COMMONWEALTH OF PENNSYLVANIA

BRYAN MECHANICAL, INC.	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF GENERAL SERVICES	:	DOCKET NO. 3699

FINDINGS OF FACT

1. Plaintiff, Bryan Mechanical, Inc. (hereinafter "BMI"), is a Pennsylvania corporation with offices in Allegheny County, Pennsylvania. BMI is a contracting company primarily engaged in the business of installing mechanical and plumbing systems. (Stipulation of Fact 1).

2. Defendant, Commonwealth of Pennsylvania, Department of General Services (hereinafter "DGS" or the "Department"), is a Commonwealth agency with a contract mailing address of 18th and Herr Streets, Harrisburg, Pennsylvania, 17125. (Stipulation of Fact 2).

3. On or about January 25, 2002, BMI and DGS entered into Contract No. DGS 800-235.33, Phase 2 ("Contract") relating to the plumbing work on construction of a chemistry building on the University Park campus of the Pennsylvania State University in Centre County, Pennsylvania ("Project"). (Stipulation of Fact 3; Plaintiff's Exhibit 2, hereinafter "P-2").

4. This plumbing Contract was awarded for the sum of $3,637,000.00. (Ex. P-2).

5. The Contract was a fixed-price, competitive-bid "specifications" contract. (T.I 147; T.II 33-34; Ex. P-2, P-3, P-14, P-15).

6. In addition, during Phase 2 on the Project, DGS awarded contracts for general construction, electrical construction and HVAC construction on this same chemistry building. (Ex. P-1A).

A. Laboratory and Sanitary Vent Piping

7. The Contract required BMI to perform its scope of work in accordance with the specifications, drawings and diagrams prepared by DGS. The Contract did not permit BMI to supplement or modify the Department's design, and did not require BMI to perform any design work. (T.I 33, 35, 39-40, 167-68; T.II 119-21; Ex. P-1, P-2, P-3, P-14, P-15).

8. The Department had retained another plumbing contractor during Phase 1 of the construction to install certain plumbing components in the basement of the chemistry building. (T.I 104).

9. BMI was the only plumbing contractor on Phase 2 of the Project which involved additional work in the basement and on the remaining floors 1-5. (Ex. P-1, P-2, P-3, P-14, P-15; Board Finding).

10. Laboratory vent ("LV") and sanitary vent ("SV") piping are used to vent gasses from the laboratory waste and sanitary waste drain systems. The LV and SV systems are gravity-fed systems, and the Project's specifications required all LV and SV piping be installed with a minimum positive slope. (T.I 62-64, 164-65; Ex. P-15).

11. The Project's floor plan drawings (the entire P.2 series of drawings - P2.01 through P2.72) depict the location of SV piping on the first through fifth floors of the building, but do not depict the location of SV piping in the basement. (T.I 38, 64, 80-82, 166-67; T.II 44; Ex. P-14).

12. The Project's floor plan drawings (the entire P.2 series of drawings - P2.01 through P2.72) depict the location of LV piping on the fifth floor of the building, but do not depict the location of LV piping in the basement or on the first through fourth floors. (T.I 38, 64, 80-2, 166-67, T.II 44; Ex. P-14).

13. It is undisputed that the drawings issued to bidders did not show the routing and sizes of all piping on the floor plans. The routing and sizes of LV piping was not shown on the floor plans for the basement and first through fourth floors. The routing and sizes of SV piping was not shown on the floor plans for the basement. (T.I 166-67, T.II 96-100, 135-136).

14. BMI asserts that the cost of installing the LV and SV piping, which was not shown fully on the floor plans, was not included in BMI's bid. However, BMI did not provide the Board with any of its bid workup papers, job cost estimates, calculations or documents to support this assertion. (T.I 81-82, T.II 133-136; Board Finding).

15. General Note No. 1 to the Project's floor plan drawings (P2.01, P2.02) states:

> Location of laboratory and building service piping provides for routing of DCW, DHWS, DHWR, DIS, DIR, NG, N2, HV, CA, LW, LV, SW and SV piping for each individual floor. Refer to the P5 series drawings for pipe connection sizes. Contractor shall field coordinate the location of all piping with the work of other trades and the building structure.

(T.I 176; Ex. P-14).

16. LV and SV piping do not appear on P2.01, the basement level floor plan; however, as indicated above, they are mentioned in the first General Note on that floor plan. (Ex. P-14; Board Finding).

17. The plan drawings and specifications do reflect the need for LV and SV piping on this Project in the riser diagrams (the P5 series of plan drawings), particularly drawings, P5.11, P5.31, P5.32 and P5.33 and in the Contract specifications. (T.II 21-29; Ex. P-14, P-15; Board Finding).

18. Several riser diagrams and drawings addressed the LV and SV systems. The P5 series of drawings showed the complete laboratory waste/vent (LW and LV) system in riser format (P5.31, P5.32 and P5.33) for all floors with all vent piping. The vent piping for the basement through the fourth floor was shown on the riser diagram. Drawing P5.31 showed typical details for the laboratory cup sink and floor drain layouts with the vent piping identified for each. Drawing P5.11 showed the sanitary waste/vent system in riser format for all floors including all vent piping required for the basement. (Ex. P-14; Board Finding).

19. In addition, each plumbing floor plan drawing also contained the following under the General Notes:

> 4. Refer to drawing 5.11 for sanitary riser diagram
> 6. Refer to drawings 5.31, 5.32 and 5.33 for lab waste riser diagram.

(Defendant's Exhibit DGS-4, hereinafter D-4, P-14; Board Finding).

20. Drawing P5.11 shows a "Sanitary Riser Diagram." This drawing provides an elevation view of the sanitary waste and sanitary vent piping system, even though it is not drawn to scale and could not be readily used to determine routing. (T.I 115-116, T.II 123-135; Ex. P-14; Board Finding).

21. Drawings P5.31, P5.32 and P5.33 show "Lab Waste Riser Diagrams." These drawings provide an elevation view of the lab waste and lab vent piping system, even though it is not drawn to scale and could not be readily used to determine routing. (T.I 115-116, T.II 123-135; Ex. P-14; Board Finding).

22. Riser diagrams are supplemental contract documents that are not necessarily provided on every project. However, riser diagrams were provided in this case and were intended to show additional details about the plumbing systems shown on the floor plans. (T.I 164, 216; Ex. P-14; Board Finding).

23. It is not contested that the plumbing and mechanical drawings for the Project were very poor. (T.I 59; T.II 31, 67).

24. The need to redesign some of the plumbing and mechanical systems, especially those going above the ceiling, resulted in some 150 change orders for the Project's mechanicals. (T.II 52).

25. The Department was aware that routing information for all piping was incomplete prior to issuing the drawings to bidders. During one of its final reviews of the Project's drawings, it made the following comment on the plumbing drawings:

> General Note (all plumbing floor plans) - The routing and sizes of all piping should be shown on the floor plans. As it is shown now, it would be very difficult for a contractor to do a material takeoff. See the marked up drawing for suggestions how to do this. Also, sections should be provided (showing all ductwork and piping) wherever it appears that space may be limited.

(Ex. P-39, p. 2 of 5, Note 24)

26. The Contract specifications provided that the run and arrangements of piping shall be approximately as shown on the drawings. (Ex. P-49 at 49.56; T.I 168).

27. The initial bid documents (which included specifications and plan drawings for the plumbing work) were issued on October 17, 2001. (Ex. P-1A, P-2, P-3, P-14, P-15).

28. After the initial bid documents were issued, the Department notified bidders that it intended to modify the design of the Project and revise the specifications and drawings originally provided to bidders. (T.I 144).

29. On Wednesday, November 21, 2001, the Department issued Bulletin No. 2, a document containing a number of changes to the specifications and drawings of the original Contract plans. (Ex. P-1B).

30. Instructions with the bid package required that questions by a bidder must be received ten days or more before the bid opening date. (T.I 55; Ex. P-1A).

31. Bids were due December 5, 2001, which meant that any inquiries of the Department for clarification had to be submitted no later than Sunday, November 25, 2001. (T.I 56-57; Ex. P-1A).

32. Bulletin No. 2 was not received by BMI until after November 21, 2001. BMI was closed for the Thanksgiving holiday on Thursday and Friday, November 22 and 23, 2001. (T.I 56-57).

33. Bulletin No. 2 contains a lengthy list of responses to inquiries from bidders regarding the original bid documents. Bulletin No. 2 does not contain any inquiry or response regarding the absence of routing information for LV and SV piping. (T.I 59, 103).

34. Bulletin No. 2 did not make any changes to the LV or SV piping systems in the specifications or to drawings P5.11, P5.31-33 (the drawings which showed these vent systems). (T.II 159; Ex. P-1A, P-1B, P-14, P-15; Board Finding).

35. Daniel McKay, the Project manager for SSM Industries, the parent corporation of BMI, concluded that no vent piping was shown on plan view drawings when he was doing the shop drawings after BMI's contract was executed, and he immediately started writing RFIs. (T.I 6-7, 33).

36. On or about March 8, 2002, BMI issued Request for Information ("RFI") No. 28 to the Project architect, inquiring whether vent piping was required in the basement or the first through fourth floors of the building. (Stipulation of Fact 8; Ex. P-45; Board Finding).

37. That same day, the Project's architect design team (also referred to herein as the "Professional") responded by referring BMI to drawing P5.11, the sanitary waste riser diagram, stating that "All vent piping is shown." (Stipulation of Fact 9; Ex. P-45; Board Finding).

38. On or about May 28, 2002, BMI issued RFI No. 97 to the Project architect inquiring whether certain SV piping was required in the basement of the building. (Stipulation of Fact 10; Ex. P-45; Board Finding).

