materials and the various source plants of Clairton Slag, Lindy, Marsh and Better Materials was available to both Plaintiff and Defendant. Further, the Board was presented with no evidence that PennDOT was asked for, but withheld, information regarding its trucking cost per mile for picking-up asphalt at the various plants. (N.T. 154-161, 166, 194-209, 214-229; P-Exs. 37-47, 49; F.O.F. 137-181; Board Finding).

183. Although it is far from clear what level of "detail" was required to be recorded by PennDOT pursuant to the terms of the 2002 SSC, even were we are to assume, arguendo, that specific lengths of haul for "F.O.B. Source" purchases and PennDOT cost calculations for each potential supplier were to be recorded, the fact is that this failure did not prevent Clairton Slag from acquiring adequate information to establish the portion of the "F.O.B. Source" category of "off contract" purchases to which it was entitled. It was, instead, Clairton Slag's mistaken focus on the lowest bid price as the sole determining factor which prevented it from presenting adequate proof of proper allocation and damages in the "F.O.B. Source" category of sales. (F.O.F. 143-147, 148-165, 166-180, 181-182; Board Finding).

184. PennDOT's failure to record the "details" of its "F.O.B. Source" purchases from Lane and Golden Eagle in 2002 and 2003 did not prevent, nor materially prejudice, Clairton Slag from ascertaining or providing the Board with adequate proof of the proper allocation of lost sales and proof of its damages for this category of its claim. (F.O.F. 183; Board Finding).

185. Under all the facts and circumstances of this case, particularly DGS's disparate treatment of Clairton Slag (as a late bidder in 2001) and the seven Non-Bidding Vendors of 2002 which led to an inappropriate attempt to renew these Non-Bidding Vendors and multiple instances of asphalt purchases made outside the 2002 SSC (in breach of contract and violation of the Procurement Code), we find DGS's actions to be inconsistent and arbitrary. However, insofar as we credit the testimony of Mr. Ligon and Ms. Minnich that these actions were undertaken by a sincere desire to save the Commonwealth the additional cost of administration and re-bids rather than some effort to frustrate Clairton Slag, we do not find DGS's actions to be vexatious. (F.O.F. 17-25, 29-35, 37-54, 89-101, 103-105, 113-117, 122-126, 133-136; Board Finding).

186. The time elapsed from April 11, 2002 to February 6, 2009 totals 2,493 days. Six percent per annum equates to a daily interest factor of 0.000164 (rounded). Accordingly, prejudgment interest on the $16,600.87 principal award totals $6,787.30. (Board Finding).

CONCLUSIONS OF LAW

1. The Board of Claims has exclusive jurisdiction over claims for breach of contract asserted against the Commonwealth. For claims filed with the Board prior to June 28, 2003 this jurisdiction derives from the Board of Claims Act, May 20, 1937, P.L. 728, No. 193 (as amended). For claims filed with the Board on or after June 28, 2003, this jurisdiction derives from Act 142, December 3, 2002, P.L. 1147, No. 142. See 72 P.S. § 4651-4; 62 Pa.C.S. § 1724; DGS v. Limbach Co., 862 A.2d 713, 718-720 (Pa. Cmwlth. 2004), aff'd per curiam, 895 A.2d 527 (Pa. 2007). [3]

2. In deciding a challenge to its "jurisdiction" the Board needs first to distinguish between subject matter jurisdiction, which is competency to act on the general class or type of case presented, and personal jurisdiction, or power to act over the parties in the case to order or effect a particular result. In re Melograne, 812 A.2d 1164, 1166-67 (Pa. 2002).

3. Where subject matter jurisdiction is lacking, a tribunal has no authority to hear a case and no actions by the parties or agreements between the parties can provide that authority. Id.

4. Power to act or jurisdiction over the person, however, can, in some circumstances, be waived by the parties, and that waiver can be found in their actions. Id.; see also Dep't of Pub. Welfare v. UEC, Inc., 397 A.2d 779, 785 (Pa. 1979).

5. The Board's subject matter jurisdiction is limited to the determination of claims arising from contracts entered into by the Commonwealth. The Board has no subject matter jurisdiction or authority to address claims raised by Clairton Slag that are not based on a contract such as the alleged failures to adhere to the "common standard" principle or other alleged irregularities with the bidding process for the 2001 or 2002 statewide asphalt supply contracts. 72 P.S. § 4651-4; 62 Pa.C.S. § 1724; Limbach, 862 A.2d at 718-720.

6. The Board has subject matter jurisdiction over Count II of the Complaint raised by Clairton Slag based on an alleged breach of the 2002 SSC. This portion of the claim, to which we hereinafter refer as the "First Issue," asserts that the Commonwealth breached the 2002 SSC by making purchases of asphalt from Lane and Golden Eagle in 2002 and 2003 as they were vendors not bidding on, or properly included in, the 2002 SSC. Subject matter jurisdiction obtains here because the Board is competent to hear contract claims against the Commonwealth, which is the general class and type of case presented in this First Issue. 72 P.S. § 4651-4; 62 Pa.C.S. § 1724; In re Melograne, 812 A.2d at 1166-67; UEC, 397 A.2d at 785.

[3] Although Act 142 of 2002 was made generally effective upon its signing date (December 3, 2002), Section 22 of the Act provided, inter alia, that the repeal of the Board of Claims Act of 1937 and effectiveness of the replacement provisions at 62 Pa.C.S. Chapter 17 Subchapter C (§§ 1721-1726) would not take effect until publication in the Pennsylvania Bulletin of the standing order under 67 Pa.C.S. § 1102(g) referenced therein. Publication of this standing order in the Pennsylvania Bulletin occurred on June 28, 2003. See Act 142, December 3, 2002, P.L. 1147, No. 142, § 22; Pa. Bulletin Vol. 33, No. 26, June 28, 2003, pp. 3053-3083.

7. The Board also has subject matter jurisdiction over the "Second Issue" raised by Clairton Slag at hearing which asserts that the Commonwealth also breached the 2002 SSC by making purchases of asphalt from other vendors who did bid on, and were properly included in, the 2002 SSC in contravention of the vendor selection criteria set forth in the 2002 SSC, which purchases Clairton Slag alleges should have been allocated to it under the terms of the contract. Subject matter jurisdiction obtains here also because the Board is competent to hear contract claims against the Commonwealth, which is the general class and type of case presented in this Second Issue. 72 P.S. § 4651-4; 62 Pa.C.S. § 1724; In re Melograne, 812 A.2d at 1166-67; UEC, 397 A.2d at 785.

8. The question of whether or not the Board has the authority to hear this Second Issue raised by Clairton Slag because of a failure to exhaust administrative remedies and/or failure to comply with the six month statute of limitations is a question of the Board's personal jurisdiction or power to act over the parties with respect to this portion of the claim. 72 P.S. § 4651-4; 62 Pa.C.S. § 1724; In re Melograne, 812 A.2d at 1166-67; UEC, 397 A.2d at 785.

9. When testimony is admitted which is not covered by the pleadings, and when the defendant fails to object, he will not be later heard to say that he was misled by the variance between the pleading and the proof. Ingrassia Constr. Co., Inc. v. Walsh, 486 A.2d 478, 481 (Pa. Super. 1984).

10. The rule which forbids the proof from being at variance with the pleadings is based on the sound policy of "insur[ing] that the Defendant will not be taken by surprise at trial." However, the rule should not be employed to create a mere technical impediment to frustrate the administration of justice. One of the most important considerations is whether the Defendant was misled or surprised in his preparation and presentation of the case at trial. Id.; Computer Print Sys., Inc. v. Lewis, 422 A.2d 148, 152 (Pa. Super. 1980).

11. If a party fails to object to evidence when it is first presented, that may constitute a waiver of the objection when the evidence is reiterated by a subsequent witness. Reading Radio, Inc. v. Fink, 833 A.2d 199, 216 (Pa. Super. 2003).

12. By sitting silently and without voicing objection for two days of hearing while extensive testimony and evidence was presented to the Board regarding both liability and damages on the Second Issue, DGS has effectively waived its evidential objection to this line of evidence and, specifically, to Mr. Straub's testimony regarding damages incurred by Clairton Slag on this Second Issue. DGS's evidential objection to Mr. Straub's testimony is overruled. Conclusions of Law ¶¶9-11.

13. However, a defense based on failure to exhaust an administrative remedy can be raised by a party or the court, sua sponte, at any time during the life of a case. Brog v. Dep't of Pub. Welfare, 401 A.2d 613, 615 (Pa. Cmwlth. 1979); see also Pa.R.C.P. 1032.

14. Clairton Slag was required to bring the Second Issue of its claim (damages claimed as a result of improper purchases from vendors properly on the 2002 SSC) to a DGS contracting officer pursuant to 62 Pa. C.S. §1712.1 prior to filing claim at this Board. 62 Pa.C.S. § 1712.1.[4]

15. Because Clairton Slag failed to present the Second Issue in its claim to DGS prior to commencing its action with the Board, it failed to exhaust its administrative remedy as prescribed by Section 1712.1 of the Procurement Code. Consequently, the Board cannot exercise personal jurisdiction over the parties with respect to this portion of the claim before us. 62 Pa. C.S. §1712.1 and 1724; Brog, 401 A.2d at 615.

16. Because Clairton Slag did present the First Issue in its claim to DGS prior to commencing its action with the Board, as prescribed by Section 1712 of the Procurement Code, the Board can exercise personal jurisdiction over the parties with respect to this portion of the claim before us. 62 Pa. C.S. §1712 (1998) and 72 P.S. § 4651-4; Brog, 401 A.2d at 615. [5]

17. In a claim for recovery on a breach of contract, it is the asserting party's burden to show that facts exist to support the requested recovery. Dep't of Transp. v. Burrell Const. & Supply Co., Inc., 534 A.2d 585, 586 (Pa. Cmwlth. 1987).

18. The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties. Chester Upland Sch. Dist. v. Edward J. Meloney, Inc., 901 A.2d 1055, 1059 (Pa. Super. 2006).

19. To construe the meaning of a written contract, the entire contract should be read as a whole and every part interpreted with reference to the whole. Pritchard v. Wick, 178 A.2d 725, 727 (Pa. 1962).

20. A contract should be considered as a whole, and, if possible, all its provisions should be given effect; the specific controls the general; and a contract should be construed so as to give effect to its general purpose. Capitol Bus Co. v. Blue Bird Coach Lines, Inc., 478 F.2d 556, 560 (C.A.3. 1973).

21. The intent of the parties to a contract must be given effect when expressed in clear and unequivocal terms. Dep't of Transp. v. Manor Mines, Inc., 565 A.2d 428, 432 (Pa. 1989); Agrecycle, Inc. v. City of Pittsburgh, 783 A.2d 863 (Pa. Cmwlth. 2001).

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[4] DGS argued the failure to exhaust administrative remedy based on 62 Pa.C.S. § 1712.1 and Clairton Slag did not suggest that its predecessor (62 Pa.C.S. § 1712) was applicable instead. Although we agree with DGS that 62 Pa.C.S. § 1712.1 is applicable to Clairton Slag's Second Issue because this issue was not raised with the Board until hearing in 2007, we note that the predecessor to this provision, found in 62 Pa.C.S § 1712 (repealed), which was effective from May 15, 1998 to December 3, 2002, contained the same requirement that a claimant first file its claim in writing with the contracting officer of the agency within six months of its accrual before bringing claim at this Board. Therefore, under either provision, Clairton Slag has failed to exhaust its administrative remedy. Compare 62 Pa.C.S. § 1712 (repealed) with 62 Pa.C.S. § 1712.1.

[5] 62 Pa.C.S. § 1712 is applicable to Clairton Slag's First Issue because this issue was raised with the Board as Count II of the Complaint filed here on August 6, 2002. Compare 62 Pa.C.S. § 1712 (repealed) with 62 Pa.C.S. § 1712.1.

22. Because the "Estimated Quantities" provision, when viewed in the context of the 2002 SSC as a whole, appears to be intended more as a cautionary note to vendors that estimated quantities may change rather than a commitment to purchase all its asphalt needs under the SSC; and because the last sentence in this provision expressly states that the "Commonwealth reserves the right to purchase [asphalt] from another source. . . ."; and because this last sentence would be mere surplusage were we to interpret the preceding language in the provision to require the Commonwealth to purchase all its asphalt needs pursuant to the 2002 SSC, we hold that this "Estimated Quantities" provision did not operate to require the Commonwealth to purchase all its asphalt needs through the 2002 SSC (during the time this contract was effective). P-Ex. 24; Conclusions of Law ¶¶17-21.

23. For the foregoing reasons, we find that the 2002 SSC is not a "requirements contract" and the Commonwealth did not agree to purchase all its asphalt needs under the 2002 SSC (during the time it was effective). (P-Ex. 24; Conclusions of Law ¶¶17-22).

24. Pursuant to its specific terms, the 2002 SSC is not a "requirements contract" and PennDOT is therefore not bound by the terms of the 2002 SSC to purchase all asphalt material from vendors listed in the 2002 SSC (during the time this contract was effective). (Ex. 24; Conclusions of Law ¶¶17-23).

25. The 2002 SSC includes a requirement for all contractors to comply with federal and state laws and regulations. (P-Ex. 24, Sheet I).

