COMMONWEALTH OF PENNSYLVANIA

PRO-SPEC PAINTING, INC.	:	BEFORE THE BOARD OF
	:	CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF GENERAL SERVICES	:	DOCKET NO. 3910

FINDINGS OF FACT

A. *General Facts*

1. Pro-Spec Painting, Inc. ("Pro-Spec") is a New Jersey corporation with its principal business address at 1819 Cedar Avenue, Vineland, New Jersey 08360. (Statement of Claim at ¶ 1; Commonwealth's Answer with New Matter and Counterclaim at ¶ 1).

2. The Department of General Services ("DGS" or the "Department") is an agency of the Commonwealth of Pennsylvania with its principal business address at 515 North Office Building, Harrisburg, PA 17125. (Statement of Claim at ¶ 2; Commonwealth's Answer with New Matter and Counterclaim at ¶ 2).

3. On November 9, 2000, Pro-Spec and DGS entered into Contract No. 570-27 IN8.1 ("Contract") for painting work at Fayette State Correctional Institute, a correctional facility, being constructed in East Millsboro, PA for a total price of $497,940. ("Fayette SCI" or "Project"). (N.T. 31-33; Ex. P-1).

4. Ronald Yarbrough ("Mr. Yarbrough") was the principal officer and owner of Pro-Spec at all times relevant to this action. (N.T. 25-27).

5. Joseph Mayer ("Mr. Mayer") was the general superintendent on the Project for Pro-Spec at all times relevant to this action. (N.T. 42-44, 58-59, 691-695).

6. P.J. Dick, Inc. ("P.J. Dick"), was DGS's agent and construction manager on the Project. (N.T. 31-32, 35, 46; Ex. P-1).

7. Douglas Zaenger ("Mr. Zaenger") was the full time project manager for P.J. Dick on the Project until approximately September of 2002. (N.T. 46, 1041, 1119-1121).

8. Joseph Kopko ("Mr. Kopko") was Director of Construction Management for P.J. Dick and Mr. Zaenger's superior at P.J. Dick. Mr. Kopko also served as the full time project manager for P.J. Dick on the Project from approximately September of 2002 through the point at which Pro-Spec demobilized from the Project for the last time in April 2003. (N.T. 96-98, 1005).

9. Gary Mizla ("Mr. Mizla") was a project superintendent for P.J. Dick on the Project, charged with the responsibility of inspecting Pro-Spec's work upon completion. (N.T. 913, 924-925).

10. Chad Gallagher ("Mr. Gallagher") was a project engineer for P.J. Dick on the Project. (N.T. 918-919).

11. Originally, Pro-Spec was scheduled to begin its on site painting work at Fayette SCI at the end of April/beginning of May 2001 following completion of precedent work by other contractors. (N.T. 33-37, 580-588; Ex. P-165).

12. It is undisputed, however, that the original milestones and schedule for the construction of Fayette SCI could not be maintained due to a series of delays/disruptions which occurred before Pro-Spec was to begin its painting work. As a result, Pro-Spec, through no fault of its own, could not commence its work in May 2001 as originally anticipated. (N.T. 35, 45, 59-60, 580-597, 704-706; Ex. P-165; Board Finding).

13. Pro-Spec actually commenced its work in late October/ early November 2001, approximately 6 months after it was originally supposed to start painting. (N.T. 33-37, 45, 59-60, 580-597, 704-706; Ex. P-165; Finding of Fact ("F.O.F.") 11-12; Board Finding).

14. Although clear that Pro-Spec did not cause this delay, neither party credibly established who or what was the cause of the delay to Pro-Spec's actual start of work by the evidence presented in this case. (N.T. 33-37, 45, 59-60, 580-597, 704-706; Ex. P-165; Board Finding).

15. The Project bid documents set June 1, 2002 as the target date for the completion of the Project. (N.T. 403, 1058-1059; Ex. P-180).

16. From the time it started work on the Project throughout the first half of 2002, DGS and P.J. Dick pressed Pro-Spec to meet the original Project completion date of June 1, 2002, thus compressing the time which Pro-Spec had to complete its work and accelerating its performance.[1] (N.T. 45, 53-57, 403, 580-597, 1058-1059; Exs. P-165, P-180, D-661; F.O.F. 13-15; Board Finding).

[1] DGS never formally extended the June 1, 2002 completion date for Pro-Spec or the Project, and it was only after June 2002 that P.J. Dick even acknowledged that the Project would not be complete by that time and mentioned later completion dates and/or the possibility of extensions. (N.T. 226-244, 352-354, 952-969; Exs. P-142, P-144, P-145, D-612, D-623, D-626, D-627, D-632, D-633, D-652; Board Finding). See also Commonwealth's Answer with New Matter and Counterclaim ¶¶ 88-89 cf. ¶¶ 90, 92 (c).

17. Pro-Spec subsequently filed a claim with this Board for delay damages and inefficiencies caused by the aforementioned delay and acceleration. This aspect of Pro-Spec's claim has been dismissed for failure to raise same at DGS prior to filing it with the Board, and the Board makes no award herein based on Pro-Spec's claim for delay or acceleration inefficiencies. (Pro-Spec Complaint, ¶¶ 46-51; Opinion and Order, May 8, 2009, B.O.C. Docket No. 3910; Board Finding).

18. With only minor and immaterial exception, all of Pro-Spec's Contract painting work on the Project was to be performed inside. (N.T. 37; Exs. P-1, P-132, P-180; Board Finding).

19. As the painter on the Project, Pro-Spec was a "finish' contractor that reasonably expected other "precedent" contractors to substantially complete their work in building areas before Pro-Spec would be required to apply its paint and finishes to these areas. (N.T. 35-37, 68-70, 73-79, 587-590, 709-719, 727-750, 1019-1020, 1024; Exs. P-132, P-134, P-165, P-180; Board Finding).

20. The logic and practicality of construction on this Project, as with most projects of similar nature, dictated that nearly all of the work of most other trades, including all of the masonry and installation of the detention hardware (including door frames, doors, window frames, door tracks, embeds, etc.) and most of the mechanicals (plumbing, electric, HVAC) other than pre-finished vent covers, faucets, cover plates, etc., would be performed in areas before Pro-Spec would be required to paint these areas, so that its paint/finishes would not be damaged or destroyed by the work of these other contractors. Accordingly, the masonry, detention hardware, and mechanical contractors, among others, are considered "precedent" contractors to Pro-Spec on the Project. (N.T. 35-37, 68-70, 73-79, 587-590, 709-719, 727-750, 1019-1020, 1024; Exs. P-132, P-134, P-165, P-180; Board Finding).

21. Thus, in the logical and accepted work sequence, Pro-Spec would apply its paint finishes to areas in the buildings <u>after</u> the work of these other precedent contractors had been completed in these areas so the Project buildings could be presented to DGS in a clean, neat and freshly painted condition upon conclusion of Pro-Spec's work. (N.T. 35-37, 68-79, 587-590, 709-719, 727-750, 1019-1020, 1023-1025; Board Finding).

22. P.J. Dick, however, in a separate and misguided effort to speed up Project completion, directed Pro-Spec to paint numerous areas before these areas were ready (i.e. before other "precedent" contractors had completed their work or product installations in these areas). (N.T. 35-37, 68-70, 86-91, 218-226, 709-719, 727-729, 747-750, 1019-1020, 1024-1025; Board Finding).

23. P.J. Dick directed Pro-Spec to proceed with its painting in an out-of-sequence manner (i.e. to paint in areas where precedent contractors such as the mason, detention hardware and mechanical contractors had still not completed their work). (N.T. 35-37, 68-70, 86-91, 218-226, 709-719, 727-750, 1019-1020, 1024-1025; Board Finding).

24. Substantial evidence, including photographs, demonstrates that Pro-Spec, as directed by P.J. Dick, painted building areas on the Project before Southern Steel completed all of its installations therein such as doors, door frames, window frames, railings and other detention hardware, thereby causing Southern Steel to damage Pro-Spec's paint finishes. (N.T. 68-74, 81, 86-91, 132-133, 166-173, 200-208, 218-221, 712-714, 732-735, 740-742, 763-765; Ex. P-164; Board Finding).

25. Substantial evidence, including photographs, demonstrates that Pro-Spec, as directed by P.J. Dick, painted building areas on the Project prior to completion of the work of precedent contractors other than Southern Steel in these areas, thereby causing the other contractors to damage Pro-Spec's paint finishes. (N.T. 68-74, 81, 86-91, 132-133, 200-208, 218-221, 710-711, 716-718, 732-745; Ex. P-164; Board Finding).

26. As a result of P.J. Dick's direction to Pro-Spec to paint areas out-of-sequence, precedent contractors, including the detention equipment contractor (Southern Steel) as well as the masonry and mechanical contractors, had to complete their installations and work in areas that were already painted by Pro-Spec, and Pro-Spec's paint finishes in these areas suffered substantial damage in the process (e.g. burn marks from welding, mud/cement splattered on walls, scraping of painted finishes, etc.). (N.T. 35-37, 68-74, 81, 86-91, 132-133, 140-141, 153, 166-180, 200-208, 218-225, 709-720, 727-750, 763-765, 1019-1020; Ex. P-164).

27. There was no credible evidence presented at hearing to indicate that these precedent contractors (including Southern Steel) performed their work in a negligent or unusually careless or sloppy manner. Rather, we conclude that the damage caused to Pro-Spec's finished work was the natural and normal consequence of these precedent contractors performing their work after Pro-Spec had painted these areas. (N.T. 68-74, 81-91, 132-133, 140-141, 153, 167-180, 200-208, 218-225, 709-720, 727-750, 763-765, 1019-1020; Ex. P-164; F.O.F. 19-26; Board Finding).

28. P.J. Dick's directions to Pro-Spec to paint areas out-of-sequence, and the natural consequences thereof, described above in Findings of Fact Paragraphs 19-27, in turn, required Pro-Spec to return to these locations a second time (and sometimes even more often) to repaint damaged areas. (N.T. 68-74, 81-91, 132-133, 140-141, 153, 167-180, 200-208, 218-225, 709-720, 727-750, 763-765, 1019-1020; Ex. P-164; F.O.F. 19-27).

29. Even where Pro-Spec's paint finishes were not extensively damaged by subsequent installation of items such as door frames, doors, window frames or other detention hardware by Southern Steel or by the subsequent work of other precedent contractors, the need to return to these areas to paint the later installations required additional rounds of set-up, preparation, tear-down and clean-up in these areas as well as a significant degree of repainting to properly blend the old and newly painted areas immediately adjacent to these new installations. (N.T. 68-74, 81-91, 140-141, 153, 167-180, 200-208, 218-225, 709-720, 727-750, 763-765, 1019-1020; F.O.F. 19-28).

30. P.J. Dick itself, at least initially, recognized that its direction to alter the normal sequence of Pro-Spec's work would require extra work for Pro-Spec. (N.T. 68-69, 86-91, 140-151, 174-175, 218-223, 727-730, 743-746, 1019-1020, 1174-1176, 1181-1191; Exs. P-27, P-78, P-137 through P-139, P-145; F.O.F. 19-29).

31. P.J. Dick informed Pro-Spec in May 2002 that change orders would be issued for the additional work involved in revisiting areas throughout the Project to perform repair painting of areas damaged by subsequent Southern Steel installations and additional work repainting areas damaged by the subsequent work of other contractors. (N.T. 68-69, 86-91, 140-151, 174-175, 218-223, 727-730, 743-746, 1019-1020, 1174-1176, 1181-1191; Exs. P-27, P-78, P-137 through P-139, P-145).

32. P.J. Dick then initiated Change Orders 007 and 0010 for out-of-sequence repair painting related to subsequent installations by Southern Steel and Change Order 008 for repainting areas damaged by other contractors' subsequent work. (N.T. 86-91, 142-151, 218-226, 1174-1176, 1181-1191; Exs. P-27, P-78, P-137 through P-139, P-145).

33. P.J. Dick had also requested Pro-Spec perform extra work comprised of 1) painting drywall that was added late when the Project plans were revised to delete fireproofing in some areas and 2) painting caulking applied out-of-sequence because DGS had initially failed to contract for this caulking at the start of the Project. (N.T. 62-74, 79-80, 95-114, 127-139, 746-762; Exs. P-6, P-8 through P-25, P-136).

34. When it requested Pro-Spec to paint the additional drywall and caulking, P.J. Dick informed Pro-Spec that one change order (Change Order 003) would be issued for painting this drywall and caulking. (N.T. 62-74, 79-80, 95-114, 127-139, 746-762, 931-932, 1184-1185; Exs. P-6, P-136).

35. P.J. Dick instructed Pro-Spec to commence all three categories of the additional or "extra" work (added drywall and caulking, out-of-sequence repair painting relating to Southern Steel installations, and repainting of areas damaged by the subsequent work of other contractors) once Pro-Spec had substantially completed its Contract work items. (N.T. 86-91, 96-111, 218-226, 1181-1191).

36. Pro-Spec reached substantial completion of its Contract work on the Project on or about August 14, 2002, as evidenced by a certificate of substantial completion signed by L. Robert Kimball & Associates, the Project's design professional. (N.T. 226; Ex. P-140).

37. After reaching substantial completion, Pro-Spec began work on the corresponding punchlist of original Contract items (also provided in mid-August 2002 by the design professional and hereinafter referred to as the "Original Punchlist") to fully complete its work on the Project. The Project's design professional at this time estimated the total value of all remaining Contract work to be $23,332. (N.T. 816-817; Ex. P-186; Board Finding).

38. Except for extra work painting some additional drywall and caulking in the amount of $475 done prior to September 1, 2002, Pro-Spec also began its change order and extra work noted above on or about September 3, 2002. (N.T. 115, 153, 194; Exs. P-2, P-3, P-8, P-31, P-82; F.O.F. 26-37).

39. Pro-Spec was subsequently provided with a follow-up punchlist, ("October Punchlist") as revised by P.J. Dick, by letter of October 14, 2002. In this letter, P.J. Dick described the October Punchlist as superceding the Original Punchlist. (N.T. 821-823; Ex. P-187).

40. Although this subsequent October Punchlist was not provided to the Board by either party, the October 14, 2002 cover letter for the October Punchlist was submitted. This cover letter bears a handwritten sign-off by P.J. Dick Project Superintendent, Gary Mizla, indicating that all work on this October Punchlist was completed by November 14, 2002. (N.T. 821-833; Ex. P-187).

41. By mid-November 2002, Pro-Spec had completed all original Contract work that had been made reasonably available to it as well as the extra work stemming from its out-of-sequence repair painting related to Southern Steel installation, painting of areas damaged by the subsequent work of other contractors and the added drywall/caulking paint work which it commenced in early September upon substantial completion, as per P.J. Dick's instruction. (N.T. 274-277, 351-355, 821-833; F.O.F. 26-40; Board Finding).

42. On or about November 15, 2002, Pro-Spec demobilized from the Project. (N.T. 274-277, 351-355, 821-833; Ex. P-187; F.O.F. 36-38).

43. In a letter dated November 22, 2002, P.J. Dick informed Pro-Spec that it had not adequately finished its work and ordered Pro-Spec to return to the Project "to complete contract work and punchlist items." (N.T. 963-964; Ex. D-636).

44. Pro-Spec disagreed that it had any outstanding Contract work items from its October Punchlist left to complete and believed P.J. Dick and DGS were mischaracterizing the additional/extra work of out-of-sequence and damage repair painting caused by the ongoing installation work of Southern Steel and other precedent contractors as original Contract/punchlist work. (N.T. 274-277, 351-355, 821-833; Ex. P-187; F.O.F. 36-40).

45. On December 13, 2002, Pro-Spec requested payment from DGS for the unpaid Contract balance and for payment for its extra work painting added drywall and caulking (referencing Change Order 003), out-of-sequence repair painting related to Southern Steel installations (referencing Change Orders 007/0010) and damage repair painting caused by the subsequent work of other contractors (referencing Change Order 008). (N.T. 91-102, 140-143, 173-177, 1092-1094, 1205-1209; Exs. P-3, P-4, P-26, P-77).

46. The requests for payment of the extra work described above in Findings of Fact, Paragraph 45 were denied on December 23, 2002. (N.T. 255; Ex. P-150).

47. On December 31, 2002, Pro-Spec filed a claim letter dated December 30, 2002 with Merle Ryan, DGS Deputy Secretary, for reimbursement for the extra work described above in Paragraphs 45-46. (N.T. 259-260; Exs. P-151, D-645B; F.O.F. 45-46; Board Finding).

48. By letter dated January 3, 2003, P.J. Dick informed Pro-Spec that liquidated damages would be held against Pro-Spec from November 28, 2002 until it completed its remaining Contract work, including punchlist items. (N.T. 351-355; Ex. D-652).

49. Pro-Spec's unpaid Contract balance request was denied on January 10, 2003. (N.T. 263, 278-280, 995; Exs. P-153, D-653).

50. DGS held a claim hearing to consider Pro-Spec's claims on January 22, 2003 ("Claim Hearing"). (N.T. 263-265, 268-274, 1077-78, 1092-94; Board Finding).

51. At the Claim Hearing, the parties discussed the unpaid Contract balance claim as well as the extra work claims noted above in Findings of Fact Paragraphs 45-49. (N.T. 268-270, 280-285, 1077-78, 1092-1094; F.O.F. 43-47; Board Finding).

52. At the Claim Hearing, both parties agreed to mutually formulate a final punchlist ("Final Punchlist") of items that Pro-Spec would complete in satisfaction of its duties under the Contract and for which Pro-Spec would be paid the remaining Contract balance. (N.T. 268-269, 280-285, 1077-78, 1092-1094; F.O.F. 43-49).

53. The Final Punchlist was subsequently formulated by the parties; Pro-Spec completed the work on the Final Punchlist by March 2003; and P.J. Dick signed off on this work as completed on March 20, 2003. (N.T. 280-282, 290-297; Exs. P-154, P-158).

54. Pro-Spec again demobilized from the Project and delivered remaining attic stock (unused paint) to P.J. Dick by April 4, 2003. (N.T. 310; Ex. P-161).

55. Thereafter, DGS neither paid Pro-Spec nor issued a final determination on any of Pro-Spec's claims as a result of the January 22, 2003 Claim Hearing or Pro-Spec's completion of the Final Punchlist formulated after the Claim Hearing. (N.T. 1092-1100, 1109-1113, 1292-1308).

56. Pro-Spec then filed with the Board of Claims on June 6, 2003 asserting claims for the following:

1. an unpaid contract balance claim in the amount of $66,758 (which included Change Order 003 work for painting added drywall and caulking in the amount of $31,958);

2. extra work in the respective amounts of: $152,167 for out-of-sequence repair painting relating to Southern Steel work; $213,581 for damage repair repainting associated with all other contractors; and an additional $2022 for painting added drywall and caulking not included in its Change Order 003 portion of the unpaid contract balance claim; and

3. damages due to delays and inefficiencies incurred on its Contract work on the Project in the amount of $187,000.

(Statement of Claim, ¶¶ 6-33, 46-51).

57. Pro-Spec's claim for delays and inefficiencies was dismissed by order of this Board dated May 8, 2009, upon DGS's motion for directed verdict for lack of jurisdiction due to Pro-Spec's failure to first raise this aspect of its claim with DGS. (Opinion and Order of May 8, 2009, BOC Docket No. 3910).

58. The Board denied the remainder of DGS's motion for directed verdict with respect to the claims for the unpaid Contract balance and the extra work for the reasons stated in the Opinion and Order of May 8, 2009. (Opinion and Order of May 8, 2009, BOC Docket No. 3910).

Discussion

Statute of Limitations Defense

59. Findings of Fact, Paragraphs 1-22, 25-26, and 34 through 82, of the Board of Claims Opinion and Order dated May 8, 2009, disposing of the Department's motion for directed verdict, are hereby incorporated and adopted as findings of fact in this Opinion and Order as if fully set forth herein. (Opinion and Order of May 8, 2009, BOC Docket No. 3910).

60. As previously noted, on December 31, 2002, Pro-Spec filed a claim letter (dated December 30, 2002) with DGS Deputy Secretary Merle Ryan, the Department's contracting officer, for payment on the extra work items described above in Paragraphs 45-47. (N.T. 259-260, 1086-1089; Exs. P-151, D-645B; F.O.F. 45-47; Board Finding).

61. An administrative claim hearing between the parties held by DGS then took place on January 22, 2003 ("Claim Hearing"). (Respondent's Motion for Directed Verdict at ¶ 21; Claimant's Answer to DGS Motion for Directed Verdict at ¶ 21; F.O.F. 50-51).

62. At the Claim Hearing, the parties fully vetted and discussed, in detail, the

unpaid Contract balance claim (Payment Application No. 12) as well as the extra work claims for painting added drywall and caulking (relating to Change Order 003), out-of-sequence repair painting related to Southern Steel installations (relating to Change Orders 007/0010) and damage repair painting caused by the subsequent work of other contractors (relating to Change Order 008) claims. (N.T. 263-64, 268-73, 281-82, 343-51, 467-69, 1092-1100; F.O.F. 45-52).

63. In the months following the Claim Hearing, Pro-Spec neither received payment nor a final determination in writing from DGS regarding either the unpaid Contract balance claim or any of its extra work claims. (N.T. 468-70, 1096-97, 1307-09; F.O.F. 52; Board Finding).

64. On June 6, 2003, 157 days after its December 30, 2002 claim letter was filed with DGS, Pro-Spec filed its statement of claim initiating the present matter with the Board of Claims. (Pro-Spec Statement of Claim and Board Docket Sheet No. 3910 ("Pro-Spec Complaint"); N.T. 259-260, 340, 1086-1089; Exs. P-151, D-645B; F.O.F. 47, 56, 60; Board Finding).

65. The Procurement Code, as amended by Act 142 of 2002 on December 3, 2002, states as follows:

> (d) Determination.--The contracting officer shall review a claim and issue a final determination in writing regarding the claim within 120 days of the receipt of the claim unless extended by consent of the contracting officer and the contractor. If the contracting officer fails to issue a final determination within the 120 days unless extended by consent of the parties, the claim shall be deemed denied. The determination of the contracting officer shall be the final order of the purchasing agency.
>
> (e) Statement of claim.--Within 15 days of the mailing date of a final determination denying a claim or within 135 days of filing a claim if no extension is agreed to by the parties, whichever occurs first, the contractor may file a statement of claim with the board.

(62 Pa.C.S. § 1712.1(d), (e)).

66. Pro-Spec's claim was filed with the Board 22 days after the expiration of the 135-day limitations period provided for in the Procurement Code (as amended in 2002) in cases where no determination letter is issued by the Commonwealth agency. (Pro-Spec Complaint; N.T. 259-260, 340; Exs. P-151, D-645B; F.O.F. 47, 56, 60, 64, 65).

67. However, the provisions in the Contract between DGS and Pro-Spec describe the filing procedures for claims in the Contract's General Conditions at Article 15.3 ("Disputes Between the Contractor and the Department") as follows:

A. Any claim, dispute, question or other matter, which the Contractor may have against the Department under this Contract will be considered by the Deputy Secretary or his designee, if the Contractor files a written claim with the Deputy Secretary within six months after the date on which the claim accrued. No claim may be filed later than six months after it accrues.