39. On June 14, 2002, the Project Professional responded by again referring BMI to drawing P5.11, which showed a connection at the riser for SV piping in the basement of the building. (Stipulation of Fact 11; Ex. P-46; Board Finding).

40. On March 17, 2003, BMI submitted a Request for Change Order for the LV piping work reflected in the Project architect's response to RFI No. 28. (Stipulation of Fact 12).

41. On March 26, 2003, BMI submitted a Request for Change Order for the SV piping work reflected in the Project architect's response to RFI No. 97. (Stipulation of Fact 13).

42. On June 11, 2003, the Project Professional denied both change order requests, taking the position that the work was reflected in the Contract documents. (Stipulation of Fact 14).

43. The 2000 International Plumbing Code was in effect at the time the Project was bid and was applicable to this Project. It provides in section 901.2.1 that: "Every trap and trapped fixture shall be vented . . . ." All sinks, drains and fixtures here in question were trapped. (T.I 122-124, T.II 149-51; Ex. P-14, P-15, D-1, D-4, D-5; Board Finding).

44. BMI or any other plumbing contractor would be expected to know that venting was required for the type of lab and sanitary waste piping systems on this Project. (T.II 99-103; Ex. D-1, D-4, D-5; Board Finding).

45. It is reasonable to expect a contractor to seek clarification from the owner or project professional if it has questions about whether or not the work it is installing complies with all applicable codes. (T.II 149-151; Ex. P-3, P-15, D-1; Board Finding).

46. BMI's witnesses, particularly Dan McKay and John Sirc (Plaintiff's expert), offered testimony to the effect that drawings P5.11 (Sanitary Riser Diagram) and P5.31-P5.33

(Lab Waste Riser Diagrams) did not show any indication that vent piping was intended on all floors for the sanitary or lab waste systems. We find this testimony evasive and wholly lacking in credibility in light of a clear depiction of vent piping (by dotted line) on these riser diagrams and Mr. Sirc's response to Plaintiff's own counsel that P5.31 is one of the lab waste and vent riser diagrams. (T.I 114-117, 177, 202-208, 215-216; Ex. P-14; Board Finding).

47. Plaintiff's expert asserted that when a riser diagram shows a piping system which is inconsistent with the rest of the drawings and the floor plans don't show such a system, it is reasonable for a contractor to assume that the system was not a part of its scope of work. The Board does not find this testimony credible, nor does it find it reasonable to ignore an obvious inconsistency between floor plans and riser diagrams for the same venting systems in the same set of plan drawings. (T.I 215-16; Ex. P-14; Board Finding).

48. The plumbing specifications and drawings for this Project, when viewed as a whole, reflect the intent that lab vent and sanitary vent piping were to be included on every floor in BMI's contract work. (Ex. P-14, P-15; F.O.F. 7-48; Board Finding).

49. The bid documents for this Project, which later became the Contract documents, when read as a whole, would put a plumbing contractor, including BMI, on notice that SV and LV piping for all floors was included in the Contract work when it prepared its bid for this Project. (Ex. P-1A, P-1B, P-2, P-3, P-14, P-15; F.O.F. 7-48; Board Finding).

50. BMI knew or should have known at the time it placed its bid that some type of venting was required for all the trapped sinks, drains, and fixtures on every floor. (Ex. P-14, P-15; F.O.F. 7-49; Board Finding).

51. The lack of SV and LV piping on all the floor plans was a material, obvious and glaring error or omission in the Contract drawings for this Project. BMI knew or should have known this. (Ex. P-14, P-15; F.O.F. 7-50; Board Finding).

52. The obvious and glaring inconsistencies between the floor plans and the riser diagrams in the Contract drawings respecting SV and LV systems was present in the initial publication of the bid documents in October 2001. Bulletin #2 changed nothing with regard to the sanitary venting or the lab venting in the riser diagrams. BMI had ample opportunity to inquire regarding inconsistencies in the drawings concerning the vent piping prior to the award of the Contract, but failed to do so. (T.I 118-119; Ex. P-1B, P-14; F.O.F 7-51; Board Finding).

53. Given the inconsistencies between the floor plans and the riser diagrams respecting the sanitary venting and lab venting systems present in the original bid documents published in October 2001, we do not find credible BMI's contention that it made no sense to submit questions on the P5 series of drawings until after the issuance of Bulletin #2. These types of inconsistencies present in the initial bid documents are exactly the type of issues that the contractor should address promptly upon receipt of bid documents so they may be addressed in subsequent bulletins in a timely matter before bids are due. Accordingly, we find that BMI was in no way precluded from submitting questions regarding the obvious and glaring inconsistencies

regarding the SV and LV piping in the bid documents and plan drawings. (T.I 118-119; Ex. P-1B, P-14; F.O.F 7-52; Board Finding).

54. Plaintiff's own expert, upon cross examination, testified that if the contractor is aware of material conflicts in the plans and the time frame permits, the contractor has an obligation to ask questions for clarification. (T.I 208-212).

55. Plaintiff's own expert also acknowledged that he had exposure to this Project prior to the time he was retained by BMI (as an expert) as an employee of Joseph Davis (another mechanical contractor); that he participated in formulating bids for the heating and air conditioning on the Project here at issue for Joseph Davis; that Joseph Davis was going to bid on the plumbing as well, but when he saw the condition of the drawings even after the bulletins were issued and the time frame to put together a bid he indicated that Joseph Davis opted not to bid on the plumbing. BMI had the same option not to bid on the Contract for this Project when the bulletins failed to address the obvious and glaring inconsistencies regarding the SV and LV piping systems present in the drawings. (T.I 143-143; Board Finding).

56. BMI claims that it incurred costs (with markup) of $378,421.89 related to the installation of LV piping not shown on the floor plans for the basement or floors one through four. (T.I 191-200; Ex. P-49).

57. BMI claims that it incurred costs (with markup) of $23,300.42 related to the installation of SV piping not shown on the basement floor plans. (T.I 200; Ex. P-49).

58. BMI's proof of damages (i.e. costs with markup) consisted solely of testimony and report by Plaintiff's expert, John Sirc. Mr. Sirc testified that he calculated these damages by starting with a breakdown of additional items, sizes and quantities used by BMI to install the LV and SV systems which he claims came from BMI (from either the takeoff or the estimate that BMI prepared to determine these material quantities); he then utilized RS Means data to extrapolate the unit cost and unit labor associated with these quantities to arrive at the extra man hours claimed for this work and the wage rates to be applied to same. The only exception to this procedure that Mr. Sirc identified was that he utilized his experience to estimate the labor costs for the layout and coordination aspects of the claim. (T.I 191-200; Board Finding).

59. Although the actual materials used are supposedly derived from BMI's records, BMI has not provided the Board with any documentation to verify the use of these materials or quantities such as a job cost report or other documentation for the actual quantity or cost of materials incurred on this or any other aspect of the Project. Moreover, the labor rates and labor figures provided in the damage calculation by Mr. Sirc are all estimates, as BMI also failed to provide any records of the actual number of man hours worked or labor costs incurred on this or any other aspect of the Project such as those typically available from a job cost report, labor report or similar documentation typically utilized by contractors performing this type of work. As noted above, BMI also failed to provide the Board with its bid workup papers, job cost estimate or other documentation of its anticipated costs in performing its job on this Project. (T.I 191-202; Ex. P-49; F.O.F. 56-58; Board Finding).

60. Daniel McKay, who functioned as a project planner and manager for BMI, and who first became involved with this Project by recapping and reviewing the bid for completeness after the estimators had performed the original materials takeoff from the plans, was uncertain whether BMI's bid included costs for any of the vent piping when questioned at hearing. (T.I 48-52, 128-129).

61. Plaintiff has failed to establish with reasonable certainty that it actually incurred substantial damages resulting from the alleged breach by DGS with regard to DGS's failure to show the LV and SV venting systems on the Project plans and drawings. (T.I 191-202; Ex. P-49; F.O.F. 56-60; Board Finding).

B. Change Order Nos. 18 to 22

62. During the course of the Project, the Department requested that BMI perform additional and extra work, and provide additional and extra material, that DGS concedes was not included within the original scope of work under the Contract. BMI completed this additional and extra work in a workman-like fashion and in accordance with generally-accepted standards in the construction industry. This work was accepted by the Department. (Stipulation of Fact 4).

63. The Department issued change orders reflecting this additional and extra work, including Change Order Nos. 18 to 22, by which the Department acknowledged that BMI was entitled to, at a minimum, an additional $273,882.79 in compensation. (Stipulation of Fact 5).

64. Change Order Nos. 18 to 22 were necessary because errors acknowledged by the Professional required field coordination and modification of the original design. (T.I 70, 77-78).

65. Change Order Nos. 18 to 22, as originally submitted by BMI, requested additional compensation in the amount of $364,911.21, allocated as follows:

Change Order No.	**Amount**
18	$98,640.71
19	$68,325.26
20	$82,700.95
21	$47,264.18
22	$67,980.11
TOTAL	**$364,911.21**

(Stipulation of Fact 6).

66. The difference between the amount requested by BMI in Change Order Nos. 18 to 22, and the amount recognized by the Department was originally $91,028.42. (Stipulation of Fact 7; Board Finding).

67. The Department subsequently issued an additional payment to BMI in the amount of $1,970.21, reducing the difference between the amount requested by BMI for Change Order Nos. 18 to 22 and the amount recognized by the Department to $89,058.21. (T.I 219-21).

68. For each change order request it submitted on the Project, BMI utilized labor rates published by the Mechanical Contractors Association of America ("MCAA") to calculate the costs of the additional and extra labor required to complete the additional and extra work. (T.I 14-15).

