COMMONWEALTH OF PENNSYLVANIA

SORDONI CONSTRUCTION SERVICES , INC.	:	**BEFORE THE BOARD OF CLAIMS**
VS.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION	:	
VS.	:	
CITY OF SCRANTION AND OFFICE OF ECONOMIC AND COMMUNITY DEVELOPMENT	:	
VS.	:	
MICHAEL J. PASONICK, JR., INC.	:	**DOCKET NO. 3992**

FINDINGS OF FACT

GENERAL BACKGROUND

The Project

1. Sordoni Construction Services, Inc. ("Sordoni") is a contracting company with a business address of 45 Owen Street, Forty Fort, PA 18704. (Ex. 11)

2. On or about August 5, 2008, the City of Scranton ("City") Office of Economic and Community Development ("OECD") entered into a Transportation Enhancements Program Federal-Aid Reimbursement Agreement ("Reimbursement Agreement") with the Commonwealth of Pennsylvania, Department of Transportation ("PennDOT") in which PennDOT agreed to reimburse the City with federal funds the costs associated with construction of the "Park, Plaza and Pedestrian Court Project" ("Project"). (Ex. 927)

3. The Project was one portion of a larger, three-phase renewal project in the area of 500 Lackawanna Avenue in the City of Scranton. (N.T. 22-24) The primary purpose of the Reimbursement Agreement was to procure construction of the Project. (Exs. 11, 927; Board Finding)

4. The Reimbursement Agreement was drafted by PennDOT utilizing a template it employed for Transportation Enhancement Programs. (Ex. 927; N.T. 2077-78, 2297-2300)

5. Funding for the Project was provided by the U.S. Department of Transportation, Federal Highway Administration ("FHWA") under the federal Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), which provided funds to state transportation departments such as PennDOT to be used for statewide "transportation enhancement activities" in accordance with 23 U.S.C. §§ 133(b)(8) and (d)(2). (Ex. 927)

6. PennDOT's original commitment in the Reimbursement Agreement was initially to reimburse the City 100% of the construction costs for the Project, up to $2,000,000. (Ex. 927)

7. The Reimbursement Agreement provided that the City was responsible (on its own or by contract) to inspect and supervise all construction work in accordance with the approved construction specifications. (Ex. 927)

8. In accordance with the Reimbursement Agreement, the City then instituted a competitive bidding process to select a contractor to build the Project, and issued an invitation to bid on the Project. These bids were opened on June 13, 2008. (Exs. 120, 927)

9. Sordoni submitted the lowest (and only) base bid for the Project in the amount of $2,088,000. (Ex. 121)

10. The total Reimbursement Agreement amount was subsequently increased to $2,338,560 in a change order approved by PennDOT September 9, 2008. (Exs. 927, 928)

11. The September 9, 2008 change order specified that $2,088,000 of the $2,338,560 was to be dedicated to construction of the Project with the balance ($250,560) to be used for construction inspection services. (Ex. 928)

12. Paragraph 11(d) of the Reimbursement Agreement provided that the City would submit to PennDOT certified periodic invoices for work performed on the Project by the City's contractor, and that PennDOT would reimburse the City "for the proportionate share of the approved charges" which share remained at 100%. (Exs. 927 at Section 11(d)(2), 928)

13. On October 14, 2008, the City entered into a contract with Michael J. Pasonick, Jr., Inc. ("Pasonick") to perform construction inspection and documentation services on the Project. (Ex. 932)

14. Also on October 14, 2008, Sordoni and the City entered into a construction services agreement ("Construction Contract") under which Sordoni was to perform construction

and related services relative to the Project in consideration of payment by the City in the amount of $2,088,000. (Ex. 11)

15. The Construction Contract required Sordoni to provide the City with "All services to be completed as set forth in the Bid Proposal and Bid Specifications" incorporated by reference. Both the Bid proposal and specifications included a brief description of the work as including:

> . . . asphalt paving, concrete paving, individual concrete pavers, storm drainage, fencing, seeding, earthwork and topsoil; repairs to existing cast-in-place concrete retaining wall, masonry, foundations and walls, structural steel framing, steel stairs and railings, ornamental metal work, waterproofing, some roofing, doors and frames, glass and aluminum curtain wall, elevator, electrical power and lighting systems, minor HVAC systems and minor plumbing work.

(Exs. 11, 15 at p. 24, 120)

16. The Construction Contract provided for Sordoni's compensation as follows:

> Following PennDOT's approval and inspected (sic) by a designated qualified inspector, OECD shall submit the invoice to PennDOT for payment using the **Transportation Enhancements Program following the guidelines of the attached Reimbursement Agreement, Exhibit B.** OECD will pay [Sordoni] upon receipt of monies from PennDOT. . . . [*emphasis in the original*].

(Ex. 11 at Article 2 p. 2)

17. Article 2 of the Construction Contract also provided that, "[f]ollowing PennDOT's approval and inspected [sic] by a designated qualified inspector," the City must submit invoices to PennDOT pursuant to the Reimbursement Agreement and, in turn, pay Sordoni the money received from PennDOT. (Ex. 11 at Article 2 p. 2)

18. On November 19, 2008, the City issued a Notice to Proceed to Sordoni, effective November 18, 2008, to begin construction on the Project (Ex.141A). Construction began on the Project November 24, 2008, with excavation between buildings commencing by Sordoni's earthwork subcontractor, Shea Demolition. (Ex. 785; N.T. 894)

19. In accordance with both the Construction Contract and the Reimbursement Agreement, Sordoni would submit periodic payment applications to Pasonick, the City's inspector. Pasonick would review the application, certify that the work for which payment was sought had been performed "in accordance with the Contract Documents," and forward it to the City, which would submit the payment application to PennDOT. PennDOT would then review the payment application and, if it approved, send payment in the application amount to the City. The City would then deposit the payment from PennDOT and prepare a check in the same amount to Sordoni in payment. (Exs. 11, 35, 927; N.T. 46-47, 83-84)