26. "In determining what constitutes the obligation of a contract, no principle is more firmly established then that the laws which were in force at the time and place of the making of the contract enter into its obligation with the same effect as if expressly incorporated in its terms." Beaver County Bldg. & Loan Ass'n. v. Winowich, 187 A. 481, 484 (Pa. 1936).

27. The duty to perform one's contract in compliance with the law existing at the time of formation is a reciprocal, contractual duty applicable to both parties. Id.

28. DGS, as a party to the 2002 SSC, had a contractual duty to comply with the laws applicable at the time the 2002 SSC was fully executed in performing the 2002 SSC. Beaver County Bldg. and Loan Ass'n v. Winowich, 187 A. 481, 484 (Pa. 1936); see also Liss & Marion, P.C. v. Recordex Acquisition Corp., 937 A.2d 503, 512 (Pa. Super. 2007); Neel v. Williams, 45 A.2d 375, 377 (Pa. Super. 1946).

29. The Commonwealth Procurement Code, as it stood prior to its amendment by Act 142 in December 2002 (referred to hereinafter as the "Procurement Code"), was applicable to all purchases by the Commonwealth of asphalt materials at issue in the present case. 62 Pa.C.S. § 101 et seq.

30. The 2002 SSC expressly reserves to the Commonwealth the right to purchase items from sources outside the 2002 SSC that quote a lower bid price. By this, DGS reserved the right for the Commonwealth to purchase paving materials outside of the SSC bidding process. Nevertheless, it was still bound to perform this contract provision for "off contract" purchases and obtain these materials according to the provisions of the Procurement Code. 62 Pa.C.S. §§ 511-520; P-Ex 24.

31. The Procurement Code provides a comprehensive system and method for awarding Commonwealth contracts. These methods provide Commonwealth agencies with the authority and flexibility to conduct procurement transactions while promoting the public interest by: seeking to invite fair competition and equal opportunity to compete; guarding against favoritism, extravagance and/or corruption in the awarding of public contracts; apportioning awards fairly and economically; and securing for the public, benefits that flow from free and unrestricted competition. 62 Pa.C.S. § 101 et seq.; see also In re 1983 Audit Report of Belcastro, 595 A.2d 15, 21 (Pa. 1991); Conduit and Foundation Corp. v. City of Philadelphia, 401 A.2d 376, 378 (Pa. Cmwlth. 1979); Hanover Area Sch. Dist. v. Sarkisian Bros., Inc., 514 F. Supp. 697, 702 (D.C. Pa. 1981).

32. The public policy behind the implementation of the Procurement Code and its provisions is to avoid favoritism, to obtain the best price for the Commonwealth and assure all bidders are treated fairly and equally when competing for contracts funded by taxpayer dollars. Id.

33. The Procurement Code established ten methods for awarding Commonwealth contracts but mandated that the competitive sealed bidding award process in Section 512 of the Procurement Code must always be used to procure needed supplies except when one of the other methods listed in the Procurement Code at Sections 512 through 520 and Section 905 are, by their terms, applicable. 62 Pa.C.S. §§ 511, 512 through 520, 905.

34. The Procurement Code requires that contracts for the purchase of supplies and materials "shall be awarded by competitive sealed bidding" to the lowest responsible bidder unless another section of the Procurement Code is applicable thereto. 62 Pa.C.S. §§ 511, 512.

35. To comply with the Procurement Code, the Commonwealth had to make its purchases from Lane and Golden Eagle, vendors that did not bid on the 2002 SSC, pursuant to a separate competitive sealed bidding process or some other Procurement Code provision providing an exception to the competitive sealed bidding process. 62 Pa.C.S. §§ 511, 512.

36. DGS relies on its attempted renewal of the 2001 SSC (i.e. an attempted renewal of a multiple award contract originally awarded pursuant to Section 517 of the Procurement Code) to establish an exception to the competitive sealed bidding process requirement of the Procurement Code with respect to its asphalt purchases from Lane and Golden Eagle in 2002 and 2003. 62 Pa.C.S. § 517; Defendant's Post-Hearing Brief pp. 5-10; F.O.F. 30-54, 91-96, 117-124.

37. In attempting to renew the 2001 SSC for use in 2002, DGS relied on the Option to Renew clause in the 2001 SSC. The clause states, in relevant part, as follows:

> Option To Renew: The contract(s) or any part of the contract(s) may be renewed for an additional three (3) one (1) year terms by mutual agreement between the Commonwealth and the Contractor(s). If the Contract(s) is/are renewed the same terms and conditions shall apply. If this contract(s) is/are renewed for additional year(s), a new performance bond or a rider supplementing the original bond will be required for the extended period.

P-Ex. 11, Sheet L, 58; F.O.F. 34-54, 91-96, 117-124.

38. The 2001 SSC was a multiple award contract that, by its terms and by DGS practice, was to be awarded to all qualified vendors (i.e. vendors with PennDOT approved source plants) who timely submitted responsive bids to DGS. Pa.C.S. § 517; P-Ex. 11, Sheet F; F.O.F. 5-8.

39. Because we find there is ambiguity and uncertainty as to whether or not the first sentence of the Option to Renew would allow DGS to renew the 2001 SSC with only a select few of the qualified vendors originally participating therein; and because we find further that reading this first sentence to allow for a selective renewal with only some of the original qualified participating vendors would make the "AWARD" provision (which states that the contract will be awarded to each qualified vendor who bids thereon) to be mere surplusage and would effectively change the "AWARD" provision of the 2001 SSC in the renewal period in contravention of the second sentence of the Option to Renew (which requires that any such renewal will be on the same terms and conditions), we hold that the first sentence in the Option to Renew clause does not allow DGS the option to renew the 2001 SSC with only a portion of the qualified vendors initially awarded participation therein. P-Ex. 11; Chester Upland Sch. Dist. v. Edward J. Meloney, Inc., 901 A.2d 1055, 1059 (Pa. Super. 2006); Pritchard v. Wick, 178 A.2d 725, 727 (Pa. 1962); Capitol Bus Co. v. Blue Bird Coach Lines, Inc., 478 F.2d 556, 560 (C.A.3. 1973); Sun Co., Inc., (R&M) v. Pa. Turnpike Commission, 708 A2d. 875, 878-79 (Pa. Cmwlth. 1998); Conclusions of Law ¶¶18-21, 37-38.

40. Because DGS's expansive interpretation of the first sentence of the renewal clause as allowing it to selectively renew a multiple award contract such as the 2001 SSC with only a few of the original qualified participating vendors would be contrary to public policy by creating a device potentially promotive of favoritism, unfairness, improper influence and/or corruption by allowing DGS to arbitrarily select and exclude qualified contractors in the renewal period, we hold that the first sentence in the Option to Renew clause does not allow DGS the option to renew the 2001 SSC with only a portion of the qualified vendors initially awarded participation therein. 62 Pa.C.S. § 101 et seq.; see also Pritchard v. Wick, 178 A.2d at 727; see also In re 1983 Audit Report of Belcastro, 595 A.2d 15, 21 (Pa. 1991); Conduit and Foundation Corp. v. City of Philadelphia, 401 A.2d 376, 378 (Pa. Cmwlth. 1979); Hanover Area Sch. Dist. v. Sarkisian Bros., Inc., 514 F. Supp. 697, 702 (D.C. Pa. 1981); Conclusions of Law ¶¶31-39.

41. Because the Option to Renew clause, when read as a whole and in the context of the entire agreement so as to give effect to all the contract provisions and in a manner most favorable to the public interest, does not allow DGS the option to renew the 2001 SSC with only a select portion of the qualified vendors originally awarded participation in that contract, DGS's attempted renewal of the 2001 SSC with Lane, Golden Eagle and five other Non-Bidding Vendors was neither authorized by the Option to Renew provision nor effective. See Conclusions of Law ¶¶18-21, 31-40.

42. The 2001 SSC was a multiple awards contract which, pursuant to the requirements of Section 517 of the Procurement Code required, inter alia, that invitations to bid or requests for proposals should be issued for the supplies to be purchased thereunder; that public notice be given for same and that awards shall be made as described in the bid/proposal solicitations (i.e. to all responsible bidders). P-Ex. 11; 62 Pa.C.S. § 517.

43. Were we to construe the Option to Renew clause to allow DGS to selectively renew the 2001 SSC with only a portion of the qualified vendors originally awarded participation therein, such attempted renewal would violate the provisions of Section 517 of the Procurement Code, and would therefore be ineffective, unenforceable and void ab initio. See, Watrel v. Dep't of Educ., 488 A.2d 378, 381 (Pa. Cmwlth. 1985), aff'd 518 A.2d 1158 (Pa. 1986).

44. Although the contract with Lane and Golden Eagle for the year 2001 included an option to renew, this renewal provision also required that the same terms and conditions must apply. P-Ex. 11, Sheet L.

45. Because changing the asphalt base price in the asphalt price index for use by Lane and Golden Eagle in 2002 and 2003 was a material change in the terms of the 2001 SSC, this also made the attempted renewal of these contracts improper and ineffective. P-Ex. 11, Sheet L.

46. Because the 2001 SSC was not renewed as to Lane and Golden Eagle, PennDOT's asphalt purchases from these two vendors in 2002 and 2003 were not made under the 2001 SSC. See, Conclusions of Law ¶¶31-45.

47. In order to be awarded participation in the 2002 SSC, Lane and Golden Eagle had to submit timely and responsive bids on this contract. Because they did not, neither Lane nor Golden Eagle were included in the 2002 SSC. 62 Pa.C.S. § 517; P-Exs. 22, 24; Conclusions of Law ¶36.

48. Because Lane and Golden Eagle neither bid on the 2002 SSC nor had their 2001 SSC properly renewed, neither of these contracts were in effect for purchases from Lane or Golden Eagle in 2002 or 2003. See, Conclusions of Law ¶¶31-47.

49. The 2002 SSC was properly renewed for use in 2003 because DGS offered the renewal to all qualified vendors participating in the 2002 SSC and renewing same with all vendors on that contract that agreed to the renewal, with no material change in terms to the 2002 SSC. P-Exs. 24, 34; See, Conclusions of Law ¶¶31-45.

50. Because Change Order No. 21, which renewed the 2002 SSC for use in 2003, makes no reference to a renewal of Lane and Golden Eagle's 2001 contract and because any attempt to renew the 2001 SSC for Lane and Golden Eagle for use in 2003 (with only a portion of the 2001 qualified vendors participating therein and with a material change to the asphalt base price) would still be ineffective, DGS has failed to establish that its purchases from Lane and Golden Eagle in 2003 were accomplished pursuant to a renewed multiple award contract. P-Exs. 24, 34; See, Conclusions of Law ¶¶31-49.

51. Because Lane and Golden Eagle did not bid on, and were not included, in the 2002 SSC; and because the 2001 SSC was not properly renewed with Lane and Golden Eagle for use in 2002 or 2003; and because no other competitive bidding procedure nor any exception to such procedure otherwise allowed by the Procurement Code was followed for purchases by the Commonwealth from Lane and Golden Eagle in 2002 and 2003, we find that these purchases were not made in compliance with the Procurement Code. P-Exs. 11, 24; Pa. C.S. §§ 511-520 and 905; Conclusions of Law ¶¶31-50.

52. By diverting asphalt orders to vendors not properly on the 2002 SSC for 2002 and 2003, including Lane and Golden Eagle, and failing to comply with the Procurement Code in making these purchases, the Commonwealth breached the 2002 SSC and thereby caused financial damage to Clairton Slag as a proper party to the 2002 SSC. P-Ex. 24; 62 Pa. C.S. §§ 511-520 and 905; Conclusions of Law ¶¶25-51.

53. Clairton Slag is entitled to recover in damages for any loss of business attributable to the Commonwealth's breach of the 2002 SSC. Dep't of Transp. v. Brozzetti, 684 A.2d 658, 665 (Pa. Cmwlth. 1996); Company Image Knitware, Ltd. v. Mothers Work, Inc., 909 A.2d 324, 336 (Pa. Super. 2006).

54. The Commonwealth Procurement Code specifically provides that the PUCC shall supplement the Procurement Code's provisions. 62 Pa.C.S. § 104.

55. Because the PUCC addresses the sale of goods in Pennsylvania, it also applies in the present case which involves the sale of asphalt. 13 Pa.C.S. § 2102.

56. DGS was required to purchase supplies according to the Procurement Code and according to the PUCC to the extent the PUCC supplements the Procurement Code under Section 104 thereof. 13 Pa.C.S. § 1101; 62 Pa.C.S. § 104.

57. Pursuant to the PUCC, every contract imposes an obligation of good faith in its performance or enforcement. 13 Pa.C.S. §§ 1201, 1203; P-Ex. 24.

58. Courts will not use the duty of good faith performance of a contract to imply or change a term in the parties' agreement. However, the obligation of good faith performance is employed to aid and further the parties' agreement according to its terms. Ash v. Continental Ins. Co., 932 A.2d 877, 883 n.2 (Pa. 2007); Stamerro v. Stamerro, 889 A.2d 1251 (Pa. Super. 2005); John B. Conomos, Inc. v. Sun Co., Inc., 831 A.2d 696 (Pa. Super. 2003); Bryan Mechanical Inc. v. Dep't of General Services, Docket No. 3699, p. 35 n.2 (Pa. Bd. Claims October 25, 2007) aff'd in unreported opinion, Nos. 2155 and 2159 C.D. 2007, slip op. (Pa. Cmwlth. May 22, 2008).