B. If the controversy is not resolved by mutual agreement, the Deputy Secretary will issue a decision in writing. The decision will:

1. State the reasons for the action taken; and
2. Inform the Contractor of its right to administrative and judicial review.

C. A copy of the decision will be delivered to the Contractor by registered mail.

D. The decision issued by the Deputy Secretary is final and conclusive unless the Contractor files a claim with the Board of Claims within thirty days of its receipt of the decision.

E. If the Deputy Secretary does not issue a written decision within 120 days after the claim is filed, then the Contractor may proceed as if an adverse decision had been received. The 120-day period may be extended with the written consent of the Department and the Contractor.

F. The Contractor shall carry on the Work and maintain the Progress Schedule during the claims process, including Board of Claims proceedings, if any, unless otherwise agreed by it and the Department in writing.

(Ex. P-180) [Emphasis Added].

68. In Article 15.3B of the Contract's General Conditions, which provisions were drafted by DGS, DGS represents, in writing, that its Deputy Secretary will issue a decision on such claims as were made here to DGS by Pro-Spec and will state therein the reasons for DGS's action on the claims and inform Pro-Spec of its rights to administrative and judicial review of the claim(s) if the controversy is not resolved by mutual agreement. Statements by DGS representatives at Pro-Spec's Claim Hearing reaffirmed this representation. (N.T. 1102-1103, 1292-1293, 1306-1309; Ex. P-180; Board Finding).

69. The Board finds credible the testimony of Pro-Spec's principal officer and owner, Mr. Ronald Yarbrough, that he understood from Article 15.3(B) of the Contract's General Conditions, as drafted by DGS, that DGS would issue a final written decision if mutual agreement could not be reached on Pro-Spec's claims after the January 22, 2003 Claim Hearing, and that the written decision would notify Pro-Spec of its right to further

review before Pro-Spec would be required to take any action to seek such review. (N.T. 1306-09; Ex. P-180; Board Finding).

70. Mr. Yarbrough's understanding reflects the explicit language and plain meaning of the Contract provisions. (N.T. 1308-09; F.O.F. 67-69; Board Finding).

71. Mr. Yarbrough's perception of the meaning of Article 15.3(B) of the Contract's General Conditions was further reinforced by the representations of DGS and its agent, P.J. Dick, both during and after the Claim Hearing held by the Department on January 22, 2003. (N.T. 469-71, 1102-1103, 1292-93, 1306-09; Ex. P-180; Board Finding).

72. At the Claim Hearing, the parties agreed to work together to develop a final punchlist specifying all the remaining paint work on the Project that, when completed, would result in resolution of Pro-Spec's claim for the unpaid Contract balance (i.e. the "Final Punchlist"). (N.T. 271-73, 280-285, 289, 292-93, 356, 467-69, 1294-96; Ex. P-154).

73. Subsequent to the Claim Hearing, the parties developed a Final Punchlist agreeable to both, and Pro-Spec completed the work identified therein by March 20, 2003. (N.T. 280-82, 361-65; Exs. P-154, 158).

74. DGS and/or its agent, P.J. Dick, indicated at the Claim Hearing that Pro-Spec's entitlement to payment on the Change Order 003 portion of the unpaid Contract balance claim (regarding the extra work painting drywall and caulking) was not in substantive dispute. (N.T. 270, 305-306, 1293-94).

75. With respect to the remaining extra work claims (the out-of-sequence and damage repair painting regarding Southern Steel and other contractors), the Board finds credible Mr. Yarbrough's testimony that DGS also led him to believe at the Claim Hearing that it was not contesting that this extra work performed by Pro-Spec was outside its Contract duties, but rather was seeking more detailed information on the labor and materials expended on this extra work so that DGS could properly calculate and allocate these additional costs. (N.T. 271-74, 277-78, 1043-49, 1065-67, 1072-78; Board Finding).

76. Pro-Spec subsequently produced the additional information that DGS had requested at the Claim Hearing. (N.T. 278, 1043-44; Exs. P-156, D-668).

77. Although DGS offered little testimony or other evidence with respect to its discussions with Pro-Spec during or after the Claim Hearing, the Board finds that the testimony of P.J. Dick's lead representative on the Project, Mr. Kopko, tended to confirm Mr. Yarbrough's recollection as to the creation and performance of a Final Punchlist and production of additional information regarding the extra work claims after the Claim Hearing. (N.T. 942-943, 1026-1028, 1043-1049, 1077-1079, 1100-1103; Ex. D-668; Board Finding).

78. The conduct of DGS described above in Findings of Fact 67 through 77, together with DGS's representation in Article 15.3(B) of the Contract, led Mr. Yarbrough reasonably to believe that the parties were working together to achieve a mutually agreeable resolution of Pro-Spec's claims and to expect that either such a resolution would occur or DGS would issue a written determination pursuant to the Contract stating the reasons Pro-Spec's claims were refused and advising Pro-Spec of its right to further review. (N.T. 263-64, 268-73, 280-83, 311-14, 356, 467-70, 1043-1044, 1047-49, 1102-03, 1292-96, 1304-09; Exs. P-154, P-163, P-180; F.O.F. 67-77; Board Finding).

79. The Board finds Mr. Yarbrough's testimony as to the representations and conduct of P.J. Dick and DGS described in Findings of Fact 67 through 77 above, and as to the effect of these representations and conduct (including Article 15.3(B)), to be clear and convincing. (F.O.F. 67-78; Board Finding).

80. The Board finds that DGS's actions toward a seemingly amicable and cooperative resolution of its claims during and after the Claim Hearing, together with the express language of Article 15.3(B) of the Contract, upon which Pro-Spec reasonably relied, caused Pro-Spec reasonably to believe its claims would be mutually resolved with DGS or that DGS would issue a written decision explaining its reasons for denying the claims and informing Pro-Spec of its right to further review before Pro-Spec would be required to take further action. (N.T. 263-64, 268-73, 280-83, 311-14, 356, 467-70, 1043-1044, 1047-49, 1102-03, 1292-93, 1306-09; Exs. P-154, P-163, P-180; F.O.F. 67-79; Board Finding).

81. The Board further finds that DGS's actions and representations (including Article 15.3(B)) led Pro-Spec to relax its vigilance as to the running of the limitations period provided in § 1712.1(d) and (e) of the Procurement Code (as amended). (N.T. 311-14, 468-70, 1102-03, 1292-93, 1304-09; Ex. P-163; F.O.F. 67-80; Board Finding).

82. DGS misperceived the Board's Opinion and Order of May 8, 2009 deciding DGS's motion for a directed verdict in this matter. The basis for the Board's decision on that motion with respect to DGS's statute of limitations argument was not that DGS was estopped from asserting the date it actually received the December 30, 2002 letter initiating Pro-Spec's formal claim, as DGS now contends. (Opinion and Order, May 8, 2009, BOC Docket No. 3910; DGS Post-Hearing Brief filed Aug. 5, 2009; Board Finding).

83. In our Opinion and Order of May 8, 2009, disposing of the motion for a directed verdict, the Board held that DGS was estopped from asserting the defense of the statute of limitations because DGS misrepresented to Pro-Spec, by reason of Article 15.3(B) and by its actions during and after the Claim Hearing, that it would either resolve the claims amicably or issue a written determination advising Pro-Spec of the reasons the claims were denied and the right to further review when, in fact, DGS did neither. The Board's May 8, 2009 decision was not based on any misrepresentation with respect to the

date the December 30, 2002 claim letter was received by the contracting officer. (Opinion and Order, May 8, 2009, BOC Docket No. 3910; F.O.F. 74-79; Board Finding).

84. The Board finds that Pro-Spec was misled (i.e. deceived) by the combination of DGS's representations in Article 15.3(B) of the Contract's General Conditions and DGS's representations and actions during and after the Claim Hearing into believing that its claims would be resolved amicably or that DGS would issue a written decision explaining why it denied Pro-Spec's claims and advising Pro-Spec of its right to further review before Pro-Spec would be required to take further action. (N.T. 293-96, 305-07, 309-14, 467-70, 1102-1103, 1292-1293, 1304-06; Exs. P-154, P-163, P-180; F.O.F. 67-81; Board Finding).

85. The presence of the representations in Article 15.3(B) together with the acts and representations of DGS at and after the Claim Hearing constituted more than mere negotiation toward an amicable settlement, but rather were tantamount to a misrepresentation that DGS would issue a written decision if no mutual agreement on Pro-Spec's claims was forthcoming. (N.T. 293-96, 305-07, 309-14, 467-70, 1102-03, 1292-93, 1304-09; Exs. P-154, P-163, P-180; F.O.F. 67-81; Board Finding).

86. Pro-Spec reasonably relied on the representations made by DGS described above in Finding of Facts 67-81 and 84-85. (N.T. 293-96, 305-07, 309-14, 467-70, 1102-03, 1292-93, 1304-09; Exs. P-154, P-163, P-180; F.O.F. 67-81, 84-85; Board Finding).

87. Pro-Spec established the facts contained in Findings of Fact 67 through 86 by clear, convincing and credible evidence. (N.T. 263-64, 268-73, 280-83, 311-14, 468-70, 942-943, 1026-1028, 1043-1049, 1077-1079, 1102-03, 1292-93, 1304-09; Exs. P-154, P-163, P-180; F.O.F. 67-86; Board Finding).

Extra Work Claims

A. Out-of-sequence painting of Southern Steel work

88. Pro-Spec was directed by P.J. Dick to paint areas adjacent to Southern Steel's work in an out-of-sequence manner. Specifically, P.J. Dick directed Pro-Spec to paint areas on the Project where Southern Steel's work installing doors, door frames, window frames and other detention hardware was not yet complete. This caused Pro-Spec to have to return to repaint these previously painted areas once Southern Steel had finished its installations. (N.T. 81, 86-91, 218-223, 709-720, 728-745, 1020, 1202-1209; F.O.F. 19-29).

89. Pro-Spec's extra work claim for painting areas adjacent to Southern Steel installations in this out-of-sequence manner is based on its costs to return and repaint these areas to repair the damage done by Southern Steel's subsequent work. (Pro-Spec Complaint ¶¶ 12-18; N.T. 86-91, 218-224, 709-720, 728-745).

90. Upon returning to these areas adjacent to Southern Steel's subsequent installations, Pro-Spec encountered significant damage done to its paint finishes and was thus forced to perform the extra work of repainting damaged areas and blending them in with the surrounding paint finishes. (N.T. 81, 86-91, 218-223, 709-720, 728-45, 1020; F.O.F. 24-29).

91. The process of returning to repaint areas already painted also caused Pro-Spec to incur substantial additional set-up, preparation, tear-down and clean-up costs it would not otherwise have incurred. (N.T. 68-74, 81-91, 200-204, 218-226, 709-720, 728-745, 1020; Ex. P-164; F.O.F. 24-29).

92. DGS does not credibly dispute that it was P.J. Dick's directions to Pro-Spec to paint in areas before Southern Steel and other "precedent" contractors had completed their work which caused the need for Pro-Spec to return to repaint portions of these areas after Southern Steel and other precedent contractors had performed their installations. (N.T. 1019-1020, 1023-1025, 1191-1192, 1202-1210; F.O.F. 19-32; Board Finding).

93. Pro-Spec's repair/repainting work adjacent to subsequent Southern Steel installations included, in very small part, original Contract work in that some of the later installed items of Southern Steel (such as door frames, doors, window frames, etc.) were not painted initially by Pro-Spec when the room or adjacent area was first painted by Pro-Spec. (N.T. 68-74, 81-91, 140-141, 167-173, 218-223, 712-720, 727-745, 1019-1020, 1202-1206; Exs. P-27, P-164; F.O.F. 24-29; Board Finding).

94. However, the weight of evidence presented shows this portion of "new" or original painting of Southern Steel product was a small and, ultimately, immaterial portion of the return work. The overwhelming portion of the return painting work with regard to subsequent Southern Steel installations was actually a duplication of the work previously performed in these areas. (N.T. 68-74, 81-91, 140-141, 167-173, 218-223, 709-720, 727-745, 1019-1020, 1202-1206; Exs. P-27, P-164; F.O.F. 24-29; Board Finding).

95. The return work to repaint the areas in which Southern Steel made subsequent installations required a second (or sometimes a third or more) round of set-up, preparation, tear-down and clean-up, as well as a significant amount of repainting not only to repair damaged areas but also to properly blend the old and newly painted areas immediately adjacent to these installations. (N.T. 68-74, 81-91, 140-141, 167-173, 218-223, 709-720, 727-745, 1019-1020, 1202-1206; Ex. P-164; F.O.F. 24-29; Board Finding).

96. The repeat visits by Pro-Spec to already painted areas where Southern Steel made subsequent installations, by their nature, required an even greater care and preparation then would have been originally required for painting the area (including the Southern Steel installations) because of the need to protect surrounding areas already finished. The Board also finds that this additional care and preparation more than offset any small or de minimus amount of original work included in the second, third or

subsequent rounds of painting in these return areas thus constituting a substantial duplication of work for Pro-Spec on these repainted areas. (N.T. 68-74, 81-91, 140-141, 167-173, 218-223, 709-720, 727-745, 1019-1020, 1202-1206; Ex. P-164; F.O.F. 24-29, 93-95; Board Finding).

97. Though there may have been some de minimus portion of original contract work that Pro-Spec performed when returning to repaint areas already painted once, in an out-of-sequence manner at P.J. Dick's direction before Southern Steel's installations were complete, the nature of this return work was, in all material respects, that of repair painting of areas subsequently damaged by other contractors on the Project. (N.T. 81, 85-91, 135-136, 142-151, 177-180, 218-226, 251-252, 709-720, 728-745, 769-770, 933-937, 1020, 1174-1178, 1181-1188, 1202-1209; Ex. P-164; F.O.F. 24-29, 93-96; Board Finding).

98. The literal language of Pro-Spec's Contract did require Pro-Spec to repair any damage that it caused on its own, but did not state that Pro-Spec had to repaint large areas it had already painted due to damage done by the subsequent work of others because of P.J. Dick's direction to perform its painting work out-of-sequence. (Exs. P-1, P-132, P-133, P-134, P-180).

99. At the time DGS and Pro-Spec entered their Contract, they did not intend for Pro-Spec to have to return to areas already painted to repair or repaint finished surfaces due to damage to these surfaces done by other contractors as part of Pro-Spec's original scope of work. (N.T. 76-77, 1020-1022; Exs. P-132, P-180; Board Finding).

100. Because the painting work performed by Pro-Spec when it returned to repair/repaint areas adjacent to subsequent installation by Southern Steel was, in all material respects, repair painting of areas on the Project damaged by a contractor other than Pro-Spec; and because such repair painting was neither called for in the Contract language nor intended by the parties to be part of original Contract work for Pro-Spec, we find this return/repainting work to be extra work beyond the scope of the Contract. (N.T. 76-77, 81, 85-91, 135-136, 142-151, 177-180, 218-226, 251-252, 709-720, 728-745, 769-770, 933-937, 1020-1022, 1174-1178, 1181-1188, 1202-1209; Exs. P-132, P-133, P-134, P-164, P-180; F.O.F. 18-32, 88-99; Board Finding).

101. Pro-Spec completed all of its extra work relating to repair repainting of areas adjacent to Southern Steel's subsequent installations in an acceptable manner. (N.T. 85-86, 142-151, 218-223, 727-746, 1174-1176, 1185-1190, 1202-1209; Exs. P-31 through P-76; Board Finding).

102. DGS has not paid Pro-Spec for its extra work relating to repair repainting of areas adjacent to Southern Steel's subsequent installations. (Pro-Spec Complaint ¶¶ 12-18, Ex. P-26; F.O.F. 45-46, 55; Board Finding).

103. The extra work described above in Findings of Fact Paragraphs 88 to 102 was caused by P.J. Dick's direction to paint the areas in an out-of-sequence manner, i.e.

to paint these areas before Southern Steel had completed its installations therein. (N.T. 81, 86-91, 140-141, 167-173, 218-225, 709-720, 728-745, 933-937, 1020, 1202-1209; F.O.F. 88-102; Board Finding).

104. With the adjustments described in Findings of Fact Paragraphs 207 to 217, the Board finds that Pro-Spec's AWA's (which it utilized to track its extra work on the Project) accurately reflect the manhours, materials, and equipment Pro-Spec utilized in performing the out-of-sequence repair repainting of areas adjacent to Southern Steel's subsequent installations. (N.T. 153-155; Exs. P-31 through P-76; F.O.F. 88-103, 123-124, 207-217; Board Finding).

105. Pro-Spec incurred damages in the amount of $138,580 for its extra work performing out-of-sequence repair repainting of areas adjacent to Southern Steel's subsequent installations on this Project. (Pro-Spec Complaint ¶¶ 12-18; N.T. 153-155; Exs. P-26, P-31 through P-76; F.O.F. 88-104, 123-124, 207-217; Board Finding).

106. The September 19, 2002 letter cited by DGS for support of its argument that it ordered Pro-Spec to cease this extra work relating to Southern Steel's installations did no such thing. This letter was addressed to Southern Steel rather than Pro-Spec. (DGS Proposed Findings of Fact ¶ 543, DGS Proposed Conclusions of Law ¶ 146, DGS Brief in Support p. 12; N.T. 1191-1192, 1209-1210; Ex. P-168).

107. There is no indication in the record that a copy of the September 19, 2002 letter referenced immediately above was ever distributed to Pro-Spec by P.J. Dick. (N.T. 1191-1192, 1209-1210; Ex. P-168; F.O.F. 106; Board Finding).

108. The Board did, however, encounter a letter dated September 17, 2002, from P.J. Dick to Pro-Spec in which Douglas Zaenger (P.J. Dick's Project Manager on the Project) directed Pro-Spec to cease damage repair work under the extant change orders (Change Orders 007/0010 and 008) and to concentrate instead only on original Contract work. (N.T. 46, 958-960, 1041, 1119-1121; Ex. D-627; F.O.F. 7).

109. The September 17, 2002 letter from Mr. Zaenger of P.J. Dick to Ron Yarbrough of Pro-Spec appears to be a response to an earlier September 17, 2002 letter from Mr. Yarbrough to Mr. Zaenger. Mr. Yarbrough's earlier letter was responding to a request for a detailed painting schedule to complete painting on the Project and complaining that completion of painting on the Project was being hampered by DGS's slow response to processing payment requisitions and documentation of change orders for the substantial repair painting required on the Project. (N.T. 241-244, 958-960; Exs. P-144, D-627).

110. By letter dated September 18, 2002, Mr. Zaenger then provided Pro-Spec with advice that Change Order 008 for damage repair painting had been executed and that Change Orders 007 and 0010 for repair/repainting of areas adjacent to Southern Steel installations were at DGS and/or the design professional for execution. (N.T. 251-252, 1188-1190; Ex. P-145; Board Finding).

111. The September 18, 2002 letter from Mr. Zaenger was then followed by a letter of September 25, 2002 from Mr. Zaenger to Mr. Yarbrough advising Pro-Spec that the change orders prepared by P.J. Dick for the damage repair and out-of-sequence painting should not have been written as per instructions received from DGS (referring apparently to Change Orders 007/0010 and 008). (N.T. 142-146, 251-252, 1188-1190, 1202-1203; Exs. P-27, P-145, D-631; F.O.F. 30-32, 110).

112. The September 25, 2002 letter from P.J. Dick further advised Pro-Spec that it was instead to track and submit its costs for this repair/repainting work (timesheets, rates, material and equipment invoices) to P.J. Dick, and that these cost submittals would serve as a basis for P.J. Dick/DGS to withhold monies from Southern Steel. (N.T. 142-146, 1202-1203; Exs. P-27, D-631).

113. The September 25, 2002 letter from P.J. Dick further indicated that Pro-Spec would then need to make a claim to receive payment for these extra repair repainting costs. (N.T. 142-146, 1202-1203; Exs. P-27, D-631).

114. By letter of September 27, 2002, Joseph Kopko, Director of Construction Management Services for P.J. Dick (Mr. Zaenger's supervisor) issued further direction to Mr. Yarbrough of Pro-Spec. In this letter, Mr. Kopko raised concerns that Pro-Spec was not capable of completing the painting work on the Project in an acceptable and timely manner. Mr. Kopko threatened that, unless Pro-Spec provided an acceptable plan of completion to P.J. Dick prior to Friday, September 27, 2002, P.J. Dick would take several actions which would include having another contractor assigned to complete Pro-Spec's Contract work and extra work. Mr. Kopko's letter stated, in relevant part, as follows:

> 1. Another contractor will be assigned to complete certain portions of the work, specifically all remaining work in Buildings A, B, C, D, E, F, G, H, 10, 11 19A and 19B and the canopy along the east side of Buildings 2 through 6.
>
> 2. That contractor will commence work in those buildings and areas on Tuesday, October 1, 2002 and will complete all remaining work including change order and remedial or corrective work.
>
> 3. Pro-Spec is to cease all work in those buildings and areas at the end of the work-day on Monday, September 30, 2002.
>
> 4. Pro-Spec is to maintain on-site sufficient resources to complete all work in the other remaining areas of the project by Friday, October 19, 2002 including contract, change order and remedial and corrective work. [Emphasis added].
>
> 5. The Construction Manager will determine the equitable value of the work performed by others to complete Pro-Spec's incomplete contract and

> remedial and/or corrective work in those buildings and areas identified above and will deduct that amount from Pro-Spec contract value. [Emphasis added].
>
> The Construction Manager will institute these actions in total unless Pro-Spec provides an acceptable plan, schedule and increase in resources (manpower and equipment) to our office prior to 5:00 p.m. on Friday, September 27, 2002 (today).

Mr. Kopko concluded the letter by clarifying that his letter was not a Notice of Failure to Prosecute, but rather one final attempt to allow Pro-Spec to comply with its Contract obligations. (N.T. 960-961; Ex. D-632).

115. Pro-Spec responded promptly to Mr. Kopko's September 27, 2002 letter with a September 27, 2002 letter of its own. In its response letter, Pro-Spec referenced an intervening telephone conversation between Mr. Kopko and Mr. Mayer that day. Pro-Spec's letter confirmed that Pro-Spec would complete all of the work outlined in Mr. Kopko's September 27, 2002 correspondence and noted an assurance from DGS Deputy Secretary Merle Ryan that all past due payments were being processed. (N.T. 961-963; Ex. D-633).

116. No substitute painter was brought in to the Project, and there appears no further correspondence relevant to this completion issue threatening substitution painters after the September 27, 2002 letters. (N.T. 958-963, 1188-1190, 1202-1203; Ex. D-632, D-633; Board Finding).

117. The above mentioned series of communications between Pro-Spec and P.J. Dick following the September 17, 2002 letter from Mr. Zaenger, concluding with the September 27, 2002 correspondence from Mr. Kopko, served to contradict and rescind any earlier instruction to Pro-Spec to cease damage repair repainting caused by out-of-sequence painting of areas adjacent to subsequent Southern Steel installations and/or subsequent installations or work by other contractors on the Project. (N.T. 127, 142-146, 241-244, 251-252, 958-963, 1188-1190, 1202-1203; Exs. P-27, P-78, P-144, P-145, D-631, D-632, D-633; F.O.F. 106-116; Board Finding).