20. For each of Sordoni's first three payment applications, after Sordoni submitted the payment applications to Pasonick, PennDOT's Patrick McCabe reviewed the invoices with Pasonick's Bernie Kovacs and certified in emails addressed to Linda Aebli (the executive director of the City's OECD) and PennDOT's April Hannon that the "work items on [the respective payment applications] have been completed as documented by the City's consultant inspection firm, and as such are OK to pay provided that it meets favorably with your review as well." (Exs. 35 at pp. 17, 30, 56; 157, 160, 175; N.T. 18-19, 340-45)

21. Following each of Mr. McCabe's emails approving Payment Applications 1-3 and letters from Pasonick approving the applications, the City forwarded the applications to PennDOT, and PennDOT sent reimbursement checks to the City which in turn paid Sordoni. (Ex. 35; N.T. 46-47, 77-88, 105-06, 113-17)

22. Following Sordoni's submission of Payment Applications 4 and 5 to Pasonick, Mr. McCabe, on July 16, 2009, sent an email to Ms. Aebli and Ms. Hannon. This email stated that, although neither he nor his staff "have any first hand knowledge of the work performed" on the invoices and were not present when the work was done, he nevertheless indicated that both Sordoni and Pasonick "are reputable companies" and, accordingly, he had "no reason to believe that the work indicated as performed on [Payment Applications 4 and 5] as represented by Pasonick Engineers, your inspection form, is anything less than factual." (Ex. 35 at p. 85)

23. Pasonick approved Payment Applications 4 and 5; the City subsequently forwarded the applications to PennDOT; PennDOT paid reimbursement checks to the City; and the City, in turn, paid Sordoni. (Ex. 35; N.T. 46-47, 83-84, 114-17)

24. Following the procedure described above, Sordoni submitted Payment Applications 1 through 5 to Pasonick from February 9, 2009 through June 1, 2009. Each payment application was approved by Pasonick and sent to the City, which submitted the payment applications to PennDOT for payment in accordance with the Reimbursement Agreement. For each of the Payment Applications 1 through 5, PennDOT paid the City the amounts included in the respective payment applications and the City then paid Sordoni. (Ex. 35; N.T. 46-47, 83-84, 230)

25. The total amount paid by PennDOT to the City (and subsequently by the City to Sordoni) was $876,382.55. (Ex. 35; N.T. 298, 2038-40; F.O.F. 441)

26. Following his July 16, 2009 email referencing Payment Applications 4 and 5, Mr. McCabe no longer reviewed Project work with Pasonick or approved any of Sordoni's subsequent payment applications. (Ex. 35; N.T. 359)

27. Sordoni submitted its sixth payment application to Pasonick on July 8, 2009. (Ex. 35 at p. 146).

28. Payment Applications 7 though 18 followed. (Ex. 35)

29. Sordoni's Payment Applications 6 through 8 were certified by Pasonick and subsequently submitted by the City to PennDOT for payment. (Ex. 35 at pp. 129-30, 149-50, 166-68, Ex. 243)

30. The City did not submit Sordoni's Payment Applications 9 through 11 to PennDOT at PennDOT's instruction. This instruction was to withhold those payment applications until issues PennDOT said it had with Payment Applications 6 through 8 had been resolved. (Exs. 282, 356; N.T. 142-43, 151)

31. PennDOT did not approve any payment application after Payment Application 5. (Exs. 35, 465, 473; N.T. 157, 170, 483-85)

32. On February 11, 2010, Sordoni, through its counsel, submitted an administrative claim to the Secretary of Transportation seeking payment from PennDOT for work it performed on the Project which Sordoni asserted was to be funded by PennDOT in accordance with the Construction Contract and the Reimbursement Agreement. (Ex. 700)

33. In response to Sordoni's administrative claim letter, Rebecca S. Burns, P.E., Acting Director of PennDOT's Bureau of Construction and Materials, sent a letter to Sordoni's counsel dated February 26, 2010, directing Sordoni to pursue any claims it may have with the City. Ms. Burns also acknowledged the Reimbursement Agreement and directed Sordoni to contact PennDOT's Office of Chief Counsel with any questions regarding the Reimbursement Agreement. Ms. Burns' letter did not expressly state that PennDOT had denied Sordoni's claim nor did it indicate a mailing date for the letter or advise of any appeal or claim rights or procedures. (Ex. 700; N.T. 2314-15)

34. Sordoni filed its initial claim with the Board on June 15, 2010, 125 days after its February 11, 2010 claim letter to the Secretary of Transportation. (Board Records at Docket No. 3992; Exs. 700, 934)

35. PennDOT filed preliminary objections to Sordoni's initial claim on July 19, 2010, and Sordoni filed an amended complaint with the Board on August 3, 2010. (Board Records at Docket No. 3992; Exs. 1, 935)

36. In its amended complaint, Sordoni seeks payment of the remaining Construction Contract balance (and for several change order requests) as a third party beneficiary of the Reimbursement Agreement. (Ex. 1)

37. On August 12, 2010 PennDOT filed preliminary objections to Sordoni's amended complaint which, among other things, challenged the Board's jurisdiction for failure of Sordoni to file its claim at the Board in a timely manner. By Board Order dated October 15, 2010, the Board overruled PennDOT's preliminary objection that Sordoni's initial claim was not timely

filed with the Board, finding that PennDOT's February 26, 2010 letter was inadequate to constitute a denial of Sordoni's administrative claim. (Board Records at Docket No. 3992)

38. PennDOT filed an answer to the amended complaint and new matter on November 15, 2010, denying that Sordoni was a third party beneficiary to the Reimbursement Agreement, asserting that the City violated the terms of the Reimbursement Agreement concerning inspection and documentation of the Project, and otherwise denying that the Board has jurisdiction over Sordoni's claim.[1] (Board Records at Docket No. 3992; Ex. 4)

39. PennDOT also filed (on November 15, 2010) a cross-claim joining the City. In it, PennDOT seeks indemnification from the City under the Reimbursement Agreement alleging that the City breached the terms of this agreement by failing to adequately inspect and supervise construction of the Project, including a failure to submit certifications and documentation of materials incorporated into the work on the Project as required by contract. (Board Records at Docket No. 3992; Ex. 5)