59. The duty of good faith performance of the 2002 SSC required the Commonwealth to comply with the Procurement Code in making asphalt purchases from sources outside the 2002 SSC pursuant to the contract provision reserving the right to purchase asphalt outside the 2002 SSC at a lower price. 13 Pa.C.S. §§ 1101, 1201, 1203; P-Ex. 24; Conclusions of Law ¶¶54-58.

60. By purchasing asphalt in 2002 and 2003 from Lane and Golden Eagle (who were not the 2002 SSC and whose 2001 contracts were not properly renewed), DGS failed to adhere to the requirements of the Procurement Code and thereby breached the duty of good faith performance of the 2002 SSC owed to vendors like Clairton Slag who were properly on the 2002 SSC. 62 Pa.C.S. §§ 511-520, 905; 13 Pa.C.S. § 1203; P. Ex-24; Conclusions of Law ¶¶25-59.

61. The measure of damages for breach of contract is that the aggrieved party should be placed as nearly as possible in the same position it would have occupied had there been no breach. Dep't of Transp. v. Brozzetti, 684 A.2d 658, 665 (Pa. Cmwlth. 1996).

62. In Pennsylvania, a party to a contract may recover lost profits where there is evidence to establish such lost profits with reasonable certainty, there is evidence to show that these profits were proximately caused by the wrong, and where the loss of profits is shown to be reasonably foreseeable. Company Image Knitware, Ltd. v. Mothers Work, Inc., 909 A.2d 324, 336 (Pa. Super. 2006).

63. The PUCC also provides for the measure of damages to include "the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages." 13 Pa.C.S.A. § 2708(b).

64. Because Clairton Slag established that the Commonwealth breached the 2002 SSC by purchasing asphalt from Lane and Golden Eagle in 2002 and 2003, Clairton Slag is entitled to damages in the form of lost profits under common law and under the PUCC to the extent it can establish these lost profits with reasonable certainty. Brozzetti, 684 A.2d at 665; Mothers Work, Inc., 909 A.2d at 336; 13 Pa.C.S. § 2708.

65. The exact amount of damages need not be calculated with mathematical certainty, but proof of damages cannot be mere guess or speculation. Spang & Co. v. U.S. Steel Corp., 545 A.2d 861, 866-67 (Pa. 1988).

66. To prove damages resulting from the Commonwealth's breach of the 2002 SSC with reasonable certainty, Clairton Slag must establish what portion of the lost business it should have properly received under the terms of the 2002 SSC. Conclusions of Law ¶¶61-65.

67. DGS is therefore liable in damages to Clairton Slag for breach of the 2002 SSC to the extent Clairton Slag can establish that it was entitled, under the vendor selection criteria in the 2002 SSC, to any of the business diverted to Lane and Golden Eagle in 2002 and 2003. 13 Pa.C.S. § 2708; Brozzetti, 684 A.2d at 665; Mothers Work, Inc., 909 A.2d at 336; Conclusions of Law ¶¶52, 61-66.

68. Once vendors are properly included on the multiple award contract, as Clairton Slag was on the 2002 SSC, the Procurement Code and the contract terms allow for selection among the contracted vendors based on specified criteria. P-Ex. 24; 62 Pa.C.S. § 517(f).

69. Public bidding is important to promote competition, avoid favoritism, extravagance, fraud and corruption in the awarding of public contracts and to secure the best services and supplies at the lowest price. Ezy Parks v. Larson, 454 A.2d 928, 932 (Pa. 1982).

70. Previously prepared bid specifications which are available to all competitors must form the basis on which the bids are prepared and resulting contracts made. Durkee Lumber Co., Inc. v. Dep't of Conservation and Natural Res., No. 3797, 2008 WL 509459 at *26-27 (Pa. Bd. Claims, Jan. 4, 2008), *citing* Ezy Parks v. Larson, 454 A2d 928, 933 (Pa. 1982).

71. DGS cannot unilaterally change the terms of a contract offer submitted by a bidder and based on the requirements specified in DGS's Invitation to Bid. Id.; see also Philadelphia Warehousing and Cold Storage v. Hallowell, 490 A.2d 955, 956-57 (Pa. Cmwlth. 1985); American Totalisator Co., Inc. v. Seligman, 384 A.2d 242, 258 (Pa. Cmwlth. 1977).

72. The provision entitled "IMPORTANT" on Sheet H of the Invitation to Bid includes the following sentence: “F.O.B. Source Cost/ton is used to determine the contractor that will be awarded the purchase order.” Although this "IMPORTANT" provision was missing from the version of the 2002 SSC signed by DGS and returned to Clairton Slag, it may not be unilaterally deleted by DGS and remains part of the 2002 SSC, as a publicly bid contract. A.J. Colella, Inc. v. Allegheny County, 137 A.2d 265, 267-268 (Pa. 1958); see also Hallowell, 490 A.2d at 956-57; American Totalisator, 384 A.2d at 258; Durkee, 2008 WL 509459 at 26-27; P-Ex. 22, Sheet H and Ex. 24.

73. The provision entitled "AWARD" on Sheet F of the Invitation to Bid and the fully executed 2002 SSC, includes the following language: “The department will normally haul material from the source that represents the lowest responsible cost to the department after taking into consideration length of haul and dead haul. However, in some instances, the department may select the most economic source based upon other considerations such as, but not limited to, differences in haul time due to terrain or urban congestion; length of wait at the source; cooling due to length of haul; crew productivity based on truck availability and haul distance." P-Exs. 22, 24, Sheet F.

74. The provision entitled "FOR DESTINATION/DEPARTMENT PAVER" on Sheet I of the Invitation to Bid and the fully executed 2002 SSC, includes the following language: “Orders will be generated to the contractor whose prices represent the lowest total cost to the Department for a specific bituminous material at the time of order (see formulas contained in this proposal). Material availability, trucking availability, or other related circumstances affecting timely delivery might be a consideration for contractor selection.” P-Exs. 22, 24, Sheet I.

75. “Under the rule of contra proferentem, any ambiguous language in a contract is construed against the drafter in favor of the other party if the latter’s interpretation is reasonable.” Sun Co., Inc., (R&M) v. Pennsylvania Tpk. Comm'n, 708 A.2d 875, 878-79 (Pa. Cmwlth. 1998).

76. Although we are mindful of the principle of contra proferentem cited by Clairton Slag, we also note the principles of contract interpretation cited above in Conclusions of Law Paragraphs 17-21, particularly the mandate that a contract should be considered as a whole and, if possible, all its provisions should be given effect. Because the "IMPORTANT" provision states that "F.O.B. Source Cost/ton" is to be used to determine the contractor who will be awarded the purchase order, but does not state that this is to be the exclusive criteria; and because these additional provisions found at "AWARD" and "FOR DESTINATION/ DEPARTMENT PAVER" add criteria but do not contradict the "IMPORTANT" provision; and because these additional provisions contain express criteria that are clearly not intended as mere surplusage, we hold that these provisions of the 2002 SSC, when read together, are not ambiguous as to what criteria should be used for ordering materials to be picked up at the source or for materials to be delivered. P-Ex. 24; Conclusions of Law ¶¶17-21, 68-75.

77. Reading the "IMPORTANT" and the "AWARD" provisions together, we find that the 2002 SSC vendor selection criteria relating to "F.O.B. Source" (i.e. asphalt material to be picked up at the source plant) requires that the PennDOT maintenance manager consider not only the bid price but also the length of haul and dead (empty) haul to and from the source plant to the PennDOT job site in order to determine the vendor with the "lowest responsible cost" to the Commonwealth. These provisions also mandate that it is the vendor providing this "lowest responsible cost" who would normally be selected to provide asphalt. P-Ex. 24; Conclusions of Law ¶¶17-21, 68-76.

78. To establish that it is entitled to any portion of the "F.O.B. Source" purchases sent to Lane and Golden Eagle in 2002 and 2003, Clairton Slag must establish not only that its bid price per ton was lower than its three other local competitors legitimately on the 2002 SSC (Lindy, Better Materials and Marsh Asphalt), but that the combination of its bid price and the distance to its plant also presented a lower cost to the Commonwealth than any one of these three competitors properly on the 2002 SSC (i.e. the "lowest responsible cost"). P-Ex. 24; Conclusions of Law ¶¶17-21, 68-77.

79. Because Clairton Slag has failed to provide the Board with sufficient evidence to establish what portion of the "F.O.B. Source" purchases made from Lane and Golden Eagle in 2002 and 2003 should have been allocated to Clairton Slag as providing the "lowest responsible cost" among Clairton Slag and its three local competitors on the 2002 SSC, and because the Board is therefore unable to determine with reasonable certainty the lost profit or damages sustained by Clairton Slag as a result of these improper purchases from Lane and Golden Eagle, the Board is unable to award Clairton Slag damages for this particular breach of the 2002 SSC. Conclusions of Law ¶¶62-79; see also Angelo Iafrate Construction Company, Inc. v. Pennsylvania Tpk. Comm'n, No. 3654, 206 WL 2585020 at *59-63 (Pa. Bd. Claims, July 27, 2006).

80. Read together the "F.O.B. DESTINATION/DEPARTMENT PAVER" provision, together with the "IMPORTANT" provision, require that PennDOT's county maintenance manager place orders with those vendors whose price (including both bid price per ton and mileage charges) represented the "lowest total cost to the Department." P-Ex. 24, Sheets H, I; Conclusions of Law ¶¶17-21, 68-76.

81. Because Clairton Slag has provided the Board with sufficient evidence by which to ascertain those instances in which Clairton Slag was the "lowest total cost to the Department" for F.O.B. Destination asphalt sales (which calculation takes into account not only the lowest bid price but also the cost for mileage charged by Clairton Slag and its three competitors properly on the 2002 SSC), we hold that Clairton Slag was entitled to a total of 2,451 tons of asphalt improperly purchased from Lane and Golden Eagle in 2002 and 2003 in breach of the 2002 SSC in the "F.O.B. Destination" category of sales. P-Ex. 24; Conclusions of Law ¶¶52, 60-72, 74-76, 80.

82. Because Clairton Slag has also provided the Board with evidence to reasonably establish that the lost profit to Clairton Slag on these three F.O.B. Destination sales of 2,451 tons amounted to $16,600.87, we find that Clairton Slag is entitled to a damage award of $16,600.87 in principal amount for this particular breach of the 2002 SSC. P-Ex. 24; Conclusions of Law ¶¶52, 60-72, 74-76, 81-82.

83. DGS did not breach the 2002 SSC by considering factors other than bid price when placing orders as required by the vendor selection criteria in the contract. P-Ex. 22, Sheets F, I; Conclusions of Law ¶¶72-83.

84. Because we have found that failure of PennDOT to record "details" of its asphalt purchases in 2002 and 2003 (including purchases from Lane and Golden Eagle) did not prevent or prejudice Clairton Slag from obtaining sufficient information to adequately establish its damages with respect to the F.O.B. Source purchases from Lane and Golden Eagle complained of, we hold that PennDOT's failure to record these "details" does not entitle Clairton Slag to a presumption or inference that Clairton Slag should have been allocated the entire 87,974 tons of lost asphalt sales claimed in this category. See, Schroeder v. Com., Dept. of Transportation, 710 A.2d 23, 27 (Pa. 1998).

85. Clairton Slag met its burden of proof in establishing its damages with reasonable certainty with regard to the F.O.B. Destination material portion of its claim in showing that the damages were the proximate consequence of the Commonwealth's purchase of 2,451 tons of asphalt from Lane and Golden Eagle in 2002 and/or 2003 in breach of the 2002 SSC and that such damages were reasonably foreseeable with respect to lost sale of the 2,451 tons of asphalt resulting in $16,600.87 of lost profits. Mothers Work, Inc., 909 A.2d at 336; Conclusions of Law ¶¶61-67, 80-84.

86. DGS is liable to Clairton Slag for $16,600.87 in damages in the form of lost profits that Clairton Slag should have received from orders improperly placed with Lane and Golden Eagle in breach of the 2002 SSC during 2002 and 2003. Mothers Work, Inc., 909 A.2d at 336; Conclusions of Law ¶¶61-67, 80-85.

87. DGS is liable for payment of prejudgment interest at the statutory rate for judgments of 6% per year on the principal amount of $16,600.87, beginning on April 11, 2002 (the day Clairton Slag filed this claim with DGS) and running to the date of this Order. This prejudgment interest totals $6,787.30. 62 Pa.C.S. § 1751; 41 P.S. § 202.

88. DGS is liable to Clairton Slag for a total amount of $23,388.17, consisting of the $16,600.87 in damages plus $6,787.30 in prejudgment interest. Conclusions of Law ¶¶61-67, 80-87.

89. Penalty and attorney fees are provided for in the Commonwealth Procurement Code at Section 3935, which provides that an award may be made to a prevailing party if the government agency is determined to have withheld payment in "bad faith." 62 Pa.C.S. § 3935.