118. The Boards finds Mr. Yarbrough's testimony credible that he believed P.J. Dick's earlier instruction to cease all damage repair repainting caused by out-of-sequence painting of areas adjacent to subsequent Southern Steel installations and/or subsequent installations or work by other contractors on the Project had been countermanded. (N.T. 127, 142-151, 235-244, 251-252; F.O.F. 106-117; Board Finding).

119. The evidence, as a whole, does not support DGS's assertion that Pro-Spec had been instructed to cease its damage repair repainting caused by out-of-sequence painting of areas adjacent to subsequent Southern Steel installations and/or subsequent installations or work by other contractors on the Project. (N.T. 127, 142-146, 235-244,

251-252, 958-963, 1188-1190, 1202-1203; Exs. P-27, P-144, P-145, D-631, D-632, D-633; F.O.F. 106-118; Board Finding).

120. P.J. Dick instructed Pro-Spec to notify it ahead of time as to what areas in each building would be receiving extra work under Change Orders 007 and 008 so that P.J. Dick could independently verify the problem areas and make its own assessment as to what was rework versus original Contract work and determine which contractors were responsible for the need to repaint the areas. (N.T. 933-937, 1030; Ex. D-610).

121. In regard to DGS's contention that Pro-Spec should be denied compensation for any and all extra work related to its out-of-sequence repainting of Southern Steel installations and/or damage repair painting following subsequent work by other contractors because Pro-Spec failed to notify DGS of the specific locations where it would be performing this repainting before commencing this work, the Board finds that Pro-Spec did provide P.J. Dick with an extensive listing of specific buildings and problem areas to which it planned to return and repaint due to damage from subsequent installations by Southern Steel and other contractors. (N.T. 218-221, 933-937, 1030; Exs. P-137, P-138, D-610; Board Finding).

122. The hearing testimony also indicates that more immediate advance notice was also given to DGS representatives on-site before proceeding with such repair rework for some but not for each occasion of repair/repainting work. (N.T. 933-937, 1030; Ex. D-610).

123. It is clear that Pro-Spec's additional work authorization forms ("AWA's") identified, in detail, all the painting re-work done relating to Southern Steel (and other contractors) and that these were provided to P.J. Dick and/or a DGS representative on-site on a daily basis. (N.T. 99-100, 116-122, 156-160, 757-758; Exs. P-8 through P-25; P-31 through P-76; P-82 through P-131).

124. Pro-Spec attached its photographs relating to its out-of-sequence repainting of areas adjacent to subsequent Southern Steel installations to its corresponding AWA's, and P.J. Dick approved this practice. (N.T. 135-136, 769-770; Ex. 164; F.O.F. 24-25, 123).

125. It is clear from the evidence as a whole that Pro-Spec, as well as DGS, was anxious to complete the painting work on the Project as soon as possible and that Pro-Spec did not engage in any excessive repainting or re-working of the areas to which it returned to perform repair work following subsequent installations by Southern Steel or subsequent work by other contractors. Rather, the testimony of Mr. Mayer (Pro-Spec's Project Superintendent) is fully credible on this point and establishes that Pro-Spec repainted areas only where, and as, necessary to complete its extra work in a professional and workmanlike manner. (N.T. 709-720, 728-745; F.O.F. 24-42, 88-101, 114-117, 123-124; Board Finding).

126. The Board finds that whether or not Pro-Spec notified P.J. Dick representatives on-site of each specific instance of repair repainting immediately beforehand, in fact, had no material effect on where or how much extra repainting work was needed or performed. (N.T. 99-100, 116-12, 156-160, 218-221, 709-720, 728-745, 757-758, 933-937, 1030; Exs. P-8 through P-25, P-31 through P-76, P-82 through P-131, P-137, P-138, P-139, D-610; F.O.F. 24-42, 88-101, 114-117, 123-125; Board Finding).

127. Although the Board finds that Pro-Spec's failure to provide P.J. Dick with advance notice of specific repainting each time it engaged in such activity to be a failure to comply with P.J. Dick's instructions on the Project, this failure did not, in any material way, deprive DGS of the benefit of this extra work, and we do not find this to be a material failure in nor sufficient reason to deny Pro-Spec compensation for the extra repainting work it performed at P.J. Dick's directions. (N.T. 218-225, 933-937, 1030; Exs. P-137, P-138, P-139, D-610; F.O.F. 24-42, 88-101, 114-117, 123-126; Board Finding).

B. ***Out-of-sequence painting of other contractors' work***

128. Pro-Spec was directed by P.J. Dick to paint areas adjacent to the work of precedent contractors other than Southern Steel (such as the masonry and mechanical contractors on the Project) in an out-of-sequence manner. Specifically, P.J. Dick directed Pro-Spec to paint areas on the Project where the work of such precedent contractors other than Southern Steel was not yet complete. This caused Pro-Spec to have to return to repaint these previously painted areas once these other contractors had finished their work. (N.T. 68-74, 86-91, 132-133, 200-208, 218-221, 710-711, 716-718, 732-745; Ex. P-164; Board Finding).

129. Pro-Spec's extra work claim for painting areas adjacent to the work of precedent contractors other than Southern Steel (such as the masonry and mechanical contractors on the Project) in an out-of-sequence manner is based on its costs to return and repaint these areas to repair the damage done by the work of such precedent contractors other than Southern Steel. (Pro-Spec Complaint ¶¶ 19-25; N.T. 86-91, 218-224, 710-711, 716-718, 732-745; Ex. P-164; Board Finding).

130. Upon returning to these areas adjacent to the subsequent work of these precedent contractors other than Southern Steel, Pro-Spec encountered significant damage done to its paint finishes and was thus forced to perform this extra work of repainting damaged areas and blending them in with the surrounding paint finishes. (N.T. 86-91, 218-224, 710-711, 716-718, 732-745; F.O.F. 25-29; Board Finding).

131. The process of returning to repaint areas already painted also caused Pro-Spec to incur substantial additional set-up, preparation, tear-down and clean-up costs it would not otherwise have incurred. (N.T. 68-74, 81-91, 200-208, 218-226, 710-711, 716-718, 732-745; Ex. P-164; F.O.F. 25-29; Board Finding).

132. DGS does not credibly dispute that it was P.J. Dick's directions to Pro-Spec to paint in areas before these other "precedent" contractors had completed their work which caused the need for Pro-Spec to return to repaint portions of these areas after these other precedent contractors had performed their installations. (N.T. 1019-1020, 1023-1024, 1191-1192, 1202-1210; F.O.F. 19-32; Board Finding).

133. Pro-Spec's repair/repainting work adjacent to subsequent work by precedent contractors other than Southern Steel did not include any material amount of original Contract work in the sense that no material portion of this repair/repainting work was initial painting but was, instead, a duplication of the painting work previously performed in these areas. (N.T. 68-74, 82-91, 177-180, 218-226, 710-711, 716-718, 732-745, 1020-1022, 1202-1209; Exs. P-78, P-164; F.O.F. 25-29; Board Finding).

134. The return work to repair/repaint the areas in which precedent contractors other than Southern Steel performed subsequent work required a second (or sometimes a third or more) round of set-up, preparation, tear-down and clean-up, as well as a significant amount of repainting not only to repair damaged areas but also to properly blend the old and newly painted areas immediately adjacent to these installations. (N.T. 68-74, 82-91, 218-226, 710-711, 716-718, 732-745, 1020-1022, 1202-1209; Ex. P-164; F.O.F. 25-29; Board Finding).

135. The repeat visits by Pro-Spec to already painted areas where precedent contractors other than Southern Steel performed subsequent work, by their nature, required an even greater care and preparation then would have been originally required for painting the area because of the need to protect surrounding areas already finished, thus constituting a substantial duplication of work for Pro-Spec on these repainted areas. (N.T. 68-74, 82-91, 218-226, 710-711, 716-718, 732-745, 1020-1022, 1202-1206; Ex. P-164; F.O.F. 25-29; Board Finding).

136. The work that Pro-Spec performed when returning to repaint areas already painted once (in an out-of-sequence manner at P.J. Dick's direction) before precedent contractors other than Southern Steel performed their work, was, in all material respects, that of repair painting of areas subsequently damaged by other contractors on the Project. (N.T. 82-91, 177-180, 218-226, 251-252, 710-711, 716-718, 732-745, 769-770, 933-937, 1020, 1174-1178, 1181-1188, 1202-1209; Exs. P-78, P-164; F.O.F. 25-29, 133-135; Board Finding).

137. Because the painting work performed by Pro-Spec when it returned to repair/repaint areas adjacent to subsequent work by precedent contractors other than Southern Steel was, in all material respects, repair painting of areas damaged by other contractors on the Project; and because such repair painting was neither called for in the Contract language nor intended by the parties to be part of original Contract work for Pro-Spec, we find this return/repainting work to be extra work beyond the scope of the Contract. (N.T. 76-77, 82-91, 177-180, 218-226, 251-252, 710-711, 716-718, 732-745, 769-770, 933-937, 1020-1022, 1174-1178, 1181-1188, 1202-1209; Exs. P-132, P-133, P-134, P-164, P-180; F.O.F. 25-29, 133-136; Board Finding).

138. Pro-Spec completed all of its extra work relating to repair repainting of areas adjacent to the subsequent work of precedent contractors other than Southern Steel, in an acceptable manner. (N.T. 82-91, 218-226, 710-711, 716-718, 732-746, 1202-1209; Exs. P-82 through P-131; Board Finding).

139. DGS has not paid Pro-Spec for its extra work relating to repair repainting of areas adjacent the subsequent work of precedent contractors other than Southern Steel. (Pro-Spec Complaint ¶¶ 19-25; Ex. P-77; F.O.F. 45-46, 55; Board Finding).

140. The extra work described above in Findings of Fact paragraphs 128-139 was caused by P.J. Dick's direction to paint the areas in an out-of-sequence manner, i.e. to paint these areas before precedent contractors other than Southern Steel had performed their work. (N.T. 68-74, 86-91, 200-208, 218-226, 710-711, 716-718, 732-745, 1020-1022, 1202-1209; F.O.F. 25-29, 128-139; Board Finding).

141. Pro-Spec attached its photographs relating to its damage repair painting caused by painting other contractors' installations to its corresponding AWA's, and P.J. Dick approved this practice. (N.T. 132-136, 769-770; Ex. P-164).

142. With the adjustment at Findings of Fact Paragraphs 207 through 216 and 218, the Board finds that Pro-Spec's AWA's utilized to track this extra work accurately reflect the manhours, materials, and equipment utilized by Pro-Spec to perform the extra work relating to out-of-sequence repair repainting of areas adjacent to the subsequent work of contractors other than Southern Steel. (Exs. P-82 through P-131; F.O.F. 128-141, 207-216, 218; Board Finding).

143. Pro-Spec incurred damages in the amount of $187,102 for its extra work performing out-of-sequence repair painting of area adjacent to the subsequent work of precedent contractors other than Southern Steel. (Pro-Spec Complaint ¶¶ 19-25; Exs. P-77, P-82 through P-131; F.O.F. 128-142, 207-216, 218; Board Finding).

C. *Unpaid Contract Balance*

144. In conjunction with the August 14, 2002 substantial completion certification, the Project's design professional also issued a punchlist (hereinafter the "Original Punchlist") which identified those items of work that remained to be done in order for Pro-Spec to complete its Contract work on the Project. (N.T. 226, 816-817; Exs. P-140, P-186; F.O.F. 36-37; Board Finding).

145. The value of Pro-Spec's remaining work specified in the Original Punchlist on or about August 14, 2002 was $23,332. (N.T. 226, 816-817; Ex. P-140, P-186).

146. As it was authorized to do under the Contract, DGS retained one and a half times the amount of $23,332 to be paid when all the Contract work had been completed. (N.T. 226-233, 274-276; Ex. P-140).

147. The certificate of substantial completion also indicated that DGS retained one dollar for change orders and one dollar for pending claims, bringing the total retainage to $35,000. (N.T. 226-227; Ex. P-140).

148. Pro-Spec's Contract, as well as those of the other contractors on the Project, originally set forth June 1, 2002 as the intended date for Project completion, but due to a series of Project delays not attributable to Pro-Spec, this date had clearly become unworkable by the beginning of September 2002. (N.T. 31-35, 45, 59-60, 226-229, 403, 704-706, 815-817, 916-918, 954-955, 1058-1059; Exs. P-8, P-31, P-82, P-140, P-142, P-186, P-187, D-623; Board Finding).

149. Pro-Spec had already begun work to complete the Original Punchlist when, by letter dated September 5, 2002, P.J. Dick instructed Pro-Spec to finish all of its outstanding work, including punchlist work, by no later than September 30, 2002. P.J. Dick's letter also threatened to procure the services of other painters to supplement or replace Pro-Spec's forces and deduct all costs related to such supplemental efforts from Pro-Spec's Contract value if needed to finish by September 30, 2002. P.J. Dick also requested that Pro-Spec submit a plan and schedule by September 10, 2002 to meet this September 30, 2002 completion deadline. (N.T. 227-229, 815-816, 916-918, 954-955; Exs. P-142, D-623).

150. Although Pro-Spec had accelerated its work, it was still unable to meet P.J. Dick's newly stated September 30, 2002 deadline for completion of the Original Punchlist. (N.T. 227-229, 242-244, 273-275, 815-816, 916-918, 954-958, 1065, 1164; Exs. P-142, D-623). Board Finding).

151. The primary reason for Pro-Spec's inability to meet the June 1, 2002 and/or the September 30, 2002 deadlines was that Southern Steel's installations and the work of other precedent contractors to Pro-Spec's painting were still incomplete by September 30, 2002. (N.T. 229-235, 243-244, 273-275, 816-821, 1055, 1164; Board Finding).

152. By cover letter dated October 14, 2002, P.J. Dick supplied Pro-Spec with a subsequent punchlist (hereinafter the "October Punchlist") and advised Pro-Spec that this October Punchlist superceded the Original Punchlist. (N.T. 815-833; Exs. P-186, P-187).

153. In this October 14, 2002 cover letter, P.J. Dick also stated that, except for the items listed in the October Punchlist, all of Pro-Spec's work on the specified buildings (Buildings 1 through 6 and Housing Unit A) was complete. (N.T. 821-823, 827-830; Ex. P-187).

154. The cover letter of October 14, 2002 also noted that some of the punchlist items remaining to be completed were now designated with another contractor's identifying number and were no longer considered Pro-Spec's responsibility. (N.T. 821-823, 827-830; Ex. P-187).

155. Gary Mizla, a P.J. Dick superintendent on the Project charged with responsibility for overseeing Pro-Spec's work, subsequently signed off on the face of the October 14, 2002 cover letter with the notation "All work completed . . . 11/14/02." (N.T. 821-823; Ex. P-187).

156. Having received the "sign-off" from Gary Mizla noted immediately above, Pro-Spec demobilized from the Project site in mid-November 2002. (N.T. 821-823, 827-830, 963-964; Exs. P-187, D-636).

157. Soon after Pro-Spec demobilized from the Project in mid-November 2002, and despite P.J. Dick's "sign-off" noted above, P.J. Dick subsequently demanded, in a letter dated November 22, 2002, that Pro-Spec return to the Project to finish Contract and punchlist work. (N.T. 821-823, 827-830, 963-964; Exs. P-187, D-636).

158. After Pro-Spec responded by asserting, inter alia, Mr. Mizla's "sign-off" on the October Punchlist, P.J. Dick wrote again to Pro-Spec on November 26, 2002 detailing work it asserted was incomplete and disputing Pro-Spec's contention that P.J. Dick had "signed off" on any buildings as complete. (N.T. 964-968; Ex. D-638).

159. Pro-Spec, frustrated with constantly changing "punchlists" due to ongoing work by other precedent contractors (including Southern Steel) and believing it had completed all original Contract work made reasonably available to it at the time, did not return in force to the job site to perform any more work immediately after P.J. Dick's November 26, 2002 letter. Instead, taking the position that DGS was now misconstruing the circumstance and demanding that Pro-Spec return to do ongoing repair and/or out-of-sequence work caused by other contractors' ongoing installations, rather than requiring completion of work that was legitimately within its original Contract scope of work, Pro-Spec refused to return to Fayette SCI until these disputes could be resolved. (N.T. 274-277, 353-355, 964-968; Board Finding).

160. Pro-Spec submitted a payment application for its unpaid Contract balance on December 13, 2002. (N.T. 91-102; Ex. P-3).

161. P.J. Dick's January 10, 2003 letter, in which it denied Pro-Spec's December 13, 2002 submission of Payment Application No. 12 for its unpaid Contract balance, reiterated DGS's position that it would assess liquidated damages against Pro-Spec retroactive to November 28, 2002 for failure to complete its Contract work. It further advised that final payment would be withheld until Pro-Spec had completed its Contract items and P.J. Dick had conducted a final inspection of Pro-Spec's work. (N.T. 278-280, 351-355, 995; Exs. P-153, D-652, D-653).

162. At the January 22, 2003 Claim Hearing held by DGS on Pro-Spec's various claims, the parties discussed the unpaid Contract balance claim. (N.T. 263-265, 268-269, 280-285, 1077-78, 1093-94; F.O.F. 59-62; Board Finding).

163. At the Claim Hearing, the parties agreed to mutually formulate a final punchlist of items (i.e. the "Final Punchlist"), the completion of which would entitle Pro-Spec to receive its final payment. (N.T. 268-269, 280-285).

164. The Final Punchlist was formulated, and Pro-Spec completed this work in March 2003. On or about March 20, 2003, Mr. Mizla from P.J. Dick again signed off on this punchlist, signifying completion of this work. (N.T. 280-282, 290-297; Exs. P-154, P-158).

165. Subsequent to Mr. Mizla's sign-off on the Final Punchlist, Pro-Spec again demobilized from the Project and delivered remaining attic stock (unused paint) to P.J. Dick by April 4, 2003. However, DGS still refused payment, insisting that Pro-Spec had not yet completed all its original Contract work. (N.T. 310, 1292-1308; Ex. P-161).

166. Given that we have found, as matters of fact, that: the design professional on the Project confirmed that Pro-Spec was substantially complete with its Contract work by August 14, 2002, and only slightly more than $23,000 of original Contract work (out of a total of $497,940) remained to be done at that time; Pro-Spec remained on the job thereafter for three more months, working to complete this outstanding original Contract work and the extra work required by P.J. Dick; P.J. Dick provided Pro-Spec with an October Punchlist and advised Pro-Spec that it superseded the Original Punchlist; Gary Mizla, the P.J. Dick superintendant charged with oversight of painting on the Project, signed off on the October Punchlist as complete by mid-November 2002; and given further that we find the testimony of Messrs. Yarbourgh and Mayer on this issue credible, the Board concludes that, by the time of Pro-Spec's demobilization in mid-November 2002, Pro-Spec had completed all of the Contract work that had been made reasonably available to it. (N.T. 226-233, 242-244, 274-276, 815-833, 916-918, 954-955, 963-964, 1065, 1164; Exs. P-140, P-142, P-186, P-187, D-623, D-636, D-638; F.O.F. 36-42, 144-159; Board Finding).

167. Although we tend to agree with DGS that the November 14, 2002 sign-off by P.J. Dick on the October 14, 2002 cover letter to the October Punchlist does not establish that all original Contract painting work for the entire Project was complete in November 2002, the weight of the evidence does confirm that Pro-Spec had completed all original Contract work which had been made reasonably available to it by this time, as well as all the extra work stemming from its out-of-sequence/damage repair painting and the added drywall/caulking paint work, as per P.J. Dick's instruction. The evidence also establishes that any amount of original Contract work remaining at this time was de minimus and not of a material amount. (N.T. 274-277, 351-355, 821-833, 963-968; Exs. P-31 through P-76, P-82 through P-131, P-187, D-636, D-638; F.O.F. 36-42, 144-156, 166; Board Finding).

168. The evidence further establishes that any original Contract work remaining after mid-November 2002, in addition to being extremely small in amount, was due to the fact that Pro-Spec's predecessor contractors had not yet completed their work so as to allow Pro-Spec to complete any small remaining amount of its original Contract work. (N.T. 274-277, 351-355, 821-833, 963-968; Exs. P-31 through P-76, P-82 through P-131, P-187, D-636, D-638; F.O.F. 36-42, 144-156, 166; Board Finding).

169. The overwhelming weight of evidence also establishes that any and all remaining amount of original Contract work owed by Pro-Spec after November 2002 was completed by its performance of the work identified on the Final Punchlist agreed to by both parties as a result of the January 2003 Claim Hearing. We therefore conclude that Pro-Spec completed all its Contract work by no later than March 2003. (N.T. 268-269, 280-285, 290-297, 1077-1078, 1093-1094; Exs. P-154, P-158; F.O.F. 36-42, 50-54, 144-165; Board Finding).

170. Though there may have been some de minimus and immaterial portion of original work that Pro-Spec performed when returning to repaint areas already painted once after mid-November 2002, the nature of this work was substantially that of repairing damage from other contractors, which was not listed as part of its original Contract responsibilities. (N.T. 81, 85-91, 135-136, 142-151, 167-173, 177-180, 200-208, 218-226, 251-252, 274-277, 351-355, 709-720, 728-745, 747-749, 769-770, 821-833, 964-968, 1020-1022, 1174-1178, 1181-1188, 1202-1209; Exs. P-132 through P- 135, P-154, P-158, P-164, D-636, D-638; F.O.F. 36-46, 144-156, 166-168; Board Finding).

171. Pro-Spec's claim for the unpaid Contract balance before the Board represents substantially the same sum as was requested in Payment Application No.12, as rounded up, in the amount of $66,758. (Pro-Spec Complaint ¶¶ 6-11; Ex. P-3).

172. The Board's review of Payment Application No.12 reveals that Pro-Spec's claim calculations contain a duplication with regard to its alleged unpaid Contract balance of $66,758, in that it appears to include $10,000 relating to Pro-Spec's extra work claim for painting out-of-sequence in areas where contractors other than Southern Steel made subsequent installations (relating to work initially described by Change Order 008). This $10,000 is duplicative in that it is claimed elsewhere in Count III of Pro-Spec's claim for return visits and repainting of areas damaged by subsequent work of contractors other than Southern Steel. (Pro-Spec Complaint ¶¶ 19-25; Exs. P-2, P-3, P-78; Board Finding).

173. Additionally, the Board agrees with DGS that Pro-Spec's unpaid Contract balance claim includes a charge for extra work performed under Change Order 003 in the amount of $31,958. The Board's review of Payment Application No. 12 reveals that of this total number, $31,483 relates to work completed under Change Order 003 between September 1, 2002 through December 13, 2002 with the remaining $475 identified as relating to work under Change Order 003 completed prior to September 1, 2002. (Pro-Spec Complaint ¶¶ 6-11, 26-33; N.T. 330-332; Exs. P-2, P-3; Board Finding).