40. On December 15, 2010, the City filed an answer and new matter to PennDOT's joinder, denying that it had failed to comply with the terms of the Reimbursement Agreement. The City also asserted that PennDOT had waived (and is estopped from proceeding with) its claims against the City by having accepted and paid Sordoni's first five payment requests. In addition, the City counterclaimed against PennDOT (alleging that PennDOT breached the Reimbursement Agreement by failing to reimburse the City for work performed by Sordoni) and cross-claimed against Sordoni for indemnification under the Construction Contract. (Board Records at Docket No. 3992; Ex. 6)

41. The City also (on December 15, 2010) joined Pasonick as an additional defendant, seeking indemnification from Pasonick under its inspection services contract. (Board Records at Docket No. 3992; Ex. 7)

42. On December 30, 2010, Sordoni filed an answer denying the City's cross-claim and a counterclaim against the City for breach of the Construction Contract (by not paying for work performed by Sordoni) and for unjust enrichment/quantum meruit. (Board Records at Docket No. 3992)

43. On January 14, 2011, PennDOT filed a response to the City's new matter and, denying that it breached the Reimbursement Agreement and reasserting that the City had breached the Reimbursement Agreement's inspection provisions. (Board Records at Docket No. 3992; Ex. 8)

44. On January 19, 2011, Pasonick filed an answer with new matter to the City's joinder complaint, denying that it breached the terms of its inspection contract with the City.

[1] In addition to refuting Sordoni's status as a legitimate third party beneficiary, PennDOT asserts that the Board lacks jurisdiction because the Reimbursement Agreement is not a Procurement Code contract and, as noted above, because Sordoni did not file its claim timely with the Board under 62 Pa. C.S. § 1712.1.

Pasonick also counterclaimed against the City and cross-claimed against Sordoni, asserting a general right to indemnification from both. (Board Records at Docket No. 3992; Ex. 9)

45. The City filed an answer to Sordoni's counterclaim on January 24, 2011, denying liability to Sordoni under the Construction Contract beyond any reimbursement it receives from PennDOT under the Reimbursement Agreement. (Board Records at Docket No. 3992)

46. Sordoni filed an answer to Pasonick's new matter and, denying that Pasonick has a right to indemnification by Sordoni. The City filed answers to PennDOT's and Pasonick's new matter and counterclaims, again denying that it breached the Reimbursement Agreement with PennDOT, and denying that Pasonick had any right to indemnification by the City. (Board Records at Docket No. 3992)

Jurisdiction

47. Sordoni asserts that it is entitled to bring this action before the Board as an intended third party beneficiary of the Reimbursement Agreement between the City and PennDOT, and as such, it asserts that the Board has jurisdiction over its claims pursuant to Sections 1712.1 and 1724(a) of the Procurement Code, 62 Pa.C.S. §§ 1712.1 and 1724(a). (Ex. 1; Sordoni's Brief at pp. 2-3)

48. PennDOT denies that the Board has jurisdiction over this matter, averring specifically: 1) that Sordoni is not an intended third party beneficiary so that it lacks a contract with the Department on which to base its claims; 2) the Reimbursement Agreement is a "grant" and therefore not a "contract" under the Procurement Code and the Board lacks jurisdiction over non-Procurement Code contracts; and 3) Sordoni did not timely file its statement of claim with the Board pursuant to Section 1712.1. (Ex. 4; PennDOT's Brief at pp. 40-53)

A. Third Party Beneficiary

49. Paragraph 11(d) of the Reimbursement Agreement provided that the City would submit to PennDOT certified periodic invoices for work performed on the Project by the City's contractor, and that PennDOT would reimburse the City "for the proportionate share [100%] of the approved charges." (Exs. 927 at Section 11(d)(2), 928)

50. The Reimbursement Agreement also required, among other things, that the City pay the money received through the Reimbursement Agreement to its contractors, which contractors included Sordoni, within ten days of the date of PennDOT's reimbursement check. (Exs. 11, 927; N.T. 273)

51. The Reimbursement Agreement (which preceded the Construction Contract) was attached to the Construction Contract between Sordoni and the City and was specifically referenced in the Construction Contract at "Article 2: Compensation." (Exs. 11, 927; Findings of Fact ("F.O.F.") 2, 14, 16)

52. Article 2 of the Construction Contract provided that, following "PennDOT's approval" and inspection of the Project contractor's work "by a designated qualified inspector," the City must submit invoices to PennDOT pursuant to the Reimbursement Agreement and pay Sordoni from the money received from PennDOT.[2] (Exs. 11, 927 at Section 11(d)(2))

53. The Reimbursement Agreement also required that all the contractors on the Project be subject to prequalification by PennDOT, that PennDOT pre-approve the Project bid documents (which included the form and terms of the Construction Contract and design specifications). (Exs. 11, 927; N.T. 273)

54. In accordance with the Reimbursement Agreement, PennDOT pre-approved all bid documents for the Project, including the Construction Contract and Project design specifications developed by the City in consultation with PennDOT's engineer. PennDOT also waived pre-qualification of Sordoni for the Project. (Exs. 11, 927; N.T. 273, 2083-84)

55. The funding which underlies the Reimbursement Agreement is provided by the FHWA to be used by PennDOT for "transportation enhancement activities." (Exs. 927, 928; F.O.F. 2, 5)

56. The Reimbursement Agreement states that PennDOT will receive the federal funding which "will reimburse a portion of the costs of projects approved by" PennDOT, such as the Project in this matter. (Ex. 927)

57. The Project is identified in the Reimbursement Agreement as "the design and construction" of a "Pedestrian court on Lackawanna Avenue connecting with Bogart Place, a pedestrian walkway and a park located on National Park Service Land." (Ex. 927)

58. The Reimbursement Agreement obligated PennDOT to reimburse the City for the City's costs in designing and constructing the Project which PennDOT had approved, using federal transportation funds received by PennDOT. (Ex. 927)

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[2] The exact phrase we refer to from Article 2 is as follows:

> Following PennDOT's approval and inspected by a designated qualified inspector, OECD shall submit the invoice to PennDOT for payment using the **Transportation Enhancements Program following the guidelines of the attached Reimbursement Agreement**, **Exhibit B**. OECD will pay the CONTRACTOR upon receipt of monies from PennDOT . . . .