90. The Board finds that Clairton Slag is the "prevailing party" in this case due to the judgment and award granted to it with regard to the "First Issue." See e.g., Profit Wize Marketing v. Wiest, 812 A.2d 1270, 1275 (Pa. Super. 2002) (prevailing party is commonly defined as a party in whose favor a judgment is rendered, regardless of the amount of damages awarded); Zavatchen v. RHF Holdings, Inc., 907 A.2d 607, 610 (Pa. Super. 2006).

91. The standard for finding that an action was taken in "bad faith" is whether it can be considered arbitrary or vexatious. Dep't of General Services v. Pittsburgh Building Co., 920 A.2d 973, 990 (Pa. Cmwlth. 2007); see also A.G. Cullen Construction, Inc. v. State System of Higher Education, 898 A.2d 1145, 1164-1166 (Pa. Cmwlth. 2006).

92. The language of 62 Pa.C.S. § 3935 authorizes the Board to award attorney's fees and/or penalty fees to a prevailing Plaintiff where DGS has been found to have withheld monies from a contractor in an arbitrary or vexatious manner. This same language (utilizing the phrase "may award" not "shall award") provides the Board with some discretion as to whether or not to award said attorney's fees and/or penalty fees and whether or not to award one, the other, or both depending on all of the facts and circumstances of the case. 62 Pa.C.S. § 3935; See e.g. Pittsburgh Bldg. Co., 920 A.2d at 990; A.G. Cullen, 898 A.2d at 1164-66; Bryan Mechanical v. DGS, Docket No. 3699 at pp. 38-40 (Pa. Bd. Claims, October 25, 2007) aff'd in unreported opinion, Nos. 2155 and 2159 C.D. 2007, slip op. (Pa. Cmwlth. May 22, 2008).

93. Because we find that DGS acted arbitrarily in its failed attempt to selectively renew the 2001 SSC so as to avoid its contract obligations to perform the 2002 SSC, but did not do so in a vexatious manner so as not to justify imposition of penalty, we will award Clairton Slag attorney's fees with regards to its claim for damages incurred due to improper purchases from Lane and Golden Eagle in violation of the 2002 SSC (i.e. the First Issue), but deny its request for penalty fees. 62 Pa.C.S. § 3935; Conclusions of Law ¶¶89-92.

94. 62 Pa.C.S. § 1725(e) authorizes the Board to award costs to prevailing parties in actions before it in the Board's discretion. Pursuant to this authority and the circumstances of this case, the Board will award Clairton Slag its costs reasonably incurred for its claim for damages it incurred due to improper purchases from Lane and Golden Eagle in violation of the 2002 SSC (i.e. the First Issue). 62 Pa.C.S. § 1725(e).

95. The Board finds that an immediate appeal of this Order as it pertains to:

A. The Board's finding of no personal jurisdiction over Clairton Slag's claim on the Second Issue;

B. The Board's grant of damages and interest to Clairton Slag for its claim on the First Issue; and

C. The Board's determination that Clairton Slag is entitled to attorney's fees and costs (but not penalty fees) with regard to its claim on the First Issue

would facilitate resolution of the entire case. See Pa. R.A.P. § 341; see also In re Appeal of Puricelli, 709 A.2d 1003, 1005-1007 (Pa. Cmwlth. 1998).

OPINION

BACKGROUND

The Department of General Services ("DGS"), in its role as the procurement agency for executive departments of the Commonwealth, has entered into and administered a Statewide Asphalt Supply Contract ("SSC") each year for the last 20 plus years. The primary purpose of these contracts is to provide the Pennsylvania Department of Transportation ("PennDOT") with an ongoing and convenient source of paving materials for the repair and maintenance of state-owned roads. Each year, DGS selects qualified vendors through its annual bid and award process for the SSC going into effect that year. Typically, asphalt vendors are notified beforehand by DGS when bids will be accepted, and each vendor participates in the process by furnishing two prices for various types of paving materials to DGS: a price per ton for material to be picked up from the plant and a price per ton with a mileage factor for material to be delivered to PennDOT's work sites. These contracts are multiple award contracts and every qualified[6] supplier that furnishes a responsive bid is awarded participation in the SSC and becomes eligible to sell asphalt under the SSC for the year bid. Each participating vendor is included in the Contractor List for the SSC in effect for that year and has the opportunity to receive orders in accordance with the SSC terms. The contract at issue here is the SSC for 2002 (and its renewal in 2003).

Because the bid dates for the SSC's vary from year to year, DGS typically notified suppliers beforehand each year when to submit their bids or advertised to this effect. In December 2000, Clairton Slag, an asphalt vendor that has been included in the SSC's for many years, was not notified of the bid date for the upcoming year's contract and missed the bid deadline for the 2001 SSC (its first miss in over 20 years). Clairton Slag contacted DGS and

[6] "Qualified" vendors are those who supply asphalt from a source plant approved by PennDOT. These qualified vendors and source plants are listed in PennDOT's Bulletin 41 prior to each year's bid.

objected to its exclusion from the 2001 SSC because it had not been notified of the bid dates. It also inquired of DGS if there was any way it could be considered for sales in 2001. However, DGS replied that Clairton Slag's failure to submit a timely bid made it ineligible to participate in that year's contract (the 2001 SSC) and no exceptions would be considered.

For the next year, 2002, Clairton Slag timely submitted its bid. It also noticed that two of its principal competitors in the region, Lane Construction ("Lane") and Golden Eagle Construction ("Golden Eagle"), failed to submit bids. Upon calling DGS to confirm this circumstance, Clairton Slag was advised by Bonnie Stellfox, a DGS employee administering the contract, that Lane and Golden Eagle had not submitted bids prior to the December 4, 2001 bid opening for the 2002 SSC. Clairton Slag was further advised that consistent with its treatment a year earlier, those companies missing the bid deadline would not be able to participate in the 2002 contract.

In fact, several vendors in addition to Lane and Golden Eagle had not submitted timely bids for the 2002 SSC and, in turn, had complained and/or filed bid protests. Because of these complaints, even while Ms. Stellfox was assuring Clairton Slag that suppliers that did not submit timely bids would not be included in the 2002 SSC, other DGS administrators were deciding to deal with the issue in a different way. Although DGS could have re-bid the 2002 SSC to deal with these problems, it did not. Instead, it attempted to renew the existing 2001 contracts of the vendors who had not submitted bids for the 2002 SSC.[7]

Clairton Slag received notice on March 11, 2002, that it would be part of the vendor group for asphalt materials in the 2002 SSC. The Notification of Award included a list of all suppliers for the 2002 SSC. This list alerted Clairton Slag that some of its competitors that had

[7] In addition to Lane and Golden Eagle, DGS also decided to "renew" contracts with five other companies who failed to submit bids for the 2002 SSC: Mayer Brothers Construction Co., Weist Asphalt Products & Paving, Inc., Berkholder Paving Division of Martin Reinstein, Inc., Eastern Industries, Inc. and Riverside Materials, Inc. However, these latter five vendors were not competitors in Clairton Slag's region.

failed to submit timely bids that year were nonetheless included in the 2002 list of approved vendors. On March 18, 2002, Clairton Slag filed a letter objecting to the inclusion of Lane Construction. By letter dated April 5, 2002, Clairton Slag was informed by DGS that the inclusion of Lane Construction was neither the result of a solicitation of a bid nor the award of a new contract but was, instead, a renewal of an existing contract. In fact, both Lane and Golden Eagle had been included in the approved vendor list for 2002 on the basis of this "renewal" of their 2001 SSC. DGS also indicated at this time that it did not consider Clairton Slag's letter to raise a bid protest issue and that Clairton Slag had no right to protest the inclusion of Lane and Golden Eagle on the list of approved vendors for 2002 since this resulted merely from a renewal of their 2001 contract. DGS also (incorrectly) informed Clairton Slag that, other than the contract period, none of the contract terms for the 2001 contractors were changed in the renewal process. The propriety of this "renewal" becomes a significant issue in Clairton Slag's contract claim and will be discussed at length later in this opinion.[8]

On April 11, 2002, Clairton Slag submitted another letter to DGS as a notice of contract claim generated by the inclusion of Lane and Golden Eagle in the asphalt vendor group for the 2002 SSC. This claim was denied by the DGS contracting officer on July 9, 2002. Clairton Slag thereafter filed the instant claim with this Board on August 6, 2002.

The claim filed here at the Board was originally comprised of two counts. Count I alleged a breach of contract because DGS failed to notify Clairton Slag of the bid deadline for contract year 2001. This count was withdrawn prior to hearing. Count II alleged a breach of contract due to PennDOT ordering asphalt materials from vendors not properly on the 2002 SSC. In this count, Clairton Slag seeks to recover lost profits plus interest arising from orders that it argues

[8] A provision in the 2001 SSC allowed for a renewal of the contract but required such renewal to be done on the same terms and conditions. Clairton Slag challenges the effectiveness and propriety of this attempted renewal of the 2001 SSC for Lane and Golden Eagle for use in 2002 because it was done selectively for only seven of the many qualified vendors originally participating in the 2001 SSC and because the base price for asphalt used in the asphalt price index (a price adjustment mechanism applied to the asphalt purchased over the year) was changed.

were improperly diverted from it and placed with competitors that were not properly on the 2002 SSC (i.e. Lane and Golden Eagle). In addition, Clairton Slag also asserted, at hearing, a claim for lost profits and interest resulting from purchases of asphalt materials from vendors properly on the 2002 SSC, but which it claims were improperly diverted from Clairton Slag in contravention of the vendor selection terms of the 2002 SSC (sometimes referred to hereinafter as the "Second Issue"). In support of this Second Issue, Clairton Slag refers to the language of the 2002 SSC which calls for purchases to be made from vendors with the lowest bid price unless certain additional conditions were present and recorded. Clairton Slag asserts that the Commonwealth failed to order from the lowest priced bidder and/or failed to record factors considered other than the bid price when purchasing asphalt product from vendors other than the lowest priced bidder. In addition to contesting both portions of Clairton Slag's claim on the merits, DGS also asserts procedural and jurisdictional objections to raising this Second Issue at hearing as Clairton Slag has done.

DISCUSSION

The primary question before the Board is whether DGS breached the 2002 SSC for purchases in years 2002 and 2003[9] by ordering asphalt from certain vendors other than Clairton Slag in breach of the 2002 SSC. Clairton Slag advances two main arguments in support of its claim for breach of contract: 1) the Commonwealth improperly purchased paving materials from vendors that were not on the 2002 SSC (i.e. Lane and Golden Eagle) and that a significant portion of these orders would otherwise have been placed with Clairton Slag (sometimes referred to hereinafter as the "First Issue"); and 2) the Commonwealth failed to adhere to specific contract

[9] DGS attempted to renew the 2002 SSC with all of its vendors (including Clairton Slag) for asphalt supply in 2003 and did so with all but four who declined the renewal. Neither party here raised an issue with the propriety of this renewal of those vendors properly on the 2002 SSC, and the evidence before the Board does not suggest that there was an attempt by DGS to selectively renew the 2002 SSC or that there were any material changes to the terms or conditions of the 2002 SSC for use in 2003. Clairton Slag does maintain that, because Lane and Golden Eagle were not properly renewed from 2001 to 2002, and were not properly on the 2002 SSC, the purchases from Lane and Golden Eagle in 2003 were also improper and constituted a breach of the 2002 SSC.

terms when selecting vendors properly on the 2002 SSC in that the Commonwealth failed to order from the lowest priced bidder and/or failed to record factors considered other than the bid price when purchasing asphalt product from vendors other than the lowest priced bidder (i.e. the Second Issue). [10] Because DGS raises a serious jurisdictional challenge to the Second Issue, we will address this aspect of the claim first.

Purchases from Certain Vendors on the 2002 SSC

The Second Issue posed to the Board is whether a breach of the 2002 SSC occurred due to PennDOT purchases of asphalt paving material picked up at the vendor's plant from suppliers properly included in the 2002 SSC but who did not offer a bid price lower than Clairton Slag's. Before we can reach the merits of this issue, however, we must first address the procedural/jurisdictional challenge to our review of this portion of the claim argued by DGS. This challenge asserts that Clairton Slag's claim of improper purchases from suppliers that were properly listed on the 2002 SSC cannot be considered by the Board because Clairton Slag's complaint, as filed with the Board, did not encompass this Second Issue but was presented for the first time at the Board hearing.

Specifically, DGS contends that Clairton Slag failed to give DGS adequate notice of the specifics of this Second Issue and, most significantly, that the Board lacks jurisdiction over this aspect of the claim because it was not first raised with the Department as required by Section 1712.1 of the Procurement Code. 62 Pa.C.S. § 1712.1. DGS also alleges that, because this Second Issue was not raised until trial, which occurred on February 20-22, 2007, this aspect of the claim is clearly outside the applicable six month limitation period provided by the Code.

[10] Clairton Slag has also asserted several bases for recovery related to the bidding process: violation of fair and legitimate bidding practices, violation of DGS's own policy by not re-bidding the Statewide Supply Contract, different treatment of individual vendors by not requiring them to submit bids on an equal basis, private negotiations with certain vendors during a competitive bid process, etc. The Board must limit its determinations to contract claims and therefore will not address any of Clairton Slag's theories of recovery to the extent that they are not based on an alleged breach of an existing contract to which Clairton Slag was a party (i.e. the 2002 SSC). 62 Pa.C.S. § 1724.