174. However, we disagree with DGS's assertion that the $31,958 relating to Change Order 003 in Pro-Spec's unpaid Contract balance claim duplicates any other claim made here at the Board. While it appears that Pro-Spec initially submitted its claim to DGS for Change Order 003 work (for extra painting of additional drywall and caulking) as a separate claim and as a part of its unpaid Contract balance (thus duplicating same), Pro-Spec corrected this with its claim filing at the Board. Specifically, Pro-Spec continued to include the alleged Change Order 003 work portion of its claim here at the Board in its unpaid Contract balance amount, but did not make a separate claim on Change Order 003 here at the Board. (Pro-Spec Complaint ¶¶ 6-11, 26-33; Board Finding).

175. Although not repeating a duplicative stand alone claim here at the Board for Change Order 003, Pro-Spec did request an additional amount of $2,022 for this painting of drywall and caulking in Count IV that it states was not included in its unpaid Contract balance amount claimed in Count I. (Pro-Spec Complaint, ¶¶ 6-11 and 26-33).

176. As there appears to be no dispute that Change Order 003 was fully executed, the Board finds no error in Pro-Spec's decision to include this portion of its claim in the unpaid Contract balance amount. However, for clarity's sake, we will address this portion of the claim separately. (N.T. 79-80, 98-111, 132-137, 492-493, 769-770, 1172; Exs. P-5, P-6, P-164; Board Finding).

177. After adjustments made to eliminate the $10,000 duplicated in its extra work claim and the $31,958 relating to Change Order 003 (which we will address separately), the Board finds that the remaining unpaid Contract balance totals $25,200. (Exs. P-2, P-3; F.O.F. 171-176; Board Finding).

178. Pro-Spec has completed all of its Contract work, and said work was accepted by DGS. (N.T. 268-270, 274-277, 280-282, 290-297, 310, 353-360, 821-833, 963-964; Exs. P-154, P-158, P-161, P-187).

179. Excluding Change Order 003 (for later discussion) Pro-Spec was never paid by DGS for the remaining unpaid Contract balance of $25,200 despite Pro-Spec's completion of its Contract work on the Project. (Pro-Spec Complaint ¶¶ 6-11, 26-33; Ex. P-3; Board Finding).

D. *Change Order 003 – Additional Drywall and Caulking*

180. Pro-Spec, in its post hearing briefs, now claims $31,626 for extra work painting:

> 1) drywall that was unanticipated and added late to the Project by DGS due to the deletion of certain fireproofing from Project plans and

2) caulking that was unanticipated and installed late due to DGS's failure to put the caulking work out for bid prior to the start of the Project.

Pro-Spec included roughly this same amount ($31,958) in its unpaid Contract balance claim as initially filed before the Board, since it claims this extra work was authorized and agreed to by Change Order 003 executed in May 2002 and performed thereafter. (Pro-Spec Complaint ¶¶ 6-11 and 26-33; Pro-Spec Statement of Damages ¶ A(1) and Proposed Conclusions of Law ¶¶ 21-24; N.T. 330-332; Exs. P-3, P-6).

181. Pro-Spec was ordered by P.J. Dick to paint both the drywall and caulking and instructed to document this work together to form the basis of this single change order. (N.T. 79-80, 98-100, 492-493, 1172; Ex. P-6).

182. There appears no serious dispute that Pro-Spec's painting of the added drywall was extra work outside the scope of the original Contract and the proper subject of Change Order 003. (N.T. 79-80, 100-111, 1172; Exs. P-5, P-6, P-132).

183. The "caulking" at issue here refers to joint sealant that was required to close the many expansion joints throughout the Project. (N.T. 62-65, 100-111, 746-753).

184. Expansion joints occurred in the Project where surfaces of steel, concrete and block construction came together. The joints had to be sealed before the surfaces could be painted. (N.T. 62-65, 100-111, 746-753).

185. As Mr. Yarbrough explained, Pro-Spec used the terms "caulking" and "joint sealant" interchangeably. (N.T. 128-129).

186. This joint sealant/caulking work was to be performed by a specialized contractor, but DGS had initially neglected to contract for installation of joint sealant to close the expansion joints that occurred throughout the Fayette SCI buildings. (N.T. 62-65, 100-111, 746-753, 931-939).

187. By the time the joint sealant contractor was brought on site, Pro-Spec had already painted in those corresponding areas because it had been directed to do so by P.J. Dick. (N.T. 62-65, 100-111, 746-753).

188. Because the caulking was then installed in previously painted areas, Pro-Spec had to revisit those areas, not only to paint the newly applied caulking, but also to repaint and/or blend the new paint into the damaged areas surrounding the joint sealant. (N.T. 62-67, 100-111, 746-753).

189. Substantial evidence supports Pro-Spec's assertions that it was directed to paint in areas prior to the installation of caulking, thereby necessitating return trips to repaint and blend damaged areas around later installed caulking. (N.T. 62-67, 132-137, 746-753; Ex. P-164; Board Finding).

190. Pro-Spec attached photographs relating to its painting of additional drywall and subsequently installed caulking areas to its corresponding AWAs, and P.J. Dick approved this practice. (N.T. 135-136, 769-770; Exs. P-8 through P-25, P-164; F.O.F. 188).

191. The Board finds that painting the caulking and accompanying area, as was directed by P.J. Dick, like the added drywall and the other out-of-sequence painting performed on the Project by Pro-Spec, was new or extra work not contemplated by the original Contract. (N.T. 79-80, 98-111, 492-493, 746-753, 1172; Exs. P-5, P-6, P-132; Board Finding).

192. The May 2002 Change Order 003, which was fully executed by the parties in an amount "not to exceed" $31,958, literally mentions only the painting of drywall that was installed to replace the deleted fireproofing. However, testimony presented from witnesses for both sides on this issue supports Pro-Spec's assertion that this change order and amount also included payment for the extra work of painting the late installed caulking. We find this testimony credible and conclude that the parties intended this Change Order 003 to include the work of painting areas adjacent to late installed caulking as well as the added drywall. (N.T. 100-111, 128-129, 931-939; Exs. P-6 and P-164).

193. In addition to the $31,958 under Change Order 003 included in Payment Application No.12 and in its claim for unpaid Contract balance, Pro-Spec also made a separate claim for $2022 in its Statement of Claim representing additional costs for painting added drywall and/or caulking on the Project. (Pro-Spec Complaint ¶¶ 6-11, 26-33; N.T. 330-332; Ex. P-3).

194. The Board does not, however, find sufficient support for Pro-Spec's claim of an additional $2,022 spent on this extra work category. (Pro-Spec Complaint ¶¶ 6-11, 26-33; N.T. 330-332; Ex. P-3, P-6, P-8 through P-25; F.O.F. 197; Board Finding).

195. Pro-Spec completed all of its work pursuant to Change Order 003 and said work was accepted by DGS. (N.T. 62-65, 100-111, 115-116, 746-753, 1020-1022; Exs. P-8 through P-25).

196. DGS has not paid Pro-Spec for its extra work painting either the added drywall or the caulking. (Pro-Spec Complaint ¶¶ 6-11, 26-33; Exs. P-3, P-4; Board Finding).

197. With the adjustment at Findings of Fact Paragraphs 207 through 216 and 219, the Board finds that Pro-Spec's AWAs utilized to track its extra work to accurately reflect the manhours, materials, and equipment utilized by Pro-Spec to perform the extra work relating to painting added drywall and caulking pursuant to Change Order 003. (Exs. P-8 through P-25; F.O.F. 180-196, 207-216, 219; Board Finding).

198. Pro-Spec has incurred damages in the amount of $28,947 for its extra work painting added drywall and caulking under Change Order 003 as directed by P.J.

Dick. (N.T. 62-65, 100-111, 115-116, 746-753, 1020-1022; Exs. P-3, P-4, P-8 through P-25; F.O.F. 180-197, 207-216, 219; Board Finding).

199. Pro-Spec has incurred total damages in the amount of $54,147 on its unpaid Contract balance claim which is comprised of $28,947 in damages attributable to Change Order 003 and $25,200 in damages as the correct amount outstanding and unpaid on the remaining Contract work which it completed. (N.T. 62-65, 79-80, 98-111, 115-116, 132-137, 268-270, 274-277, 280-282, 290-297, 310, 353-360, 745-753, 821-833, 963-964, 1020-1022; Exs. P-2, P-3, P-4, P-8 through P-25; F.O.F. 144-198; Board Finding).

E. Liquidated Damages

200. Article 4 of the Contract provides that, in the event the contractor fails to complete the work within the time specified, it will pay the Department $1,400 per day until the work is completed. (Ex. P-1).

201. The Board has found that Pro-Spec did not prematurely walk off the job in November 2002 because, among other things: Gary Mizla, a P.J. Dick Project Superintendent had signed off on the then effective punchlist (i.e. the October Punchlist) as complete; Pro-Spec had completed all Contract work made reasonably available to it at the time; and because any remaining original Contract work to be done thereafter was of a de minimus and immaterial amount. (N.T. 274-277, 351-355, 821-823, 963-964; Exs. P-187, D-636; F.O.F. 36-41, 144-170, 178-179, 195; Board Finding).

202. DGS's demand for Pro-Spec to immediately return to the Project in late November 2002 following P.J. Dick's sign-off on the October Punchlist was driven by the ongoing damage caused by later installation work of other contractors to areas that Pro-Spec had already painted once and constituted, in all material respects, duplicative extra work beyond the scope of Pro-Spec's original Contract. (N.T. 274-277, 351-355, 821-823, 963-964; Ex. D-636; F.O.F. 36-41, 88-103, 128-138, 144-170, 178-179, 195; Board Finding).

203. Any suggestion by DGS that Pro-Spec was the cause of its own delays is not supported by the factual record, as Pro-Spec was not shown to have neglected any of its original responsibilities under the Contract and punchlists or to have caused any of the delays to its painting work or other problems which plagued the Project. (N.T. 31-35, 45, 59-60, 274-277, 351-355, 704-706, 821-823, 963-964; Ex. D-636; F.O.F. 36-41, 88-103, 128-138, 144-170, 178-179, 195; Board Finding).

F. Attorney's Fees, Interest and Penalties

204. Although this Board has found itself in substantial agreement with Pro-Spec on the disputed issues in this case, particularly in regard to the fundamental dispute on what was and was not original Contract work under the extenuated circumstances faced by both parties on the Project, we do not find DGS's position or actions here to be

either arbitrary or vexatious. (N.T. 274-280, 351-355, 821-833, 995; Exs. P-153, P-187, D-652, D-653; F.O.F. 125-127, 136-138, 173-175, 193-195, 197-198; Board Finding).

205. The parties' disagreements as to whether the extensive return/repair painting caused by out-of-sequence work and ongoing installations constituted original Contract work or extra work were reasonable. (N.T. 274-280, 351-355, 821-833, 995; Exs. P-153, P-187, D-652, D-653; F.O.F. 125-127, 136-138, 173-175, 193-195, 197-198; Board Finding).

206. Pro-Spec has not established to this Board that DGS's conduct was arbitrary or vexatious in denying Pro-Spec's claims for its extra work or the unpaid Contract work. (N.T. 274-280, 351-355, 821-833, 995; Exs. P-153, P-187, D-652, D-653; F.O.F. 204-205; Board Finding).

G. Damages

207. The Board disagrees with DGS that the 20% cost factor Pro-Spec adds to its painting labor for direct supervision of its extra work and the 10% cost factor it adds for clean-up are unsubstantiated. To the contrary, we find the testimony of Mr. Yarbrough credible on this issue, in that: 1) the labor hours reflected in the AWAs reflect only time spent prepping and painting those areas; 2) Pro-Spec incurred additional labor costs for clean-up and additional supervision time spent by its foremen and others that are not reflected in the AWAs; and 3) the 10% factor for clean-up and 20% factor for direct supervision applied to the cost of actual painting man hours is an accurate and reasonable estimate of these additional costs incurred by Pro-Spec for the extra work done on this Project. (N.T. 181-189, 439-445, 495-500, 539-540; Exs. P-4, P-8 through P-25, P-26, P-31 through P-76, P-77, P-82 through P-131; Board Finding).

208. Mr. Yarbrough and Mr. Mayer credibly testified that Pro-Spec submitted a price schedule to P.J. Dick, which included labor unit cost rates and material unit cost rates, at the start of the Project before it mobilized, and that these were never disputed. (N.T. 51-53, 489-492, 760-761; Exs. P-182, D-578).

209. Pro-Spec's labor and material unit cost rates used in its AWAs for its extra work represented an increase over the rates initially submitted to P.J. Dick at the start of the Project. For example, the total hourly rate (fully burdened) set for journeyman painters at the start of the job in February 2001 was 42.95. The total hourly rate for these same painters utilized by Pro-Spec in its claim is 45.98, representing a 7% increase. (N.T. 51-53, 458-64, 489-492, 529-532; Exs. P-4, P-8 through P-25, P-26, P-31 through P-76, P-77, P-82 through P-131, P-182, D-578).

210. The total labor unit cost rate is composed of a base labor rate as well as a burden rate (including FICA, FUTA, unemployment/disability, CMCIP replacement insurance, tool-safety allowances). (N.T. 51-53, 489-492; Exs. P-4, P-26, P-77, P-182, D-578).

211. The 7% percent increase in Pro-Spec's final labor rates over nearly two years and as reflected in its AWAs effects no change in the contract's prevailing wage rate (base rate of $20.88 per hour plus benefits of $7.53) but shows an increase in additional burden from 14.35 to 17.57 per hour. Similar increases were reflected in the total hourly labor rates Pro-Spec claims for its working foremen. (N.T. 51-53, 458-64, 489-492, 529-532; Exs. P-4, P-8 through P-25, P-26, P-31 through P-76, P-77, P-82 through P-131, P-182, D-578).

212. Pro-Spec's base labor rate of $20.88 per hour plus benefits of $7.53 matches that listed in the prevailing wage schedule found in volume 1 of the Project Bid Documents. (N.T. 489-492, Exs. P-4, P-26, P-77, P-180, P-182, D-578).

213. Accordingly, the 7% increase in the final labor rates as reflected in Pro-Spec's AWAs is attributable to the burden rate and translates into a change from $14.35 to $17.57 per hour. (N.T. 458-64, 489-492, 529-532; Exs. P-4, P-8 through P-25, P-26, P-31 through P-76, P-77, P-82 through P-131, P-182, D-578; Board Finding).

214. Pro-Spec has not documented or explained the 7% increase in the final labor rates as reflected in Pro-Spec's AWAs. (N.T. 51-53, 458-64, 489-492, 529-532; Exs. P-4, P-8 through P-25, P-26, P-31 through P-76, P-77, P-82 through P-131, P-182, D-578; Board Finding).

215. Additionally, Pro-Spec's bond markup increase from 0.3% to 3% from its original rate submissions to its claim was also unexplained. (N.T. 458-64, 489-492, 529-532; Exs. P-4, P-8 through P-25, P-26, P-31 through P-76, P-77, P-82 through P-131, P-182, D-578; Board Finding).

216. Because Pro-Spec has not documented or explained its higher labor rates and bond markup, the Board concludes that the best and most accurate estimate of Pro-Spec's damages derives from applying the labor, material and equipment rates and the bond markup percentage originally submitted by Pro-Spec to the man hours, material and usage reflected in its AWA's (rather than the higher labor rates and bond markup claimed). (N.T. 458-64, 489-492, 529-532; Exs. P-4, P-8 through P-25, P-26, P-31 through P-76, P-77, P-82 through P-131, P-182, D-578; Board Finding).

217. With the adjustment made to reduce Pro-Spec's higher labor rates and bond markup (as reflected on its Exhibit 26 addressing its claim for extra work performing out-of-sequence painting of subsequent Southern Steel installations) to its original labor rates and bond markup, Pro-Spec's damage calculation for this extra work totals $138,580. This reduced amount represents a reasonable estimate of damages actually incurred by Pro-Spec for its extra work created by P.J. Dick's direction to paint areas adjacent to Southern Steel's work in an out-of-sequence manner. (N.T. 458-64, 489-492, 529-532; Exs. P-26, P-31 through P-76, P-182, D-578; F.O.F. 88-104, 207-216; Board Finding).

218. With the adjustment made to reduce Pro-Spec's higher labor rates and bond markup (as reflected on its Exhibit 77 addressing its claim for extra work performing out-of-sequence painting of subsequent installations made by other contractors) to its original labor rates and bond markup, Pro-Spec's damage calculation for this extra work totals $187,102. This reduced amount represents a reasonable estimate of damages actually incurred by Pro-Spec for its extra work created by P.J. Dick's direction to paint areas adjacent to other contractors' work in an out-of-sequence manner. (N.T. 458-64, 489-492, 529-532; Exs. P-77, P-82 through P-131, P-182, D-578; F.O.F. 128-142, 207-216; Board Finding).

219. With the adjustment made to reduce Pro-Spec's higher labor rates and bond markup (as reflected on its Exhibit 4 addressing its claim for Change Order 003) to its original labor rates and bond markup, Pro-Spec's damage calculation for this extra work painting added drywall and caulking totals $28,947. This reduced amount represents a reasonable estimate of damages actually incurred by Pro-Spec for performing this extra work at P.J. Dick's direction. (N.T. 458-64, 489-492, 529-532; Exs. P-4, P-8 through P-25, P-182, D-578; F.O.F. 180-198, 207-216; Board Finding).

CONCLUSIONS OF LAW

Jurisdiction

1. The Board has subject matter jurisdiction over Pro-Spec's claim in the action based on alleged unpaid Contract work and additional work beyond the scope of the Contract. Subject matter jurisdiction obtains here because the Board is competent to hear contract claims against the Commonwealth, which is the general class and type of case presented in this matter. 62 Pa.C.S. § 1724; DGS v. Limbach Company, et al., 862 A.2d 713, 716-20 (Pa. Cmwlth. 2004) aff'd per curium 895 A.2d 527 (Pa. 2006); Employers Ins. of Wausau v. PennDOT, 865 A.2d 825, 833-34 (Pa. 2005); In re Melograne, 812 A.2d 1164, 1166-1167 (Pa. 2002); Frye Constr., Inc. v. City of Monongahela, 584 A.2d 946, 948-949 (Pa. 1991); Dep't of Pub. Welfare v. UEC, Inc., 397 A.2d 779, 784-85 (Pa. 1979); Feingold v. Bell of Pa., 383 A.2d 791, 793-794 (Pa. 1977).

2. The question of whether the Board has the authority to hear Pro-Spec's claim because of alleged failures to comply with the statutorily prescribed periods of limitations is one of personal jurisdiction. In re Melograne, 812 A.2d at 1166-1167; Dep't. of Pub. Welfare v. UEC, Inc., 397 A.2d at 784-785.

3. Objections to jurisdiction over the person can, in some circumstances, be waived or estopped on equitable grounds by actions of the parties. In re Melograne, 812 A.2d at 1166-1167; Frye Constr. v. City of Monongahela, 584 A.2d at 948-949; Dep't. of Pub. Welfare v. UEC, Inc., 397 A.2d at 784-785.

4. Whether the Board may exercise in personam jurisdiction over DGS for all or any part of Pro-Spec's extant claims here asserted depends on whether or not Pro-Spec submitted these claims to the Board in a timely manner or whether DGS is somehow estopped from asserting this defense. Frye Constr. v. City of Monongaehla, 584 A.2d at 948-949; Dep't. of Pub. Welfare v. UEC, Inc., 397 A.2d at 784-785.

Statute of Limitations

5. The Procurement Code (as amended) at Subsections 1712.1(d) and (e) provides for the limitation of the period in which claims may be filed with the Board after said claim has been received by the Commonwealth agency's contracting officer:

> (d) Determination.—The contracting officer shall review a claim and issue a final determination in writing regarding the claim within 120 days of the receipt of the claim unless extended by consent of the contracting officer and the contractor. If the contracting officer fails to issue a final determination within the 120 days unless extended by consent of the parties, the claim shall be deemed denied. The determination of the contracting officer shall be the final order of the purchasing agency.

> (e) Statement of claim.—Within 15 days of the mailing date of a final determination denying a claim or within 135 days of filing a claim if no extension is agreed to by the parties, whichever occurs first, the contractor may file a statement of claim with the board.

62 Pa.C.S. § 1712.1(d), (e).

6. Because no written final determination was issued by a DGS contracting officer in this case, the statutory time period within which Pro-Spec's claim was to be filed with the Board was 135 days from the date Pro-Spec first filed its claim with the DGS contracting officer. 62 Pa.C.S. § 1712.1(d), (e); Exs. P-151, D-645B.

7. Because Pro-Spec filed its claims with DGS's contracting officer on December 31, 2002, and then filed its claims with the Board on June 6, 2003, i.e. 22 days after the 135 day limitation period had expired, Pro-Spec will be deemed to have waived its claims and the Board would have no in personam jurisdiction in this matter unless Pro-Spec can establish grounds to estop DGS from raising this statute of limitations defense. 62 Pa.C.S. § 1712.1(d), (e); Exs. P-151, D-645B; Fine v. Checcio, 870 A.2d 850, 859 (Pa. 2005); In re Melograne, 812 A.2d at 1166-1167; Dep't. of Pub. Welfare v. UEC, Inc., 397 A.2d at 784-785.

8. Proof of estoppel requires clear, precise and convincing evidence, and the burden of proof is on the asserting party. Molineux v. Reed, 532 A.2d 792, 794 (Pa. 1987); Simmons v. Snider, 645 A.2d 400, 405 (Pa. Cmwlth. 1994).

9. In the present status of this case, the burden of providing clear and convincing evidence in support of a finding of estoppel is on Pro-Spec, the party asserting the argument, without benefit of the standard applicable to a directed verdict. Molineux. v. Reed, 532 A.2d at 794; Simmons v. Snider, 645 A.2d at 405.

10. Contrary to the Department's assertion, the Board's opinion deciding the motion for a directed verdict in this case was not based on a determination that DGS was estopped from asserting the date it actually received Pro-Spec's letter initiating its claim. Rather, in that opinion and order, the Board held that the Department was estopped from asserting the defense of the statute of limitations because it misrepresented to Pro-Spec, by reason of Article 15.3(B) and subsequent actions, that the Department would either resolve the claims amicably or issue a written final determination stating the reasons for denial and advising of the right to further review before Pro-Spec would be required to file a further claim, and then did neither. Opinion and Order, May 8, 2009, BOC Docket No. 3910.

11. To the extent DGS may be perceived to argue that evidence pertaining to a misrepresentation of the date the limitations period began to run constitutes the only evidence that would support a finding of estoppel of this defense, the Board has found no basis in law to support such a restriction on the application of the estoppel doctrine to a

statute of limitations defense. On the contrary, multiple cases hold that principles of estoppel may prevent a party from raising the defense of a statute of limitations where filing dates are not the issue. Dep't of Pub. Welfare v. UEC, Inc. 397 A.2d at 784; Simmons v. Snider, 645 A.2d at 405.

12. If, through fraud or concealment, the defendant causes the plaintiff to relax his vigilance respecting the running of a statute of limitations, the defendant is estopped from invoking that defense. Fine v. Checcio, 870 A.2d at 859; Dep't of Pub. Welfare v. UEC, Inc., 397 A.2d at 784.