We find that "inspection" to be intended by the word "inspected" in the foregoing quote and note that "OECD" is simply a bureau within the City. We further note that this contract language seems to contemplate some type of PennDOT participation by way of an "approval" as well as a third-party inspection of Project work before the submission of invoices by the City to PennDOT. This process appears to have been followed by PennDOT for the first five payment applications as exemplified by Mr. McCabe's review of these early payment applications (which were paid by PennDOT) before his subsequent refusal to continue this activity (a refusal that does not appear to have ever been explained to Sordoni or the City). (Exs. 35, 927; F.O.F. 16-17, 51; Board Finding)

59. Sordoni, as the Project's general contractor, was specifically contemplated by, and referenced in, the Reimbursement Agreement (by position rather than by name) to be the ultimate recipient of funds under the Reimbursement Agreement. (Exs. 11, 927; F.O.F. 2, 4-6, 8-12, 14-17, 19, 49-58; Board Finding)

60. Because the Reimbursement Agreement provided that PennDOT would reimburse the City for the costs of constructing the Project and that the City would then pay these monies to the Project contractor for its work on the Project, we find that the purpose of this Reimbursement Agreement was to provide money to pay the contractor selected to perform the construction of the Project and that both parties to the Reimbursement Agreement intended the contractor selected for the Project (i.e. Sordoni) to receive the benefit of PennDOT's payments under the Reimbursement Agreement. (Exs. 11, 927; F.O.F. 2, 4-6, 8-12, 14-17, 19, 49-59; Board Finding)

61. The performance of the Reimbursement Agreement by PennDOT satisfies the City's obligation to pay money to Sordoni for construction of the Project, and we find the circumstances referenced above so compelling that recognition of Sordoni's right to receive PennDOT's payments under the Reimbursement Agreement is appropriate to effectuate the intentions of both the City and PennDOT to give Sordoni the benefit of the promised performance by PennDOT. (Exs. 11, 927; F.O.F. 2, 4-6, 8-12, 14-17, 19, 49-60; Board Finding)

62. The fact that PennDOT's role in the construction of the Project, as contemplated by the Reimbursement Agreement, was integral and ongoing and Sordoni performed its construction work on the Project under the ultimate control and direction of PennDOT (as discussed more fully below) lends further support to our finding that the parties to the Reimbursement Agreement intended that Sordoni, as the general contractor working on the Project, would receive the benefit of PennDOT's payments under the Reimbursement Agreement. (Exs. 11, 927; F.O.F. 2, 4-6, 8-12, 19-24, 49-61, 77-87)

63. In accordance with the Reimbursement Agreement, Pasonick approved and the City submitted Sordoni's payment applications 1-8 to PennDOT which reviewed and approved the first five such applications for which payment was made by PennDOT and passed along to Sordoni. The City did not submit Sordoni's subsequent payment applications at PennDOT's direction due to a dispute over work documentation. (Exs. 11, 35, 927; F.O.F. 19-31)

64. Both the City and Sordoni entered into the Construction Contract and their respective commitments to construct the Project with the understanding that PennDOT was contractually committed through the Reimbursement Agreement to fund the Project. (Exs. 11, 35, 927; F.O.F. 4, 14-17, 77-91; Board Finding)

65. PennDOT argues that, despite the foregoing circumstances, Sordoni cannot be considered a third party beneficiary because, in its view, the Reimbursement Agreement explicitly precludes third party beneficiary claims. Specifically, it asserts that the Reimbursement Agreement "expressly incorporates PennDOT's Publication 408" which disclaims third party liability under "[c]ontracts covered by these specifications . . . ." (PennDOT's Brief, pp. 43-47)

66. Neither Paragraphs 3 or 10 of the Reimbursement Agreement (nor any other language therein) purports to incorporate any part of Publication 408 into the Reimbursement Agreement itself. (Ex. 927: F.O.F. 106-109)

67. Only certain enumerated provisions of Publication 408, and not the publication in its entirety, were made applicable to the Project under the Construction Contract specifications approved by PennDOT. Among the Publication 408 provisions not incorporated into the Construction Contract was § 107.29, the Publication 408 provision which disclaims third party beneficiary rights. (Exs. 11, 30, 927; See: F.O.F. 106-136)

68. PennDOT also asserts that the preclusion of third party claims it finds in Publication 408 is "reinforced" by the Reimbursement Agreement's "save harmless clause." (Ex. 927 at ¶ 16; PennDOT's Brief at pp. 46-47)

69. The "save harmless" clause cited by PennDOT merely states that the City will indemnify PennDOT from a third party claim. This provision does not purport to preclude such a claim, but, to the contrary, actually seems to contemplate the potential occurrence of one. (Ex. 927 ¶ 16; See: F.O.F. 456-464)

70. Sordoni, as general contractor on the Project, was and is an intended third party beneficiary of the Reimbursement Agreement between PennDOT and the City. As such, its claim against PennDOT arises from the Reimbursement Agreement, a contract entered into by a Commonwealth agency. (Exs. 11, 35, 927; F.O.F. 2, 4-6, 8-12, 19-24, 49-69; Board Finding)

B. Procurement Code Contract or Grant

71. PennDOT also asserts a lack of Board jurisdiction over this matter because: 1) the Board's jurisdiction is strictly limited to Procurement Code contracts and 2) the Reimbursement Agreement is not a "contract" under the Procurement Code but is instead a "grant." (PennDOT's Brief at pp. 40-43)

72. Section 102(f) of the Procurement Code states that the code does not apply to "grants" by providing as follows:

> **(f) Application to grants.—**This part does not apply to grants. For the purpose of this part, a grant is the furnishing of assistance by the Commonwealth or any person, whether financial or otherwise, to any person to support a program. The term does not include an award whose primary purpose is to procure construction for the grantor. Any contract resulting from such an award is not a grant but a procurement contract.