Consequently, DGS argues that the Board lacks jurisdiction to hear this Second Issue under Section 1724 of the Code, noting Paragraph 1724(c) in particular. 62 Pa.C.S. § 1724.

Paragraph 1724(c) is titled "Limitations" and provides, in pertinent part, that "[t]he Board shall have no power and exercise no jurisdiction over a claim . . . unless it is filed with the board in accordance with section 1712.1." 62 Pa.C.S. §§ 1712.1, 1724(c). Paragraph 1712.1(b) sets forth the procedure for a contractor to file a claim with the Commonwealth, including a provision that any claim must be filed with the Commonwealth's contracting officer within six months from the date it accrues or else the claim is deemed to be waived. Paragraph 1712.1(c) requires that such a claim shall state all grounds upon which it is based. DGS's assertions thus challenge the Board's jurisdiction over the Second Issue (i.e. the improper purchases from suppliers properly on the 2002 SSC) for two reasons: (1) the Second Issue was not raised with the Department and therefore administrative remedies were not exhausted and (2) the Second Issue was not timely raised since it was first asserted after the six month limitations period had expired.

As a threshold matter, we must first address what version of the initial claim procedures outlined in the Procurement Code pertain to this Second Issue. As we have noted in our Conclusions of Law, Section 1712 of the Procurement Code (62 Pa.C.S. § 1712, repealed) was in effect on August 6, 2002 when Clairton Slag filed its claim at this Board. It is therefore Section 1712 of the Procurement Code (repealed) which was the administrative remedy provision applicable to the First Issue raised in Clairton Slag's claim and Section 4651-4 of the Board of Claims Act of 1937 which determines the Board's jurisdiction over this First Issue. See 62 Pa.C.S. § 1712 (repealed), 62 Pa.C.S. §§ 1712.1 and 1724; 71 P.S. § 4651-4 (repealed). However, because we have found that the Second Issue was not raised in the original claim filed with this Board, but was instead raised to the Board for the first time at hearing in February of 2006, we believe it is appropriate to apply the provisions of the Procurement Code effective in

February of 2006 to the Second Issue. Accordingly, we will apply the initial claim provisions found at 62 Pa.C.S. § 1712.1 and the Board's jurisdictional provisions found at 62 Pa.C.S. § 1724 to our analysis of the jurisdictional challenge posed by DGS to this Second Issue. In doing so, however, we note that, because the requirement of filing a written claim with the DGS contracting officer was nonetheless required by both Section 1712 and its successor, Section 1712.1, the analysis and results would be the same under either section.

This Board has addressed challenges to its jurisdiction on several occasions in the past. In each instance we have been mindful of the Pennsylvania Supreme Court's discussion in the case of In re Melograne, 812 A.2d 1164 (Pa. 2002). In this case, the Court is careful to distinguish between subject matter jurisdiction, which is competency to address the general class or type of case to be heard, and personal jurisdiction, which it describes as power to act over the parties in the case to order or effect a particular result. Id. at 1166-1167. Where a tribunal lacks subject matter jurisdiction, it has no authority to hear the case and no actions by the parties or agreements between the parties can provide that authority. Objections to jurisdiction over the person, however, can, in certain circumstances, be waived or estopped on equitable grounds by actions of the parties. Id.; see also Dep't of Pub. Welfare v. UEC, Inc., 397 A.2d 779, 785 (Pa. 1979).

In the present case, the Board has subject matter jurisdiction over the Second Issue because we clearly have competency to hear this general class and type of case (i.e., a contract claim against the Commonwealth). 62 Pa. C.S. § 1724(a); In re Melograne, 812 A.2d at 1166-67; Dep't of Pub. Welfare v. UEC, 397 A.2d at 785. However, whether or not the Board can exercise personal jurisdiction over DGS on this Second Issue depends on: 1) whether or not Clairton Slag's claim letter to DGS and complaint at the Board can be fairly read to encompass this Second Issue or 2) whether or not DGS has waived this objection to personal jurisdiction, as Clairton Slag maintains, by failing to raise it in a timely manner. To resolve these questions, it is

necessary to examine, inter alia, the pleadings, the evidence presented in the case and the actions of the parties.

Clairton Slag initially contends that this Second Issue is fairly within the scope of its original claim letter filed with DGS and its complaint filed with this Board. Alternatively, Clairton Slag explains the absence of the Second Issue from the claim letter to DGS and the complaint at the Board by arguing that it was only after a hearing before this Board to resolve discovery disputes and subsequent depositions of PennDOT employees, conducted well after the complaint had been filed with the Board, that Clairton Slag became aware of the facts giving rise to this Second Issue.

A careful reading of Clairton Slag's claim to the DGS contracting officer and its complaint at the Board reveals no semblance of allegation that PennDOT breached the contract by improperly ordering asphalt from vendors who had submitted bids and were properly listed on the 2002 SSC. The allegations of the claim letter and the complaint are limited to the assertion that the contract was breached by PennDOT's award of purchase orders to vendors who failed to submit bids. Thus, we cannot agree that Clairton Slag included this Second Issue in its claim letter to DGS or in its complaint filed at the Board.

Clairton Slag's remaining argument, that DGS has waived its objections to personal jurisdiction based on a failure to exhaust administrative remedies and/or failure to comply with the six month statute of limitations with regard to this Second Issue is also, ultimately, unavailing. Although Clairton Slag may be able to overcome the statute of limitations objections

raised by DGS,[11] Clairton Slag has not established a sufficient basis to overcome DGS's objection that Clairton Slag failed to exhaust its administrative remedy with regard to this Second Issue. Specifically, Clairton Slag's suggestion that DGS's delay in raising the failure to exhaust administrative remedy issue until the end of the hearing[12] waived DGS's right to do so is contrary to Pennsylvania case law. See, Brog v. Dep't of Pub. Welfare, 401 A.2d 613, 615 (Pa. Cmwlth. 1979). Because Clairton Slag clearly failed to bring this Second Issue to a DGS contracting officer per 62 Pa.C.S. § 1712.1 (or 62 Pa.C.S. § 1712 (repealed)), and because DGS's delay in raising this failure until the end of hearing does not waive the objection, Clairton Slag's failure to exhaust its administrative remedy becomes dispositive with regard to the Second Issue. The Board must, therefore, conclude that we lack personal jurisdiction over DGS with regard to this Second Issue (Clairton Slag's claim for damages based on improper purchases from vendors properly on the 2002 SSC) and dismiss this portion of the claim.

Purchases from Vendors not Bidding on the 2002 SSC

With regard to its First Issue, Clairton Slag argues initially that the 2002 SSC is a "requirements contract" under which the Commonwealth is obligated to order all of the asphalt

[11] The Defendant here has the burden of proving that the limitation period was, in fact, violated. However, the Department has not carried its burden of proof that this Second Issue was advanced after the six month period had expired. While we agree with DGS that there is no "discovery rule" applicable to this case, it is equally true that Clairton Slag's cause of action on this Second Issue did not accrue until 1) Clairton Slag knew of the claim and was capable of preparing a concise and specific statement detailing the injury and 2) Clairton Slag was notified by the Commonwealth that it would not be paid for this aspect of the claim by the Commonwealth. See, Darien Capital Mgmt., Inc. v. Pub. Sch. Employee's Ret. Sys., 700 A.2d 395, 397 (Pa. 1997). Accordingly, it appears to the Board that this second aspect of Clairton Slag's claim could not have accrued until Clairton Slag first learned of facts giving rise to it during discovery. DGS itself acknowledges in its argument that this could have been as late as August 31, 2006. Starting from that date, the six month limitation period would expire at the end of February 2007. Since Clairton Slag raised the Second Issue to DGS at least by the first day of hearing on February 20, 2007, a date within six months of the close of discovery, the second issue could have been timely brought under the applicable period of limitations. DGS has offered us no evidence to show that the claim underlying the Second Issue did not accrue within the six month period prior to hearing. Because the Board finds that DGS has not met its burden of proving that Clairton Slag failed to assert the Second Issue within the six month limitation period of the Procurement Code, we have focused instead on the failure to exhaust administrative remedy argument as dispositive of the matter.

[12] It was not until the very end of Clairton Slag's case in chief that DGS objected to Clairton Slag's expert testifying about damages for the Second Issue. Only then did DGS object that this part of the claim was not alleged in the complaint and stated, "So we believe it's--this claim is not properly before the Board and therefore lacking jurisdiction, it's obviously not relevant." N.T. 442.

the Commonwealth needed for road maintenance from vendors on the contract for the years the 2002 SSC was in effect (2002 and 2003). Clairton Slag reasons that, since Lane and Golden Eagle did not bid on the 2002 SSC, they were not properly on this contract, and the Commonwealth was in breach to the extent it placed orders with these two vendors and others who did not bid on the 2002 SSC for purchases made in 2002 and 2003 (i.e. the "Non-Bidding Vendors").

In support of its position that the 2002 SSC is a requirements contract, Clairton Slag cites the "ESTIMATED QUANTITIES" section of Sheet A of the general conditions and instructions incorporated in the contract. This section provides, inter alia, "that any quantities listed in the proposal are estimated only and may be increased or decreased in accordance with the actual requirements of the Commonwealth and that the Commonwealth in accepting any bid or portion thereof, contracts only and agrees to purchase only the supplies, equipment, and materials in such quantities as represent the actual requirements of the Commonwealth." P-Ex. 24, Sheet A.

DGS, on the other hand, points to the following, and last, sentence of the "estimated quantities" section, which provides: "The Commonwealth reserves the right to purchase items covered by this contract from another source if the price is lower than the contract price." Id. DGS therefore argues that, in light of this final sentence, the Commonwealth was not limited to purchasing from the vendors on the SSC but could obtain its supplies from other sources.

It is fundamental that in construing the meaning of a written contract, all parts must be considered in totality. "The entire contract should be read as a whole and every part interpreted with reference to the whole, so as to give effect to its true purpose." Pritchard v. Wick, 178 A.2d 725, 727 (Pa. 1962). This means, among other things, that a contract should be construed so as to give effect to all its provisions wherever possible. Id., see also Capitol Bus Co. v. Blue Bird Coach Lines, Inc., 478 F.2d 556, 560 (C.A.3. 1973). Specific provisions control the general provisions, but a contract should be construed so as to give effect to its general purpose. Id.

Above all, the intent of the parties to a contract, when it is expressed in clear and unequivocal terms, must be given effect. Dep't of Transp. v. Manor Mines, Inc., 565 A.2d 428, 432 (Pa. 1989); Agrecycle, Inc. v. City of Pittsburgh, 783 A.2d 863 (Pa. Cmwlth. 2001).

Even though the "ESTIMATED QUANTITIES" section cited by Plaintiff does indicate that the Commonwealth "contracts only and agrees to purchase only the . . . materials in such quantities as represent the actual requirements of the Commonwealth", we believe this clause, particularly given its placement in the contract as a whole, is intended to express a limit and qualification on the estimated quantities set forth in the bid materials. We do not believe this language was intended to obligate the Commonwealth to purchase all materials from SSC vendors. Our reading is further confirmed by the concluding sentence of the provision which expressly reserves to the Commonwealth the right to purchase items from other sources outside the SSC offering a lower price. This latter sentence, which cannot be viewed as mere surplusage, plainly states that the Commonwealth may purchase asphalt materials from vendors who are not on the 2002 SSC. Given this clear language, the Board disagrees with Clairton Slag's argument that the earlier phrase controls or that evidence outside the contract demonstrates the parties' intention to treat this as a requirements contract. The specific terms of the contract itself, therefore, defeat Clairton Slag's contention that PennDOT was bound by the "ESTIMATED QUANTITIES" section of the contract to purchase all asphalt materials it needed from vendors included in the 2002 SSC under all circumstances.

The Board's conclusion that the 2002 SSC was not a "requirements contract" does not, however, dispose of the basic issue of whether the Commonwealth was in breach of the 2002 SSC to the extent it obtained asphalt from vendors not properly on the 2002 SSC in the manner it did here. That is, even though the Commonwealth did not have a contract duty to make all its asphalt purchases from vendors properly on the 2002 SSC under all circumstances, the

Commonwealth did have a contractual duty to perform the 2002 SSC in conformity with its terms and with the laws existing at the time of contract formation.

That is to say, even though the 2002 SSC does allow asphalt to be purchased outside its scope, any such purchases would still need to be made in compliance with existing procurement law. The 2002 SSC itself contains an express provision placing the duty of compliance with applicable law on the participating contractors:

> All contractors shall comply with the federal and state laws and regulations and obtain all federal and state approvals and permits that all the materials offered by the contractor to be sold and used for the Commonwealth's required use.

P-Ex. 24, Sheet I.