13. The fraud or concealment required to toll the statute need not be fraud in the strictest sense, but rather fraud in the broadest sense including unintentional deception: "It is not the intention of the party estopped but the natural effect upon the other party which gives vitality to an estoppel." Dep't of Public Welfare v. UEC, Inc., 397 A.2d at 784; Nesbitt v. Erie Coach Co., 204 A.2d 473, 476-77 (Pa. 1964).

14. Mere negotiation toward an amicable settlement does not provide a basis for estoppel, nor does a mistake, misunderstanding or lack of knowledge. Fine v. Checcio, 870 A.2d at 857; Dep't of Pub. Welfare v. UEC, Inc., 397 A.2d at 784; Nesbitt v. Erie Coach Co., 204 A.2d at 475.

15. Neither the Borky v. Township of Centre nor the Price v. Chevrolet Motor Div. case cited by DGS addresses the issue of estoppel of a statute of limitations defense, nor do they overrule or materially modify the long established equitable principles for estoppel of a statute of limitations defense as set forth in the line of cases based on Nesbitt v. Erie Coach Co., Dep't of Pub. Welfare v. UEC, Inc. and/or Fine v. Checcio. Compare Borky v. Township of Centre, 847 A.2d 807 (Pa. Cmwlth. 2004); Price v. Chevrolet Motor Div., 765 A.2d 800 (Pa. Super 2000) to Fine v. Checcio, 870 A.2d at 859; Molineux. v. Reed, 532 A.2d at 794; Dep't of Pub. Welfare v. UEC, Inc., 397 A.2d at 784; Nesbitt v. Erie Coach Co., 204 A.2d at 475; Simmons v. Snider, 645 A.2d at 405; Dep't of Revenue v. King Crown Corp., 415 A.2d 927, 930 (Pa. Cmwlth. 1980).

16. In Dep't of Revenue v. King Crown Corp., 415 A.2d 927, 930 (Pa. Cmwlth. 1980), the Commonwealth Court compared the two expressions of estoppel principles in the cases noted above as follows:

> Estoppel here thus depends on the reasonableness of King's belief that a settlement had been agreed upon, and the existence of the intent or "culpable negligence" on the part of the Commonwealth's agent in creating that belief. To reach an answer, we find a discussion in UEC, Inc., helpful. Although addressed to the distinct situation of estoppel against reliance upon a statute of limitations, which requires fraud or concealment by the party to be estopped, the interpretation placed on those words is illuminating. That rule was held
>
> > not [to] mean fraud or concealment in the strictest sense encompassing an intent to deceive, but rather fraud in the broadest

> sense which includes an unintentional deception . . . (citation omitted.) It is not the intention of the party estopped but the natural effect upon the other party which gives vitality to an estoppel. Nesbitt v. Erie Coach Co., 204 A.2d 473, 475 (Pa. 1964).
>
> UEC, Inc., supra, 483 Pa. at 513, 397 A.2d at 784. Accordingly, we find that intent or "culpable negligence" must be accorded a similarly broad meaning.

Dep't of Revenue v. King Crown Corp., 415 A.2d at 930.

17. Whether the "fraud and concealment" language of the UEC, Inc. line of cases or the "intent or culpable negligence" language of other estoppel cases is employed, estopping a statute of limitations defense requires that these terms be accorded a broad meaning so that estoppel, as a doctrine of fundamental fairness, remains available to a party that reasonably relies to its detriment on misleading representations by the other party. Dep't of Pub. Welfare v. UEC, Inc., 397 A.2d at 784; Dep't of Revenue v. King Crown Corp., 415 A.2d at 930.

18. Article 15.3(B) of the Contract between the parties, as drafted by DGS, constitutes a clear and explicit representation by DGS to Pro-Spec that DGS would issue a final decision in writing if mutual agreement could not be reached on Pro-Spec's claims and that this written decision would (1) state the reasons for the action taken, and (2) inform Pro-Spec of its right to further review. Ex. P-180.

19. Because the Board has found, as matters of fact, that:

(a) DGS, through Article 15.3(B) of the Contract, represented that it would make a determination of Pro-Spec's claims in a writing explaining both the reasons therefore and Pro-Spec's rights for further review if the claims were not resolved by mutual agreement;

(b) DGS's actions at, and after, the DGS Claim Hearing indicating DGS's movement toward a mutual and cooperative resolution of Pro-Spec's claims (as set forth in the Board's Findings of Fact, particularly Paragraphs 59 to 81), together with the express language of Article 15.3(B) of the Contract, caused Pro-Spec reasonably to believe either its claims would be resolved by mutual agreement with DGS or that DGS would issue a written decision explaining its reasons for denying the claims and informing Pro-Spec of its right to further review;

(c) the presence of the Article 15.3(B) representation together with the acts and representations of DGS at and after the DGS Claim Hearing constituted more than mere negotiation toward a mutual settlement, but rather a commitment to issue a written decision if no mutual resolution was reached;

(d) Pro-Spec reasonably relied on the aforementioned representations and actions of DGS;

(e) these representations and actions of DGS had the natural effect of causing Pro-Spec to relax its vigilance respecting the running of the applicable statute of limitations;

(f) these representations and actions of DGS (in light of its failure to resolve Pro-Spec's claims by mutual agreement or to issue a written decision on same) constitute fraud or concealment as well as culpable negligence by DGS; and

(g) Pro-Spec has established the foregoing factual elements of estoppel in this case with credible, clear and convincing evidence,

the Board concludes that DGS is equitably estopped from asserting the statute of limitations as a defense to Pro-Spec's claims herein. We further conclude that the Board has in personam jurisdiction over these claims. Fine v. Checcio, 870 A.2d at 859; Molineux. v. Reed, 532 A.2d at 794; Dep't of Pub. Welfare v. UEC, Inc., 397 A.2d at 784; Nesbitt v. Erie Coach Co., 204 A.2d at 475; Simmons v. Snider, 645 A.2d at 405; Dep't of Revenue v. King Crown Corp., 415 A.2d at 930.

Extra Work

20. 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. Dep't of Transp., 746 A.2d 1164, 1168 (Pa. Cmwlth. 2000); Dep't of Transp. v. Brozzetti, 684 A.2d 658, 663 (Pa. Cmwlth. 1996).

21. Because we have found that, at the time DGS and Pro-Spec entered their Contract, they did not intend for Pro-Spec to have to return to areas already painted to repair or repaint finished surfaces due to damage to these surfaces done by other contractors as part of Pro-Spec's original scope of work, we hold that such work, including repair/repainting caused by out-of-sequence work done at the direction of the owner and/or its agent, P.J. Dick, was extra work outside the scope of Pro-Spec's Contract with DGS. Id. See also, Exs. P-1, P-132, P-133, P-134, P-180.

22. Pro-Spec's Contract obligations, though they did require Pro-Spec to repair any damage that it caused on its own, did not include having to repaint areas it had already painted due to damage done by the subsequent work of other contractors because of P.J. Dick's direction to Pro-Spec to perform its painting work out-of-sequence. (N.T. 76-77, 1020-1022; Exs. P-132, P-180; Board Finding)

23. The law is clear that a contractor who performs work beyond the scope of its contract at the behest of the owner is entitled to additional compensation. A.G. Cullen Constr. Co., Inc. v. State Sys. of Higher Educ., 898 A.2d 1145, 1171 (Pa. Cmwlth. 2006); Dep't of Transp. v. Gramar Constr. Co., 454 A.2d 1205, 1207 (Pa. Cmwlth. 1983) (where contract is ambiguous as to the amount of work to be performed, it must be construed against the drafter and extra work outside the contract terms must be compensated).

24. Pennsylvania courts have required payment for extra work done at the behest of the owner even where there is no written change order that covers the work in question. Universal Builders, Inc. v. Moon Motor Lodge, Inc., 244 A.2d 10, 15 (Pa.

1968); James Corp. v. N. Allegheny Sch. Dist., 938 A.2d 474, 487 (Pa. Cmwlth. 2007); A.G. Cullen Constr. Co. Inc. 898 A.2d at 1171.

A. ***Out-of-sequence painting around Southern Steel work***

25. Because the Board has found, as matters of fact, that:

(a) Pro-Spec's out-of-sequence painting of multiple areas on the Project around Southern Steel's detention equipment installations, as ordered by P.J. Dick, caused Pro-Spec to have to return to these areas to repaint same (or some portion thereof) for a second, third or more times thereafter to repair already finished painted surfaces damaged by these subsequent Southern Steel installations;

(b) these repeat visits to repaint damaged surfaces caused Pro-Spec to incur additional rounds of set-up, preparation, tear-down and cleanup as well as a significant degree of repainting in these areas around the damaged portions in order to properly blend old and newly painted areas;

(c) the amount of original work (painting any newly installed detention hardware) involved in these return/repair painting visits was so small as to be considered de minimus and immaterial when compared to: (i) the total repair painting; (ii) the additional rounds of set-up, preparation, tear-down and cleanup; and (iii) the extra care required to protect surrounding finishes that had remained undamaged;

(d) returning to paint these already painted areas surrounding subsequent Southern Steel installations is properly viewed, in its entirety, as repair painting of areas damaged by these Southern Steel installations and, therefore, extra work outside the scope of work contemplated by the parties under the Contract;

(e) this extra work outside the scope of Pro-Spec's Contract was caused by, and done at, P.J. Dick's direction to paint these areas in an out-of-sequence manner; and

(f) P.J. Dick, at all times relevant hereto, acted as construction manager and DGS's agent on the Project,

the Board concludes that DGS has a duty to pay Pro-Spec for this extra work involved in repairing and repainting areas adjacent to, and damaged by, Southern Steel's subsequent installations, and DGS is liable to Pro-Spec for all costs and damages incurred by Pro-Spec as a result of this extra work. Exs. P-1, P-132, P-133, P-134, P-180; Universal Builders, Inc., 244 A.2d at 15; James Corp., 938 A.2d at 487; A.G. Cullen Constr. Co. Inc., 898 A.2d at 1171; Dep't of Transp. v. Gramar Constr. Co., 454 A.2d at 1207; C.O.L. 20-24.

26. Per the specific instructions of P.J. Dick, Pro-Spec had a duty to provide P.J. Dick with advance notice of specific repainting of areas around Southern Steel work each time it engaged in such activity. Exs. P-1, P-180 (including General Conditions 5.1.J and 6.4), D-610.

27. Because the Board has found that Pro-Spec did advise P.J. Dick generally, in writing, of most areas of repainting activity beforehand; and because Pro-Spec did provide P.J. Dick with advance notice of repainting specific areas immediately before it engaged in such activity in some, albeit not all, instances; and because whether Pro-Spec did or did not notify P.J. Dick representatives on-site of each such specific instance of repainting immediately beforehand had no material effect on where or how much extra repainting work was needed or performed; and because Pro-Spec substantially performed this part of its work on the Project, and DGS received the full benefit thereof; we conclude that Pro-Spec's failure to provide P.J. Dick with immediate advance notice of specific repainting activity each time it engaged in such activity was not a material breach of its duty to comply with P.J. Dick instructions on the Project nor sufficient reason to relieve DGS of the responsibility to compensate Pro-Spec for the extra repainting work it performed at P.J. Dick's direction. See e.g. Widmer Eng'g, Inc. v. Michael H. Dufalla, 837 A.2d 459, 467-468 (Pa. Super. 2003); Schlein v. Gross et ux., 142 A.2d 329, 333 (Pa. Super. 1958); Exs. P-1, P-180 (including General Conditions 5.1.J and 6.4), D-610.

28. The Board concludes that DGS breached its duty to Pro-Spec by failing to pay Pro-Spec for its extra work returning to, and repainting, areas surrounding subsequent Southern Steel installations. Universal Builders, Inc. 244 A.2d at 15; James Corp., 938 A.2d at 487; A.G. Cullen Constr. Co. Inc. 898 A.2d at 1171; Dep't of Transp. v. Gramar Constr. Co., 454 A.2d at 1207; N.T. 140-143, 1092-1094; Ex. P-26; C.O.L. 20-27.

B. ***Out-of-sequence painting around the work of other contractors***

29. Because the Board has found, as matters of fact, that:

(a) Pro-Spec's out-of-sequence painting of multiple areas on the Project around installations of contractors other than Southern Steel, as ordered by P.J. Dick, caused Pro-Spec to have to return to these areas to repaint same (or some portion thereof) for a second, third or more times thereafter to repair already finished painted surfaces damaged by these subsequent installations;

(b) these repeat visits to repaint damaged surfaces caused Pro-Spec to incur additional rounds of set-up, preparation, tear-down and cleanup as well as a significant degree of repainting in these areas around the damaged portions in order to properly blend old and newly painted areas;

(c) the amount of original work (painting any new items) involved in these return/repair painting visits was nil or so small as to be considered de minimus and immaterial when compared to: (i) the total repair painting; (ii) the additional rounds of set-up, preparation, tear-down and clean-up; and (iii) the extra care required to protect surrounding finishes that had remained undamaged;

(d) returning to paint these already painted areas surrounding subsequent work of contractors other than Southern Steel is properly viewed, in its entirety, as repair painting of areas damaged by this subsequent work of others and, therefore, extra work outside the scope of work contemplated by the parties under the Contract;

(e) this extra work outside the scope of its Contract was required by, and done at, P.J. Dick's direction to paint these areas in an out-of-sequence manner; and

(f) P.J. Dick at all times relevant hereto acted as construction manager and DGS's agent on the Project,

the Board concludes that DGS had a duty to pay Pro-Spec for this extra work involved in repairing and repainting areas adjacent to and damaged by the subsequent work of contractors other than Southern Steel, and DGS is liable to Pro-Spec for all costs and damages incurred by Pro-Spec as a result of this extra work. Universal Builders, Inc., 244 A.2d at 15; James Corp., 938 A.2d at 487; A.G. Cullen Constr. Co. Inc., 898 A.2d at 1171; Dep't of Transp. v. Gramar Constr. Co., 454 A.2d at 1207; Exs. P-1, P-132, P-133, P-134, P-180; C.O.L. 20-24.

30. Per the specific instructions of P.J. Dick, Pro-Spec had a duty to provide P.J. Dick with advance notice of specific repainting of areas around the work of other contractors each time it engaged in such activity. Exs. P-1, P-180 (including General Conditions 5.1.J and 6.4), D-610.

31. Because the Board has found that Pro-Spec did advise P.J. Dick generally, in writing, of most areas of repainting activity beforehand; and because Pro-Spec did provide P.J. Dick with advance notice of repainting specific areas immediately before it engaged in such activity in some, albeit not all, instances; and because whether or not Pro-Spec notified P.J. Dick representatives on-site of each such specific instance of repainting immediately beforehand had no material effect on where or how much extra repainting work was needed or performed; and because Pro-Spec substantially performed this part of its work on the Project, and DGS received the full benefit thereof; we conclude that Pro-Spec's failure to provide P.J. Dick with immediate advance notice of specific repainting activity each time it engaged in such activity was not a material breach of its duty to comply with P.J. Dick instructions on the Project nor sufficient reason to relieve DGS of the responsibility to compensate Pro-Spec for the extra repainting work it performed at P.J. Dick's direction. Exs. P-1, P-180 (including General Conditions 5.1.J and 6.4), D-610; See e.g. Widmer Eng'g, Inc. v. Michael H. Dufalla, 837 A.2d 459, 467-468 (Pa. Super. 2003); Schlein v. Gross et ux., 142 A.2d 329, 333 (Pa. Super. 1958).

32. The Board concludes that DGS breached its duty to Pro-Spec by failing to pay Pro-Spec for its extra work returning to, and repainting, areas surrounding subsequent work by contractors other than Southern Steel. Universal Builders, Inc. 244 A.2d at 15; James Corp., 938 A.2d at 487; A.G. Cullen Constr. Co. Inc. 898 A.2d at 1171; Dep't of Transp. v. Gramar Constr. Co., 454 A.2d at 1207; N.T. 140-143, 1092-1094; C.O.L. 20-24, 29-31.

C. *Unpaid Contract Balance*

33. Because the Board has found, as matters of fact, that:

(a) Pro-Spec, at the direction of P.J. Dick (on behalf of DGS), painted additional drywall not originally included in the Contract scope of work and painted caulking installed late and in an out-of-sequence manner pursuant to Change Order 003;

(b) both of these painting tasks constituted extra work beyond the scope of the Original Contract;

(c) Change Order 003 was fully executed and authorized the aforementioned work in an amount not to exceed $31,958;

the Board finds that the Contract was modified by Change Order 003 to include the work of painting the additional drywall and the late installed caulking and that DGS is liable to Pro-Spec for payment on this extra work as part of the unpaid Contract balance. Ex. P-180 (General Conditions, Article 11); 62 Pa.C.S. §§ 3931 (a); Boro Construction Inc. v. Ridley School District, No. 16 C.D. 2009, No. 17 C.D. 2009, 2010 Pa. Commw. LEXIS 124 at *15-16 (March 8, 2010); James Corp., 938 A.2d at 488; See also Universal Builders, Inc., 244 A.2d at 15; A.G. Cullen Constr. Co. Inc., 898 A.2d at 1171; Dep't of Transp. v. Gramar Constr. Co., 454 A.2d at 1207; C.O.L. 20-24.

34. Because the Board has found, as matters of fact, that:

(a) Pro-Spec reached substantial completion of its work on the Project on August 14, 2002, and was presented promptly thereafter with a punchlist (the "Original Punchlist") of remaining Contract work to be done (as identified by the Project Professional) with an approximate value of $23,332;

(b) Pro-Spec promptly began to complete the outstanding work on this Original Punchlist together with pursuing substantial extra work which involved returning to repaint areas adjacent to subsequent Southern Steel installations and/or subsequent work by other contractors;

(c) On October 14, 2002, P.J. Dick supplied Pro-Spec with a subsequent punchlist (referred to herein as the October Punchlist) and advised Pro-Spec that the October Punchlist superseded the Original Punchlist;

(d) P.J. Dick's superintendant overseeing painting on the Project, Gary Mizla, subsequently indicated that all work referenced in the October Punchlist had been completed on or about November 14, 2002;

(e) Pro-Spec demobilized from the Project as a result of Mr. Mizla's sign-off and because it had completed all work then reasonably available to it;

(f) Pro-Spec and DGS thereafter, at the DGS Claim Hearing, agreed to mutually formulate a final punchlist of items (the "Final Punchlist"), the completion of which would entitle Pro-Spec to receive final payment on its Contract;

(g) DGS and Pro-Spec then formulated this Final Punchlist, and Pro-Spec completed the work on this Final Punchlist in March 2003 (as once again indicated by a sign-off from Mr. Mizla); and

(h) as a result of the foregoing, as supported by additional evidence presented at hearing, Pro-Spec has completed all of its Contract work on the Project,

the Board concludes that, in addition to payment for the extra work painting additional drywall and late installed caulking pursuant to Change Order 003, DGS is liable to Pro-Spec for the remaining amount of the unpaid balance on the Contract. 62 Pa.C.S. §§ 3931(a); Boro Construction Inc. v. Ridley School District, No. 16 C.D. 2009, No. 17 C.D. 2009, 2010 Pa. Commw. LEXIS 124 at *15-16 (March 8, 2010); James Corp., 938 A.2d at 488.

35. The Board concludes that DGS has breached its contractual duty to Pro-Spec by failing to pay it the outstanding balance of payment due on the Contract following Pro-Spec's completion of painting work on the Final Punchlist in March 2003. 62 Pa.C.S. §§ 3931(a); Boro Construction Inc. v. Ridley School District, No. 16 C.D. 2009, No. 17 C.D. 2009, 2010 Pa. Commw. LEXIS 124 at *15-16 (March 8, 2010); James Corp., 938 A.2d at 488; C.O.L. 20-24, 33-34.

D. ***Damages***

36. As the plaintiff in this contractual dispute, Pro-Spec carries the burden with regard to proving both a breach of contract and its damages resulting therefrom. Spang & Co. v. U.S. Steel Corp., 545 A.2d 861, 866-867 (Pa. 1988).

37. 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. Spang, 545 A.2d at 866-867; A.G. Cullen Constr. Co., Inc., 898 A.2d at 1174; J.W.S. Delavau, Inc. v. Eastern America Transport & Warehousing, 810 A.2d 672, 685-686 (Pa. Super. 2002).

38. Because the Board has found that the best and most accurate estimate of Pro-Spec's damages for its extra work derives from applying the labor, material and equipment rates and bond mark-up percentage originally submitted by Pro-Spec at the start of the Project to the total man hours, material and equipment usage reflected in the AWAs submitted as support for its extra work claims on the Project; and that application of these original rates to the total man hours, material and equipment usage reflected in its AWAs for its extra work claim for performing out-of-sequence painting of subsequent Southern Steel installations, together with appropriate markup, totals $138,580 and represents a reasonably accurate estimate of the damages actually incurred by Pro-Spec for this extra work, we find that DGS is liable to Pro-Spec in the amount of $138,580 for its extra work performing out-of-sequence painting on and around subsequent Southern Steel installations. Spang, 545 A.2d at 866-867; Universal Builders, Inc., 244 A.2d at 15; James Corp., 938 A.2d at 487; A.G. Cullen Constr. Co., Inc., 898 A.2d at 1171-1174; Dep't of Transp. v. Gramar Constr. Co., 454 A.2d at 1207; J.W.S. Delavau, Inc. 810 A.2d at 685-686; Ex. P-182; C.O.L. 36-37.

39. Because the Board has found that the best and most accurate estimate of Pro-Spec's damages for its extra work derives from applying the labor, material and equipment rates and bond mark-up percentage originally submitted by Pro-Spec at the start of the Project to the total man hours, material and equipment usage reflected in the AWAs submitted as support for its extra work claims on the Project; and that application of these original rates to the total man hours, material and equipment usage reflected in its AWAs for its extra work claim for performing out-of-sequence painting around subsequent work by contractors other than Southern Steel, together with appropriate markup, totals $187,102 and represents a reasonably accurate estimate of the damages actually incurred by Pro-Spec for this extra work, we find that DGS is liable to Pro-Spec in the amount of $187,102 for its extra work performing out-of-sequence painting on and around subsequent installations by contractors other than Southern Steel. Spang, 545 A.2d at 866-867; Universal Builders, Inc., 244 A.2d at 15; James Corp., 938 A.2d at 487; A.G. Cullen Constr. Co., Inc., 898 A.2d at 1171-1174; Dep't of Transp. v. Gramar Constr. Co., 454 A.2d at 1207; J.W.S. Delavau, Inc. 810 A.2d at 685-686; Ex. P-182; C.O.L. 36-37.