(62 Pa. C.S. § 102(f))

73. PennDOT argues that the Reimbursement Agreement is not a "contract" but a "grant" under the foregoing Procurement Code definition because "it does not involve the procurement of construction for PennDOT (i.e. the grantor); rather it provides funds for the City of Scranton pursuant to a federal program." (PennDOT's Brief at pp. 40-41)

74. Sordoni argues, contrary to PennDOT's position, that the evidence adduced at hearing clearly shows the primary purpose of the Reimbursement Agreement was, in fact, "to procure construction for the grantor" because: (1) the clear purpose of the Reimbursement Agreement was to procure construction of the Project; (2) the Commonwealth should be considered the "grantor" in this case; and (3) the Commonwealth most decidedly did benefit from this construction. (Sordoni's Reply Brief at p. 39; See e.g. Exs. 11, 12, 32, 35, 620, 622, 927, 928)

75. As Sordoni correctly points out, PennDOT itself, except as suits its purpose in this case, asserts in its literature and on its website that these types of reimbursement agreements are not grants. (Sordoni's Reply Brief at p. 39; See e.g. Exs. 32, 620, 621, 622)

76. As noted above, the funding which underlies the Reimbursement Agreement is provided by the FHWA to be used by PennDOT for "transportation enhancement activities." (Exs. 620, 622, 927; F.O.F. 2, 4-5, 16, 52, 55-58)

77. To be considered for use of the above funding from the FHWA, a project must first be selected and pre-approved by PennDOT as a possible funding recipient. (Ex. 622; N.T. 53-57, 61, 2077-78, 2142-43, 2150, 2297-2300)

78. Once a project is pre-approved by PennDOT and selected for funding by a regional or metropolitan planning organization (in which PennDOT also participates), as was done for this Project, PennDOT either drafts or "reviews and approves" the bidding documents, plans, policies, procedures and specifications for the project and enters into a reimbursement agreement (of its own drafting) with the appropriate local entity as the first step toward constructing the chosen project. (Ex. 622; N.T. 53-57, 61, 2077-78, 2142-43, 2150, 2297-2300)

79. These reimbursement agreements specifically contemplate and require a second step (i.e. that PennDOT itself will either create or "review and approve" all the bid documents, plans, policies, procedures and specifications needed for the project to be put out for competitive bid and a second contract will be awarded by the local entity in accordance with the Procurement Code and other applicable federal and state laws). These bid documents include the form and terms of the construction contract to be used. (Exs. 11, 622, 927; N.T. 53-57, 61, 2077-78, 2142-43, 2150, 2297-2300)

80. These same reimbursement agreements then obligate PennDOT to pass on the federal funding to reimburse the designated portion of the costs of such projects which have first been approved by PennDOT. (Exs. 11, 622, 927; N.T. 2077-78, 2142-43, 2150, 2297-2300; F.O.F. 4)

81. The Reimbursement Agreement in this case contemplated and required a second step (i.e. that PennDOT itself would either create or "review and approve" all the bid documents, plans, policies, procedures and specifications needed for the Project to be put out for competitive bid by the City, including the Construction Contract, and that this Construction Contract would be bid and awarded in accordance with the Procurement Code and other applicable federal and state laws). PennDOT did review and approve all the bidding documents, plans, policies,

procedure and specifications for this Project, including the Construction Contract, and the Project was then put out for competitive bidding and awarded in accordance with the Procurement Code. (Exs. 2, 4, 11, 12, 32, 622, 927, 928; N.T. 53-57, 61, 269-73, 1698, 2077-78, 2142-43, 2150, 2297-2300; F.O.F. 76-80)

82. These actions noted immediately above conformed to the Reimbursement Agreement which specified that the design and construction of the Project was to be "in accordance with plans, policies, procedures and specifications prepared and/or approved by" PennDOT. (Exs. 11, 927; F.O.F. 76-81)

83. The Reimbursement Agreement then obligated PennDOT to reimburse the City for the costs of constructing the Project which PennDOT had approved, using federal transportation funds received by PennDOT for that purpose. (Exs. 11, 927; F.O.F. 2-12, 14-24, 49-64, 76-82)

84. Neither the Reimbursement Agreement alone, nor the Construction Contract alone, would be effective or capable of accomplishing construction of the Project or fulfilling PennDOT's mandate to utilize the federal funds it received for "transportation enhancement activities." In actuality, they are two co-dependent agreements that are of no practical use without one another. (Exs. 11, 927; F.O.F. 2-12, 14-24, 49-64, 76-83; Board Finding)

85. PennDOT's role in the construction of the Project, as contemplated by the Reimbursement Agreement, was integral and ongoing. Among other things, PennDOT pre-approved the Project and participated on its selection for funding; PennDOT retained and exercised pre-approval authority of all Project bid documents used to solicit and control Sordoni's participation in the Project (which documents included the Construction Contract and all applicable construction plans and specifications); PennDOT retained and exercised authority to review and approve Sordoni's work on the Project before making payments under the Reimbursement Agreement; and PennDOT was required to reimburse the City for approved costs including the design and construction of the Project according to a procedure which specified that the City was to submit periodic invoices from its contractor for work performed according to specifications approved by PennDOT and promptly pay the money it received from PennDOT to its contractor (Sordoni). (Exs. 11, 35, 620, 622, 927; F.O.F. 2-12, 14-24, 49-64, 76-84; Board Finding)

86. It is also clear from the efforts that Sordoni made throughout its work on the Project to obtain payment from PennDOT on the Reimbursement Agreement that Sordoni was working under the ultimate control and direction of PennDOT. (Exs. 35, 85, 157, 160, 175; N.T. 18-19, 46-47, 83-84, 340-45; F.O.F. 14-24, 49-64, 139-170; Board Finding)

87. PennDOT, by a combination of the Reimbursement Agreement and the Construction Contract, was fulfilling its mandate to apply the funding it received from the FHWA to a "transportation enhancement" activity by constructing the Project which PennDOT had approved and over which PennDOT exercised ultimate direction and approval through the Reimbursement Agreement and the Construction Contract. (Exs. 11, 927; F.O.F. 2-12, 14-24, 49-64, 76-86)

88. PennDOT asks the Board to look at the Reimbursement Agreement as if it existed in complete isolation rather than take into account the evidence presented at hearing with regard to the reason for its existence and the factual circumstances surrounding its creation and performance. (See PennDOT's Brief at p. 40; Board Finding)