69. The MCAA labor rates provide guidelines that allow a contractor to adjust the rates upward or downward to account for the specific conditions and circumstances of each project. (T.I 16-18).

70. Early on in this Project, the Department had a dispute with BMI regarding the labor rates BMI used in Change Order No. 1. (T.I 22-23).

71. BMI wished to utilize the full MCAA labor rate for Change Order No. 1, and DGS insisted on a reduced rate. The Professional on the Project indicated that it was used to seeing the MCAA rate reduced by a factor of 0.7 for contractors bidding this type of work in the Philadelphia area. BMI responded that this was change order work, which was generally more costly to perform than original bid work. In addition, it asserted that work in State College was more remote (requiring more travel and cost to its laborers) and the labor pool was smaller (and less competitive) than in the Philadelphia area, thereby justifying the full MCAA rate rather than a reduced rate. In the backup materials respecting DGS's decision to reduce the value of Change Order No. 1 (e.g. 10/9/02 memo from Bob Dick) the Professional also asserts that the costs requested by BMI are in excess of BMI's original schedule of values submitted for the Project but does not document same. (T.I 20-23; Ex. P-16).

72. At a hearing on Change Order No. 1, BMI agreed to resolve the disputed labor rate applicable to Change Order No. 1, by applying a 0.7 factor to the full MCAA labor rate for that change order so the dispute could be resolved that day. BMI witnesses testified that this agreement to utilize a reduced MCAA labor rate applied to Change Order No. 1 only. (T.I 19-23; Ex. P-16).

73. The need to redesign some of the plumbing and mechanical systems, especially those going above the ceiling, resulted in some 150 change orders on the Project's mechanicals. (T.II 52).

74. With the exception of Change Order No. 1 and Change Order Nos. 18 to 22, all of the change orders issued by the Department to BMI on this Project utilized full MCAA labor rates to determine the amount of additional compensation to which BMI was entitled. (T.I 18-19, 23-26; Ex. P-17 through P-32).

75. Every deductive change order for this Project that entitled the Department to a credit against BMI's contract price was submitted by BMI and accepted by the Department

utilizing full MCAA labor rates to determine the amount of the credit to which the Department was entitled. (T.I 18).

76. The Department paid BMI only 70% of the labor rates utilized by BMI to calculate the amount of compensation due BMI under Change Order Nos. 18 to 22. (T.I 31).

77. As justification for its reduction of labor rates for Change Order Nos. 18 to 22, DGS apparently maintained that the reduced MCAA labor rates negotiated for Change Order No. 1 were applicable to Change Order Nos. 18-22. (T.I 20-23; T.II 8-18, Ex. P-16; Board Finding).

78. DGS's position that the reduced MCAA labor rate negotiated for Change Order No. 1 were applicable to Change Order Nos. 18-22 appears to have originated with Daniel Weinzierl, DGS construction regional director for the Central Region. Mr. Weinzierl was present at the claim hearing for Change Order No. 1. (Ex. P-16, D-2; Board Finding).

79. The Professional for the Project reviewed Change Order Nos. 18 to 22 as submitted by BMI and issued a "guesstimate" of the cost of the work. In each case, this "guesstimate" generally concurred with BMI's cost estimates:

Change Order	**BMI**	**Professional before application of .7 to LR**	**Department**
18	$98,640.71	$98,000.00	$74,985.84
19	$68,325.26	$70,000.00	$50,231.20
20	$82,700.95	$80,000.00	$61,261.08
21	$47,264.18	$50,000.00	$35,319.42
22	$67,980.11	$68,000.00	$52,085.25

(T.I 27-32; Ex. P-9—P-13).

80. DGS did not offer any direct testimony at hearing as to why it treated payment for Change Order Nos. 18 to 22 differently from other change orders where it paid full MCAA labor rates. (Board Finding).

81. Unlike Change Order No. 1, the Professional's "guesstimate" of costs for BMI's Change Order Nos. 18-22 appear to be in substantial agreement with BMI's costs as requested in its change orders. However, Mr. Weinzierl directed the Professional to recalculate its cost estimate by applying a 0.7 factor to the labor which resulted in a reduced recommendation from the Professional which was then noted in Section 3 of each of these change orders. (Ex. P-9, P-10, P-11, P-12, P-22; Board Finding).

82. Mr. Thomas Szymczak was the witness for BMI who asserted that he was at the claim hearing for Change Order No. 1 and that the agreement to utilize a reduced MCAA labor rate for Change Order No. 1 applied only to Change Order No. 1 and not to subsequent change orders. (T.I 19-23).

83. Edward Pedrazzani, who was a construction inspection supervisor for DGS and present at the claim hearing, did not recall whether there was any discussion at the hearing for Change Order No. 1 about whether the 70% rate would be applied to all future change orders on the Project. (T.II 12-13).

84. DGS did introduce testimony by Mr. Pedrazzani who testified that Mr. Szymczak was not at the claim hearing for Change Order No. 1. DGS also utilized Mr. Pedrazzani to introduce Exhibit D-2, the formal minutes of the claim hearing for Change Order No. 1, which included a sign-in sheet for everyone present at the claim hearing. Mr. Szymczak was not noted as being present on the seating chart for the claim hearing. (T.II 7-12; Ex. D-2).

85. Exhibit D-2, minutes of the claim hearing between BMI and DGS for Change Order No. 1, was admitted for the limited purpose of rebutting Mr. Szymczak's testimony that he was present at the claim hearing and knew first hand what was discussed therein regarding the application of the 0.7 factor to the MCAA labor rates. (T.II 9-11).

86. The Board finds that BMI did not agree at the claim hearing on Change Order No. 1 to apply a 0.7 factor to its MCAA labor rates in subsequent change orders. This finding is based primarily on the fact that DGS itself did not require application of a 0.7 factor to the MCAA rates used in any of the dozen or more other change orders submitted by BMI except for Change Order Nos. 18-22, and on the finding that the Professional, which was also represented at the hearing for Change Order No. 1, did not apply this reduced rate until directed to do so by Mr. Weinzierl. Accordingly, we find DGS's justification for reducing the amount for Change Order Nos. 18-22, as submitted by BMI, to be without reason or basis in fact. (Ex. P-4 through P-8, P-17 through P-32; F.O.F. 62-85; Board Finding).

87. The Department does not dispute that the additional and extra work reflected in Change Order Nos. 18 to 22 was completed, that the material quantities were accurate, or that the work was performed in a reasonable and acceptable manner. DGS's representatives testified that BMI's workmanship was excellent with respect thereto. (T.I 79, T.II 67).

88. The Contract, at section 10.3, provides that the cost of a change order is to be determined in one of the following ways:

> A. By a detailed cost breakdown properly itemized (the breakdown shall include size, quantity, type, subcontractors, etc., and may include a maximum of fifteen percent (15%) markup to labor costs for overhead and profit and a maximum of ten percent (10%) markup to subcontractors, material and equipment costs for overhead and profit);

B. By unit prices stated in the bid proposal, specifications, or from prices agreed upon in the contract breakdown sheet; or

C. By force account.

(Ex. P-3, p. 34).

89. The Contract at section 10.6 provides, in part, that:

> [I]f none of the methods set forth in the "Change Orders" section is utilized, the Department may direct the Contractor to proceed with the Work involved on a time and material (force account) basis.

(Ex. P-3, p. 35).

90. There was no evidence that DGS directed BMI to proceed with the work for Change Order Nos. 18-22 on a force account basis. (Board Finding).

91. The Contract at section 10.5 provides the following:

> If the Department and the Contractor cannot agree as to whether the cost or credit to the Department resulting from a change in the Work, said cost or credit shall be determined by the Department. The Contractor will proceed with the change order Work under this Article if directed by the Department, and the cost may be submitted by the Contractor to the Department when the Work is completed for a re-evaluation by the Department.

(Ex. P-3).

92. BMI has exhausted its administrative remedies with respect to its claims for additional compensation for the work reflected in Change Order Nos. 18 through 22 and in the Project architect's response to RFI Nos. 28 and 97. (Stipulation of Fact 15).

93. BMI has established that the only justification asserted by DGS for reducing the amount of Change Order Nos. 18-22 has no merit (i.e. BMI did not agree to apply the 0.7 factor to its MCAA labor rates in all subsequent change orders). (Ex. P-4 through P-8, P-17 through P-32; F.O.F. 62-92; Board Finding).

94. DGS presented no credible evidence that BMI's labor rates as requested in these Change Order Nos. 18-22 were materially in excess of BMI's unit prices stated in its bid proposal specifications or from prices agreed upon in the contract breakdown sheet. No bid proposal specifications or contract price breakdown sheets were presented into evidence. (F.O.F. 62-93; Board Finding).

95. Although BMI's claim for the additional sum of $89,058.21 for Change Order Nos. 18-22 is also based on standard industry labor rates (MCAA rates), unlike its claim for additional LV and SV piping work, the quantities and cost estimates for Change Order Nos. 18-22 were confirmed as reasonable and appropriate by DGS's own Professional on the Project (until that Professional was directed by Mr. Weinzierl to reduce the labor portion of its estimate by a factor of 0.7). Under the circumstances and for the relatively small dollar amount involved, the Board finds that BMI has provided sufficient evidence to establish with reasonable certainty that it did incur an additional $89,058.21 in actual cost in connection with its performance of Change Order Nos. 18-22. (Ex. P-4 through P-8; F.O.F. 62-94; Board Finding).

96. Having found no legitimate reason or basis in fact for Mr. Weinzierl's directive to the Professional to reduce the labor rate utilized in its estimate of cost for Change Order Nos. 18-22, or for DGS's decision to reduce the amounts requested by BMI for the work to be performed pursuant to Change Order Nos. 18-22, we find this action by DGS to be arbitrary and to constitute a lack of good faith and fair-dealing on the part of DGS in its review and determination of the cost of these change orders and the implementation and performance of this Contract. We do not, however, find these actions to be vexatious nor intended to annoy or irritate BMI. (F.O.F. 62-95; Board Finding).