40. Because the Board has found that the best and most accurate estimate of Pro-Spec's damages for its extra work derives from applying the labor, material and equipment rates and bond mark-up percentage originally submitted by Pro-Spec to DGS at the start of the Project to the total man hours, material and equipment usage reflected in the AWAs submitted as support for its extra work claims on the Project; and that application of these original rates to the total man hours, material and equipment usage reflected in its AWAs for its extra work claim pursuant to Change Order 003 for painting additional drywall and out-of-sequence painting of caulking, together with appropriate markup, totals $28,947 and represents a reasonably accurate estimate of the damages actually incurred by Pro-Spec for this extra work, we find that DGS is liable to Pro-Spec in the amount of $28,947 for its extra work painting additional drywall and out-of-sequence painting of caulking pursuant to Change Order 003. Spang, 545 A.2d at 866-867; Universal Builders, Inc., 244 A.2d at 15; James Corp., 938 A.2d at 487; A.G. Cullen Constr. Co., Inc., 898 A.2d at 1171-1174; Dep't of Transp. v. Gramar Constr. Co., 454 A.2d at 1207; J.W.S. Delavau, Inc. 810 A.2d at 685-686; Ex. P-182; C.O.L. 36-37.

41. Because the Board finds that (including $28,947 for extra work performed pursuant to Change Order 003 but excluding $10,000.00 for extra work for out-of-sequence painting around subsequent work by contractors other than Southern Steel for which an award has been made elsewhere) Pro-Spec has established the unpaid balance on its Contract totals $54,147 (comprised of $28,947 on Change Order 003 and $25,200 for the remaining unpaid balance on the Contract); and because we find that Pro-Spec properly completed all its work under the Contract (including Change Order 003), we find DGS liable to Pro-Spec for $54,147 as the outstanding amount owing under the Contract. Spang, 545 A.2d at 866-867; Boro Construction Inc., v. Ridley School District, No. 16 C.D. 2009, No. 17 C.D. 2009, 2010 Pa. Cmmw. LEXIS 124 at *15-16 (March 8, 2010); James Corp., 938 A.2d at 487; A.G. Cullen Constr. Co., Inc., 898 A.2d at 1174; J.W.S. Delavau, Inc. 810 A.2d at 685-686; C.O.L. 33-35, 40.

42. Following from our determinations that Pro-Spec is entitled to damages for its extra work beyond the scope of the Contract and the remaining unpaid Contract balance, we therefore find that DGS is liable to Pro-Spec for total damages in the principal amount of $379,829 plus pre-judgment interest at the rate of 6% per annum on this principal sum from December 31, 2002 (the date on which Pro-Spec's claim was first filed with the DGS contracting officer) until the date of this decision. This interest totals $170,923 and results in a total judgment for Pro-Spec of $550,752. 62 Pa.C.S. § 1751, 41 P.S. § 202, C.O.L. 20-41.

43. DGS is also liable to Pro-Spec for post-judgment interest on the outstanding judgment at the rate of 6% per annum until paid. 62 Pa.C.S. § 1751, 41 P.S. § 202; James Corp. 938 A.2d at 493.

E. ***Liquidated Damages Counterclaim***

44. Article 4 of the Contract provides that the Contractor (Pro-Spec) agrees that time is of the essence and that, if Pro-Spec fails to complete its work within the time specified in the Contract, Pro-Spec will pay the Department One-Thousand, Four Hundred and 00/100 dollars ($1,400.00) per day for each and every calendar day after the completion date until Pro-Spec's work is completed and accepted. Ex. P-1.

45. "Liquidated damages is a term of art originally derived from contract law; it denotes the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damage that will probably ensue from the breach, is legally recoverable . . . if the breach occurs. [Emphasis added.]" Pantuso Motors, Inc. et al. v. Corestates Bank, N.A., 798 A.2d 1277, 1282 (Pa. 2002); See also Wayne Knorr, Inc. v. Dep't of Transp., 973 A.2d 1061, 1091 (Pa. Cmwlth. 2009); Restatement (Second) of Contracts, § 356(1) ("Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. [Emphasis added.]").

46. "As to the applicable burden of proof in a liquidated damages claim, the government has 'the ultimate burden of persuasion as well the initial burden of going forward to show that the contract was not completed by the agreed contract completion date and that liquidated damages were due and owing.' [cites omitted]. The government meets its initial burden by showing 'the contract performance requirements were not substantially completed by the contract completion date and that the period for which the assessment was made was proper.' Id. Once the government satisfies its initial burden, the burden shifts to the contractor to show 'any delays were excusable and that it should be relieved of all or part of the assessment.' A party asserting liquidated damages were improperly assessed bears the burden of showing the extent of the excusable delay to which it is entitled. Id." Wayne Knorr, Inc. v. Dep't of Transp., 973 A.2d at 1091.

47. A party may not retain liquidated damages for the amount of delay caused by its own actions. Similarly, it is not appropriate to assess liquidated damages for delay against a contractor where the delay was occasioned by additional work ordered by the owner or because its work was not made available to the contractor through no fault of its own. Wayne Knorr, Inc. v. Dep't of Transp., 973 A.2d at 1091-1092; See also Dep't of Transp. v. Cumberland Constr. Co., 494 A.2d 520, 524 (Pa. Cmwlth. 1984); Dep't of Transp. v. W.P. Dickerson & Son, Inc., 400 A.2d 930, 933 (Pa. Cmwlth. 1979).

48. Because the Board has found, as matters of fact, that:

(a) Pro-Spec reached substantial completion of its work on the Project on August 14, 2002, and was presented promptly thereafter with a punchlist (the "Original Punchlist") of remaining Contract work to be done (as identified by the Project Professional) with an approximate value of $23,332;

(b) Pro-Spec promptly began to complete the outstanding work on this Original Punchlist together with pursuing substantial extra work which involved returning to repaint areas adjacent to subsequent Southern Steel installations and/or subsequent installations of other contractors;

(c) thereafter, on October 14, 2002, P.J. Dick supplied Pro-Spec with a subsequent punchlist (referred to herein as the October Punchlist) and advised Pro-Spec that the October Punchlist superseded the Original Punchlist;

(d) P.J. Dick's painting superintendant on the Project, Gary Mizla, subsequently indicated that all work referenced in the October Punchlist had been completed on or about November 14, 2002;

(e) Pro-Spec demobilized from the Project as a result of Mr. Mizla's sign-off and because it had completed all work then reasonably available to it;

(f) the original Contract work remaining to be done at the time when Pro-Spec demobilized was relatively small and was not then reasonable available to it because of delays in installations of Southern Steel detention hardware and the work of other contractors on the Project;

(g) none of the delay in completion of the paint work in the Contract was caused by Pro-Spec but was due to delay in its work being made available, which delay was caused by others; and

(h) Pro-Spec returned to the Project and completed all remaining Contract work promptly upon presentation to it of an agreed upon Final Punchlist and said work being made reasonably available to it,

we hold that DGS is not entitled to retain liquidated damages against Pro-Spec on this Project pursuant to Article 4 of the Contract. Pantuso Motors, Inc. et al. v. Corestates Bank, N.A., 798 A.2d at 1282; Wayne Knorr, Inc. v. Dep't of Transp., 973 A.2d at 1091-1092; Dep't of Transp. v. Cumberland Constr. Co., 494 A.2d at 524; Dep't of Transp. v. W.P. Dickerson & Son, Inc., 400 A.2d at 933; Ex. P-1.

F. ***Attorney's Fees/Penalties***

49. A prevailing contractor in any proceeding to recover a payment due may be awarded reasonable attorney fees if it is determined that the government agency acted in bad faith. 62 Pa.C.S. § 3935(b).

50. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious. 62 Pa.C.S. § 3935(b); A.G. Cullen Constr., Inc., 898 A.2d at 1164.

51. Arbitrary and vexatious are defined respectively as "based on random or convenient selection or choice rather than on reason or nature" or "without sufficient ground in either law or in fact and if the suit served the sole purpose of causing annoyance." A.G. Cullen Constr., Inc., 898 A.2d at 1164-1165 (citing Cummins v. Atlas R.R. Constr. Co., 814 A.2d 742, 747 (Pa. Super. 2002) (quoting Thunberg v. Strause, 682 A.2d 295, 299 (Pa. 1996))).

52. Because the Board has found that the dispute between DGS and Pro-Spec over what was and what was not original Contract work (as opposed to extra work) was reasonable under the circumstances, and that DGS did not conduct itself in an arbitrary or vexatious manner in this matter nor act in bad faith, DGS is not liable for the payment of a penalty or attorney fees under Section 3935 of the Commonwealth Procurement Code. 62 Pa.C.S. § 3935(b); A.G. Cullen Constr., Inc., 898 A.2d at 1164-1165.

53. Because DGS did not act in bad faith, Pro-Spec's request for attorney's fees and penalties is denied. 62 Pa.C.S. § 3935(b); A.G. Cullen Constr., Inc., 898 A.2d at 1164-1165.

54. The Board has determined that, under the circumstances of this case, each party shall bear its own costs. 62 Pa.C.S. § 1725(e); C.O.L. 49-53.

OPINION

Pro-Spec Painting, Inc. ("Pro-Spec") initiated this action for damages arising from its contract with the Department of General Services ("DGS" or the "Department") for painting work on the Fayette State Correctional Institute project (hereinafter "Fayette SCI" or "Project"). In its claim, Pro-Spec seeks to recover damages for: 1) an unpaid contract balance; 2) extra work painting items added late to the Project by DGS, and 3) extra work and additional costs incurred by reason of having to perform its painting and finishing work in an out-of-sequence manner at the direction of P.J. Dick, Inc. ("P.J. Dick"). P.J. Dick was DGS's agent and construction manager on the Project. This third category of damages for out-of-sequence painting work is further separated into two sub-categories: A) out-of-sequence painting and repainting of door frames, doors, window frames, door tracks, other detention hardware and adjacent areas due to subsequent installations of same by Southern Steel and B) out-of-sequence painting and repainting of areas damaged by the subsequent work of other contractors. Pro-Spec claims damages for these items in the approximate amount of $434,528 plus interest, costs, attorneys fees and such other relief as the Board deems appropriate.[2]

DGS defends Pro-Spec's extant claims on various bases, asserting, inter alia, that: 1) the Board has no personal jurisdiction over DGS in this matter because the entire claim was filed late at the Board; 2) Pro-Spec did not properly or timely complete its original contract work; 3) most, if not all, of the "extra" work claimed by Pro-Spec was really original Contract work; and 4) Pro-Spec's damage calculations are inaccurate and

[2] Pro-Spec also claimed an additional $187,000 in damages for delay and inefficiency in its claim here at the Board. However, we dismissed this portion of the claim by Order of May 8, 2009 granting, in part, DGS's Motion for Directed Verdict due to a failure to exhaust administrative remedy since Pro-Spec had failed to first present this delay and inefficiency part of its claim to DGS pursuant to 62 Pa.C.S. § 1712.1.

overstated. Additionally, DGS asserts a counterclaim for liquidated damages due to the late completion of Pro-Spec's contract painting work and for additional damages for further costs incurred due to Pro-Spec's inadequate supervision and late completion of its work resulting in delay and/or extra costs caused to other contractors, the construction manager and/or the Project's design professional.[3]

Background

Pro-Spec and DGS entered into contract No. 570-27 IN8.1, dated November 9, 2000 ("Contract"), for painting at Fayette SCI, a state correctional facility being constructed in East Millsboro, Pennsylvania. Originally, Pro-Spec was to begin its work at Fayette SCI at the beginning of 2001 following completion of precedent work by other contractors. It is undisputed, however, that the original milestones and schedule for the construction of Fayette SCI could not be maintained due to a series of disruptions. As a result, Pro-Spec, through no fault of its own, could not commence its work on time. Pro-Spec actually commenced its work in late October and early November 2001, approximately 10-11 months after it was supposed to start painting.[4]

Although the delayed start experienced here by Pro-Spec, in and of itself, need not necessarily have interfered with the proper and expeditious performance of Pro-Spec's work nor caused Pro-Spec to incur additional costs or perform extra work, particularly had it been granted a compensating extension of time to complete its painting when it did begin, this did not occur. In point of fact, DGS and P.J. Dick instead pressed

[3] Although the above-referenced additional damages were claimed by DGS initially, the only portion of its counterclaim argued in its post-trial filings is for liquidated damages. DGS also failed to present evidence of any other damages at hearing.

[4] Although it is clear that Pro-Spec played no part either in causing its own late start or in delaying the Project prior thereto, neither party has established who or what was the cause of this original delay by the evidence presented in this case.

Pro-Spec to meet the original Project completion date of June 1, 2002, thus compressing the time which Pro-Spec had to complete its work. Far worse than this, however, P.J. Dick, in a misguided effort to further speed up Project completion, directed Pro-Spec to paint numerous areas before these areas were ready (i.e. before other "precedent" contractors had completed their product installations and work in these areas).

As the painter on the Project, Pro-Spec was a “finish” contractor that reasonably expected other “precedent” contractors to substantially complete their work before Pro-Spec would be required to apply its paint and finishes. That is to say, both the logic and practicality of construction dictated that the work of most other trades (such as the masonry, mechanical and detention hardware contractors) would be performed in areas before Pro-Spec would be required to paint these areas so that Pro-Spec's paint/finishes would not be damaged or destroyed by the subsequent work of these other contractors. Thus, in the logical and expected work sequence, Pro-Spec would apply its paint finishes on the Project after the work of these other contractors had been completed so the Project buildings could be presented to DGS in a clean, neat and freshly painted condition upon conclusion of Pro-Spec's work. Nevertheless, P.J. Dick directed Pro-Spec to proceed with painting in areas where precedent contractors such as those noted above had not yet completed their work. As a result of these directions by P.J. Dick to Pro-Spec to paint areas out-of-sequence, other precedent contractors, most notably the detention equipment contractor, Southern Steel, Inc. ("Southern Steel") as well as the masonry and mechanical contractors, had to complete their installations in areas that were already painted by Pro-Spec, and Pro-Spec’s paint finishes in these areas suffered substantial damage in the process (e.g. burn marks from welding, mud/cement splattered on walls, scraping of

painted finishes, etc.).[5] This, in turn, required Pro-Spec to return to these locations a second time (and sometimes even more often) to repaint damaged areas. In fact, even where Pro-Spec's paint finishes were not extensively damaged by subsequent installation of door frames, doors, window frames, door tracks or other detention hardware by Southern Steel (or by the subsequent work of other contractors), the need to return to these areas to paint after these subsequent installations required additional rounds of set-up, preparation, tear-down and clean-up, as well as a significant degree of repainting to properly blend the old and newly painted areas immediately adjacent to these new installations. It is these repeat visits which Pro-Spec alleges to be a substantial duplication of work and for which it now seeks compensation.

P.J. Dick itself, at least initially, recognized that its direction to alter the normal sequence of Pro-Spec's work would require extra work for Pro-Spec. Accordingly, P.J. Dick informed Pro-Spec in May 2002 that change orders would be issued for additional work to revisit areas throughout the Project to perform repeat painting caused by subsequent Southern Steel installations and additional work repainting areas damaged by the subsequent work of other contractors. P.J. Dick then initiated Change Orders 007 and 0010 for out-of-sequence painting related to installations by Southern Steel and Change Order 008 for repainting areas damaged by other contractors' subsequent work.

Prior to the foregoing, P.J. Dick had also requested Pro-Spec perform extra work 1) painting drywall that was added late when the Project plans were revised to delete fireproofing in some areas and 2) painting caulking applied out-of-sequence because

[5] We do not suggest here that these precedent contractors performed their work in a negligent or unusually careless or sloppy manner, and no credible evidence of this was presented at hearing. Rather, we conclude that the damage caused to Pro-Spec's finished work was the natural and normal consequence of performing this precedent work after Pro-Spec had painted these areas.

DGS had initially failed to contract for this caulking at the start of the Project. At the time, P.J. Dick informed Pro-Spec that one change order (Change Order 003) would be issued for painting this drywall and caulking. P.J. Dick instructed Pro-Spec to commence all three categories of the additional or "extra" work (added drywall and caulking, repainting of areas relating to Southern Steel installations, and repainting of areas damaged by the work of other contractors) once it had substantially completed its original Contract items.

Pro-Spec reached substantial completion of its original Contract work on the Project on or about August 14, 2002, as evidenced by a certificate of substantial completion signed by L. Robert Kimball & Associates, the Project's design professional. Thereafter, Pro-Spec began work on the corresponding punchlist of original Contract items provided in mid-August by the design professional in order to fully complete its work on the Project. It also began the change order and extra work noted above. Approximately two months later, Pro-Spec was provided with a follow-up punchlist (as revised by P.J. Dick) by letter of October 14, 2002. Although this subsequent punchlist was not provided to the Board by either party, a copy of this October 14, 2002 cover letter for this second punchlist (the "October Punchlist") was submitted into evidence. This copy of the October 14, 2002 cover letter also bears a handwritten sign-off by a P.J. Dick Project Superintendent indicating "all work completed" by November 14, 2002. On or about November 15, 2002, Pro-Spec demobilized from the Project.

In a letter dated November 22, 2002, P.J. Dick informed Pro-Spec that it had not adequately finished its work and ordered Pro-Spec to return to the Project "to complete contract work and punchlist items." Pro-Spec disagreed that it had any outstanding

Contract punchlist items left to complete at the time and believed DGS was mischaracterizing the extra work of painting out-of-sequence (caused by the ongoing installation work of other precedent contractors) as original Contract/punchlist work.

On December 13, 2002, Pro-Spec requested payment from DGS for the unpaid balance on its Contract and for payment for its extra work painting added drywall and caulking out-of-sequence, repainting related to Southern Steel installations and damage repair painting caused by the subsequent work of other contractors. The requests for payment on this extra work were denied on December 23, 2002, and Pro-Spec filed a claim letter dated December 31, 2002 with Merle Ryan, DGS Deputy Secretary, for reimbursement of this extra work. By letter dated January 3, 2003, P.J. Dick informed Pro-Spec that liquidated damages would be held against it from November 28, 2002 until it finished its Contract work, including punchlist items. Pro-Spec's unpaid Contract balance request was denied on January 10, 2003.

DGS held a claim hearing to consider Pro-Spec's claims on January 22, 2003. At this claim hearing (hereinafter the "Claim Hearing), the parties discussed the unpaid Contract balance claim as well as the extra work claims noted above. At this same DGS Claim Hearing, both parties agreed to mutually formulate a final punchlist of items that Pro-Spec would complete in satisfaction of its duties under the Contract and for which Pro-Spec would be paid the remaining Contract balance. This Final Punchlist was formulated; Pro-Spec completed this work in March 2003; and P.J. Dick signed off on this work as completed on March 20, 2003. Pro-Spec again demobilized from the Project and delivered remaining attic stock (unused paint) to P.J. Dick by April 4, 2003.

Thereafter, DGS neither paid Pro-Spec nor issued a final determination on any of Pro-Spec's claims as a result of the administrative Claim Hearing held by DGS or Pro-Spec's completion of the Final Punchlist formulated after the DGS Claim Hearing. Pro-Spec then filed with the Board of Claims on June 6, 2003, asserting claims for the following:

> 1. an unpaid Contract balance in the amount of $66,758 (which included Change Order 003 work for painting added drywall and caulking in the amount of $31,958);
>
> 2. extra work in the respective amounts of: $152,167 for out-of-sequence painting related to detention equipment and hardware installed by Southern Steel (relating to Change Orders 007/0010); $213,581 for damage repair repainting associated with all other contractors (relating to Change Order 008); and an additional $2,022 for painting added drywall and caulking that was not included in its Change Order 003 portion of the unpaid Contract balance claim) and
>
> 3. damages due to delays and inefficiencies incurred on its Contract work on the Project in the amount of $187,000.

The claim for delays and inefficiencies was dismissed by Order of this Board dated May 8, 2009, upon DGS's motion for directed verdict for lack of jurisdiction due to Pro-Spec's failure to first raise this aspect of its claim with DGS. We denied the remainder of DGS's motion with respect to the claims for the unpaid Contract balance and the extra work for the reasons stated in our Order of May 8, 2009.[6]

[6] In its motion for directed verdict, DGS asserted a failure on the part of Pro-Spec to exhaust its administrative remedy with regard to both the delay and inefficiency claim and the unpaid contract balance claim, as well as Pro-Spec's failure to timely file all its claims here at the Board. We granted only the delay and inefficiency portion of the motion.

Discussion

Statute of Limitations Defense

DGS raises again the statute of limitations argument it advanced in support of its motion for a directed verdict: that the Board lacks personal jurisdiction over the parties to this matter because Pro-Spec's claim at the Board was filed beyond the 135 day limitation period prescribed by 62 Pa.C.S. § 1712.1(d) and (e). It is DGS's position that the Board wrongly decided in our opinion on its motion for directed verdict that DGS was estopped from asserting this statute of limitations defense to bar Pro-Spec's entire claim. More specifically, DGS argues that, since the statute's 135 day period for filing with the Board runs from the date the claim was actually received by the contracting officer, DGS can only be estopped from asserting this statute of limitations if it was proven to have misrepresented the date Pro-Spec's claim was received by the contracting officer. Since no evidence was presented to support the conclusion that DGS either intentionally or negligently misrepresented material facts relating to its receipt of the claim, DGS contends that the grounds for estoppel are not present and the statute of limitations must be found to bar Pro-Spec's claim pursuant to Section 1712.1(e).

When the Board previously considered DGS's statute of limitations defense and the applicability of estoppel to this matter, we did so pursuant to the standard pertinent to a motion for directed verdict. That standard required that the Board accept as true all facts and inferences which supported the position of the party against whom the motion was made and reject evidence to the contrary. Parkside Townhomes Assoc. v. Board of Assessment Appeals, 711 A.2d 607, 612 (Pa. Cmwlth. 1995). In the present posture of the case, however, where a final decision must issue based on facts as presented by the

parties and found by the Board, we are not constrained by the directed verdict standard. Rather, the burden of proving clear and convincing facts in support of a finding of estoppel is squarely on Pro-Spec, the party asserting the argument, without benefit of a directed verdict view of the evidence. Molineux v. Reed, 532 A. 2d 792, 794 (Pa. 1987); Simmons v. Snider, 645 A.2d 400, 405 (Pa. Cmwlth. 1994). The Board has therefore carefully reviewed again the evidence in light of the parties' arguments to determine if Pro-Spec has carried its current burden on this issue. We find that it has.

The Department's statute of limitations defense is based on the fact that Pro-Spec's claim was filed 21 days after the expiration of the limitations period prescribed by Subsections 1712.1(d) and (e) of the Procurement Code, which provide for claims to be filed with the Board as follows:

> (d) Determination. The contracting officer shall review a claim and issue a final determination in writing regarding the claim within 120 days of the receipt of the claim unless extended by consent of the contracting officer and the contractor. If the contracting officer fails to issue a final determination within the 120 days unless extended by consent of the parties, the claim shall be deemed denied. . . .
> (e) Statement of claim. Within 15 days of the mailing date of a final determination denying a claim or within 135 days of filing a claim if no extension is agreed to by the parties, whichever occurs first, the contractor may file a statement of claim with the board.

62 Pa.C.S. § 1712.1 (d) and (e)

DGS maintains that because no written final determination was issued, Pro-Spec's statement of claim should have been filed with the Board by May 15, 2003, which date was 135 days from December 31, 2002 (the date Pro-Spec's claim to the contracting officer was filed). Since both parties agree the statement of claim was filed on June 6, 2003, 22 days after the 135 day limitation period expired, DGS concludes the claim was

untimely and must be dismissed as outside the Board's in personam jurisdiction. 62 Pa.C.S. § 1712.1 (d) and (e).

