

COMMONWEALTH OF PENNSYLVANIA

THE FARFIELD COMPANY : BEFORE THE BOARD OF CLAIMS
: VS. :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF GENERAL SERVICES : DOCKET NO. 3788

FINDINGS OF FACT

1. The Farfield Company (“Farfield”) is an electrical contractor with its primary office located at 312 East Meadow Valley Road, Lititz, Pennsylvania, 17543. (Complaint and Answer ¶1; Exhibits 1, 2).

2. The Department of General Services (“DGS”), is an agency of the Commonwealth of Pennsylvania with its principal office located at 515 North Office Building, Harrisburg, Pennsylvania, 17120. (Complaint and Answer ¶3; Exhibits 1, 2).

3. On November 25, 2003, DGS and Farfield executed Contract No. D.G.S. 800-269.4 (“Contract”) for a project known as Library Addition and Classroom Building Addition, Pennsylvania State University - York Campus, York, York County, Pennsylvania (“Project”). The Contract was executed by DGS and effective on November 25, 2003. (Complaint and Answer ¶5; Exhibits 1, 2, 4).

4. The Contract provided that Farfield was to perform the work described in the contract documents for a price of \$1,189,300. (Exhibit 4).

5. The architectural professional for the project was Murphy & Dittenhafer, Inc. (“Professional”), an architectural firm with offices at 226 West Market Street, York, Pennsylvania. (Complaint and Answer ¶8; Exhibits 1, 2).

6. The Professional’s representative on the Project was Bruce R. Johnson, an architect registered in Pennsylvania, Ohio and Maryland. (N.T. 60-61).

7. The standard form of agreement between DGS and Farfield states that the Contract documents for the Project consist of the notice to bidders, the instructions to bidders, the bid form, the contract bonds, the conditions of the contract (general, special, supplementary and other conditions), all the contract drawings, all the specifications of the contracts, all bulletins and addenda issued prior to execution of the agreement, all change orders, and the administrative procedures of the bureau of construction. These documents are drafted by DGS and/or its Professional. (Exhibits 4-8, 20-23; Board Finding).

8. Division 1 of the Contract’s specifications is entitled “General Requirements.” (Exhibit 7).

9. Specification Section 01010 of Division 1 is entitled “Summary of Work.” (Exhibit 7).

10. Section 01010 provides that detailed requirements of the work are described in the pertinent specification sections and are shown on the drawings. (N.T. 66-67; Exhibit 7).

11. Part 1.04 of Section 01010 describes in summary form the work to be included in the various prime contracts awarded by DGS for the Project, including the electrical Contract. (Exhibit 7).

12. Subpart A of Part 1.04 states: “The work of this project consists of but is not necessarily limited to the following. Detailed requirements of the work are described on the pertinent specification sections and/or shown on the drawings.” (Exhibit 7).

13. Subpart H of Part 1.04 summarizes the electrical construction work that was part of Farfield’s Contract. (Exhibit 7).

14. Paragraph 13 of Subpart H states: “Conduit and backbox infrastructure systems for security, data, phone, cable TV systems, and theater audio/lighting systems to be installed by Owner’s separate contractors. [Emphasis added.]” (Exhibit 7).

15. Specification Section 16010(1.2)(B)(A) states: “Electrical Work shall include the following Specification Sections and Drawings as outlined: . . . Section 16715 – Data Networking System.” (Exhibit 22).

16. Specification Section 16010(1.2)(B)(B) lists drawings E-1 through E-16 as showing work applicable to Farfield’s electrical construction work. (Exhibit 22).

17. Specification Section 16715 is entitled “Data Networking Equipment/Cabling System.” (Exhibit 23).

18. Section 16715 identifies numerous components that go into the data network/cabling system including: the conduit, backbox and cable tray, duct work, cables, television jacks, raceway outlet boxes and wall plates. (N.T. 68; Exhibit 23).