89. It is abundantly clear from the evidence produced at hearing, as well as the plain language of the Reimbursement Agreement, that the "primary purpose" of this agreement was, in fact, to procure construction of the Project. The fact that it contemplated and required a second agreement (i.e. the Construction Contract) to accomplish this goal does not alter this purpose. (Exs. 11, 622, 927; F.O.F. 2-4, 14-24, 49-64, 76-88; Board Finding)

90. These transportation enhancement projects, including the Project in this case, benefit the municipality and region in which they are constructed and, by logical extension, the Commonwealth as a whole. (Ex. 622; F.O.F. 2-5, 15-16, 55-58, 76; Board Finding)

91. By reason of the Reimbursement Agreement (which PennDOT drafted) and the terms of the Construction Contract (which had first to be reviewed and approved by PennDOT) PennDOT had and exercised final authority to review, and approve payments for, all of Sordoni's work on the Project. As a practical matter, this meant that, in fact, all of Sordoni's work on the Project was performed under the ultimate direction and control of PennDOT, a Commonwealth agency. (Exs. 11, 35, 622, 927; F.O.F. 2-4, 14-24, 49-64, 76-90; Board Finding)

92. PennDOT Publication 535, titled "Overview of PennDOT Local Processes: A Guide to Getting Started on a Local Project with PennDOT," which appears applicable to the type of transportation enhancement project at issue in this case (i.e. the Project). This publication includes the underlined statement that "(i)t is important to note that all of these programs are cost reimbursement programs, not grant programs." (Ex. 32 at p. 11)

93. PennDOT, in fact, emphasizes that transportation enhancement programs like the one applicable to this Project where federal funds are distributed through PennDOT are part of a reimbursement program "**not a grant program.**" (Exs. 620, 621, 622)

94. The Project was constructed on publicly owned land and provided a public walkway/plaza connecting two public streets in the City of Scranton as well as providing improvements to a public park and access thereto from both streets via steps, elevator and a walk bridge between these features. As such the Board considers the Project to be a public transportation facility. (Exs. 11, 15; N.T. 203-205, 415-417; Board Finding)

95. Because application of the FHWA funding to the Project satisfies PennDOT's mandate from the FHWA to use the funding which underlies the Reimbursement Agreement for "transportation enhancement activities"; because in order to be considered for use of the above funding from the FHWA, the Project had first to be selected and pre-approved by PennDOT and selected by a regional MPO (in which selection PennDOT also participated); because PennDOT reviewed and approved all the bidding documents, plans, policies, procedure and specifications for this Project, including the Construction Contract, before the Project was put out for competitive bidding by the City as required by the Reimbursement Agreement; because the

Reimbursement Agreement obligated PennDOT to reimburse the City for the costs of constructing the Project which PennDOT had approved, using federal transportation funds received by PennDOT for that purpose; and because PennDOT's role in the construction of the Project, as contemplated by the Reimbursement Agreement, was integral and ongoing in that PennDOT retained and exercised authority to review and approve Sordoni's work on the Project before making payments under the Reimbursement Agreement; and because of the efforts Sordoni made throughout its work on the Project to satisfy PennDOT's desire for more work documentation in order to obtain payment from PennDOT on the Reimbursement Agreement; and because the foregoing shows that work on the Project was, in fact, done under the ultimate control and direction of PennDOT, we find that construction of the Project was, in actuality, done for PennDOT. (Exs. 11, 622, 927; F.O.F. 76-94, Board Finding)

96. The Reimbursement Agreement is the first half of two co-dependent written agreements entered into for the purpose of obtaining construction services, which services were then acquired by the second half of these two co-dependent written agreements (the Construction Contract) which was competitively bid and awarded as approved by PennDOT in accordance with the Procurement Code as the Reimbursement Agreement required. (Exs. 11, 927; F.O.F. 2-4, 14-24, 49-64, 76-94; Board Finding)

SORDONI'S PERFORMANCE

97. Sordoni's claim against PennDOT, as set forth in its amended claim, was originally for $1,305,916.55 represented by Payment Applications 6 through 11, 14, 17 and 18 plus 10% retainage on Payment Applications 1 through 11 and 14 (which retainage had been deducted from the amount requested in the original applications). (Exs. 1, 2)

98. Payment Applications 17 and 18 relate to changes requested by the developer of the larger multi-phase redevelopment, not PennDOT or the City. (Stipulation Ex. 815)

99. Payment Application 17 has been satisfied by the developer and has been withdrawn by Sordoni with respect to PennDOT. (Stipulation Ex. 815)

100. Payment Application 18 relates to retainage on the change order amount requested in Payment Application 17 (also attributable to the developer). (Exs. 1, 2; Stipulation Ex. 815)

101. The remaining principal amount now claimed by Sordoni against PennDOT is $1,241,311.45 consisting of Payment Applications 6 through 11 and 14, plus retainage, less $32,400 (which latter amount Sordoni asserts is the value of unfinished work remaining on the Project). (Sordoni's Proposed Finding of Fact, ¶¶ 79-82)

102. With the few exceptions specified below, the weight of the evidence presented at hearing did not indicate that incomplete or faulty workmanship or materials were provided on the Project by Sordoni. (N.T. 370, 677-78, 742-43, 752, 1459, 1566-67, 1681-82, 2505-06; F.O.F. 335-42, 385-97; Board Finding)

103. PennDOT's refusal to make payments on the Reimbursement Agreement after Payment Application 5 "because it [did] not believe the work was performed in accordance with the policies, plans, and specifications approved by PennDOT" was (and is) based primarily on the alleged failure of Sordoni (and the City through its inspection agent Pasonick) to provide adequate documentation that work on the Project was performed in compliance with Project specifications. (PennDOT's Proposed Finding of Fact at ¶¶73-111; Exs. 81, 96, 292, 378, 391, 465, 471; F.O.F. 104-105, 139-170; Board Finding)