97. No evidence of the date of the filing of the claim with the contracting officer on Change Order Nos. 18-22 was presented at the hearing. (Board Finding).

98. DGS held a hearing on BMI's formal claim with respect to Change Order Nos. 18-22 on January 6, 2004. This hearing date establishes the closest date presented into evidence by which a claim respecting Change Order Nos. 18-22 was filed with a DGS contracting officer. Accordingly January 6, 2004, will be used for purposes of commencing prejudgment interest calculations. (Plaintiff's Amended Claim ¶14 and Ex. B, Defendant's Answer ¶14; Board Finding).

CONCLUSIONS OF LAW

1. The Board of Claims has exclusive jurisdiction to hear and determine this matter as a claim against the Commonwealth of Pennsylvania, Department of General Services, arising from a contract entered into with the Commonwealth. Commonwealth Procurement Code, 62 Pa.C.S.A §§ 1705-1751.

2. The Board of Claims has jurisdiction over the parties as well as the subject matter over the claim asserted by BMI. Id.

3. 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. Com., Dept. of Transportation v. Burrell Const. & Supply Co., Inc., 534 A.2d 585, 586 (Pa. Cmwlth. 1987).

4. 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 School District v. Edward J. Meloney, Inc., 901 A.2d 1055, 1059 (Pa. Super. 2006).

5. Where the contract is free from ambiguity, the parties' intent is to be determined from the express language of the contract. Id.

6. All parts of the Contract between BMI and DGS must be considered in construing the intent of same. This includes the specifications, plans and drawings incorporated therein. Ex. P-3 (General Conditions §§ 1.8); Montgomery County v. Com., Department of Commerce, 434 A.2d 1316, 1319 (Pa. Cmwlth. 1981).

7. Where a contract is ambiguous, Pennsylvania case law and the rule of contra proforentem requires the ambiguity be construed against the drafter (i.e. DGS in this case) and in favor of the other party's interpretation if reasonable. Com., Dept. of Transportation v. Semanderes, 531 A.2d 815, 818 (Pa. Cmwlth. 1987).

8. However, Pennsylvania courts have created an exception to the general rule of contra proforentem as stated above when a government construction contract contains an obvious, glaring ambiguity or error. In such a case, the private contractor is under a duty to inquire and try to resolve the problem before entering into the contract. Failure to make such an inquiry prevents the contractor from complaining of the ambiguity or error after the contract is signed and problems arise. See e.g., Com., Department of Transportation v. Bracken Construction Co., 457 A.2d 995, 999 (Pa. Cmwlth. 1983); Com., Department of Transportation v. Anjo Construction Co., 487 A.2d 455, 459 (Pa. Cmwlth. 1985) ("Where a contractor discovers an obvious error or discrepancy in the contract, he is obliged to bring the situation to the Commonwealth's attention if he intends to subsequently resolve the issue in his own favor.")

9. Because the Board has found the Contract plans, specifications and drawings, taken as a whole, express the clear intent to provide for LV and SV piping on all floors of the building, and the inconsistencies between the floor plans and the riser diagrams respecting the LV and SV piping to be obvious and glaring errors of significance in the drawings, BMI had a

duty before bidding to bring this inconsistency and omission of the LV/SV piping on the floor plans to DGS's attention. Id.

10. Because BMI failed to bring the omission of the LV and SV piping on some of the floor plans to DGS's attention prior to bidding and contracting, DGS is not liable for payment of the cost of the LV and SV piping which BMI claims that it omitted from its bid. Id.

11. Because the Board finds that the omission of LV and SV piping from some of the Project floor plans was an obvious, glaring and significant error in the drawings; and because the errant floor plans were readily available to BMI for its own independent investigation (not uniquely within the purview of DGS) we find that BMI's breach of contract claim against DGS based on the theory of misrepresentation per Acchione and its progeny is without merit due to the lack of reasonable reliance on the alleged misrepresentation. Acchione and Canuso, Inc. v. Com., Department of Transportation, 501 Pa. 337, 461 A.2d 765, 768 (1983).

12. A plaintiff in a contract action has the burden of showing not only a breach of contract but also its damages resulting therefrom. See e.g., Spang & Company v. U.S. Steel Corp., 519 Pa. 14, 25-26, 545 A.2d 861, 866 (1988). Such proof may take a variety of forms, including a reliance on expert testimony where there is not another "reasonably safe basis" for measuring damages suffered by reason of a defendant's breach of contract. See, Massachusetts Bonding & Ins. Co. v. Johnston & Harder, 343 Pa. 270, 278-280, 22 A.2d 709, 713-714 (1941).

13. While the exact amount of damages need not be calculated with mathematical certainty, the proof cannot be based on mere guess or speculation. Damages cannot be recovered if they are too speculative, vague, contingent or beyond what the evidence can establish with reasonable certainty. Id.; See also, Spang at 519 Pa. 14, 25-26, 545 A.2d 861; Paliotta v. Department of Transportation, 750 A.2d 388, 390 n.2 (Pa. Cmwlth. 1999).

14. Because the Board has found that BMI failed to establish its resultant damages from the alleged breach respecting the LV and SV piping with reasonable certainty, DGS is not liable to BMI on its claim for additional costs on this count. Id.

15. Change Order Nos. 18 - 22 encompassed additional and extra work that was not within the scope of the original Contract. Ex. P-1, P-2, P-3, P-9 through P-13, P-14, P-15.

16. Additional or extra work beyond the scope of the original Contract is, pursuant to the terms of the Contract, to be addressed by written change orders pursuant to Article 10 of the General Conditions. Ex. P-3 (General Conditions Article 10).

17. Pursuant to the Contract the cost of a change order is to be determined by one of three methods at the option of DGS. These three methods include:

(A) By a detailed cost breakdown properly itemized . . .

(B) By unit prices stated in the bid proposal, specifications, or from prices agreed upon in the contract breakdown sheet; or

(C) By force account.

18. If the contractor and DGS cannot agree upon a cost for the change order work, DGS may instruct the contractor to proceed on a force account basis (often referred to as a time and materials basis). Alternatively, in the case of disagreement between a contractor and DGS, DGS may determine the cost and instruct the contractor to proceed. In this latter case, the contractor may thereafter submit its asserted cost for re-evaluation by DGS. Ex. P-3 (General Conditions Sections 10.5 and 10.6).

19. Because DGS did not instruct BMI to proceed by way of force account nor request BMI to re-cost Change Order Nos. 18-22 by utilizing unit prices stated in the bid proposal, specifications or agreed upon in the Contract breakdown sheet, BMI complied with Change Order Section 10.3 with regard to Change Order Nos. 18-22 by providing a detailed cost breakdown properly itemized for these change orders. Ex. P-3 (General Conditions Section 10.3).

20. General Conditions Section 10.5 provides DGS with the responsibility and authority to determine the cost of a change order and to direct the contractor to proceed therewith in the case of a disagreement. However, this does not mean that DGS's determination of this cost (if different than contractor's) cannot later be challenged by re-submitting the additional cost claimed by the contractor and then pursued through the normal appeal process (including appeal to the Board of Claims following a claim hearing on the amount at DGS). Any interpretation of Section 10.5 making DGS the final word would make the remaining provisions of Article 10 and appeal provisions of the Contract superfluous. Ex. P-3 (General Conditions Article 10). See also, Montgomery County v. Com. Department of Commerce, 434 A.2d at 1319.

21. Pursuant to Article 10 of the General Conditions, DGS had both the initial authority and responsibility to review and determine change order costs for additional work which it directed BMI to perform. Id.

22. DGS breached the Contract by arbitrarily reducing the cost of Change Order Nos. 18 - 22, when the requested payments were supported by estimates made by DGS's own Project Professional, its sole reason for reducing same was its erroneous assertion that BMI had agreed to apply only 70% of the MCAA rates to these change orders, and no other legitimate reason for the reduction was provided by DGS. Id.

23. Although Pennsylvania case law appears to be divided on whether or not every contract imposes upon each party a duty of good faith and fair-dealing in its performance or whether this duty of good faith and fair-dealing is recognized only in limited situations, the Board finds that, in light of the express provisions of Article 10 in the General Conditions of the Contract explicitly providing DGS with both the authority and responsibility to review and determine the cost of change orders that DGS does have a duty of good faith and fair-dealing to

the contractor in evaluating, responding and determining the appropriate cost of change orders for additional work DGS orders to be performed beyond the scope of the original contract. See, Ash v. Continental Insurance Co., - - A.2d - -, 2007 WL 2962716, 8 (Pa. Oct. 11, 2007) (No. 35 WAP 2005).[1]

24. DGS breached its duty of good faith and fair-dealing on this Contract by arbitrarily reducing the cost of Change Order Nos. 18 - 22, when the requested payments were supported by estimates made by DGS's own Project Professional, its sole reason for reducing same was its erroneous assertion that BMI had agreed to apply only 70% of the MCAA rates to these change orders, and no other legitimate reason for the reduction was provided by DGS. Id.

25. DGS is liable to BMI for the resulting damages BMI incurred because of DGS's breach of contract by its arbitrary reduction of costs and refusal to pay the remaining 30% of labor charges submitted by BMI for Change Order Nos. 18 - 22, which damages total $89,058.21. Id.; Ex. P-3 (General Conditions Article 10).

26. DGS is liable to BMI for a total of $89,058.21 in damages.

27. DGS is liable for payment of prejudgment interest of $20,272.50 on the aggregate amount of BMI's damages ($89,058.21).