More importantly, long-established case law confirms that this duty to perform one's contractual obligation in compliance with the laws existing at the time of contract formation is a reciprocal one placed on both parties by the contract. Beaver County Bldg. & Loan Ass'n v. Winowich, 187 A. 481, 484 (Pa. 1936)("In determining what constitutes the obligation of a contract, no principle is more firmly established then that the laws which were in force at the time and place of the making of the contract enter into its obligation with the same effect as if expressly incorporated in its terms."); see also Neel v. Williams, 45 A.2d 375, 377 (Pa. Super. 1946); Liss & Marion, P.C. v. Recordex Acquisition Corp., 937 A.2d 503, 512 (Pa. Super. 2007); Empire Sanitary Landfill, Inc. v. Dep't of Envtl. Res., 684 A.2d 1047, 1059 (Pa. 1996); First Nat'l Bank v. Flanagan, 528 A.2d 134, 137-138 (Pa. 1987). Accordingly, Clairton Slag had a contractual right to expect, and the Commonwealth had a contractual duty to provide, compliance with state and federal laws in the Commonwealth's performance under the 2002 SSC, and most specifically, in the Commonwealth's implementation of asphalt purchases made outside the 2002 SSC pursuant to the last sentence of the "ESTIMATED QUANTITIES" section of the contract. Thus, the next question to be resolved is whether or not the Commonwealth acted in accordance

with the law controlling Commonwealth purchases when it bought asphalt from vendors that did not submit bids for inclusion in the 2002 SSC.

It is beyond dispute that the Commonwealth Procurement Code, 62 Pa.C.S. § 101, et seq., applies to all purchases by the Commonwealth of the asphalt materials here at issue. It is equally clear that, with specific enumerated exceptions, the Procurement Code requires that contracts for the purchase of supplies and materials "shall be awarded by competitive sealed bidding" to the lowest responsible bidder. 62 Pa.C.S. §§ 511, 512; Associated Builders & Contractors, Inc. v. Dep't of General Services, 932 A.2d 1271 (Pa. 2007). Public bidding is important "for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts and to secure the best work or supplies at the lowest price practicable." Ezy Parks v. Larson, 454 A.2d 928, 932 (Pa. 1982); In accord, American Totalisator Co., Inc. v. Seligman, 414 A.2d 1037 (Pa. 1980).

Because the evidence presented in this case clearly establishes that Lane and Golden Eagle did not bid on the 2002 SSC (utilized by DGS for purchases in 2002 and 2003); and it is equally well established that the Commonwealth did not engage in a competitive sealed bid process separate and apart from the 2002 SSC for asphalt purchases from Lane and Golden Eagle in 2002 and 2003, the Commonwealth's compliance with Procurement Code requirements, by necessity, depends on a showing that its purchases from Lane and Golden Eagle were made pursuant to some exception to the Procurement Code's competitive sealed bid process. 62 Pa. C.S. §§ 511, 512 (1998). One way of doing so, and the only one argued by Defendant, is its assertion that PennDOT's purchases of asphalt from these contractors who did not bid on the 2002 SSC were made pursuant to another contract that was properly entered into under the Procurement Code. Specifically, DGS argues that these asphalt purchases made from Lane and Golden Eagle in 2002 and 2003 were made pursuant to the 2001 SSC, which DGS maintains was renewed for Lane, Golden Eagle and five contractors that failed to bid on the 2002 SSC. The

issue here, alluded to earlier, becomes whether or not DGS properly renewed the 2001 SSC with these vendors according to the terms of that contract.

The 2001 SSC did, indeed, contain a renewal clause which stated, in relevant part:

> **OPTION TO RENEW**: the contract(s) or any part of the contract(s) may be renewed for an additional (3) (1) year terms by mutual agreement between the Commonwealth and the contractor(s). If the contract(s) is/are renewed the same terms and conditions shall apply.

P-Ex. 11, Sheet L.

According to this clause, the 2001 contract can be renewed, but if it is, the same terms and conditions must apply. Here, however, in attempting to renew the 2001 SSC for Lane and Golden Eagle, DGS changed the asphalt base price in the asphalt price index. The asphalt price index is employed in the SSC's to adjust the bid price of the participating vendors in relation to the unpredictable price fluctuations of the asphalt cement (also referred to as liquid asphalt) needed to make the bituminous paving materials supplied to the Commonwealth over the year that the SSC is in effect. In the 2001 SSC, the asphalt base price was set at $182 per ton. In the 2002 SSC, the asphalt base price was set at $147 per ton. Rather than keeping the asphalt base price index term the same as it was in the 2001 SSC, DGS changed this base price term when it sought to renew the 2001 contracts for Lane and Golden Eagle for use in 2002.

DGS offered testimony explaining that it renewed the 2001 contracts using the 2002 asphalt base price in the index to save money by not having to do a total re-bid and to simplify the administration of the contracts. DGS further defends this change in terms by arguing that the price index is not applied until after the order is billed so it would not affect the determination as to which vendor would receive an order. Clairton Slag argues that it was a material change affecting the price of asphalt sold to the Commonwealth and that this change made the Lane and Golden Eagle product competitive when a proper renewal of the 2001 SSC with no change in terms would otherwise not have been competitive in 2002.

The Board agrees with Clairton Slag. DGS's action in substituting the new asphalt base price, while attempting to renew the 2001 SSC for Lane and Golden Eagle, clearly changed the price to be paid by the Commonwealth for asphalt from these vendors and made it feasible for Lane and Golden Eagle to compete with other vendors in 2002. It is hard to imagine a term more material to the agreement than the price of the goods to be purchased. Accordingly, while this action may have been expedient for DGS, it resulted in a material change to the 2001 SSC contract terms in violation of that contract's renewal provision.[13]

Perhaps even more importantly, the Board must also conclude that the Option to Renew clause did not provide for a renewal of the 2001 SSC with only a relatively small and selected portion of the qualified vendors originally awarded participation in the 2001 SSC. In this regard, we note initially that DGS and Clairton Slag proposed different readings of the first sentence contained in the Option to Renew clause. DGS would have us read the sentence to provide that it could renew not only discreet portions of the 2001 contract (such as by renewing for one or more of the specific products covered by the contract) but could also renew the entire contract with any one or more of the qualified vendors originally participating therein. Clairton Slag, on the other hand, acknowledges that DGS could renew any portion of the contract, but maintains that compliance with the bidding structure set forth by the Procurement Code (and particularly the criteria set forth in Section 517 of the code regarding multiple award contracts) requires that we do not read the sentence to allow DGS to renew the contract with only a small selected portion of the qualified vendors originally participating therein.

In deciding this issue, we acknowledge that we find some basis in the language for each party's interpretation and therefore find some ambiguity and uncertainty inherent in this first

[13] The Board also found unpersuasive DGS's argument that the 2001 SSC was first renewed intact and then Lane and Golden Eagle later agreed to a "voluntary price reduction." To begin with, the reduction in the base asphalt price for the index benefitted Lane and Golden Eagle, not DGS. More importantly, the facts and documents in evidence indicate clearly that this modification to the asphalt base price was being negotiated during DGS's efforts to renew the 2001 SSC.

sentence. In support of our determination that there is ambiguity in the first sentence we further note that certain DGS employees also expressed doubt that the provision allowed DGS to exercise the Option to Renew with only a select portion of the qualified vendors originally participating in the 2001 SSC rather than with all such qualified vendors. Additionally, we find that DGS's more expansive reading would also conflict with the "AWARD" provision in the 2001 SSC. This provision states, in relevant part, that, "a contract award will be to each qualified contractor source bid." (P-Ex. 11, Sheet F). DGS's expansive reading of the first sentence of the Option to Renew clause would, by conflicting with the "AWARD" provision, also serve to change the terms and conditions of the original contract in violation of the second sentence of the Option to Renew clause which requires renewals to be on the same terms and conditions. Finally, we agree with Clairton Slag that reading the Option to Renew clause to allow DGS to renew the 2001 SSC with only a portion of the qualified vendors originally participating therein would run afoul of Section 517(e)(3) of the Procurement Code which, by statute and the language of the bid invitation, dictates that this multiple award contract be awarded to all qualified vendors. Even more disturbingly, DGS's expanded reading would run contrary to the public policy behind the enactment of the Procurement Code itself by providing an opportunity for favoritism, unfairness, improper influence and/or corruption by allowing DGS to arbitrarily select a portion of the original contractor group for one or more additional years by subsequent renewals of the original contract (and thereby avoid the need for bidding at all in these subsequent years).

Based on the need to construe each contract provision in light of the whole so as to give effect to all of the contract's provisions where possible, as well as the need to construe such provisions in furtherance of compliance with law and public policy, we hold that the Option to Renew clause provides DGS with the option to renew the 2001 SSC, but only if this option is exercised by DGS with respect to all qualified vendors participating therein and without any

material changes to the original agreement. Accordingly, we conclude that DGS's attempted renewal of the 2001 SSC with Lane, Golden Eagle and the other five non-bidding vendors was not authorized by the Option to Renew clause and was, therefore, not effective.[14]

Since DGS did not renew the 2001 SSC for Lane and Golden Eagle in accordance with its express terms, the Board concludes that the 2001 SSC for Lane and Golden Eagle was not effectively renewed. As a result, neither the 2001 SSC nor the 2002 SSC were in effect for these vendors for purchases in 2002 or 2003: the 2001 SSC because it was not properly renewed and the 2002 SSC because it was not bid by these vendors as required by the Procurement Code. Moreover, since the 2002 SSC was renewed for use in 2003 for all the vendors that wished to renew (without a material change of terms or conditions), the vendors that did not bid on the 2002 SSC were also excluded from sales made thereunder in 2003.

Without a valid renewal of the 2001 SSC for Lane, Golden Eagle and the other vendors that did not bid on the 2002 SSC, the Commonwealth was constrained by law to make all its asphalt purchases in 2002: A) from those vendors properly included in the 2002 SSC; or B) pursuant to competitive bidding procedures or some statutory exception from competitive bidding for any purchase outside the 2002 SSC. In other words, Clairton Slag, as a party to the 2002 SSC, had a contractual right to expect the Commonwealth to purchase its asphalt in 2002 and 2003 from the 2002 SSC or to comply with the Procurement Code for asphalt purchases made outside the 2002 SSC. See e.g. Beaver County Bldg. & Loan Ass'n v. Winowich, 187 A. 481, 484 (Pa. 1936) ("In determining what constitutes the obligation of a contract, no principle is more firmly established then that the laws which were in force at the time and place of the making of the contract enter into its obligation with the same effect as if expressly incorporated

[14] Even if the Option to Renew clause were read to allow a selective renewal, such renewal would, in our view, be in violation of Section 517 of the Procurement Code and would therefore be void ab initio. Watrel v. Dep't of Educ., 488 A.2d 378, 381 (Pa. Cmwlth. 1985); Ezy Parks v. Larson, 454 A.2d 928 (Pa. 1983); Acchione v. City of Philadelphia, 397 A.2d 37 (Pa. Cmwlth. 1979); Shaeffer v. City of Lancaster, 754 A.2d 719, 722 (Pa. Cmwlth. 2000).

in its terms.") To the extent the Commonwealth purchased asphalt from vendors like Lane and Golden Eagle that were neither parties to the 2002 SSC nor suppliers otherwise properly selected pursuant to the Procurement Code, it diverted business from vendors properly on the 2002 SSC like Clairton Slag, and caused them financial damage for lost sales in 2002 and 2003.[15] This diversion constitutes a breach by the Commonwealth of the 2002 SSC to which Clairton Slag was a proper party vendor.

DGS further asserts, however, that even if it did improperly renew the 2001 SSC for Lane and Golden Eagle, and even if orders placed with those vendors were illegal, Clairton Slag does not have standing to protest in this forum because such actions would be a breach of the 2001 SSC not the 2002 SSC with Clairton Slag. The Board finds this argument, as well, to be without merit for the reasons noted above. As a party to the 2002 SSC, Clairton Slag had the contractual right to expect the Commonwealth to comply with existing law in performing the 2002 SSC and the Commonwealth had the contractual duty to do so. Id. To the extent the Commonwealth violated the existing law (i.e. Procurement Code) in making purchases of asphalt off contract, the 2002 SSC was breached, and Clairton Slag has the right to recover damages it suffered as a result of this breach. In this case, the Commonwealth improperly purchased asphalt from Lane and Golden Eagle, whose contracts were neither bid nor properly renewed, and these actions constitute a breach of the 2002 SSC.

Although we believe the facts and legal principles enunciated above amply support the Board's conclusion, we note that the Pennsylvania Uniform Commercial Code ("PUCC") provides further support for this result. The PUCC is specifically made applicable to contracts

[15] DGS argues that including these non-bidding vendors did not violate the Procurement Code because the SSC is a multiple awards contract under § 517 and therefore represents an exception to the bidding requirements of the Code. The Board agrees with DGS that the 2002 SSC was a multiple awards contract provided for under § 517 of the Procurement Code, but that fact does not change the requirement that asphalt suppliers must submit bids to be included as potential vendors under that contract. Once properly included on the multiple award contract, as Clairton Slag was on the 2002 SSC, the Procurement Code and contract itself allows for selection among the contracted vendors based on specified criteria. However, Lane and Golden Eagle were not among those vendors on the 2002 SSC. 62 Pa.C.S. § 517 (f) (1998).

entered into under the Procurement Code. "Unless displaced by the particular provisions of this part, existing Pennsylvania law, including Title 13 (relating to commercial code), shall supplement the provisions of this part." 62 Pa.C.S. § 104. Because the PUCC addresses the sale of goods in Pennsylvania, it applies in the present case to the sale of asphalt. 13 Pa. C.S. § 2102. Most relevant to this case, the PUCC imposes an obligation of good faith in the performance of the terms of this contract. 13 Pa.C.S. § 1203.