A. Submittals

Publication 408 Applicability

104. PennDOT asserts initially that Sordoni failed to comply with the general documentation and submittal requirements of the Construction Contract specifications, including those set forth in PennDOT Publication 408, which PennDOT claims was incorporated into the Construction Contract specifications in its entirety. (PennDOT Proposed Findings of Fact, Brief and Proposed Conclusions of Law at pp. 16-18; Exs. 81, 96, 292, 378, 391, 465, 471; N.T. 673-74, 678)

105. PennDOT has identified a number of specific Project areas where it claims Sordoni's work documentation and submittals were deficient under PennDOT Publication 408 and, therefore, not in compliance with the Construction Contract specifications, the Construction Contract or the Reimbursement Agreement. In fact, PennDOT plainly states that its initial decision to stop payments was based on its perceived lack of full compliance with Publication 408 by Sordoni and the City's inspector, Pasonick. (PennDOT's Proposed Finding of Fact at ¶ 94; Exs. 81, 96, 292, 378, 391, 465, 471; N.T. 673-74, 678)

106. The Reimbursement Agreement contains no language which even purports to incorporate Publication 408 into itself and references Publication 408 in only two sections: at Paragraphs 3 (relating to design) and 10 (relating to inspections). (Ex. 927; Board Finding)

107. Paragraph 3 of the Reimbursement Agreement provides that the contemplated Project design "shall be in accordance with plans, policies, procedures, criteria and specifications prepared or approved by the DEPARTMENT [PennDOT] and the FHWA, including: but not limited to . . . Publication 408 Specifications . . . ." [Emphasis added]. (Ex. 927)

108. Paragraph 10 of the Reimbursement Agreement includes a similar reference to Publication 408, providing for the City to "inspect and supervise all construction work in accordance with approved plans and specifications, including, but not limited to, the Publication 408 Specifications . . . ." [Emphasis added]. (Ex. 927)

109. Paragraphs 3 and 10 of the Reimbursement Agreement address items to be included in the design plans or specifications of the Project (as approved by PennDOT) and made part of the Construction Contract, not provisions to be incorporated into the Reimbursement Agreement. (Exs. 11, 927)

110. Publication 408 (in its various iterations) was and is a voluminous document comprising over 1,000 pages of specifications designed to address issues covering the full gamut of PennDOT construction projects (including construction of roadways, bridges, dams, airports and other heavy or specialized construction). (Ex. 30; N.T. 481-82; Board Finding)

111. Because Publication 408 addresses all these potential types of PennDOT construction, all of the Publication 408 provisions rarely, if ever, apply to one particular project. (F.O.F. 110; Board Finding)

112. Since Publication 408 addresses all types of PennDOT construction, all of the Publication 408 provisions rarely, if ever, would apply to one particular project. Accordingly, common sense and practical experience dictates that Paragraphs 3 and 10 of the Reimbursement Agreement were not intended to require that all provisions of Publication 408 be made applicable to the Project but were intended only to make those Publication 408 provisions identified in the "approved plans and specifications" applicable to the Project. (Exs. 11, 927; F.O.F. 104-111, Board Finding)

113. The approved plans and specifications for the Project comprise over 700 pages of highly detailed requirements for various construction elements of the Project (without counting any Publication 408 provisions incorporated by reference). (Ex. 15; N.T. 2083-84)

114. The approved plans and specifications were drafted by the Project architect, Hemmler + Camayd Architects, in consultation with PennDOT's engineer, and were reviewed and approved by PennDOT to be used in the bid documents and became part of the Construction Contract. (Exs. 11, 15, 927; N.T. 273, 1604-05, 1625-31, 1659-60, 2083-84, 2297)

115. The approved Construction Contract specifications, under the heading "SPECIAL INSTRUCTIONS TO BIDDERS", subheading "SPECIAL PROVISIONS", state that the Project "is to be constructed in accordance with these specifications and the specified special provisions and sections of PENNDOT Publication 408." [Emphasis added]. (Ex. 15 at p. 26 or SI-3)

116. The word "specified" in the above "SPECIAL INSTRUCTIONS TO BIDDERS", subheading "SPECIAL PROVISIONS" of the Construction Contract specifications can be read most properly to modify the phrase "special provisions and sections of PennDOT Publication 408" or more loosely to modify only the term "special provisions." We consider the latter reading less appropriate grammatically because it would create a sentence with two conjunctive "ands" rather than a grammatically correct listing of three components in a series with the first two items separated by a comma (i.e. ". . . in accordance with these specifications, the specified special provisions and sections of PennDOT Publication 408."). Accordingly, the plain language of the Project's plans and specifications (as approved by PennDOT) makes only the "specified" "special provision and sections of Publication 408" applicable to the Project, not the entirety of Publication 408. (Ex. 15 at p. 26 or SI-3; F.O.F. 118, Board Finding)

117. The Construction Contract specifications, on the following page, go on to identify 14 "designated special provisions" of PennDOT Publication 408 as being applicable to the Project. (Ex. 15 at p. 27 or SI-4)

118. Other references to discrete portions of Publication 408 are also interspersed among these 700 pages of specification text. (Ex. 15; F.O.F. 220-22, 255-59, 272-74)

119. Such a special designation and listing of enumerated Publication 408 provisions on page SI-4 as well as other specific textual references to discrete provisions of Publication 408 interspersed throughout the specifications would be logically unnecessary and pure surplusage if all of Publication 408 was made applicable to the Project by the previous sentence quoted in Paragraph 115 above. (Ex. 15; F.O.F. 115-18; Board Finding)

120. Returning to the Reimbursement Agreement, we found Paragraphs 3 and 10 of the Reimbursement Agreement unclear and ambiguous (at best) as to whether their intent was to incorporate all of Publication 408 or only those portions of Publication 408 identified in the "approved plans and specifications" into the Construction Contract. (Ex. 927; F.O.F. 106-12; Board Finding)

121. PennDOT's own action in approving Project plans and specifications which incorporated only specified portions of Publication 408 is a strong indication that PennDOT itself read Paragraphs 3 and 10 of the Reimbursement Agreement to require only these specified portions of Publication 408 be made applicable to the Project, at least during its role in the formation of the Reimbursement Agreement and the Construction Contract. (Exs. 11, 15 at pp. 26-27, 927; F.O.F. 2, 4, 14, 51-54, 106-120; Board Finding)