28. Prejudgment interest is payable at the statutory rate for judgments of 6% per year. (41 P.S. § 202 (legal rate of interest)).

29. The 6% per annum statutory rate of interest for judgments equals a daily rate of interest of 0.000164 (.06 divided by 365 days). The number of days for which BMI is entitled to prejudgment interest on its cost of damages is 1,388 days (January 6, 2004, to October 25, 2007). Thus, $89,058.21 x 0.000164 x 1,388 days = $20,272.50 in prejudgment interest. 62 Pa.C.S. § 1751; 41 P.S. § 202.

30. DGS is liable to BMI for a total amount of $109,330.71 consisting of $89,058.21 in damages plus $20,272.50 in prejudgment interest.

31. Penalty and attorney fees are provided for in the Commonwealth Procurement Code, 62 Pa.C.S.A. § 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."

32. The standard for finding that an action was taken in "bad faith" is whether it can be considered arbitrary or vexatious. Department 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).

33. The language of 62 Pa.C.S.A. § 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

[1] See discussion in Opinion at p. 35.

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. Id.

34. Because we find that DGS acted arbitrarily with regard to the withholding of monies on Change Order Nos. 18-22, but did not do so in a vexatious manner so as not to justify imposition of penalty, we will award BMI attorney's fees with regards to its claim on Change Order Nos. 18-22, but deny its request for penalty fees.

35. 62 Pa.C.S.A. § 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 BMI its costs reasonably incurred for its claim respecting Change Order Nos. 18-22. 62 Pa.C.S.A. § 1725(e).

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

A. The Board's denial of BMI's claim on the LV and SV piping issue;

B. The Board's grant of damages and interest to BMI for its claim on Change Order Nos. 18-22; and

C. The Board's determination that BMI is entitled to attorney's fees and costs (but not penalty fees) with regard to its claim on Change Order Nos. 18-22

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

Plaintiff, Bryan Mechanical, Inc. ("BMI"), is a mechanical and plumbing contractor which installed certain plumbing systems in a chemistry building built for the Pennsylvania State University. BMI brings this claim against the Defendant, Department of General Services (the "Department" or "DGS"), the purchasing agency under the contract, seeking $490,780.52 in total damages for two alleged breaches of contract committed by DGS. First, BMI asserts that DGS failed to include in certain contract plans the piping configuration for "sanitary vent" piping and for "laboratory vent" piping, that DGS directed BMI to install this piping, and that BMI is now entitled to $401,722.31 in additional compensation for the extra work it performed beyond the scope of its Contract. Second, BMI asserts that DGS paid BMI only 70% of the compensation to which BMI was entitled for extra work performed pursuant to Change Order Nos. 18 to 22. BMI claims $89,058.21 in damages for this breach of contract, a figure representing the remaining 30% of the payments to which BMI insists it is entitled. In addition, BMI seeks the payment of interest, statutory penalties and attorneys' fees.

For the reasons set forth below, the Board finds in favor of DGS and against BMI with respect to BMI's claim for additional costs related to the sanitary (SV) and laboratory (LV) venting claims. However, the Board finds for BMI with respect to its claim for additional monies on the approved Change Order Nos. 18 to 22. BMI's request for attorneys' fees, as it relates to its claim on Change Order Nos. 18-22, is also granted.

LV and SV Piping Claim

On or about January 25, 2002, BMI and DGS entered into Contract No. DGS 800-235.33, Phase 2 ("Contract") relating to the plumbing work on construction of a chemistry building on the University Park campus of the Pennsylvania State University in Centre County, Pennsylvania

("Project"). This plumbing Contract was awarded for the sum of $3,637,000.00. The Contract required BMI to perform its scope of work in accordance with the specifications and drawings prepared by DGS. The Contract did not permit BMI to supplement or modify the Department's design and did not require BMI to perform any design work. It is undisputed that the Contract plans included errors and omissions.

The primary controversy here involves the Project's drawings, which include floor plans (i.e. a view perspective looking down at each floor) and riser diagrams (i.e. a side or elevation view of all floors) depicting the various piping systems to be constructed in the building. The floor plans included in the drawings show the location of vent piping for the sanitary waste system (SV piping) in the first through fifth floors of the building, but do not depict the location of the SV piping in the basement. Additional floor plan drawings show the location of vent piping for the laboratory waste system (LV piping) on the fifth floor, but do not depict the location of the LV piping in the basement or on the first through fourth floors. LV and SV piping are used to vent gases from the laboratory waste and sanitary waste drain systems, respectively. The lack of routing and sizes of LV and SV piping on all the floor plans is undisputed. However, both vent systems (LV and SV) are depicted on all floors in the riser diagrams included in the drawings. The riser diagrams are referred to in the floor plans as providing piping sizes, but are not drawn to scale and do not provide proper routing information for the LV and SV piping systems.

Shortly after BMI began its work under the Contract and during its process of creating shop drawings, on March 8, 2002, BMI issued RFI 28 to the Project architect (also referred to herein collectively with the Project engineer as the "Professional"). RFI 28 inquired whether vent piping was required in the basement or the first through fourth floors of the building. The

Project architect responded the same day by referring BMI to drawing P5.11, the sanitary waste riser diagram, which showed LV piping in the basement and on the first through fourth floors of the building. On May 28, 2002, BMI issued RFI 97 to the Project architect inquiring whether SV piping was required in the basement of the building. On June 14, 2002, the Project architect responded again by referring BMI to drawing P5.11, which showed SV piping in the basement of the building on the riser diagram.

On March 17 and 26, 2003, BMI submitted requests for change orders for the LV and SV piping work referenced in the Project architect's response to RFI 28 and RFI 97, respectively. On June 11, 2003, DGS denied both change order requests, taking the position that the work was reflected in the Contract documents. BMI claims total costs (with markups) for installing the LV and SV piping of $401,722.31.

BMI first contends that there is only one reasonable interpretation of the Contract and asserts that, because the LV and SV piping were missing from the Contract floor plans, that this work was not a part of BMI's scope of work under its Contract. BMI argues that under a "specifications contract" bidders are expected to bid the design provided by the Department and are not permitted to supplement or modify that design. It further contends that bidders would have no way of knowing whether the omitted services were an error or an intentional omission and that it had a right to rely on the representations in a specifications contract. A.G. Cullen Construction, Inc. v. State System of Higher Education, 898 A2d 1145, 1156 (Pa. Cmwlth. 2006).

To support this argument, BMI offered testimony that industry standards and contract language alike required the plans and specifications provided by an owner in a "specifications contract" such as this to be "100% complete." BMI's expert also asserted, in essence, that,

where the riser diagrams differed from the floor plans with regard to the venting systems, BMI was fully justified in ignoring the riser diagrams (except for pipe sizing). BMI here points to General Note No. 1 on the floor plans, which states:

> Location of laboratory and building service piping provides for routing of DCW, DHWS, DHWR, DIS, DIR, NG, N2, HV, CA, LW, LV, SW and SV piping for each individual floor. Refer to the P5 series drawings for pipe connection sizes. Contractor shall field coordinate the location of all piping with the work of other trades and the building structure.

BMI interprets this note to mean that contractors were to rely on the riser diagrams for pipe size connection only and ignore same for all other purposes.

Alternatively, BMI argues that the Contract is ambiguous because complete SV and LV piping systems were not shown on the floor plans, but were shown on the riser diagrams and detail drawings. BMI states that if the Board should find the Contract (including the Contract drawings) to be ambiguous, the rule of *contra proforentem* requires the language to be construed against the drafter (DGS in this case) and in favor of the other party (BMI) if the latter's interpretation is reasonable. Com., Department of Transportation v. Semanderes, 531 A.2d 815, 818 (Pa. Cmwlth. 1987).

DGS disagrees with BMI's assertion in several respects. DGS first asserts that when the Contract is viewed in its entirety, including the drawings, specifications, and express references to applicable code provisions, the documents do reveal the need for, and inclusion of, SV and LV vent piping on all floors. It argues that the inclusion of the SV and LV venting on the Contract riser diagrams (even though not to scale) clearly indicates a conflict with the partial omission of the LV and SV piping on the floor plans. It further contends that this, combined with plumbing code requirements of venting for the sinks, drains and fixtures shown on the floor plans would have alerted a reasonable and prudent bidder to include these piping services in its bid, or, at

very least, to have sought clarification of this issue prior to bidding. DGS also points out that BMI's claim is not for extra work resulting from a need to route piping differently from what the documents described or from delay caused by a need to coordinate work with other prime contractors because of lack of detail on the drawings. Instead, BMI claims that the Contract documents were such as to justify the total exclusion of vent piping from its bid, which DGS finds unreasonable and unjustified.

The Board is in substantial agreement with DGS. To begin with, it is axiomatic that all parts of the Contract must be considered in construing same. This includes the specifications, plans and drawings incorporated therein. See, Montgomery County v. Com., Department of Commerce, 434 A.2d 1316, 1319 (Pa. Cmwlth. 1981) (In construing a contract, each and every part of it must be taken into consideration and given effect, if possible, and the intention of the parties must be ascertained from the entire instrument.) See also, Chester Upland School District v. Edward J. Meloney, Inc., 901 A.2d 1055, 1059 (Pa. Super. 2006) (The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of contracting parties.)