Although Pro-Spec does not dispute that its claim was filed outside the 135 days prescribed by the statute, it contends that DGS is equitably estopped from raising the statute of limitations as a defense due to the express language of the Contract between the parties as well as DGS's actions and the representations made to Pro-Spec during and after the January 2003 Claim Hearing held by the Department. In support of this argument, Pro-Spec presented evidence that it was misled by the Contract language and by DGS's representations upon which Pro-Spec relied to its detriment. It points first to Article 15.3(B) of the Contract which provides as follows:

> If the controversy is not resolved by mutual agreement, the Deputy Secretary will issue a decision in writing. The decision will:
>
> 1.State the reasons for the action taken; and
>
> 2.Inform the Contractor of its right to administrative and judicial review.

Ex. P-180.

Pro-Spec's principal officer and owner, Mr. Ronald Yarbrough, testified convincingly that he understood from this Contract language (as drafted by DGS) that DGS would issue a written final decision if mutual agreement could not be reached on Pro-Spec's claims after the DGS Claim Hearing, and that the written decision would notify Pro-Spec of its right to further review before Pro-Spec would be required to take any action to seek such review. Mr. Yarbrough's understanding is clearly in line with the explicit language and plain meaning of these Contract provisions.

Mr. Yarbrough's perception of the meaning of Article 15.3(B) of the Contract was further reinforced by the representations of DGS and its agent, P.J. Dick, both during and after the Claim Hearing held by the Department on January 22, 2003. In this regard, the evidence presented to the Board shows that the parties agreed at the DGS Claim Hearing to work together to develop a Final Punchlist that would specify all the remaining paint work on the Project and, when completed, would result in resolution of Pro-Spec's claim for the unpaid Contract balance. Subsequent to the Claim Hearing, the parties did develop a Final Punchlist agreeable to both, and Pro-Spec completed the work therein by March 20, 2003. At that time, P.J. Dick signed off on the Final Punchlist as complete. Additional testimony established that DGS and/or P.J. Dick further indicated at the Claim Hearing that payment on the Change Order 003 portion of the unpaid Contract balance claim was not in serious dispute. With respect to the extra work claims, Mr. Yarbrough also presented credible evidence that DGS advised him at the January Claim Hearing that it was not contesting that this extra work performed by Pro-Spec was outside its Contract duties, but rather sought more detailed information so that DGS could properly calculate and allocate these additional costs. Thereafter, Pro-Spec produced the additional information requested.

For its part, DGS offered little to no testimony with respect to discussions at or after the DGS Claim Hearing to dispute Mr. Yarbrough's testimony. In fact, Mr. Kopko's testimony (P.J. Dick's lead representative on the Project) tended to confirm Mr. Yarbrough's recollection as to the creation and performance of a Final Punchlist and production of additional information regarding the extra work claims after that hearing.

In sum, Mr. Yarbrough testified credibly that the foregoing conduct by DGS, in conjunction with DGS's representation in Article 15.3(B) of the Contract, led him to believe that the parties were working together to achieve a mutually agreeable resolution of the claims and to expect that either this would occur or DGS would issue a written determination pursuant to the Contract stating the reasons Pro-Spec's claims were refused and advising of Pro-Spec's right to further review. We found Mr. Yarbrough's testimony on this issue to be clear and convincing when we decided DGS's motion for directed verdict, and we still do. Accordingly, we continue to find that DGS's actions toward a seemingly amicable and cooperative resolution of Pro-Spec's claims during and after the DGS Claim Hearing, together with the express language of Article 15.3(B) of the Contract, upon which Pro-Spec reasonably relied, had the natural effect of causing Pro-Spec reasonably to believe its claims would be mutually resolved with DGS or that DGS would issue a written decision explaining its reasons for denying the claim(s) and informing Pro-Spec of its right to further review before Pro-Spec would be required to take further action. We further find that these actions and representations of DGS (including Article 15.3(B)), as explained above, led Pro-Spec to relax its vigilance as to the running of the limitations period provided in Subsections 1712.1(d) and (e). Accordingly, the doctrine of equitable estoppel prevents DGS from now asserting this defense of the statute of limitations.

As to DGS's arguments contesting the application of estoppel in this instance, we find no merit to DGS's contention that it cannot be estopped from raising the statute of limitations as a defense because no evidence was produced proving DGS misrepresented the facts relating to the date it actually received Pro-Spec's claim letter. To begin with, it

appears that DGS misperceived the Board's opinion deciding DGS's motion for directed verdict. That is to say, to the extent that the Department contends the Board determined DGS was estopped from asserting the date it actually received the letter, this was not, in fact, the basis of the Board's decision on the directed verdict motion. In that opinion and order disposing of the motion for a directed verdict, we held, as we do here, that the Department was estopped from asserting the defense of the statute of limitations because it misrepresented to Pro-Spec, by reason of Article 15.3(B) and subsequent actions, that it would either resolve the claims amicably or issue a final determination in writing advising of its reasons for denial and advising of rights to further review, and then did neither. Our decision on the directed verdict motion and our decision here on the same issue are in no way dependent on the date the claim letter was received by the contracting officer.

If, instead, DGS is arguing that evidence pertaining to a misrepresentation of the date the limitations period began to run is the only evidence that would support a finding of estoppel of this defense, the Board cannot agree. Although such a factual circumstance may invoke an estoppel argument, we have found no case law, and DGS has cited none, that so limits the application of estoppel to a statute of limitations defense. On the contrary, Pennsylvania appellate courts have repeatedly found that principles of estoppel may prevent a party from raising the defense of the statute of limitations in cases where the filing dates are not the issue. Thus, for example, in Simmons v. Snider, 645 A.2d 400, 405 (Pa. Cmwlth. 1994), the Department of Public Welfare was estopped from using a statute of limitations to bar class plaintiffs from recovering costs incurred outside the limitations period where the Department's policies were found to deprive them of

their incentive to exercise their rights. Even earlier, in the seminal case of Dep't of Pub. Welfare v. UEC, Inc., the Pennsylvania Supreme Court held that the Department of Public Welfare was estopped from asserting a six month statute of limitations where that agency had repeatedly assured a contractor that it would be paid under a written contract for valuable services. Dep't of Pub. Welfare v. UEC, 397 A.2d 779, 784 (Pa. 1979).

The foregoing cases and others, as well as our holding in this case, are instead based on well settled principles pertinent to the present matter. If through fraud or concealment the defendant causes the plaintiff to relax his vigilance respecting the running of the statute of limitations, the defendant is estopped from invoking that defense. Fine v. Checcio, 870 A.2d 850, 859 (Pa. 2005); Dep't of Pub. Welfare v. UEC, 397 A.2d at 784. The fraud or concealment required to toll the statute need not be fraud in the strictest sense, but rather fraud in the broadest sense including unintentional deception. "It is not the intention of the party estopped but the natural effect upon the other party which gives vitality to an estoppel." Nesbitt v. Erie Coach Co., 204 A.2d 473, 476-77 (Pa. 1964). Proof of estoppel requires clear, precise and convincing evidence and the burden of proof is on the asserting party; Molineux v. Reed, 532 A. 2d 792, 794 (Pa. 1987); Simmons v. Snider, 645 A.2d at 405. Mere negotiation toward an amicable settlement does not provide a basis for estoppel, nor does a mistake, misunderstanding or lack of knowledge. Nesbitt, 204 A.2d at 475. Insofar as we have found, as matters of fact: that Pro-Spec was misled (i.e. deceived) by the combination of DGS's Contract representations in Article 15.3 (B) and DGS's representations and actions (both during and after the DGS Claim Hearing) into believing that its claims would be resolved amicably with DGS or that DGS would issue a written decision explaining why it refused

Pro-Spec's claims and explaining Pro-Spec's rights to further review before Pro-Spec would be required to take further action; that Pro-Spec reasonably relied on these representations; that these representations had the natural effect of causing Pro-Spec to relax its vigilance respecting the running of the statute of limitation on its claims; and that the presence of the Article 15.3 (B) representations together with the acts and representations of DGS at and after the Claim Hearing constituted more than mere negotiation toward an amicable settlement but rather a commitment to issue a written decision if no mutual agreement was forthcoming; that these representations and actions by DGS constituted fraud, concealment and/or culpable negligence as these terms are defined in estoppel case law; and that Pro-Spec has established these elements of estoppel in this matter with credible, clear and convincing evidence, we believe our application of estoppel in this matter complies in all material respects with the applicable case law principles set forth above.

Nothing in the two estoppel cases cited by DGS materially modifies these equitable principles noted above. See Price v. Chevrolet Motor Div., 765 A.2d 800 (Pa. Super. 2000); Borkey v. Township of Centre, 847 A.2d 807 (Pa. Cmwlth. 2004). While both of these cases (neither of which address a statute of limitations defense) speak in terms of a need to show that the defendant intentionally or through "culpable negligence" misrepresented some material fact in order to invoke estoppel, this formulation must still be considered in the context of the effect the acts or representations of the defendant had on the plaintiff, as well as the reasonableness of the plaintiff's interpretation of those acts and representations. As stated by the Commonwealth Court in Dep't of Revenue v. King

Crown Corp., 415 A.2d 927 (Pa. Cmwlth. 1980) when comparing these two expressions of estoppel principles:

> Estoppel here thus depends on the reasonableness of King's belief that a settlement had been agreed upon, and the existence of intent or "culpable negligence" on the part of the Commonwealth's agent in creating that belief.
>
> To reach an answer, we find a discussion in UEC, Inc., supra, helpful. Although addressed to the distinct situation of estoppel against reliance upon a statute of limitations, which requires fraud or concealment by the party to be estopped, the interpretation placed on those words is illuminating. That rule was held "not [to] mean fraud or concealment in the strictest sense encompassing an intent to deceive, but rather fraud in the broadest sense which includes an unintentional deception . . . (citation omitted). It is not the intention of the party estopped but the natural effect upon the other party which gives vitality to an estoppel. Nesbitt v. Erie Coach Co., 204 A.2d at 476." UEC, Inc., 397 A.2d at 784.
>
> Accordingly, we find that intent or "culpable negligence" must be accorded a similarly broad meaning.

Id. at 930 (emphasis supplied).

Thus it appears to us that the appellate courts recognize that whether one applies the "fraud and concealment" language of UEC or the "intent or culpable negligence" language of other estoppel cases, estopping the defense of a statute of limitations requires, in either case, that these terms be accorded a broad meaning so that estoppel, as a doctrine of fundamental fairness, remains available to a party that reasonably relies to its detriment on misleading representations by the party against whom the estoppel is sought. See e.g. UEC, Inc., 397 A.2d at 779; King Crown Corp., 415 A.2d at 930.

In summation, the Board has found, as a matter of fact, that Pro-Spec reasonably relied on Article 15.3(B) of the Contract representing that the Department would make a determination of Pro-Spec's claims in writing explaining the reasons therefore and Pro-Spec's rights for further review if its claims were not to be resolved by mutual agreement. We further found that this misrepresentation and DGS's further actions during and after

the DGS claim hearing, upon which Pro-Spec reasonably relied, constituted fraud, concealment and/or culpable negligence and caused Pro-Spec to relax its vigilance with regard to the running of the statute of limitations. Accordingly, the Board holds that DGS is equitably estopped from asserting the statute of limitations as a defense to Pro-Spec's claims herein, and the Board has in personam jurisdiction over these claims.

Having concluded that the Board may properly assert jurisdiction over Pro-Spec's claim for an unpaid Contract balance (including Change Order 003 work painting additional drywall and caulking) as well as the categories of extra work noted above, we now turn to a discussion of the merits of these claims. In doing so, we note initially that much of the dispute between Pro-Spec and DGS with regard to these outstanding claims revolves around the question of what is, and what is not, properly considered to be additional or extra work as opposed to original Contract work. Because we believe a discussion of Pro-Spec's extra work claims relating to Southern Steel installations will help elucidate this matter most clearly, we will begin there.

Extra Work Claims

Pro-Spec claims $151,613.96 for extra work created by P.J. Dick's direction to Pro-Spec to paint areas adjacent to Southern Steel's work in an out-of-sequence manner. Specifically, Pro-Spec asserts that P.J. Dick's instructions to paint in areas where Southern Steel's work installing door frames, doors, window frames, door tracks and other detention hardware was not yet complete caused Pro-Spec to have to return to repair and repaint these previously painted areas once Southern Steel had finished its installations. Pro-Spec's extra work claim in this category is based on its costs to return

and repaint these areas a second time. In support of this claim, Pro-Spec presented persuasive evidence that, upon returning to these areas, Pro-Spec encountered significant damage done to its paint finishes and was thus forced to perform this extra work of repainting damaged areas and blending them in with the surrounding paint finishes. Pro-Spec also established that this process of returning to repaint areas already painted caused it to incur substantial additional set-up, preparation, tear-down and clean-up costs it would not otherwise have incurred.

DGS does not credibly dispute that it was P.J. Dick's directions to Pro-Spec to paint in areas before Southern Steel and other "precedent" contractors had completed their work which caused the need for Pro-Spec to return to repaint portions of these areas a second time after Southern Steel and others had performed their installations. DGS does, however, offer two arguments in defense of this claim which we must address further. First, DGS argues that, even though P.J. Dick initially acknowledged this return to repaint areas around subsequent Southern Steel installations was extra work; initiated change orders (Change Orders 007 and 0010) for this return work; and instructed Pro-Spec to perform same in early September 2002, that P.J. Dick later directed Pro-Spec to stop performing this return/repainting work by letter dated September 19, 2002, and that Pro-Spec ignored this direction to stop. Secondly, DGS argues that much of the return work performed by Pro-Spec in regard to Southern Steel installations did not involve repainting at all, but was original painting of the Southern Steel installations such as door frames, doors, window frames and other hardware that had not been installed at the time the area was first painted and, thus, was original Contract work. Accordingly, DGS asserts that Pro-Spec's costs of repainting these areas includes a significant amount of

original Contract work and, because this was not properly segregated by Pro-Spec in accounting for its extra costs to return, no award should be granted for this category of damages. DGS further complains that Pro-Spec failed to properly notify P.J. Dick beforehand of its performance of this additional work, thus depriving P.J. Dick of the ability to inspect and determine whether it agreed certain repainting was necessary.

We find no merit to DGS's first argument that P.J. Dick ordered Pro-Spec to cease its return to, and repainting of, areas surrounding subsequent Southern Steel installations. To begin with, the September 19, 2002 letter (Ex. P-168) cited by DGS as support for its argument that it ordered Pro-Spec to cease this work did no such thing. (See DGS Proposed Findings of Fact ¶ 543, DGS Proposed Conclusions of Law ¶ 146, DGS Brief in Support p. 12). In fact, this letter was addressed to Southern Steel, and there was no indication a copy of this letter was even distributed to Pro-Spec by P.J. Dick.

The Board did, however, encounter a letter dated September 17, 2002 from P.J. Dick to Pro-Spec in which Douglass Zaenger (P.J. Dick's Project Manager on the job) directed Pro-Spec to cease damage repair work under the extant change orders (Change Orders 007/0010 and 008) and to concentrate instead only on original Contract work.[7] However, by subsequent letter of September 18, 2002, Mr. Zaenger then provided Pro-Spec with advice that Change Order 008 for damage repair painting had been executed and that Change Orders 007 and 0010 for repair/repainting of areas adjacent to Southern Steel installations were at DGS and/or the design professional for execution. This

[7] This September 17, 2002 letter from Douglass Zaenger of P.J. Dick to Ron Yarbrough of Pro-Spec appears to be a response to an earlier September 17, 2002 letter from Mr. Yarbrough to Mr. Zaenger. Mr. Yarbrough's letter was responding to a request for a detailed painting schedule to complete painting on the Project. In the earlier letter Mr. Yarbrough complained that completion of painting on the Project was being hampered, inter alia, by DGS's slow response to processing payment requisitions and documentation of change orders for the substantial repair painting required on the Project.

September 18, 2002 letter was then followed by a letter of September 25, 2002, from Mr. Zaenger to Mr. Yarbrough advising Pro-Spec that the change orders prepared by P.J. Dick for the damage repair and out-of-sequence painting should not have been written as per instructions received from DGS (referring apparently to Change Orders 007/0010 and 008). This September 25, 2002 letter further advised, however, that Pro-Spec was instead to track and submit its costs for this work (timesheets, rates, material and equipment invoices) to P.J. Dick, and that these costs submittals would serve as a basis for P.J. Dick/DGS to withhold monies from Southern Steel. The September 25, 2002 letter further indicated Pro-Spec would then need to make a claim to receive payments on these amounts for these extra repair painting costs. Finally, by letter of September 27, 2002, Joseph Kopko, Director of Construction Management Services for P.J. Dick (Mr. Zaenger's superior at P.J. Dick) issued a letter to Mr. Yarbrough of Pro-Spec. In this letter, Mr. Kopko raised concerns that Pro-Spec was not capable of completing the painting work on the Project in an acceptable and timely manner. Mr. Kopko's letter threatened that, unless Pro-Spec provided an acceptable plan of completion to P.J. Dick prior to Friday, September 27, 2002, P.J. Dick would take several actions which would include having another contractor assigned to complete "all remaining work <u>including contract</u>, <u>change order and remedial or corrective work</u>" in Buildings A, B, C, D, E, F, G, H, 10, 11, 19A and 19B and canopy along the east side of Buildings 2 through 6 (emphasis added). The letter also required Pro-Spec to maintain onsite resources sufficient to complete <u>all</u> work in the other remaining portions of the Project by Friday, October 19, 2002, again <u>including contract</u>, <u>change order and remedial or corrective work</u>. Pro-Spec then responded promptly to Mr. Kopko's September 27, 2002 letter by a

September 27, 2002 letter of its own. Pro-Spec's letter confirms an intervening telephone conversation between Mr. Kopko and Joe Mayer (Pro-Spec's manager for the Project) that day and confirms that Pro-Spec would complete all of the work outlined in Mr. Kopko's September 27, 2002 correspondence and notes an assurance from DGS Deputy Secretary Merle Ryan that all past due payments are being processed. No substitute painter was brought in, and there appears no further correspondence on this issue until payment was requested by Pro-Spec.

In our view, the above mentioned series of communications between Pro-Spec and P.J. Dick following the September 17, 2002 Zaenger letter (concluding with the September 27, 2002 correspondence from Mr. Kopko) served to contradict and rescind any earlier instruction to cease damage repair and/or Southern Steel repainting. Thus, we find Mr. Yarbrough's testimony that he believed P.J. Dick's earlier instruction to cease all damage repair painting had been countermanded to be entirely credible. We therefore find no merit, as a matter of fact, to DGS's argument that Pro-Spec had been instructed to cease its repair painting either in regard to out-of-sequence painting of areas adjacent to Southern Steel installations or damage repair painting following other contractors subsequent installations.

DGS's second argument in defense of this claim, that much of this return/repainting work for Southern Steel was actually initial painting of Southern Steel items and, therefore, original Contract work, is also unpersuasive. Although this argument poses a degree of appeal at first blush because some of the later installed items of Southern Steel (e.g. certain door frames, doors, window frames, and other hardware) were not painted initially when the room or adjacent area was first painted by Pro-Spec,

we find that the weight of the evidence presented shows this portion of "new" or original painting to be a small and, ultimately, immaterial portion of the return work. That is to say, the overwhelming portion of the return painting work performed with regard to subsequent Southern Steel installations was actually a duplication of the work previously performed in these areas. This is particularly evident when one considers that the return work to repaint these areas required a second (or sometimes a third or more) round of set-up, preparation, tear-down and clean-up, as well as a significant amount of repainting to properly blend the old and newly painted areas immediately adjacent to these installations. In fact, these repeat visits, by their nature, required even greater care and preparation then would have been originally required for painting the area (including the Southern Steel installations) because of the need to protect surrounding areas already finished. This additional care and preparation, in our view, more than offsets any small or de minimus amount of original work included in the second or third round of painting in these return areas. Thus, we agree with Pro-Spec's assertion that returning to these already painted areas surrounding subsequent Southern Steel installations is properly viewed, in its entirety, as a duplication of effort to repair subsequent damage to its paint finishes and, therefore, extra work outside the Contract. We further agree that this extra work was caused by P.J. Dick's direction to paint these areas before they were ready, i.e. in an out-of-sequence manner.

DGS also asserts that Pro-Spec should be denied compensation for any and all extra work related to its out-of-sequence painting of Southern Steel installations because Pro-Spec failed to notify DGS of the specific locations where it would be performing this repainting before commencing this rework. In this regard, we note first that Pro-Spec did

provide P.J. Dick with an extensive listing of specific buildings and problem areas to which it planned to return due to damage from subsequent installations by Southern Steel and other contractors. We also note that the hearing testimony indicates that more immediate advance notice was also given to DGS representatives on-site before proceeding with such re-work some of the time albeit not for each occurrence. It is also clear that additional work authorization forms ("AWAs") that identified in detail the extra work done relating to Southern Steel (and other contractors) were provided to P.J. Dick and/or DGS representatives on-site on a daily basis.

Although we find Pro-Spec's failure to provide P.J. Dick with advance notice of specific repainting each time it engaged in such activity to be a breach of its duty to comply with P.J. Dick instructions on the Project, we do not find this to be a material breach. We arrive at this finding because the evidence shows that Pro-Spec substantially performed this repainting work, did so where and as needed in an workmanlike manner, and did not deny DGS of the benefit of same by this failure of immediate notice. Hence we do not find this failure sufficient reason to relieve DGS of its responsibility to compensate Pro-Spec for this extra repainting work it performed at P.J. Dick's directions.

Specifically, DGS’s arguments that it needed to inspect areas of potential repainting beforehand in order to determine if (and how much) repainting was actually needed is unpersuasive. To the extent DGS's argument suggests that Pro-Spec may have engaged in excessive repainting of these areas to which it returned, we find the argument to be wholly without merit. It is clear from the evidence that Pro-Spec, as well as DGS, was anxious to complete the painting work on the Project as soon as possible. Moreover, we find the testimony of Joe Mayer (Pro-Spec's Project Superintendent) that Pro-Spec

repainted areas only where, and as, necessary to complete its work in a professional and workmanlike manner to be fully credible. Finally, we found no reason whatsoever to draw into question the accuracy of the AWAs utilized by Pro-Spec to track the quantity or location of this extra work. In short, we find that whether or not Pro-Spec notified P.J. Dick representatives on-site of each specific instance of repainting immediately beforehand, in fact, had no material effect on where or how much extra repainting work was needed or performed in order to complete painting on the Project in a professional and workmanlike manner.