19. Article 1.3 of Section 16715 identifies items to be provided by the Electrical Contractor, contractor’s installer and the Using Agency. Among other things it states: “Electrical Contractor shall provide the following: . . . 2. Conduit, raceways, sleeves, cable tray and pull boxes for telephone, data and telephone distribution unless noted otherwise. [Emphasis added.]” (Exhibit 23).

20. Farfield was provided with all applicable Contract conditions, specifications and bulletins before its bid. (N.T. 68-69).

21. Farfield did not include in its bid any subcontract price for the performance of the data network/cabling work. (N.T. 17; Exhibit 17).

22. Farfield did not solicit any proposals from subcontractors for the data network/cabling work when it was preparing its bid. (N.T. 37).

23. Farfield did not receive any unsolicited proposals from subcontractors who specialize in the installation of data network/cabling systems. (N.T. 37).

24. Farfield did not include an amount for the data network/cabling work in its bid. (N.T. 17; Exhibit 9).

25. Mr. Johnson, the Professional's representative on the Project, testified that the next lowest bid to Farfield's for electrical work on the Project was not much lower than Farfield's and did not contain a significant difference in the amount of subcontract allowance. (N.T. 76-77).

26. Farfield established by uncontradicted testimony that it has done millions of dollars worth of work for Penn State, the using agency, in some 35 years; that Penn State had preferred vendors for such things as the type of data cabling that was to be done on this Project; and that Penn State would often contract directly with others for this type of cabling work. The testimony further indicated that if Penn State did go through Farfield to subcontract the data cabling it was identified more specifically than in this case. (N.T. 37-38).

27. On April 2, 2004, Farfield advised Mr. Johnson, DGS's Professional representative on the Project, that it had not included systems for data network/cabling work in its bid because Specification Section 01010(1.04)(H)(13) identified the work as being installed by the Owner's separate contractors. (Exhibit 9).

28. On April 12, 2004, Mr. Johnson advised Farfield that, in his opinion, the data network/cabling work was "clearly and adequately communicated as being part of the Electrical Contract scope." Accordingly, Mr. Johnson and DGS directed Farfield to proceed with the work as part of its Contract. (N.T. 18-19; Exhibit 10, 12).

29. On April 22, 2004, Farfield advised DGS that it disagreed with Mr. Johnson's interpretation and requested a claims hearing as soon as possible. (Exhibit 11).

30. By letter dated April 30, 2004, DGS initially denied Farfield's request for a claims hearing, and directed Farfield to perform the "work in question so as not to delay the progress of this project." (Exhibit 12).

31. On April 8, 2005, Farfield advised DGS that it had completed the disputed work and again requested a claims hearing as soon as possible so that it could resolve its claim. (Answer ¶15; Exhibit 2).

32. A claims conference was conducted by DGS on June 9, 2005. (Complaint and Answer ¶16; Complaint, Exhibit G; Exhibits 1, 2).

33. By letter dated August 22, 2005, DGS advised Farfield that its claim had been denied in full. The letter stated: "We disagree with your interpretation of the specifications. The work in dispute was included within your contract and should have been performed without a

change order. Therefore, your claim is denied in its entirety.” (Complaint, Exhibit H).

34. Bulletins are issued by DGS in advance of contract bidders submitting a bid and are intended to modify or clarify the bid documents. (N.T. 61).

35. There were two bulletins issued with respect to the Project. There was nothing in either Bulletin No. 1 or Bulletin No. 2 that addressed Specification Sections 01010(1.04)(H)(13), 16715(1.3.A.2) or any other specification with regard to the data network/cabling work. (N.T. 82; Exhibits 5, 6).

36. Bulletin No. 1 does reference Item CS-1, the cover sheet for the electrical drawings, and states that the Orchestra Lift, Audio Visual and Stage Lighting will be awarded via separate contract. (Exhibit 5).

37. Throughout the bidding process and after the bids were awarded, Farfield did not raise any questions about whether it was responsible for the data network/cabling work. (N.T. 63).