In the present case, the contract specifically provided for the purchase of asphalt from vendors on the 2002 SSC and criteria for selecting same. The 2002 SSC also allowed purchases to be made from sources outside the 2002 SSC pursuant to the "ESTIMATED QUANTITIES" provision contained in the 2002 SSC. As a materials vendor and party to the 2002 SSC, Clairton Slag could, however, reasonably expect that good faith performance of the 2002 SSC, in general, and of the "ESTIMATED QUANTITIES" provision, in particular, would still entail compliance with the Procurement Code for these "off contract" purchases. We therefore hold that the Commonwealth breached its duty of good faith performance of the 2002 SSC by purchasing asphalt from Lane and Golden Eagle in 2002-2003 in violation of the Procurement Code.[16]

For all the foregoing reasons, DGS is liable in damages to Clairton Slag for breach of the 2002 SSC to the extent Clairton Slag can establish that portion of the lost business improperly

[16] This Board acknowledges, as did the Pennsylvania Supreme Court in Ash v. Continental Ins. Co., 932 A.2d 877, 883 n.2 (Pa. 2007), the diversity in appellate court rulings as to the duty of good faith applicable to contracts under Pennsylvania law. Bryan Mechanical, Inc. v. Dept. of General Services, Docket No. 3699, p. 35 n. 2 (Pa. Bd. Claims, October 25, 2007) aff'd in unreported opinion, Bryan Mechanical v. Dep't of General Services, Nos. 2155 and 2159 C.D. 2007, slip op. (Pa. Cmwlth. May 22, 2008). However, our review of several cases addressing this principle, including those cited in Ash, suggests that those cases which did not apply the doctrine requiring good faith in contract performance typically did so in circumstances where this principle was invoked to add obligations not contained in the contract or to modify terms expressly stated therein. Clearly, the good faith provision does not give rise to a cause of action independent of the terms of the contract, nor can its application result in defeating a party's express contractual rights specified in a written agreement. Agrecycle, Inc. v. City of Pittsburgh, 783 A.2d 863 (Pa. Cmwlth. 2001); Dep't of Transp. v. E-Z Parks, 620 A.2d 712 (Pa. Cmwlth. 1993). However, it is our understanding that the Commonwealth Court, in the cases cited, was not rejecting a requirement of good faith in performing contract provisions or duties already contained in the contract as they are in this case. For instance, cases which have held parties to a standard of good faith performance of their agreement (citing both the Restatement (Second) of Contracts § 205 and the PUCC) appear to involve circumstances where the rights and duties sought to be enforced were either expressly stated or implicit in the agreement. E.g. Stamerro v. Stamerro, 889 A.2d 1251 (Pa. Super. 2005); John B. Conomos, Inc. v. Sun Co., Inc., 831 A.2d 696 (Pa. Super. 2003) (refinery had duty of good faith in performing its obligation to inspect contractor's work); Somers v. Somers, 613 A.2d 1211 (Pa. Super. 1992) (holding that the duty of good faith in an employment contract required employer to resolve a third party dispute so as to avoid depriving employee of his share of resulting proceeds); Baker v. Lafayette College, 504 A.2d 247 (Pa. Super. 1986). In agreement with this analysis, see Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 617 (C.A.3. 1995).

diverted to Lane and Golden Eagle that should have gone to it. It is in this last area of proof, however, where Clairton Slag has accomplished only partial success.

Damages

Clairton Slag asserts that it is entitled to damages for the Commonwealth's breach of the 2002 SSC in the form of lost profits under common law and under the Uniform Commercial Code at 13 Pa.C.S.A. § 2708. Generally, the measure of damages for breach of contract is that the aggrieved party should be placed as nearly as possible in the same position it would have occupied had there been no breach. Dep't of Transp. v. Brozzetti, 684 A.2d 658, 665 (Pa. Cmwlth. 1996). Thus, Clairton Slag reasons, because it should have received orders that were diverted to competitors in breach of the 2002 SSC, it sustained damages in the form of lost profits on those orders.

In Pennsylvania it is established law that a party to a contract may recover lost profits as follows:

> The general rule of law applicable for loss of profits in both contract and tort actions allows such damages where (l) there is evidence to establish them with reasonable certainty, (2) there is evidence to show that they were the proximate consequence of the wrong; and, in the contract actions, that they were reasonably foreseeable. (citations omitted.)

Company Image Knitware, Ltd. v. Mothers Work, Inc., 909 A.2d 324, 336 (Pa. Super. 2006). The Pennsylvania Uniform Commercial Code also provides for the measure of damages to include "the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages." 13 Pa.C.S. § 2708(b).

As stated above, the first prong of the rule of law for lost profits requires the aggrieved party to support its request with evidence to establish the damages with reasonable certainty. Mothers Work, 909 A.2d at 336. Although the exact amount need not be calculated with

mathematical certainty, the proof cannot be mere guess or speculation. Spang & Co. v. U.S. Steel Corp., 545 A.2d 861, 866-67 (1988).

Having established that the Commonwealth breached the 2002 SSC by making asphalt purchases from Lane and Golden Eagle during 2002 and 2003 outside of the 2002 SSC, Plaintiff's remaining burden is to establish the damages it incurred (i.e. the profits it lost) as a result of these breaches of contract with reasonable certainty. To do this, as Clairton Slag itself acknowledges by way of its extensive data collection and damage calculations, it must first establish, within reason, both the quantity of this lost business and what portion of the lost business it should have properly received under the terms of the 2002 SSC.

Unfortunately for Clairton Slag, it is in this last aspect where its proof fails for all but a small segment of its overall claim. This appears to be due to Clairton Slag's position that the language of the 2002 SSC, particularly those provisions setting forth criteria for selecting vendors in the contract, must be read to limit the Commonwealth's vendor selection criteria for "F.O.B. Source" purchases exclusively to the lowest bid price per ton. This, in turn, appears to have caused Clairton Slag, with three exceptions, to base its allocation of the business lost to Lane and Golden Eagle on this sole standard, a standard for allocation which we find does not comport with the vendor selection criteria set forth in the 2002 SSC.

Specifically, Clairton Slag's calculations present the asphalt purchases improperly placed with Lane and Golden Eagle in two categories:

> 1. All of the orders for materials to be picked up at plants (F.O.B. Source) placed with Lane and Golden Eagle, which Clairton Slag claims would have gone to it because Clairton Slag offered the lowest bid price for these materials. These orders totaled 87,974 tons of asphalt.
>
> 2. Three orders for materials delivered to PennDOT worksites (F.O.B. Destination) by Lane and Golden Eagle, as improperly included vendors, where Clairton Slag otherwise offered the lowest total cost (bid price plus mileage factor cost). These orders totaled 2,451 tons of asphalt.

However, as we explain below in greater detail, the Board finds that the provisions of the 2002 SSC which set forth criteria to be utilized for selecting vendors on the contract for "FOB Source" purchases do not state that the bid price per ton is the only factor that will normally, or may, be considered.

The 2002 SSC contains several provisions that are relevant to our consideration of the proper allocation of lost purchases outside the contract to those vendors legitimately on the 2002 SSC. The first of these appears in the Invitation to Bid documents published by DGS for the 2002 SSC at the top of Sheet H. The relevant provision states:

> IMPORTANT
>
> Refer to bid conditions for "Delivery Time F.O.B. Destination/Department Paver" for explanation of contract requirements for minimum and maximum tons per hour.
>
> All references to Department Paving Equipment shall include Department Wideners.
>
> F.O.B. Source Cost/Ton is used to determine the contactor that will be awarded the Purchase Order.
>
> Payment and applicable discounts will be adjusted prices. If a Price Adjustment (escalator/de-escalator) is in effect at all time of delivery.

P-Ex. 22, Sheet H [Emphasis added].

"F.O.B. Source" means that the materials are to be picked up from the vendors' location by PennDOT's trucks. "F.O.B. Destination" or "F.O.B. Destination/Department Paver" means that the materials are to be delivered by vendors to PennDOT's work sites. In responding to DGS's Request for Proposals, bidders provided separate prices for "F.O.B. Source" and "F.O.B. Destination" materials (with the latter price including mileage rate factors). The bid prices of all approved vendors were then incorporated into the Contractors List that was provided to each contractor, along with a copy of the 2002 SSC executed by the DGS. The Contractors List was also distributed to PennDOT offices across the Commonwealth.

Clairton Slag contends that the above language contained in the "IMPORTANT" provision was incorporated into the 2002 SSC and clearly provides that the lowest bid price per ton is to be the sole basis for ordering materials to be picked up from the source.[17] Further, Clairton Slag points out that its bid price "F.O.B. Source" was lower than that of the other bidders in its area that had been properly included in the 2002 SSC.

DGS disagrees that the "IMPORTANT" clause limits PennDOT to purchasing material from suppliers with the lowest "F.O.B. Source" bid price per ton. In support of its position, DGS points out that there are additional provisions in the contract allowing PennDOT to apply other considerations in selecting a vendor. These provisions differ slightly for materials to be picked up at the source and for materials to be delivered to the work site. However, both provisions are substantially similar in recognizing that other factors in addition to bid price per ton, such as length of haul and length of dead haul, can affect the final total cost to PennDOT (or other purchasing agency) and may or should be considered in deciding which vendor on the 2002 SSC from which to make any given purchase. The following paragraph from Sheet F of the 2002 SSC specifies these considerations when picking up asphalt paving materials from the source plant:

> **AWARD:** The F.O.B. source cost per ton will be the price the Department of Transportation will pay for bituminous materials purchased "FOB source of supply/loaded on department trucks". A contract award will be to each qualified contractor source bid. After award, the county maintenance manager will issue a field purchase order, on an as needed basis, for loading material in a department truck. The department will normally haul material from the source that represents the lowest responsible cost to the department after taking into consideration length of haul and dead haul. However, in some instances, the department may select the most economic source based upon other considerations such as, but not limited to, differences in haul time due to terrain or urban

[17] Clairton Slag equates the term "F.O.B. Source Cost/Ton" to be the same as F.O.B. source bid price/ton and uses these terms interchangeably. The first sentence of the "Award" provision later in the contract appears to support this equivalency.

> congestion; length of wait at the source; cooling due to length of haul; crew productivity based on truck availability and haul distance. details of such transactions shall be the responsibility of the county maintenance manager, will be on file in the county, and are subject to review by any awarded contractor on this contract.

P-Ex. 24, Sheet F (with original capitalization and punctuation).

For paving materials to be delivered to the field by the suppliers, the following paragraph from Sheet I of the contract applies:

> **FOB DESTINATION/DEPARTMENT PAVER:**
>
> The County Manager is responsible for issuing Field Purchase Orders for material delivered to any specific geographical locations that are reasonably accessible. The Department will place orders in accordance with actual needs. Orders will be generated to the contractor whose prices represent the lowest total cost to the Department for a specific bituminous material at the time of order (see formulas contained in this proposal). Material availability, trucking availability, or other related circumstances affecting timely delivery might be a consideration for contractor selection. details of such transactions are the responsibility of the County Maintenance Manager, on file in the County Office, and are subject to review by any awarded contractor on this contract.

P-Ex. 24, Sheet I (with original capitalization and punctuation).

To begin with, we agree with Clairton Slag that the "IMPORTANT" provision appearing in the bid documents and the contract signed and submitted by Clairton Slag is incorporated into the 2002 SSC despite the apparent failure by DGS to have this provision carried over into the 2002 SSC document signed and returned by it.[18] This conclusion corresponds to well established case law respecting publicly bid contracts and has not been seriously contested by

[18] This provision, under the heading "IMPORTANT," appeared in the bid package as one of the terms in the proposed contract which Clairton Slag signed and returned to DGS in responding to the bid invitation. However, this provision was apparently removed from the copy of the 2002 SSC executed by DGS and returned to Clairton Slag with no mention made by DGS of its unilateral removal of same at the time. Compare Plaintiff's Exhibit 22 with Plaintiff's Exhibit 24. As part of the bid package, however, the "IMPORTANT" provision became part of Clairton Slag's response to the invitation to bid. The law is well established that a contractor's bid becomes the "offer" in a public contracting situation. DGS could either accept or reject the offer; however, it could not unilaterally change the material terms of same in a public contract bid setting. See e.g. Page v. King, 131 A. 707, 709-710 (Pa. 1926); Flinn v. Philadelphia, 258 Pa. 355, 359-360, 102 A. 24, 25-26 (1917); Durkee Lumber Co., Inc.

DGS. Nat'l Constr. Services, Inc. v. Philadelphia Reg'l Port Authority, 789 A.2d 306, 309 (Pa. Cmwlth. 2001). Accordingly, in seeking to interpret and understand the vendor selection provisions contained in the 2002 SSC, we must consider the "IMPORTANT" provision along with the "AWARD" provision and the "F.O.B. DESTINATION/DEPARTMENT PAVER" provision cited by DGS.

While we agree with Clairton Slag that the "IMPORTANT" provision must be considered as part of the 2002 SSC, we do not agree that this provision alone controls the standard by which vendor selection for purchases are to be made on this multiple award contract. Specifically, we note that this "IMPORTANT" provision states only that the "F.O.B. Source Cost/Ton" is to be used to determine the contractor that will be awarded the purchase order, but does not state that this consideration is to be the sole or exclusive factor that may be considered in selecting same. Hence, we do not read the literal language of this provision to be in conflict with the subsequent "AWARD" provision or the "F.O.B. DESTINATION/DEPARTMENT PAVER" provision which expressly provide for consideration of factors other than the bid price (or base cost) per ton to be utilized in making individual purchase decisions under the 2002 SSC. Indeed, we agree with DGS that were we to interpret the 2002 SSC as Clairton Slag would have us do, there would be little or no reason for having a multiple award contract at all since no factors other than the lowest bid price per ton could be considered in selecting vendors. Simply put, we find no inherent conflict or ambiguity in the literal terms of the three vendor selection provisions cited above.