The Contract in the present case specifically includes the drawings, the specifications and the General Conditions. It also makes express references to compliance with applicable code provisions. Here, the Contract's floor plans depict the location of LV piping on the fifth floor of the building, but not in the basement or on the first through fourth floors. They also depict the location of the SV piping on the first through fifth floors of the building, but do not depict the location of the SV piping in the basement. However, just as clearly, the riser diagrams (referred to in several notes on the floor plans) depict SV and LV piping on all floors (including the basement) of the building. Additionally, industry practice and applicable plumbing codes also

alert any reasonable and prudent plumbing contractor that some type of venting is needed for the multiple sinks, drains and fixtures of the sanitary and lab waste drain systems. Pursuant to our own review of the plans, specifications and drawings for this Project, as well as the totality of other evidence submitted, the Board concludes that these documents and drawings were not ambiguous. Rather we find them to clearly show the intent to include SV and LV piping on all floors of the building. We further find that the partial omission of the SV and LV piping from certain floor plans was a significant, obvious and glaring error in said plans and drawings.

Because we find the clear intent of the Contract documents (including specifications and drawings), taken as a whole, was to provide for SV and LV piping on each floor, BMI's alternate argument, asserting the principle of "contra proforentem" also fails. Although stated correctly as a legal principle, it is simply not applicable to this case as a matter of fact. Rather, the dispositive issue here is whether the drawings were such as to justify the total exclusion of SV and LV vent piping from the bid of BMI, and whether the omission of the venting on the floor plans was so blatant and significant as to have required BMI, as the bidder, to call this to the attention of DGS prior to its bid.

In Com. Department of Transportation v. Bracken Construction Co., 72 Pa. Cmwlth. 620, 457 A.2d 995, 999 (Pa. Cmwlth. 1983), the court acknowledged:

> The courts have created an exception to that general rule [stated above] when a government construction contract contains an obvious, glaring ambiguity. In such a case, the private contractor is under a duty to inquire and try to resolve the problem before entering into the contract. Failure to make such an inquiry prevents the contractor from complaining of the ambiguity after the contract is signed and problems arise. (citation omitted).

The Commonwealth Court went on to explain that the type of ambiguity which will create this duty is "not subtle, hidden or minor, but patent, blatant and significant." Id. In that case,

concerning whether the cost of rebar was included in the price for the reinforced concrete, the Court held that the notification rule did not apply because the costs of the rebar were so minor (1/8 of 1% of the total contract price) and that in a job of the magnitude there, it was the custom not to raise such a minor difficulty in the pre-bid conference.

This same rule requiring bidder notification to the Commonwealth of an obvious error was reiterated in Com. Department of Transportation v. Anjo Construction Co., 87 Pa. Cmwlth. 310, 487 A.2d 455, 459 (Pa. Cmwlth. 1985). In Anjo, the Board of Claims held that the plaintiff was not entitled to recover its anticipated profits because: (1) it had breached the contract by failing to notify DOT when it discovered that 195 ounces of a concrete additive was a gross underestimation (33,624.8 ounces were actually necessary to complete the work) and (2) It did not comply with a contract provision requiring written authorization for extra material. The Anjo Court reversed the Board's monetary award for the amount of additive. The Commonwealth Court stated, "Where a contractor discovers an obvious error or discrepancy in the contract, he is obliged to bring the situation to the Commonwealth's attention if he intends to subsequently resolve the issue in his own favor."

As we have noted above, the Board's own review of the drawings show the clear intent to include SV and LV piping on all floors. It is equally clear that the plumbing system would not have complied with plumbing codes, which require venting for all trapped sinks and drains of the type used on this Project, if constructed without the LV and SV piping. The Contract here required compliance with all applicable building codes. There were also notes about the venting on the floor plans referring to the riser diagrams for each floor. BMI's own expert acknowledged an obligation on the part of a bidder to bring obvious errors in plans to the owner's attention. He further testified that he had declined to place a bid on this plumbing work

for the company he worked for because he noted so many problems with the plans. The installation of the venting was essential to the completion of the work, making the lack of routing a significant issue. For all the foregoing reasons, the Board holds that BMI had a duty to notify DGS of this omission of SV and LV piping from some of the floor plan drawings before bidding on or entering into the Contract.

By way of explanation for its failure to bring this problem to DGS's attention prior to bidding, BMI apparently wishes to make much of the fact that there was a last minute bulletin, (Bulletin No. 2), modifying the plumbing drawings. After issuing the initial bid documents on October 17, 2001, DGS notified bidders that it would be issuing Bulletin No. 2 with revisions to the Project. The bulletin was sent out on November 21, 2001, and the bid submission deadline was December 5, 2001. Any questions from bidders had to be submitted ten days or more before the bid date according to instructions contained in the bid package. This meant that questions would have to be submitted by Sunday, November 25, 2001. BMI was closed for the Thanksgiving holiday on Thursday and Friday, November 22 and 23, 2001. BMI did not submit any questions, but did submit its bid. DGS awarded BMI the Contract and entered into same on or about January 25, 2002.

The Board finds BMI's excuse argument wholly unpersuasive. Bulletin No. 2 did not make any changes to the SV or LV piping systems in the specifications or applicable drawings. The inconsistencies in the drawings respecting SV and LV piping were apparent from mid-October through to the bid date on December 5, 2001. We also find its contention that it made no sense to seek clarification on the SV and LV piping inconsistency until the new plans were issued to be without merit. These types of material inconsistencies are exactly to type of issues that need to be questioned promptly in the process so they can be addressed by subsequent

bulletins, not ignored with hope they would be addressed. BMI had ample time to review the plans from October 17 to November 25 before the end of the question deadline.

As stated above, BMI had a duty to notify DGS of the significant and obvious omission of LV and SV piping from some of the floor plans before bidding on the Project. Having failed to do so, BMI cannot now hold DGS responsible for these omissions because it did not seek clarification and failed to include this work in its bid. Thus, based on the finding that BMI failed to fulfill its duty to notify DGS to try to resolve the issue of the missing information on the floor plans, the Board concludes that BMI cannot recover the $401,722.31 in additional compensation it seeks for installing the LV and SV piping. Its claim on this count must be denied.

BMI's second theory of recovery is that DGS's "omission" of a complete depiction of the LV and SV piping in the drawings constitutes a misrepresentation. The Pennsylvania Supreme Court has identified five factors relative to the determination of misrepresentation in the public construction contract setting:

> (1) Whether a positive representation of specifications or conditions relative to the work is made by the Governmental agency letting the contract or its engineer.
>
> (2) Whether this representation goes to a material specification in the contract.
>
> (3) Whether the contractor, either by time or cost constraints, has no reasonable means of making an independent investigation of the conditions or representations.
>
> (4) Whether these representations later prove to be false and/or misleading either due to actual misrepresentation on the part of the agency or its engineer or by what amounts to a misrepresentation through either gross mistake or arbitrary action on the part of the agency or its engineer.
>
> (5) Whether as a result of this misrepresentation, the contractor suffers financial harm due to his reliance on the misrepresentation in the bidding and performance of the contract.

Acchione and Canuso, Inc. v. Department of Transportation, 501 Pa. 337, 461 A.2d 765, 768 (Pa. 1983).

DGS argues, inter alia, that it is disingenuous for BMI to say that it could expect to complete standard plumbing installations, such as laboratory benches, without expecting them to be vented. DGS contends that it wouldn't be reasonable for a plumbing contractor to believe that DGS intended to design and install incomplete, dysfunctional systems for five floors of a building which did not comply with standard construction codes. DGS also points out that Acchione dealt with contract specifications that were based on assumptions made by PennDOT drafters that were neither revealed nor reasonably susceptible to independent discovery. Here, the need for SV and LV piping was not uniquely within the purview of DGS. BMI had "reasonable means of making an independent investigation of the conditions or representations" on the drawings. In fact, it had almost two months to review the initial bid package and to ask questions regarding the significant, glaring and obvious inconsistencies between the floor plans and riser diagrams respecting LV and SV piping. The third element of the Acchione rubric is obviously lacking here. For this same reason we also find a lack of reasonable reliance by BMI on these drawings as a basis to omit the need for SV or LV pricing in its bid. The necessary elements of actionable misrepresentation are not, in fact, present here. This theory of liability for the LV and SV piping fails as well.

Finally, the Board also finds that BMI failed to carry its burden of proof to establish its actual damages resulting from the omission of LV and SV piping from some of the floor plans. It is, of course, fundamental, that a plaintiff bears the burden of establishing not only a breach of contract but also its damages resulting therefrom. See e.g., Spang & Company v. U.S. Steel Corp., 519 Pa. 14, 25-26, 545 A.2d 861, 866 (1988). It is equally true that such proof may take a

variety of forms, including a reliance on expert testimony particularly where there is not another "reasonably safe basis" for measuring damages suffered by reason of a defendant's breach of contract. See, Massachusetts Bonding & Ins. Co. v. Johnston & Harder, 343 Pa. 270, 278-280, 22 A.2d 709, 713-714 (1941). While the exact amount need not be calculated with mathematical certainty, the proof cannot be based on mere guess or speculation. Damages cannot be recovered if they are too speculative, vague, contingent or beyond what the evidence can establish with reasonable certainty. Id.; See also, Spang at 519 Pa. 25-26, 545 A.2d 866. BMI, in turn, maintains that the use of MCAA's published labor rates is not only a commonly accepted method of pricing change orders in the mechanical contracting industry, but that it has been accepted by a number of courts as a proper method for calculating damages in construction cases. See, e.g., McCarthy Bros. Co. v. State of Illinois, 47 Ill. Ct. Cl. 15, 37, 1995 WL 880780 (1995); S. Leo Harmonay, Inc. v. Binks Mfg. Co., 597 F. Supp. 1014, 1030-31 (D.C.N.Y. 1984); L.K. Comstock & Co., Inc. v. Becon Construction Co., Inc., 932 F. Supp. 906, 928 (E.D. Ky. 1993). DGS, of course, points out that none of BMI's cited cases are from Pennsylvania.