38. At the pre-bid meeting, there were no questions about, or discussion of, the data network/cabling issue by Farfield or any other contractor. (N.T. 34).

39. According to Section 3.5 of the General Conditions of the Construction Contract, the Professional is the initial interpreter of the requirements of the Contract document. (N.T. 51).

40. In accordance with Section 3.5, Mr. Johnson told Farfield that the data network/cabling work was part of Farfield’s Contract. (N.T. 50-51; Exhibit 10).

41. Section 5.1 of the General Conditions of the Construction Contract states that if the contractor finds any errors in the plans or specification, he must immediately inform the Professional in writing. (N.T. 51, 75, 102).

42. Farfield did not notify the Professional at any point prior to its bid that there was an error in Specification Sections 01010, 16010 or 16715. (N.T. 75, 102; Board Finding).

43. DGS and the Professional never intended to award a separate contract for the data network/cabling work. (N.T. 63, 102).

44. The cover sheet for the Contract drawings lists electrical drawings No. E-1 through E-16 as included in the Contract. It identifies audio visual and stage lighting as “NIC” (not-in-contract). (N.T. 63, 70, 71; Exhibit 10, 24).

45. The work of other prime contractors appears on the electrical drawings. This is done, inter alia, to facilitate coordination of trades and work placement. (N.T. 85-90; Exhibit 24; Board Finding).

46. Article 2.2 of the General Conditions of the Construction Contract states: “If there is a conflict between the drawings and the specifications, the specifications shall prevail. If there

is a conflict between the General Conditions and the specifications, the specifications shall prevail.” (Exhibit 20).

47. DGS’s Professional, Mr. Johnson, confirmed his understanding that if there is an inconsistency between the specifications and the drawings, then the specifications control. (N.T. 83).

48. Farfield’s interpretation of the Contract, that Specification Section 01010(1.04)(H)(13) identifies the conduit and backbox infrastructure systems and data network/cabling as work to be performed by the Owner’s separate contractors, is a reasonable interpretation of the Contract, particularly since Specification Section 16175(1.3.A.2) identifies the Electrical Contractor (i.e. Farfield) as the provider of conduit, raceways, sleeves, cable trays and pull boxes for telephone data and television but concludes with the phrase “unless otherwise noted.” (Exhibit 7; Board Finding).

49. The interpretation by DGS and its Professional that “the work delineated on electrical drawings E-9 through E-12 and E-14, and by Specification Section 16715” is part of Farfield’s Contract, while not unreasonable, is inconsistent with Section 01010(1.04)(H)(13) of the Contract’s specifications, which affirmatively states that the data network/cabling work would be “installed by Owner’s separate contractors” and Specification Section 16715 which identifies the electrical contractor (i.e. Farfield) as the provider of certain data network/cabling “unless otherwise noted”. (Exhibits 7, 10; Board Finding).

50. Because Specification Section 01010(1.04)(H)(13) states explicitly that the data network/cabling work was to be installed by the Owner’s separate contractors; Specification Section 16715 identifies the Electrical Contractor (i.e. Farfield) as the provider of data network/cabling but qualifies some of the items with “unless otherwise noted”; and the Contract drawings show data network/cabling, but contain the work of other contractors and are stated to be subordinate to the specifications in any event; the Board finds the Contract, as a whole, to be reasonably susceptible to different construction, and ambiguous as to whether or not the data network/cabling was part of the work to be performed by Farfield. (Exhibits 7, 10, 24; F.O.F. 14, 18, 19, 44-49; Board Finding).

51. For the same reasons stated in Paragraph 50 immediately above, particularly the affirmative statement in the beginning of the Specifications at Sections 01010(1.04)(H)(13) that the data network/cabling work will be installed by the Owners separate contractors, the recognition that drawings can contain the work of other contractors for coordination and placement purposes, and the fact that Penn State would sometimes use its own separate contractor for data network/cabling, as well as the contentions of the respective parties that its opponent’s interpretation is so clearly wrong, the Board also finds that the ambiguity in the Contract is not glaring or obvious. (Exhibits 7, 10, 24; F.O.F. 14, 18, 19, 25, 26, 28, 30, 33, 44-50; Board Finding).