DGS's final argument, i.e. that Pro-Spec's damage claim for this extra work is inflated and/or improperly calculated, is also unpersuasive for the most part. To begin with, we do not agree with DGS that the 20% additional labor factor Pro-Spec adds to its actual painting time for direct supervision of this extra work, and the 10% additional labor factor it adds for clean-up, are unsubstantiated. To the contrary, we find the testimony of both Mr. Yarbrough and Mr. Mayer credible on this issue. That is to say, we find that: 1) the labor hours reflected in the AWAs reflect only time spent in the actual preparation and "brush in hand" painting of those areas; 2) Pro-Spec incurred additional labor for clean-up and additional supervision time spent by its foremen and others to perform this work that are not reflected on the AWAs; and 3) the 10% factor for clean-up and 20% factor for direct supervision applied to the cost of actual painting manhours on the AWAs is an accurate and reasonable estimate of these additional labor costs incurred by Pro-Spec in performing this extra work on this Project.

DGS's other argument, that the labor rates applied by Pro-Spec in its claim were never approved by DGS, does not necessarily defeat or reduce Pro-Spec's claim. In a

claim for damages as a result of performing work beyond the scope of a contract, it is simply not required for a contractor to show that the owner (here DGS) approved of the rates applied to the contractor's labor, material or equipment costs, but only that these damages were incurred and were reasonable under the circumstance. A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ., 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). That said, we do acknowledge that the final labor rates used for the AWAs in connection with the extra work claimed by Pro-Spec represent an increase of approximately three dollars per hour over the rates originally submitted and approved by DGS upon commencement of the Project, and that Pro-Spec has offered no explanation for this increase.[8] Pro-Spec's rates for materials and equipment in its claim, however, remain the same as in its original pricing submittal. Additionally, Pro-Spec's bond markup increase from 0.3% in its original rate submission to 3% in its claim is also unexplained. Insofar as it remains Pro-Spec's burden to establish its damages, we find that the best and most accurate estimate of same in this case derives from applying the labor, material and equipment rates originally submitted by Pro-Spec to the man hours, material and equipment usage reflected in its AWA's (rather than the higher labor rates and bond markup claimed). We thus find that, with the aforementioned adjustments to Pro-Spec's labor rate and bond markup, the damages reflected on Pro-Spec's Exhibit P-26

[8] For example, the total hourly rate (fully burdened) set forth by Pro-Spec for journeyman painters at the start of the job in February 2001 was $42.95. The total hourly rate for these same painters utilized by Pro-Spec in its claim is $45.98. This increase reflects no change in the contract's prevailing hourly wage rate (base rate of $20.88 plus benefits of $7.53) but shows an increase in additional burden (e.g. FICA, FUTA, unemployment/disability, CMCIP and tool/safety allowances) from $14.35 to $17.57 per hour. Compare Exs. P-4, P-26, P-77, P-180 (Vol. 1), P-182, D-578. Similar increases were reflected in the total hourly labor rates Pro-Spec claims for its working foremen and superintendent. However, no explanation was offered for this increase in additional burden while the prevailing hourly wage base remained unchanged in Pro-Spec's claim.

totals $138,580. We further find that this amount represents a reasonable estimate of the damages actually incurred by Pro-Spec for the extra work it performed on the Project caused by P.J. Dick's direction to paint areas adjacent to Southern Steel's work in an out-of-sequence manner.

The law is clear that a contractor who performs work beyond the scope of its contract at the behest of the owner is entitled to additional compensation. A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ., 898 A.2d 1145, 1171 (Pa. Cmwlth. 2006); Dep't of Transp. v. Gramar Constr. Co., 454 A.2d 1205, 1207 (Pa. Cmwlth. 1983). Courts have applied this rule to require payment for extra work even where there is no written change order that covers the work in question. Universal Builders, Inc. v. Moon Motor Lodge, Inc., 244 A.2d 10, 15 (Pa. 1968). We find that Pro-Spec is entitled to damages for extra work performed for out-of-sequence painting of Project areas adjacent to subsequent Southern Steel installations in the principal amount of $138,580.

In a similar vein, Pro-Spec claims $204,106 for extra work performing repair painting of areas damaged by contractors other than Southern Steel as a result of P.J. Dick's direction to paint areas out-of-sequence and before these other contractors had completed their work. Pro-Spec again argues that, as a result of this direction, the subsequent work of other contractors damaged areas where Pro-Spec had already painted and it had to return and repaint the damaged areas and blend the re-worked surfaces in with the surrounding paint finishes. As with the Southern Steel re-work, Pro-Spec also asserts that this process of returning and repainting areas already painted was extra work as it required Pro-Spec to duplicate efforts and incur substantial additional set-up, preparation, tear-down and clean-up costs it would not otherwise have incurred.

DGS offers substantially the same arguments in its defense to this extra work claim as it did for that related to Southern Steel re-work. With the only difference being that DGS's argument that some of this damage repair painting relating to other contractors was original Contract work is even weaker, we reject DGS's arguments here for the same reasons. We do, however, make the same adjustment to Pro-Spec's damage calculation for reduced labor rates. We therefore find that Pro-Spec is entitled to damages for extra work performed for out-of-sequence painting of Project areas due to subsequent work by contractors other than Southern Steel in the principal amount of $187,102.

Unpaid Contract Balance

Pro-Spec is also seeking to recover $66,758 that it alleges remains owing under the Contract. In support of this position, Pro-Spec presented evidence that it actually completed several "final" punchlists of work following its substantial completion of work on August 14, 2002. Most particularly, Pro-Spec asserts that it most certainly completed all its Contract obligations when it finished the Final Punchlist that it and DGS agreed upon following the January 2002 Claim Hearing at the Department. This Final Punchlist was signed-off as complete by P.J. Dick on March 20, 2003.

DGS disputes that it ever accepted Pro-Spec's work as complete by signing off on the October Punchlist in November 2002 and/or the Final Punchlist in March 2003, and argues that some of Pro-Spec's Contract work was still not complete when it demobilized from the Project following March 20, 2003. DGS also maintains that approximately

$31,626 of change order work which Pro-Spec has claimed elsewhere in its Statement of Claim is improperly duplicated in the $66,758 unpaid Contract balance claim.

Pro-Spec reached substantial completion of its work on the Project by August 14, 2002, as evidenced by a certificate of substantial completion executed by the Project's design professional on that date. In conjunction with this certification, the Project's design professional also issued an original punchlist which identified those items of work that remained to be completed in order for Pro-Spec to satisfy its contractual obligations. The value of Pro-Spec's remaining work, as specified in this August punchlist (the "Original Punchlist"), was $23,332. As it was authorized to do under the Contract, DGS retained one and a half times this amount to be paid when all the work had been completed. The certificate also retained one dollar for approval of change orders and one dollar for pending claims, bringing the total withheld to $35,000.

Pro-Spec had already begun work to complete the Original Punchlist when, by letter dated September 5, 2002, P.J. Dick instructed Pro-Spec to finish all of its outstanding work by no later than September 30, 2002.[9] Although Pro-Spec had accelerated its work, it was still unable to meet this September 30, 2002 deadline for completion of the Original Punchlist. The primary reason for this inability was that Southern Steel's installations and other work precedent to Pro-Spec's painting were still incomplete at the time.

By letter dated October 14, 2002, P.J. Dick then supplied what it referred to as an "updated" punchlist to Pro-Spec and identified this new list as superseding the Original Punchlist. In this letter, P.J. Dick also stated that, except for the items listed on this

[9] Pro-Spec's Contract, as well those of the other contractors, originally set forth June 1, 2002 as the intended date for Project completion. However, due to a series of Project delays not attributable to Pro-Spec, this date had clearly become unworkable by the beginning of September 2002.

revised punchlist (the "October Punchlist") all of Pro-Spec's work on the specified buildings was complete. The letter also noted that some of the remaining punchlist items were now designated with other contractors' identifying numbers and were no longer considered Pro-Spec's responsibility. Gary Mizla, a P.J. Dick superintendent on the Project charged with overseeing Pro-Spec's work, subsequently signed off on the face of the October 14, 2002 letter with a notation that all work on the October Punchlist was complete by November 14, 2002. Pro-Spec then demobilized from the Project site. During this time in November 2002, other contractors, including Southern Steel, still had installation work to perform throughout the Project.

After Pro-Spec demobilized from the Project in mid-November 2002, and despite having signed off on the October Punchlist as complete, P.J. Dick subsequently demanded that Pro-Spec return to the Project to complete more "contract work and punchlist items." In a letter dated November 26, 2002, P.J. Dick detailed what it considered incomplete work and disputed Pro-Spec's assertion that its work had been signed off as complete. Pro-Spec did not return to the job site or complete any more work at that time believing it had completed all Contract work and extra work that had been made reasonably available to it. Instead, taking the position that DGS was now misconstruing the circumstance and demanding that Pro-Spec return to repair additional damage caused by other contractors' ongoing installations, Pro-Spec refused to return to Fayette SCI at that time. Pro-Spec submitted a payment application for its unpaid Contract balance on December 13, 2002. Pro-Spec's request for this unpaid Contract balance was denied in a letter dated January 10, 2003. In this last letter, P.J. Dick also

reiterated its intention to assess liquidated damages against Pro-Spec as described in DGS's earlier correspondence dated January 3, 2003.

At the January 22, 2003 Claim Hearing held by DGS on Pro-Spec's various claims, the parties discussed the unpaid Contract balance claim. There, the parties agreed to mutually formulate a final punchlist of items following the Claim Hearing, the completion of which would entitle Pro-Spec to receive its final payment. This list was formulated; Pro-Spec completed the work in March 2003; and on or about March 20, 2003, Mr. Mizla from P.J. Dick again signed off on this Final Punchlist, signifying completion of this work. Thereafter, Pro-Spec again demobilized from the Project and delivered attic stock to P.J. Dick on or about April 4, 2003. However, DGS still refused payment, insisting that Pro-Spec has not yet completed all its Contract work.

Facts here, once again, support Pro-Spec. We begin by noting that the design professional on the Project confirmed that Pro-Spec was substantially complete with its Contract work by August 14, 2002, and only slightly more than $23,000 of original Contract work (out of a total of $497,940) remained to be done at that time. Pro-Spec remained on the job thereafter for three months longer working to complete this outstanding Contract work and the extra work required by P.J. Dick. These factors, added to Gary Mizla's sign-off on the October Punchlist as complete and the testimony of Messrs. Yarbrough and Myers, provide ample proof to the Board that by the time of Pro-Spec's demobilization in mid-November 2002, Pro-Spec had completed all of the Contract work that had been made reasonably available to it. The evidence further convinces the Board that any remaining Contract work, by mid-November 2002, was both extremely small in amount and was due to the fact that Pro-Spec's predecessor

contractors had not yet completed their work so as to allow Pro-Spec to complete the small remaining amount of its original work.[10] Finally, the Board has no doubt that any and all remaining amount of Contract work owed by Pro-Spec was completed by its performance of the work identified on the Final Punchlist agreed to by both parties as a result of the January 2003 Claim Hearing. This was evidenced once again by Mr. Mizla's sign-off on this Final Punchlist as complete. Accordingly, we find the evidence overwhelming that Pro-Spec completed its Contract work in all material respects by no later than March 2003, and that DGS is therefore liable to Pro-Spec for the unpaid balance represented by this work on the Contract. 62 Pa.C.S. §§ 3931 (a); James Corp. v. N. Allegheny Sch. Dist., 938 A.2d 474, 488 (Pa. Cmwlth. 2009).

With respect to the amount of the unpaid Contract balance, DGS also argues that the $66,758 amount claimed duplicates amounts Pro-Spec is seeking to recover elsewhere in its claims for change order and/or extra work. On this point, we find some agreement with DGS. A review of Pro-Spec's tabulations in support of Payment Application No. 12 (the document initially submitted to DGS for payment of the alleged unpaid contract balance of $66,758) reveals that $10,000 of this is attributable to Change Order 008. Therefore, because Change Order 008 referenced extra work repainting areas surrounding work by contractors other than Southern Steel, and because we have fully addressed and compensated Pro-Spec for this extra work in another portion of this Opinion, we must

[10] Although we tend to agree with DGS that this November 14 sign-off by P.J. Dick does not establish that all original Contract painting work for the entire Project was complete in November 2002, the weight of the evidence does confirm that Pro-Spec had completed all Contract work which had been made reasonably available to it by this time as well as all the extra work stemming from its out-of-sequence/damage repair painting and the added drywall/caulking paint work by mid-November 2002, as per P.J. Dick's instruction, and that any amount of original Contract work remaining was de minimus.

reduce the initial total claimed in the Application No. 12 (and here at the Board as part of the unpaid Contract balance) by this $10,000.

As to DGS argument that Pro-Spec's unpaid Contract balance claim also improperly duplicates a claim made here for Change Order 003 work (painting additional drywall and late caulking), we disagree. To begin with, Pro-Spec did not state a separate claim for Change Order 003 here at the Board. Moreover, since Change Order 003 was fully executed (and therefore modifies the Contract to include this extra work) we find no error in Pro-Spec's decision to include this portion of its claim in the unpaid Contract balance amount. However, for clarity's sake, we will address this portion of the unpaid Contract balance claim for painting the additional drywall and caulking separately.

Additional Drywall and Caulking Work (Change Order 003).

Pro-Spec initially included a claim of $31,958 for extra work painting: 1) drywall that was unanticipated and added late to the Project by DGS due to the deletion of certain fireproofing from Project plans and 2) caulking that was applied late due to DGS's failure to put the caulking work out for bid prior to the start of the Project in its unpaid Contract balance count here at the Board. It subsequently modified this Change Order 003 claim portion to $31,626.

Pro-Spec argues that it was ordered by P.J. Dick to paint both the additional drywall and late installed caulking and instructed to document this work together to form the basis of this single change order. Pro-Spec therefore included this amount in its unpaid Contract balance as it claims this work was fully authorized and agreed to by Change Order 003 executed by all parties in May 2002.

In response to the merits of this claim, DGS first maintains that this Change Order 003 was issued only to paint drywall added due to the deletion of fireproofing and that it was not a directive to Pro-Spec to paint caulking. DGS argues further that, in any event, Pro-Spec cannot recover for painting this caulking under a change order because Pro-Spec was contractually obligated to paint caulking on the Fayette SCI Project and had included those costs in its bid. Finally, as with all Pro-Spec's claims for extra work, DGS challenges Pro-Spec's methods for calculating its damages and asserts inflated costs, particularly in the use of additional labor factors for customary cleanup (10%) and supervision (20%).

First of all, we note that there appears no serious dispute that Pro-Spec's painting of the added drywall was extra work outside the scope of the original Contract and the proper subject of Change Order 003. With respect to the "caulking" component, however, we are presented with contradictory evidence as to 1) whether or not it was intended to be included in the change order and 2) whether or not the painting of same was outside the scope of Pro-Spec's original Contract work.

The "caulking" at issue here refers to joint sealant that was required to close the many expansion joints throughout the Project.[11] Expansion joints occurred in the Project where surfaces of steel, concrete and block construction came together. The joints had to be sealed before the surfaces could be painted. This sealing work was to be performed by a specialized contractor, but DGS had neglected to contract for this job prior to the commencement of the Project. By the time the joint sealant contractor was brought on site, Pro-Spec had already painted in those corresponding areas because it had been

[11] As explained in Mr. Yarbrough's testimony, Pro-Spec used the terms "caulking" and "joint sealant" interchangeably.

directed to do so by P.J. Dick. Because the caulking was then installed in previously painted areas, Pro-Spec had to revisit those areas, not only to paint the newly applied caulking, but also to repaint and/or blend the new paint into the areas surrounding the joint sealant. The Board finds that painting the caulking and accompanying area out-of-sequence, as was directed by P.J. Dick, like the added drywall and the other out-of-sequence painting performed on the Project by Pro-Spec, amounted to repainting of these areas and constituted extra work beyond the original scope of its Contract.

With respect to DGS's contention that Change Order 003 neither references nor includes the task of painting caulking, we note first that the May 2002 Change Order 003 in the "not to exceed" amount of $31,958 expressly mentions only the painting of drywall that was installed to replace the deleted fireproofing. However, testimony presented from witnesses for both sides on this issue supports Pro-Spec's assertion that this Change Order 003 was intended by the parties to include payment for the extra work of painting the late installed caulking out-of-sequence. We also note that Pro-Spec regularly submitted AWA's with pictures for this extra work (including the out-of-sequence painting of this caulking) without comment or objection from P.J. Dick or DGS. We thus conclude, on the weight of the evidence, that Change Order 003 work included the painting of late installed caulking as well as the additional drywall.

Because we find that painting the added drywall and painting the caulking out-of-sequence was extra work outside the original scope of Pro-Spec's Contract and was included in Change Order 003, payment for this extra work, which we have found to total

$28,947,[12] is properly included in the total unpaid Contract balance. This amount for Change Order 003, plus the remaining amount due for Contract work as yet unpaid of $25,200, brings the total due to Pro-Spec on the Contract (as modified by Change Order 003) to $54,147.

Liquidated Damages

DGS asserts that it is entitled to liquidated damages against Pro-Spec in the amount of $158,200 pursuant to Article 4 of the Contract. Article 4 provides that, in the event the contractor fails to complete its work within the time specified, it will pay the Department $1,400 per day until the work is completed. DGS contends that liquidated damages are due because Pro-Spec's completion date of June 1, 2002 was never extended and Pro-Spec left the Project before completing its obligations when it demobilized from the Project in mid-November 2002 and did not finally complete the work until March 20, 2003.

However, the Board has found that Pro-Spec did not prematurely demobilize from the job in November 2002 because, among other things: Gary Mizla, a P.J. Dick Project Superintendent had signed off on the then effective punchlist (i.e. the October Punchlist); because Pro-Spec had completed all Contract work then made reasonably available to it; and because the amount of any remaining Contract work thereafter was de minimus and immaterial in nature. Moreover, as we have discussed above with regard to Pro-Spec's extra work and unpaid Contract balance claims, DGS's demand for Pro-Spec to return to

[12] This amount reflects an adjustment for the use of Pro-Spec's original labor rates and bond cost rather than the higher rates claimed as applied to the labor, material and equipment usage documented in Pro-Spec's AWAs for these tasks.

the Project in late November 2002 following P.J. Dick's sign off on the October Punchlist was, in our view, driven by the ongoing damage caused by later installation work of other contractors to areas that Pro-Spec had already painted once and constituted, in all material respects, duplicative extra work beyond the scope of Pro-Spec's Contract. Furthermore, the factual record establishes that Pro-Spec timely performed all of the Contract work as such work was made reasonably available to it, and that the delay to Pro-Spec's Contract work on the Project was due to the fact that its work was not available to Pro-Spec on time. We further found that this delay making work available to Pro-Spec was not caused by Pro-Spec but rather by others on the Project. Under such a circumstance, DGS may not retain liquidated damages for the amount of delay it alleges for Pro-Spec's work on the Project. Wayne Knorr, Inc. v. Dep't of Transp., 973 A.2d 1061, 1091-1092 (Pa. Cmwlth. 2009), *citing* Dep't of Transp. v. W.P. Dickerson & Son, Inv., 400 A.2d 930, 933 (Pa. Cmwlth. 1979).[13]

g. Attorney Fees, Interest and Penalty.

Pursuant to 62 Pa.C.S. §3935, a claimant may recover attorney fees, interest and penalties against a defendant who withholds payment in bad faith. Payment will be deemed to be withheld in bad faith "to the extent that the withholding was arbitrary or vexatious." 62 Pa. C.S. § 3935(a); A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ.**,** 898 A.2d 1145, 1164 (Pa. Cmwlth. 2006). In A.G. Cullen, the Commonwealth Court elaborated on the meaning "arbitrary" and "vexatious" as the terms are used in Section 3935. Borrowing the Pennsylvania Supreme Court's definition in a case involving an award of attorney fees under Section 2503 of the Judicial Code, 42 Pa. C.S.

[13] Stated another way, we do not find that the parties intended, nor do we find it reasonable, to interpret Article 4 of the Contract to make Pro-Spec a guarantor of the performance of other contractors on the Project.

§ 2503, the Commonwealth Court defined the word "arbitrary," as "based on random or convenient selection or choice rather [than] on reason or nature." A.G. Cullen, 898 A.2d at 1164-65 (citing Cummins v. Atlas R.R. Constr. Co., 814 A.2d 742, 747 (Pa. Super. 2002) (quoting Thunberg v. Strause, 682 A.2d 295, 299 (Pa. 1996))). Further, the Court defined the words "vexatious conduct" as "that which is committed without sufficient ground in either law or in fact with the purpose of causing annoyance." Id.

Although this Board has found itself in agreement with Pro-Spec on the majority of issues in this case, including the fundamental dispute on what was and was not original Contract work under the extenuated circumstances faced by both parties on the Project, we do not find DGS's position or actions here to be either arbitrary or vexatious. The parties disagreements as to whether the extensive return/repair painting caused by out-of-sequence work and ongoing installations constituted original Contract work or extra work were reasonable. Therefore, Pro-Spec has not established to this Board that DGS acted in bad faith in withholding payments as it did.

Because the Board does not find bad faith on the part of DGS, we will not award attorney's fees to Pro-Spec or assess any additional penalties against DGS. The Board will, of course, award interest on the principal amount of damages we find due Pro-Spec beginning from December 31, 2002, the date Pro-Spec's claim was filed with the DGS contracting officer, in accordance with 62 Pa.C.S. § 1755. Finally, the Board has determined that, under the circumstances of this case, each party shall bear its own costs. 62 Pa.C.S. § 1725(e).

III. Conclusion

Following from our determination that Pro-Spec is entitled to damages for its extra work beyond the scope of the Contract and on the remaining unpaid Contract balance, we find that Pro-Spec is entitled to damages in the amount of $54,147 on the unpaid Contract balance (which amount includes $28,947 pursuant to Change Order 003); $138,580 for extra work repainting areas around subsequent Southern Steel installations; and $187,102 for repainting areas damaged by the subsequent work of other contractors for a total principal damage award of $379,829. Pro-Spec is also entitled to pre-judgment and post-judgment interest on the principal amount at the statutory rate of six percent per annum. The Department's claim for liquidated damages is denied. As Pro-Spec has not demonstrated that DGS's conduct was arbitrary or vexatious, the Board finds that this case does not justify assessing attorney's fees or penalties against DGS under 62 Pa.C.S. § 3935. Each party shall bear its own costs.

ORDER

AND NOW, this 30th day of June, 2010, it is **ORDERED** and **DECREED** that final judgment be rendered in favor of the Plaintiff, Pro-Spec Painting, Inc., and against Defendant, Commonwealth of Pennsylvania, Department of General Services, in the amount of $550,752 for this claim plus post-judgment interest. This sum consists of the principal amount of $379,829 for the unpaid Contract balance and damages incurred in performing extra work beyond the scope of the Contract, plus $170,923 in pre-judgment interest. Pro-Spec is also entitled to post-judgment interest on the outstanding judgment at the statutory rate for judgments (6% per annum) beginning on the exit date of this Order and continuing until the judgment is paid in full. Pro-Spec's claim for penalty and attorney fees is denied, and the Department's claim for liquidated damages is denied. Each party shall bear its own costs.

BOARD OF CLAIMS

OPINION SIGNED

_____
Jeffrey F. Smith
Chief Administrative Judge

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

_____
Andrew Sislo
Citizen Member