"The burden of proof is on the contractor who seeks reimbursement for damages to show facts necessary for such recovery." Paliotta v. Department of Transportation, 750 A.2d 388, 390 n.2 (Pa. Cmwlth. 1999). In Paliotta, both this Board and the Commonwealth Court held that the expert's cost estimates presented there, with nothing more to substantiate same, were insufficient to establish damages actually incurred. Id. at 390-392. The Board finds BMI's evidence respecting the LV and SV piping to be similarly lacking in this case. BMI presented only MCAA cost estimates from its expert for the alleged additional work and failed even to document the material quantities these estimates were purportedly derived from. BMI provided no job cost report, labor report or any equivalent documentation or testimony as to the actual

man hours worked or for any other costs incurred on the LV/SV portion, or any other portion, of this job. It did not provide a bid estimate workup or testimony with regard to same to establish what costs it expected or what costs it included in its estimate for the extra LV/SV portion of the work or for the job in toto. BMI provided no evidence of competitor's bids to establish that its own bid costs were reasonable or to indicate whether other bid competitors included the SV or LV piping costs in their estimates.

The Board recognizes that some degree of extrapolation or uncertainty is to be expected, most particularly when dealing with lost profits or other intangible aspects of damage. However, we find the total lack of cost documentation in this claim (of the type normally kept by similarly situated contractors) to seriously undermine our ability to view these numbers as providing any reasonable degree of certainty as to the resultant damage actually incurred by BMI. This whole damage calculation becomes even more speculative when we consider Mr. McKay's testimony revealing his own uncertainty as to whether BMI's original bid contained any amount at all for vent piping or not. As a bottom line, BMI has the burden of proof to establish the resultant damages it actually incurred. Merely presenting an estimate of its costs (no matter how reliable the MCAA may be) with nothing more does not establish that BMI actually incurred these costs. Although MCAA estimates may be acceptable for pricing of change orders and otherwise estimating costs, the Board finds that the MCAA estimates presented here, alone, to be insufficient to establish that BMI actually incurred substantial damages with reasonable certainty.

Change Order Nos. 18-22

In its second claim, BMI asserts that it is entitled to the full amount for labor which it submitted for work reflected in Change Order Nos. 18 to 22 because DGS expressed only

satisfaction with the work and did not offer any legitimate justification for reducing the MCAA labor rate submitted by BMI. Because DGS's original design for the above-ceiling services was deficient, the Department was forced to revise its design by, among other things, lowering ceiling heights, running services through beam penetrations and adding additional vertical risers. This work, including the addition of hot/cold water risers, the addition of the lab gas risers, the addition of the storm risers and additional lab waste and vent risers, was the subject of Change Orders 18 to 22. It is undisputed by the parties that this work was beyond the scope of the original Contract.

DGS paid only 70% of the MCAA formula labor rate submitted by BMI when it evaluated BMI's proposed costs associated with the subject change orders. For all other change orders, except for Change Order No. 1, DGS paid 100% of the MCAA rates. Also, for change orders that resulted in a credit in favor of DGS, DGS used 100% of the MCAA rates. The MCAA has calculated the labor rates required to install specific types of materials (piping, fittings, hangers, etc.) and provided a methodology for adjusting those labor rates to fit the circumstances of a particular project. The MCAA rates may be adjusted up or down to reflect the difficulty of the installation or the decrease in productivity associated with working in certain conditions. Because change order work is often out of sequence, it is often more costly to perform than if the same work was performed as part of the original contract scope. As noted above, BMI maintains that the use of MCAA's published labor rates is a commonly accepted method of pricing change orders in the mechanical contracting industry, and that it has been accepted by a number of courts as a proper method for calculating damages in construction cases.

BMI used the MCAA labor rates to prepare every request for additional compensation that it submitted on the Project. After BMI submitted its request for payment for change orders, the Professional hired by DGS for the Project would also provide an estimate for the cost of the change order work. The following chart shows BMI's requested labor amounts, the Professional's estimates, and DGS's approved labor amounts. BMI points out that the Professional's estimates validated BMI's submissions. In fact, the Professional's total of $366,000 for the five change orders was actually about $1100.00 more than the $364,911.21 total submitted by BMI. This comparison is as follows:

Change Order	**BMI**	**Professional**	**Department**
18	$98,640.71	$98,000.00	$74,985.84
19	$68,325.26	$70,000.00	$50,231.20
20	$82,700.95	$80,000.00	$61,261.08
21	$47,264.18	$50,000.00	$35,319.42
22	$67,980.11	$68,000.00	$52,085.25

(Plaintiff's Exhibit 9-13; T.I 27-32).

DGS argues that at a hearing on Change Order No. 1, which also involved a dispute over labor rates, BMI agreed to the payment for labor on it and all other change orders at only 70% of the MCAA rate. DGS argues that paying 70% of Change Order No. 1 was precedent and that rate then applied to the remainder of the Project. DGS also argues that its reduction of the amounts for Change Order Nos. 18-22 did not breach the Contract because the Contract specifically allows DGS to determine the cost of change orders. It cites General Condition Paragraph 10.5 which provides that if the parties cannot reach agreement as to the cost of change order work, "[S]aid cost or credit shall be determined by the Department." Additionally DGS points out that BMI never submitted its actual time and material figures to DGS, but rather relied on MCAA rates for its change orders and continues to do so for its claim. DGS emphasizes that

the cases cited by BMI, where the courts accepted the use of MCAA rates as a proper method for calculating change orders and damages, were not cases involving the Commonwealth of Pennsylvania. It argues that the Commonwealth Court has specifically found it to be error not to utilize the time and materials approach for such calculations.

BMI asserts that it used the MCAA labor rates for each and every change order request it submitted on this Project. This is not credibly disputed by DGS; nor is it disputed that DGS paid the full amount of this labor rate for every change order except Change Order No. 1 and the subject Change Order Nos. 18 to 22. DGS did not offer reasons related to work performance or other factors for reducing the MCAA rate of pay for labor on Change Order Nos. 18-22. Its only explanation of this reduction appears in an internal DGS memo from Daniel Weinzierl (DGS Regional Director for the Central Region) to the Professional at the time of the change orders. Mr. Weinzierl's memo directs the Professional to reduce its labor estimate to 70% because, according to Mr. Weinzierl, BMI had agreed to apply the reduced 70% rate to all change orders on the Project at the hearing on Change Order No. 1. It does not appear, however, that this reason was communicated to BMI at the time.

The Board finds that the preponderance of evidence presented to the Board contradicts DGS's assertion that BMI agreed at its claim hearing on Change Order No. 1 to reduce its labor rate on all subsequent change orders by 70%. Specifically, Thomas Szymczak (President of BMI) testified that the agreement respecting Change Order No. 1 at the DGS claim hearing did not apply to subsequent change orders. However, DGS effectively drew Mr. Szymczak's testimony into question by casting serious doubt on his actual attendance at the claim hearing.

That said, the direct examination of DGS's own construction inspection supervisor, Edward Pedrazzani, who was present at the claim hearing meeting, failed to provide any evidence that the 70% rate was to be used for future change orders. Mr. Weinzierl, who initiated application of this 70% rate to Change Order Nos. 18-22, did not testify at the Board hearing in this matter. While the testimony offered at hearing was inconclusive, the Board finds that DGS's own conduct with regard to the numerous change orders issued to BMI to be considerably more persuasive. DGS itself paid the full rate on all other change orders subsequent to Change Order No. 1 except with regard to Change Order Nos. 18-22 and even charged back change order credits against BMI at the full 100% rate. We also note that the Project Professional, who was also represented at the claim hearing, did not apply the 70% labor rate until instructed to do so by Mr. Weinzierl. We believe the actions of DGS with regard to the multitude of change orders on this Project speak louder than the testimony presented at hearing. Accordingly, we find that BMI did not agree to utilize 70% of the MCAA labor rate in all its change orders, and the only justification provided by DGS for reducing the labor rate on Change Order Nos. 18-22 to be without basis in reason or fact. We further find that this action, taken without legitimate basis in reason or fact, to be arbitrary and to constitute a failure of DGS to properly review and determine change order costs for additional work it ordered pursuant to Article 10 of the General Conditions. Additionally, the arbitrary actions taken by DGS with respect to Change Order Nos. 18-22 in reducing these costs based on an unjustified assertion that BMI agreed to a reduction in labor rates; its failure to provide any other reasons therefore; done in contravention of its

Professional's own estimates, also constitute a breach by DGS of its duty to perform its portion of the Contract (review and determination of change order costs) in good faith and fair-dealing. See, Ash v. Continental Insurance Co., - - A.2d - -, 2007 WL 2962716, 8 (Pa. Oct. 11, 2007) (No. 35 WAP 2005).[2]

We also find little merit to DGS's remaining arguments raised now in defense of its reduction to Change Order Nos. 18-22. In this regard, we note initially that Section 10.3 of the General Conditions to the Contract provides for three ways of pricing a change order to be determined at the option of DGS. These are:

> (A) By a detailed cost breakdown properly itemized . . .
>
> (B) By unit prices stated in the bid proposal, specifications or from prices agreed upon in the contract breakdown sheet; or
>
> (C) By force account.