52. John Muscavage is a project manager for Farfield and was the project manager for the Project. (N.T. 15-16).

53. Farfield subcontracted with Pennsylvania Networks to perform the bulk of the additional data network/cabling installation work. The value of the Pennsylvania Networks

subcontract was originally \$58,750.00. (N.T. 26; Exhibit 15).

54. A change order in the amount of \$3,695.00 was issued to Pennsylvania Networks by Farfield for a “cabling shed” to prevent damage to equipment caused by power surges resulting from lightning strikes or other similar events. This addition resulted in a total payment to Pennsylvania Networks of \$62,445.00 for the additional work. (N.T. 27; Exhibit 19).

55. This cabling shed work was not shown on any of the DGS drawings or specifications. DGS was made aware of this work and stated that it should be added to Farfield’s claim. (N.T. 27-28).

56. Farfield performed some of this data network/cabling work using its own material and labor force. (N.T. 22).

57. In order to determine the price of the material and the labor used by Farfield itself in performing the data network/cabling work, Mr. Muscavage looked at the contract drawings, counted the number of outlets to be installed, and then referred to R.S. Means, a national pricing survey for electrical-work change orders, for change order unit-prices and labor-hours connected with the additional work. (N.T. 22-24; Exhibit 19).

58. Mr. Muscavage priced the materials and labor for the additional work performed by Farfield using the material prices and labor-hours stated in R.S. Means, because that was the standard procedure accepted by DGS for change-order work on the Project. (N.T. 29-31, 33).

59. DGS accepted some 20 change orders for Farfield on the Project using R.S. Means as the method of pricing the work. (N.T. 30).

60. Fairfield’s use of the R.S. Means national pricing survey in order to determine the material prices and to calculate labor-hours produced a reasonable calculation of damages incurred by Farfield for Farfield’s own part of the additional work in this case. (F.O.F. 56-59; Board Finding).

61. Farfield incurred costs of \$4,727.80 for material for the installation of the additional data network/cabling work and \$18,931.91 for the labor for installing that material. (Exhibit 19; F.O.F. 56-60).

62. Farfield incurred costs totaling \$94,657.94 to install the additional data network/cabling systems. (Exhibits 14-16; F.O.F. 53-61; Board Finding).

63. Although the Board concludes that Farfield’s interpretation of the Contract specifications and drawings is correct, Mr. Johnson’s testimony on his interpretation of the Contract specifications and drawings is sufficiently plausible that the Board does not find that DGS acted in an arbitrary or vexatious manner in denying Farfield’s claim. (Exhibit 10; F.O.F. 11-19, 27, 28, 48-51; 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. Sections 1701-1751 of the Commonwealth Procurement Code, 62 Pa.C.S.A. §§ 1701-1751.

2. The Board of Claims has jurisdiction over the parties as well as the subject matter of the claim asserted by the plaintiff, Farfield Company. Id.

3. Farfield and DGS entered into a valid contract for the electrical work on the Project known as Library Addition and Classroom Building Addition, Pennsylvania State University -York Campus, York, Pennsylvania, Contract No. DGS 800-269.4.

4. The cardinal rule for interpreting a contract is to ascertain the intent of the parties at the time the contract was made and give effect to that intent. Dick Enterprises v. Department of Transportation, 746 A.2d 1164, 1168 (Pa. Cmwlt. 2000).

5. If there is no ambiguity in the contract, the parties' intent shall be determined by referring only to the language in the contract. Department of Transportation v. Brozzetti, 684 A.2d 658, 663 (Pa. Cmwlt. 1996).

6. However, a contract is ambiguous if it is reasonably susceptible to different constructions, is obscure in meaning through indefiniteness of expression, or has a double meaning. Id.