In fact, reading these three vendor selection provisions together, we believe that the lowest bid price per ton is one of several factors to be considered by PennDOT in determining

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v. Dep't of Conservation & Natural Res., No. 3797, 2008 WL 509459, at *26-27 (Pa. Bd. Claims, January 4, 2008) (Because all bids in public contracting must be based on the same assumptions to ensure that bids can be fairly compared to each other, published bid specifications which are available to all competitors must form the basis on which the bids are prepared and contracts are made *citing* Ezy Parks v. Larson, 454 A.2d 928, 933 (Pa. 1982)). In the present matter, the Board finds that the 2002 SSC included the "IMPORTANT" provision set forth in DGS's original invitation to bid and in Clairton Slag's signed bid proposal.

the vendor with which to place its purchase orders in any given situation. Specifically, the 2002 SSC provisions, taken as a whole, require the county maintenance manager at PennDOT (when picking-up paving materials at the source/plant) to consider not only the lowest bid price per ton but also the length of haul and dead haul to and from the source to determine the vendor with the "lowest responsible cost" to the Commonwealth and to utilize this vendor under normal circumstances. However, it is also clear that the county maintenance manager may elect to purchase material from another vendor which he determines to be the "most economic source" based on additional considerations such as, but not limited to, differences in haul time due to terrain or urban congestion; length of wait at the source; cooling due to length of haul, crew productivity due to truck availability and haul distance among other factors.

For purchases of material to be delivered to the work site by the vendor, the county maintenance manager will be expected to place orders with the vendor whose prices (which include mileage charges represent the "lowest total cost to the Department." However, in making a vendor selection for these “F.O.B. Destination” purchases, he may also consider factors such as material availability, trucking availability or other factors and circumstances affecting the timely delivery of such material in addition to the cost per ton delivered.

Because we find that the "IMPORTANT" provision, by its literal language, does not state the bid price per ton is the only factor that may be considered, we believe it must be read together with express terms of the "AWARD" provision (regarding “F.O.B. Source” purchases) and the "F.O.B. DESTINATION/DEPARTMENT PAVER" provision (for “F.O.B. Destination” purchases). Additionally, we find that when the "IMPORTANT" provision and the "AWARD" provision are read together, they require that PennDOT will normally purchase asphalt “F.O.B. Source” from the vendor providing the "lowest responsible cost" to the Commonwealth. This is defined by these provisions to be composed of not only the lowest bid price but to include, as well, consideration of the length of the “dead” (empty) haul to the asphalt source from the job

site and the loaded haul to the job site from the asphalt source. Accordingly, based on the language of the 2002 SSC contractor selection provisions for "F.O.B. Source" materials, in order to establish that it is entitled to any portion of the "F.O.B. Source" purchases improperly made from Lane and Golden Eagle, Clairton Slag must establish not only that its bid price per ton was lower than its three other competitors legitimately on the 2002 SSC, but that the combination of its bid price and the distance from its plant to the work site presented a lower overall cost to the Commonwealth than the combination of bid price and distance from the work site than any one of its three regional competitors in Maintenance Districts 11-1 or 12-4 that were properly on the 2002 SSC. [19]

Put another way, we do not read the combination of the "IMPORTANT" provision and the "AWARD" provision to necessarily require PennDOT to purchase asphalt from Clairton Slag in a circumstance where Clairton Slag's bid price may be a handful of pennies per ton less expensive then Lindy's, but Lindy's plant is one mile from the PennDOT work site and Clairton Slag's is 20 miles from the work site. In fact, we read these two provisions to mandate that, absent extraordinary circumstances, quite the opposite would be the norm. That is, by these contract terms, PennDOT would normally make its purchase from the closer plant where the proximity of same to the job site offsets the minor difference in bid price per ton, since PennDOT itself incurs transportation costs in running its trucks between the asphalt source and the work site (which costs include not just the costs of running the truck but cost in men and time on the job waiting for the asphalt material).

Unfortunately, while Clairton Slag has provided the Board with the tonnage improperly purchased from Lane and Golden Eagle and bid price per ton comparisons with Lindy, Better Materials and Marsh Asphalt, it has not provided the Board with any evidence from which we

[19] Lindy, Better Materials and Marsh Asphalt were Clairton Slag's competitors in the 11-1 and 12-4 Maintenance Districts who bid on, and were properly included in, the 2002 SSC.

can ascertain the length of the haul or dead haul between the various work sites and itself and the length of such haul from these three competitors for any of these “F.O.B. Source” purchases. As a result, the Board cannot determine how many of these improper purchases would have properly been allocated to Clairton Slag as providing the "lowest responsible cost" among Clairton Slag and its three local competitors properly on the 2002 SSC. Absent some reasonable means to make such an allocation, we cannot reasonably estimate Clairton Slag's lost profits/damages and must, therefore, decline to award damages for this portion of its claim.

The criteria of the "lowest responsible cost" for “F.O.B. Source” purchases, by taking into account not only the bid price per ton but also the length of haul to and from the work site, not only comports with the literal language of the contract and common sense, but parallels the similar concept contained in the “F.O.B. Destination/Department Paver” provision for selecting vendors to deliver asphalt to the work site. While the language used in this latter provision refers to the criteria as "lowest total cost" it clearly requires a consideration of the bid price per ton and the mileage cost per ton delivered to be the baseline consideration utilized by PennDOT in selecting these vendors. It is only in this category of claim (F.O.B. Destination) where Clairton Slag has provided us with sufficient evidence to provide the Board with a reasonable basis upon which to ascertain the portion of lost sales that should have gone to it. In this case, the evidence supports Clairton Slag’s entitlement to the lost business wrongly sent to Lane and Golden Eagle in only three instances totaling 2,451 tons and resulting in $16,600.87 of lost profits on these three purchases.

In this second group (F.O.B. Destination/Department Paver) orders were improperly placed with Lane and Golden Eagle that breached the 2002 SSC and should have been placed with Clairton Slag. To identify these three instances, Mr. Schaefer reviewed MORIS reports, foremen’s logs of delivered orders and straight line road diagrams from PennDOT (if necessary) to locate the sites to which these materials were delivered. He then drove these routes to the job

site from Clairton Slag's plant and the other vendors' plants. Using these distances, he calculated each vendor's total cost to PennDOT for the materials delivered (bid price per ton and hauling costs). Mr. Schaefer found Clairton Slag's total cost to PennDOT to be the lowest on three purchase orders. In these instances, Clairton Slag presented ample evidence to establish that two of the orders given to Lane (for Sugar Run Road at 924 tons and Taylor Run Road at 326 tons) and one order given to Golden Eagle (for Justabout Road at 1201 tons), should have been ordered from Clairton Slag as providing PennDOT the lowest total cost after Lane's and Golden Eagle's prices were removed from consideration. (P-Ex. 49). Mr. Schaefer then added these amounts for a total tonnage of 2,451 in this second group. DGS offered no credible, conflicting evidence to counter these tonnage calculations or the profit analysis performed by Clairton Slag on this tonnage. Here, the Board found Mr. Schaefer's analysis to be acceptable, and Clairton Slag's calculations to accurately reflect what the contract required to allocate these "F.O.B. Destination/Department Paver" purchases to Clairton Slag.[20]

In sum, we agree with DGS that we have no personal jurisdiction over it with respect to Clairton Slag's claim for lost business improperly allocated to competing vendors that were properly included in the 2002 SSC because Clairton Slag failed to first present this issue to DGS, thereby failing to exhaust its administrative remedy as required by 62 Pa.C.S. §1712.1. Further, while we agree with Clairton Slag that the Commonwealth breached the 2002 SSC by reason of its off-contract purchases from Lane and Golden Eagle in 2002 and 2003, Clairton Slag has failed to provide us with sufficient evidence to ascertain what portion of the inappropriate purchases made "F.O.B Source" should have been allocated to it. This failure results from

[20] In doing these three calculations for the "F.O.B. destination" material, Clairton Slag shows that it was entirely capable of providing the Board with evidence of the haul length among the competing asphalt source plants of Lindy, Better Materials and Marsh Asphalt that should have been considered and provided to the Board in support of its "F.O.B. Source" allocation calculations. This undercuts, as a matter of fact, any complaint by Clairton Slag that PennDOT's failure to record purchase "details" as required by the SSC made adequate proof of damages not reasonably possible or exclusively within the Commonwealth's control. Additionally, we are presented with no evidence that PennDOT was asked for, but withheld, information regarding its trucking costs for picking up asphalt at the various plants.

Clairton Slag's omission of any evidence as to the length of haul between the PennDOT work site and Clairton Slag's plant in comparison to the PennDOT work site and the source plants of Lindy, Better Materials and Marsh Asphalt (its competitors properly on the 2002 SSC in Maintenance Districts 11-1 and 12-4) for this category of purchases. In contrast, Clairton Slag did demonstrate the proper allocation of lost business among itself and its competitors properly on the 2002 SSC in the instance of the three improper "F.O.B. Destination/Department Paver" purchases from Lane and Golden Eagle which it identified. Clairton Slag also adequately established loss profits of $16,600.87 on these three "F.O.B. Destination/Department Paver" purchases. Accordingly, the Board finds for judgment in favor of Clairton Slag on its claims in the total amount of $16,600.87 plus prejudgment interest in the amount of $6,787.30.

With regard to ancillary relief such as attorney's fee, penalties and/or costs, we believe the circumstances of this case fully justify a finding that DGS acted in an inconsistent and arbitrary manner in the matter before us. Among other things, we note DGS's disparate treatment of Clairton Slag (as a late bidder in 2001) when compared to the treatment of the seven Non-Bidding Vendors in 2002, and the multiple instances of asphalt purchases made outside the 2002 SSC in breach of that contract and in violation of the Procurement Code under the guise of an inappropriate and ineffective attempt to selectively renew the 2001 SSC contrary to the terms of its own renewal provision. For these reasons we find it necessary to award Clairton Slag both attorney's fees and costs. We will, nevertheless, decline to award penalty fees as we find DGS's actions, although misguided, to be motivated by a sincere desire to save the Commonwealth additional expense rather than exhibiting a vexatious quality justifying the more severe measure of an additional penalty.

As a result of the foregoing awards of costs and attorney's fees, Clairton Slag will be directed to submit to the Board an itemized listing of its costs incurred for the portion of its claim respecting the First Issue before the Board. This itemization shall separately identify and detail

attorney's fees, but may also include all other reasonable costs incurred, including the cost of experts, travel cost (for witnesses, attorneys, consultants, etc.), copying and duplication costs and the like relating to the First Issue. These itemizations shall be submitted to the Board within 20 days of the exit date of this Order. DGS shall then have 20 days from the submission of such itemized list of costs and fees to respond. In the event DGS contests any of the costs or fees and the parties are unable to stipulate to agreed upon amounts within 40 days from the exit date of this Order, the Board will hold an evidentiary hearing on same and issue a supplemental order respecting these costs and fees only.

In order to avoid any question as to the final nature of this Order, the Board hereby makes an express determination that an immediate appeal of this Order, as it pertains to:

A. The Board's dismissal of Clairton Slag's Second Issue;

B. The Board's grant of damages and interest to Clairton Slag for its claim on the First Issue; and

C. The Board's determination that Clairton Slag is entitled to attorney's fees and costs (but not penalty fees) with regard to its claim on the First Issue

would facilitate resolution of the entire case. We do so in acknowledgment that should our grant of damages be overturned or modified or our determinations as to entitlement to attorney's fees and costs be overturned or modified, the determination of the amount of said attorney's fees and costs becomes moot. See Pa. R.A.P. § 341; see also In re Appeal of Puricelli, 709 A.2d 1003, 1005-1007 (Pa. Cmwlth. 1998).

ORDER

AND NOW, this 6th day of February, 2009, it is hereby **ORDERED** and **DECREED** that final judgment be rendered in favor of the Plaintiff, Clairton Slag, Inc., and against Defendant, Commonwealth of Pennsylvania, Department of General Services, in the amount of $23,388.17 for the First Issue presented in its claim. This sum consists of $16,600.87 in lost profits and $6,787.30 in pre-judgment interest. Clairton Slag is also awarded post-judgment interest on the outstanding judgment at the statutory rate for judgments (6% per annum) beginning on the exit date of this Order and continuing until the judgment is paid in full. In addition, Clairton Slag is hereby awarded reasonable attorney's fees and costs respecting its claim made on the First Issue, the dollar amounts of which shall be determined as set forth in this Opinion. Clairton Slag's claim respecting the Second Issue is **DISMISSED** for lack of Board jurisdiction.

BOARD OF CLAIMS

OPINION SIGNED

_____
Jeffrey F. Smith
Chief Administrative Judge

_____
Harry G. Gamble, P.E.
Engineer Member

_____
Andrew Sislo
Citizen Member