It is clear from the Board's review of same that Change Order Nos. 18-22 calculate costs by detailed cost breakdown compliant with Subsection (A) above. It is equally clear from the evidence that DGS at no time instructed BMI to perform this change order work by force account or to provide it an alternative cost calculation pursuant to unit prices or contract breakdown sheet

[2] Although we recognize diverse holdings in this area, our review of the numerous cases addressing this issue (including those cited in Ash) indicate that those cases denying application of the doctrine requiring good faith and fair-dealing in contract performance typically did so in circumstances where this principle was invoked to add terms or obligations not expressly stated in the contract (e.g. a duty to notify a contractor of talks with another to replace it . . .). That is not the circumstance of this case. Here, Article 10 expressly: requires the contractor to perform additional work outside the scope of its original contract at the direction of DGS; requires the contractor to agree that payment made under the change order regimen will be the exclusive compensation for such additional work or revision to the original contract; and provides DGS with the authority and responsibility to determine the cost of such change order even in the face of disagreement with the contractor. Moreover these lopsided terms reflect the nature of public contracting where the government entity dictates all of the contract terms, prohibits negotiation and exerts all drafting opportunities to maximize its authority and minimize its own responsibility even with respect to work beyond the scope of the original contract. While we certainly understand the reluctance to utilize this principle of good faith performance to add terms to a contract, we are suggesting nothing more here than the expectation that both parties will exert honest efforts to perform their expressly enumerated obligations in good faith and without attempt to avoid same. It is this principle we invoke to find that DGS had an implied duty of good faith and fair-dealing in pricing BMI's change orders, and that it breached this duty in its arbitrary rejection of BMI's costs in Change Order Nos. 18-22.

referenced in Subsection (B). No indication of unit prices or contract breakdown sheet prices were presented into evidence by either party.

We similarly find no merit to DGS's apparent argument that Section 10.5 of the General Conditions leaves it up to DGS as the final arbiter of change order cost or credit. Although it expressly gives DGS initial authority to determine change order cost, we note that Section 10.5 goes on to say that after completing the work as directed, the contractor may subsequently submit its cost for re-evaluation by the Department. Once re-submitted we see no language in the Contract preventing a contractor from challenging DGS's determination by filing a claim and proceeding through normal appeal channels if it disagrees with DGS's re-evaluation. Any interpretation of Section 10.5 that would make DGS the final word on change order cost would, in essence, make Sections 10.3, Section 10.6 and several other provisions of Article 10 superfluous, as well as any and all related appeal provisions contained in the Contract. We find no reason or justification for such an interpretation.

We do, of course, acknowledge that DGS's cite to I.A. Construction Corp. v. Department of Transportation, 591 A.2d 1146 (Pa. Cmwlth. 1991) does provide support for the use of the force account method as an appropriate way to measure damages in the case of disputed change order amounts. However, because DGS itself acknowledged that it did not request a force account be kept for these change orders, we believe the question here reverts to the need to make a reasonable assessment of the actual costs incurred by BMI in performing the work entailed with Change Order Nos. 18-22. This, in turn, brings the Board back to the issue of utilizing the MCAA labor rates as a component of BMI's damage calculations, but with specific regard in this instance to Change Order Nos. 18-22.

As we noted above in connection with BMI's LV/SV piping claim, the Board agrees with DGS that use of a standard industry index of costs to prove a contractor's actual costs or damages, with no other corroborating or supporting documentation, is highly suspect and may well fail to establish a contractor's resultant damages with reasonable certainty. However, the Board does not find that same degree of uncertainty here in the case of Change Order Nos. 18-22. To begin with, each change order contains a detailed breakdown of the quantities and types of materials to be utilized for each job and a breakdown of the labor man hours associated therewith that DGS and the Project Professional have agreed with. See Ex. P-9 through P-13. That is to say, there is little to no uncertainty as to the quantity of materials or labor man hours that were consumed in performing the work at issue. Secondly, this work is acknowledged by both parties to be beyond the scope of the original Contract, so there is no question that any portion this work was contained or costed in the original bid. Third, BMI's cost figures for Change Order Nos. 18-22 are fully supported by the unbiased estimates of DGS's own Project Professional. The totals for labor, as submitted by BMI using the MCAA rates, and those calculated by the Project Professional are practically identical. BMI asked for $364,911.21, and the Professional calculated $366,000.00, a figure about $1100 more than BMI's request. Lastly, DGS's only expressed disagreement with these cost figures for Change Order Nos. 18-22 comes solely from its insistence that the 0.7 factor of Change Order No. 1 be applied to Change Order Nos. 18-22. It is precisely this assertion which we have found to be without basis in fact. Thus, in this limited instance, and in consideration of the totality of the evidence presented, we find that the change orders (with cost breakdowns corroborated fully by the Project Professional and in all material aspects by DGS itself) do establish with reasonable certainty BMI's actual damages incurred in performing the change order work in question. The Board finds in favor of

the Claimant on this second claim for payment of the balance of the full labor costs on Change Order Nos. 18 to 22 in the amount of $89,058.21.

The Board also awards BMI interest on its claim amount, which Section 1751 of the Commonwealth Procurement Code states is payable from the date BMI's claim was filed with the contracting officer. BMI failed to provide the Board with any evidence of the exact date that it filed this claim for Change Order Nos. 18-22 with the DGS contracting officer. Therefore, the Board will calculate the interest using the closest date in evidence to the date such a claim was filed. This date is January 6, 2004, the date of BMI's formal hearing with DGS on this matter. Prejudgment interest is calculated then from January 6, 2004, to the exit date of this Opinion and Order. DGS is to pay prejudgment interest on this claim in the amount of $20,272.50.

Finally, BMI seeks penalty and attorney's fees for its claims. 62 Pa.C.S.A. § 3935, authorizes an award of penalty and/or attorney's fees where payment is deemed to have been withheld in bad faith. Bad faith has been defined to encompass withholding payment due to a contractor in an arbitrary or vexatious manner. Department of General Services v. Pittsburgh Building Co., 920 A.2d 973, 990 (Pa. Cmwlth. 2007). 62 Pa.C.S.A. § 3935 provides as follows:

> § 3935. Penalty and attorney fees
>
> (a) Penalty. – If arbitration or a claim with the Board of Claims or a court of competent jurisdiction is commenced to recover payment due under this subchapter and it is determined that the government agency, contractor or subcontractor has failed to comply with the payment terms of this subchapter, the arbitrator, the Board of Claims or the court may award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was withheld in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious. An amount shall not be deemed to have been withheld in bad faith to the extent it was withheld pursuant to section 3934 (relating to withholding of payment for good faith claims).
>
> (b) Attorney fees. – Notwithstanding any agreement to the contrary, the prevailing party in any proceeding to recover any payment under this subchapter may be awarded a reasonable attorney fee in an amount to be determined by the

> Board of Claims, court or arbitrator, together with expenses, if it is determined that the government agency, contractor or subcontractor acted in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious. [Emphasis supplied].

The Board understands the Legislature's use of the word "may" instead of "shall" in these provisions to provide it with some degree of discretion in determining whether or not to award attorney fees and/or penalties based on its assessment of the totality of the claim and surrounding circumstances, even where it has found the Commonwealth's actions to be arbitrary or vexatious. We note also that, even in recent cases where the Commonwealth Court has deemed it appropriate to award attorney fees pursuant to this provision, it has done so without the additional imposition of a penalty award. See e.g., DGS v. Pittsburgh Building Company, 920 A.2d at 990; A.G. Cullen v. State System of Higher Education, 898 A.2d 1145, 1164-1166 (Pa. Cmwlth. 2006). Among the legitimate reasons for allowing such discretion, we believe, would be a determination that the action by the Commonwealth agency, while being arbitrary (and thus justifying an award of attorney's fees to make a prevailing plaintiff whole in its contract claim) was not found so vexatious as to justify the imposition of a penalty at 1% per month as an appropriate windfall to the Plaintiff or burden to be paid by the Commonwealth's taxpayers. Because the Board has found DGS's actions with regard to its denial of the full amount requested by BMI for Change Order Nos. 18-22 to be without basis in fact or reason (i.e. arbitrary), but not so egregious as to justify the imposition of penalty, we will award BMI reasonable attorney's fees related to its claim on Change Order Nos. 18-22 only. In addition, the Board shall also require DGS to pay BMI its costs of litigation (other than attorney fees) related to its claim for payment pursuant to Change Order Nos. 18-22 pursuant to 62 Pa.C.S.A. §1725(e). Each party shall bear its own costs for all other aspects of the claims asserted in this matter.

As a result of the foregoing awards of costs and attorney's fees, BMI will be directed to submit to the Board an itemized listing of its costs incurred for the portion of its claim respecting Change Order Nos. 18-22 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 Change Order Nos. 18-22. 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 has made an express determination that an immediate appeal of this Order as it pertains to:

A. The Board's denial of BMI's claim on the LV and SV piping issue;

B. The Board's grant of damages and interest to BMI for its claim on Change Order Nos. 18-22; and

C. The Board's determination that BMI is entitled to attorney's fees and costs (but not penalty fees) with regard to its claim on Change Order Nos. 18-22

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 25th day of October, 2007, it is hereby **ORDERED** and **DECREED** that final judgment be rendered in favor of the Plaintiff, Bryan Mechanical, Inc. ("BMI"), and against Defendant, Department of General Services ("DGS"), for the claim for additional compensation for work reflected in Change Order Nos. 18 to 22, in the amount of $109,330.71. This sum consists of $89,058.21 in costs withheld by DGS and $20,272.50 in prejudgment interest. BMI is also awarded post-judgment interest on the outstanding judgment at the statutory rate for judgments (6% per annum) beginning on the date of this Order and continuing until the judgment is paid in full. In addition, BMI is hereby awarded reasonable attorney's fees and costs respecting its claim made on Change Order Nos. 18-22, the dollar amounts of which shall be determined as set forth in this Opinion. BMI's claim respecting additional compensation for its LV/SV piping work is **DENIED**, with each party to bear its own costs on this portion of the claim.

BOARD OF CLAIMS

OPINION SIGNED

_____
Jeffrey F. Smith
Chief Administrative Judge

_____
Ronald L. Soder, P.E.
Engineer Member