7. In order to construe the meaning of a contract containing an ambiguity, the Board may examine the circumstances surrounding the contract in order to ascertain the intent of the parties. Department of Transportation v. Bracken Construction Co., 457 A.2d 995, 997 (Pa. Cmwlt. 1983).

8. When an examination of the circumstances surrounding the execution and performance of a contract fails to clarify the intent of the parties, a court may employ various rules of contract construction to determine the legal effect of the contract's language. Id. at 999.

9. When a contract is ambiguous, the contract's ambiguity will be construed against the drafter of the contract. Id.; Department of Transportation v. E-Z Parks, 620 A.2d 712, 718 (Pa. Cmwlt. 1993).

10. Because the Contract, as a whole, is ambiguous as to whether or not it included the data network/cabling work here at issue, that ambiguity will be resolved against DGS, the drafter of the Contract. Accordingly, we hold that the Contract did not include the data network/cabling work here at issue. Id.

11. In accordance with Article 2.2 of the General Conditions of the Construction Contract, if there is a conflict between the Contract drawings and the specifications, the specifications control.

12. Because they are specifications, Section 01010(1.04)(H)(13), stating that the data network/cabling system will be installed by the “Owners separate contractors” and 16715(1.3.A.2) identifying the Electrical Contractor (i.e. Farfield) as the provider of data network/cabling “unless otherwise noted” the inclusion of data network/cabling on the drawings does not establish that the data network cabling was included in the Contract.

13. When government construction contracts contain an obvious or glaring ambiguity, a public contractor is obliged to inquire and attempt to resolve the problem before entering the contract. Department of Transportation v. Mosites Construction Co., 494 A.2d 41, 44 (Pa. Cmwlth. 1985)

14. When a government contract contains an ambiguity that is subtle, hidden or minor, a public contractor is not obliged to inquire into and attempt to resolve the problem before entering the contract. Id.

15. Because we find that the ambiguity in the Contract with respect to the data network/cabling work here at issue was neither obvious nor glaring, we hold that Farfield did not have a duty to inquire or resolve this issue before entering the Contract. Id.

16. DGS breached the Contract by refusing to make payment to Farfield for the additional work and costs in question, which work and costs were outside the scope of the Contract and which Farfield incurred at the direction of DGS. A.G. Cullen Construction v. State System of Higher Education, 898 A.2d 1145, 1171 (Pa. Cmwlth. 2006); Department of Transportation v. Paoli Construction Co., 386 A.2d 173, 175 (Pa. Cmwlth. 1978).

17. A contractor performing work and incurring costs beyond the scope of the contract is entitled to additional compensation for that extra work and costs. A.G. Cullen Construction v. State System of Higher Education, 898 A.2d 1145, 1171 (Pa. Cmwlth. 2006); Department of Transportation v. Paoli Construction Co., 386 A.2d 173, 175 (Pa. Cmwlth. 1978).

18. DGS is liable to Farfield for the extra work and costs connected with the installation of the data network/cabling system. Id.

19. Damages need not be determined with mathematical certainty, but only with reasonable certainty, and evidence of damages may consist of probabilities and inferences. Sufficient facts must be introduced to allow a court to arrive at an intelligent estimate without conjecture. A.G. Cullen Construction v. State System of Higher Education, 898 A.2d 1145, 1174 (Pa. Cmwlth. 2006); J.W.S. Delavau, Inc. v. Eastern America Transport and Warehousing, 810 A.2d 672, 685 (Pa. Super. 2002).

20. Farfield is entitled to payment of damages in the principal amount of \$94,657.94.

21. When a government agency withholds in bad faith a contractual payment due to a contractor, the Board may assess a penalty of 1% per month of the amount withheld against the agency and may also award reasonable attorney fees to the prevailing contractor. Section 3935 of the Commonwealth Procurement Code, 62 Pa.C.S.A. § 3935.

22. The penalty and attorney fees under Section 3935 are available to the plaintiff when monies are withheld in “bad faith,” *i.e.*, when it is determined that the government agency’s withholding of the money was arbitrary or vexatious. A.G. Cullen Construction v. State System of Higher Education, 898 A.2d 1145, 1164 (Pa. Cmwlth. 2006).

23. An action taken “without sufficient ground either in law or fact” is vexatious and would justify an award of attorney’s fees and penalty and interest. *Id.* at 1165 (quoting Thunberg v. Strause, 545 Pa. 607, 615, 682 A.2d 295, 299-300).

24. Because Mr. Johnson and DGS had a reasonable, albeit incorrect, interpretation of the Contract drawings and specifications, DGS did not conduct itself in an arbitrary or vexatious manner in this action, and DGS is not liable for the payment of a penalty or attorney fees under Section 3935 of the Commonwealth Procurement Code.

25. DGS is liable for payment of prejudgment interest on the principal amount of damages, \$94,657.94. Prejudgment interest is payable at the statutory rate for judgments (6% per annum) beginning on April 8, 2005, the date on which Farfield presented its claim to DGS, and running through the date of this Opinion and Order.¹ Accordingly, DGS is liable to Farfield for a total of \$105,307.34 comprised of \$94,657.94 in damages plus \$10,649.40 in prejudgment interest. 41 P.S. § 202 (legal rate of interest); 62 Pa.C.S.A. § 1751.

26. DGS is liable for post-judgment interest on the total outstanding judgment at the statutory rate for judgments (6% per annum) beginning on the date of the attached Order and continuing until the judgment is paid in full. 41 P.S. § 202 (legal rate of interest)

¹ Prejudgment interest in this case in the amount of \$10,649.40 is calculated as follows: \$94,657.94 x 0.000164 x 686 days (4/8/05 to 2/23/07) = \$10,649.40.

DISCUSSION

The dispute in this matter arose from a contract between Farfield, an electrical contractor, and DGS for the construction of the electrical portion of a library addition and classroom building addition at the York Campus of Pennsylvania State University. The primary question is whether or not the data network/cabling work described in Specification Section 16715 is included as part of the work for which Farfield contracted.

Farfield contends that this work was excluded from its scope of work based on specification Section 01010(1.04)(H)(13), which states: “Conduit and backbox infrastructure systems for security, data, phone, cable tv systems, and theatre audio/lighting systems to be installed by Owner’s separate contractors. (Emphasis added.)” Farfield argues that the foregoing language is unequivocal and that it overrides any contrary language or work set forth in specification Section 16715 or in the Contract drawings (Nos. E-1 through E-16). Farfield further argues that, if an ambiguity exists as to whether or not the data network/cabling was included in its Contract, such an ambiguity was subtle and therefore the ambiguity should be resolved against DGS.

DGS contends that the language contained in Section 01010(1.04)(H)(13) means that only the theatre audio and lighting systems were to be installed by separate contractors, and that Section 01010(1.04)(A) specifically refers Farfield to other pertinent specifications and contract drawings in order to determine the scope of work under the Contract. Those other documents include Sections 16010 and 16715 of the specifications, Bulletins Nos. 1 and 2, and drawings Nos. E-9, E-10, and E-11 through E-14. DGS argues that these documents show that the data network/cabling work was part of Farfield’s Contract. DGS further argues that Farfield made a unilateral mistake in regard to its interpretation of the Contract and that DGS cannot be held responsible for the extra work and costs incurred because of that error. It also argues that

Farfield had an obligation to inquire about any alleged ambiguity and to resolve the issue before entering into the Contract.

Although it is true that Specification Section 16010 refers to Section 16715 as part of the Contract work, and Section 16715 extensively describes the data network/cabling system, Section 16715 (1.3)(A)(2) of the specifications states that the contractor shall provide the necessary “[c]onduit, raceways, sleeves, cable tray and pull boxes for telephone, data and television distribution unless otherwise noted. (Emphasis added.)” Section 01010(1.04)(H)(13) states that these items will be “installed by Owner’s separate contractors.” Thus, even Section 16715 does not constitute a clear refutation of the unequivocal statement in Section 01010(1.04)(H)(13) that the data network/cabling work at issue will be performed by another contractor. Furthermore, in regard to the Contract drawings, because Article 2.2 of the General Conditions of the Construction Contract states that, “If there is a conflict between the drawings and the specifications, the specifications shall prevail”, it cannot be said that the existence of data network/cabling work on those drawings somehow modifies the explicit language in Section 01010(1.04)(H)(13). Finally, we found nothing in Bulletin 1 or 2 that modified the language of Section 01010(1.04)(H)(13) or the other applicable specifications. The Board also found credible testimony which confirmed that contract drawings will often show the work of other contractors for the sake of coordination and placement. For all these reasons, the Board finds the Contract, as a whole, to be ambiguous as to whether or not the data network/cabling at issue was included in Farfield’s work.

It is a well-established rule of contract interpretation that ambiguities in a contract shall be interpreted against the drafter thereof. Department of Transportation v. E-Z Parks, 620 A.2d 712, 718 (Pa. Cmwlth. 1993). Having found nothing in the record to alter this rule, the Board holds that the Contract did not include the data network/cabling as issue in this case.

As an alternative argument, DGS appears to contend that Section 01010(1.04)(H)(13) and the inclusion of the data network/cabling work in Sections 16010 and 16715, and in the enumerated Contract drawings, constitute a sufficiently glaring ambiguity in the documents as to require Farfield to make an inquiry regarding the issue. DGS cites equally well established case law for the concept that when a government construction contract contains an obvious or glaring ambiguity, the contractor has the obligation to seek clarification of the ambiguity prior to entering the contracts. Department of Transportation v. Mosites Construction Co., 494 A.2d 41, 44 (Pa. Cmwlth. 1985). However, the same cases have held that when the ambiguity is subtle, hidden or minor, and the ambiguity is not revealed until after the contract is executed, there is no obligation of inquiry on the part of the contractor. Id.

Section 01010(1.04)(H)(13) states that the items constituting the data network/cabling system will be “installed by Owner’s separate contractors.” Despite this language, Section 16101(1.2)(B)(A) lists “Section 16715 – Data Networking System” as part of the Contract’s electrical work and some of the contract drawings do show data network/cabling installations. Although the Board believes the documents, as a whole, are ambiguous, the Board is persuaded that the ambiguity is not obvious or glaring, and Farfield should not be required to absorb the extra costs for performing the additional data network/cabling. Standing alone, the language in Section 01010(1.04)(H)(13) unequivocally states that the data network/cabling is to be performed by other contractors and Section 16715 does not wholly contradict this. In addition, we have noted that contract drawings often show work that is intended to be performed by other prime contractors to facilitate coordination of the trades, particularly when their work must interface or be in close proximity. Simply put, it would not be unusual to show the placement of data network/cabling on a drawing provided to the electrical contractor so as to avoid conflicting placement of these two wiring components even if the work was to be done by

two different contractors. Add to this Farfield's experience with Penn State work which indicates Penn State would often use a separate contractor for this type of work, and Farfield's interpretation that the data network/cabling on this Project was to be the subject of a separate contract was clearly reasonable. We find nothing in the Contract drawings or specifications provided which in our view constitutes a glaring or obvious contradiction to the plain language of Section 01010(1.04)(H)(13). Accordingly, to the extent there is any ambiguity in the Contract documents, it is subtle and must be construed against DGS, drafter of these documents.²

DGS has also questioned Farfield's use of R.S. Means as a basis to cost out portions of Farfield's damages. A government contractor who performs work beyond the scope of its contract is entitled to additional compensation. A.G. Cullen Construction v. State System of Higher Education, 898 A.2d 1145, 1171 (Pa. Cmwlth. 2006). Damages need not be determined with mathematical certainty, but only with reasonable certainty, and evidence of damages may consist of probabilities and inferences. Sufficient facts must be introduced to allow a court to arrive at an intelligent estimate without conjecture. A.G. Cullen Construction v. State System of Higher Education, 898 A.2d 1145, 1174 (Pa. Cmwlth. 2006); J.W.S. Delavau, Inc. v. Eastern America Transport and Warehousing, 810 A.2d 672, 685 (Pa. Super. 2002).

First of all, we note that \$62,445.00 of the \$94,657.94 claimed as damages is a subcontracted amount not in serious question. As to the remaining \$32,212.94, the method of using R.S. Means in order to determine the cost of extra work has been recognized by the Board in the past and accepted by DGS repeatedly in change-order costing. When using this method, Mr. Muscavage looked at the contract drawings to ascertain quantities and then referred to R.S. Means for change order unit-prices and labor hours connected with the work. Mr. Muscavage

² Although not critical to our holding, the Board does note that cases cited for the proposition that contractors have a duty to recognize errors in plan documents typically involve situations where they know from on-site observation that specifications or drawings were in error. Absent some indicia that the contractor knew or had good reason to know of the error, we would be cautious in imposing the cost of extra work actually performed by the contractor merely because it did not catch an error made initially by the Commonwealth agency.

testified that he priced the materials and labor for the additional work using the material prices and labor hours stated in R.S. Means, because that was the standard procedure accepted by DGS for change-order work on the Project. Although this is not the ideal method of calculating contract damages, we do see it as reasonable under the circumstances of this case, *i.e.*, the amounts are relatively small, the materials were taken from inventory already on hand which had been invoiced in bulk long prior to the occasion, and the additional tasks were likely performed in conjunction with contract work and not easily broken out given the relatively small amount of additional work to run the data cabling. In sum, Farfield has presented sufficient facts and R.S. Means is a sufficiently reliable resource for pricing electrical work that the Board will accept Farfield's proof of damages as reasonably established in this instance.

Farfield also has asked for a 1% per month penalty interest and attorney fees pursuant to Section 3935 of the Procurement Code, 62 Pa.C.S.A. § 3935. These sums are available to the plaintiff when payments due under contract are withheld in bad faith, *i.e.*, when it is determined that the government agency's withholding of the money was arbitrary or vexatious. A.G. Cullen Construction v. State System of Higher Education, 898 A.2d 1145, 1164 (a. Cmwlth. 2006). Farfield contends that there was no reasonable basis for the withholding of payment in this matter. Commonwealth Court has held that an action taken "without sufficient ground either in law or fact" is vexatious and would justify an award of attorney fees and penalty and interest. *Id.* at 1165 (quoting Thunberg v. Strause, 545 Pa. 607, 615, 682 A.2d 295, 299-300). Although ultimately held by this Board to be incorrect, the interpretation of the Contract by Mr. Johnson was sufficiently coherent and credible that the Board will not conclude that DGS's behavior in this matter was arbitrary or vexatious. The Board concludes that, despite Farfield's reasonable reliance on the language in Specification Section 01010(1.04)(H)(13), the position taken by DGS and the Professional was not without support in other provisions of the specifications and

drawings. The requested penalty and attorneys fees will not be awarded. However, interest at 6% per annum from April 8, 2005, on the judgment is appropriate. Therefore, a judgment in the principal amount of \$94,657.94 shall be awarded Farfield with statutory interest running from April 8, 2005. Each party shall bear its own costs and attorney's fees.

ORDER

AND NOW, this 23rd day of February, 2007, **IT IS ORDERED** and **DECREED** that judgment be entered in favor of Plaintiff, The Farfield Company, and against Defendant, Commonwealth of Pennsylvania, Department of General Services, in the sum of \$105,307.34 composed of \$94,657.94 in damages plus \$10,649.40 in prejudgment interest accruing thereon from April 8, 2005, to the date of this Order. In addition, Farfield is 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.

Each party herein will bear its own costs and attorney fees.

BOARD OF CLAIMS

OPINION SIGNED

Jeffrey F. Smith
Chief Administrative Judge

Ronald L. Soder, P.E.
Engineer Member

John R. McCarty
Citizen Member