122. The Board finds that only the 14 provisions of Publication 408 enumerated in the Construction Contract specifications (as well as other references to discrete portions of Publication 408 interspersed within the specification text), and not Publication 408 in its entirety, was intended by the parties to apply to the Project. (Exs. 11, 15 at pp. 26-27, 927; F.O.F. 2, 4, 14, 51-54, 106-121; Board Finding)

123. The requisite level of documentation required by the Reimbursement Agreement is set forth by reference to the Construction Contract specifications "as approved by PennDOT." (Exs. 11, 15, 927; F.O.F. 2, 4, 14, 51-54, 106-122; Board Finding)

124. Under the terms of the Construction Contract, Sordoni agreed to provide the City with "[A]ll services to be completed as set forth in the Bid Proposal and Bid Specifications . . . [which] define specifically the services to be provided by the CONTRACTOR." (Ex. 11)

125. Neither the City nor Pasonick withheld from PennDOT any construction documentation provided them by Sordoni. (F.O.F. 19-29, 135-38; Board Finding)

126. Only one Construction Contract provision or specification relates to the general issue of work documentation on the Project to be provided to PennDOT. This is one of the 14

"specially designated provisions" of Publication 408 incorporated into the Construction Contract specifications (i.e. Section 112). (Exs. 15, 30; Board Finding)

127. Section 112 of Publication 408 provides, in relevant part, that all project records used to record work progress are to be retained for 3 years after receipt of final payment and are to be made available to PennDOT at a reasonable time and place upon written notice from PennDOT. (Ex. 30 at p. 102)

128. In addition, Publication 408, Section 112 provides that repeated failure to comply with this provision may be grounds for default. (Ex. 30 at p. 102)

129. Section 112 of Publication 408 does not prescribe the form, content or type of information which is to be provided, nor does it contain any requirement whatsoever that document submittals regarding products or materials used on the Project, or tests done on the Project, be submitted to the City or PennDOT with payment requests or on any other regular basis. (Ex. 30 at p. 102)

130. The content of Project submittals and the type of information about products and materials used, or tests done, as part of the requisite documentation for work on the Project is set forth in the applicable sections of the 700 plus pages of detailed specifications provided by Hemmler + Camayd, not by general incorporation of all of PennDOT's Publication 408 requirements (as was continually asserted by PennDOT as a basis for cessation of payments on the Project). (Ex. 15; F.O.F. 115-122, 140-70; Board Finding)

131. In addition to the content requirements for the various submittals (which were arranged throughout these 700 plus pages of specifications by major task), submittal requirements are set forth generally in Section 01330 of the Project specifications (as approved by PennDOT). (Ex. 15 at pp. 170-82; Board Finding)

132. Section 01330 provided that submittals required to be made by Sordoni would be made to the Project architect, who would determine whether the submittals were sufficient to show compliance with the Project plans and specifications. (Ex. 15 at pp. 170-173; N.T. 1645-46)

133. These applicable Construction Contract specifications provided, inter alia, that product and testing information submittals required to be made by Sordoni would be made to the Project architect and designer (Hemmler + Camayd) and that it would be Hemmler + Camayd, as the Project designer, who would determine whether or not these submittals were sufficient to show compliance with the Project plans and specifications. Kenneth Ruby, Hemmler + Camayd's project manager for the Project, testified that Sordoni had submitted to the architect all the documentation required by Hemmler + Camayd for review and/or approval and that Sordoni provided all submittals necessary to show that it performed its construction work in a satisfactory manner as required by the Project specifications. He voiced no concerns regarding the timing of these submittals. (Ex. 15 at pp. 170-73; N.T. 1682, 1691-92; Board Finding)

134. Hemmler + Camayd Architects was the architect for the Project, hired by the developer of private property adjacent to the Project (i.e. 500 Lackawanna Avenue Company). (N.T. 1615, 1625, 1631, 1683-84)

135. An additional procedure (not expressly required by the approved Project plans or specifications) was established whereby the architect would provide Pasonick (the company engaged by the City to perform the City's Project inspection and supervision duties pursuant to the Reimbursement Agreement at Paragraph 10) with copies of submittals. (Exs. 11, 15, 927, 932; N.T. 1694-97, 1881-82, 1889-90)

136. Since this inspection and supervision (by Pasonick) was to be performed "in accordance with the approved plans and specifications" (as set forth in the Reimbursement Agreement at Paragraph 10) we do not see it as altering the content of the Project documentation or the procedure for Project submittals as we have described them above (i.e. all submittals to be made to, and reviewed or acted upon by Hemmler + Camayd and all documentation content to be as prescribed in the 700 plus pages of detailed specifications provided by Hemmler + Camayd, not as prescribed by an all-encompassing reference to Publication 408). (Exs. 11, 15, 927, 932; F.O.F. 130-35; Board Finding)

137. This additional procedure (Hemmler + Camayd forwarding copies of submitted information to Pasonick) was reasonably calculated to fulfill the only contractual commitment Sordoni or the City had to PennDOT with regard to Project documentation and submittals which was to retain copies of the documentation and submittals required by the Construction Contract specifications and to produce the documentation requested at a reasonable time and place upon written request by PennDOT, if and when such request was made, pursuant to Section 112 of Publication 408. (Exs. 11, 15, 927; F.O.F. 122-36; Board Finding)

138. There was no provision in the Construction Contract or the Reimbursement Agreement which required Sordoni (and/or the City) to provide documentation and/or submittals in accordance with any provision of Publication 408 not among those specifically enumerated in the approved Construction Contract specifications. (Exs. 11, 15, 927; F.O.F. 122-37; Board Finding)

139. Notwithstanding this foregoing limitation, PennDOT refused to make any further payments after Payment Application #5 based on its position that the Project was not being fully documented as required by Publication 408. (Exs. 11, 15, 927; F.O.F. 27-31, 103, 140-70)

140. On November 10, 2009, Richard Cochrane, PennDOT's District 4 Assistant District Executive for Construction, wrote a letter to Linda Aebli concerning the "Material Documentation" which had previously been provided to April Hannon of PennDOT. (Ex. 292)

141. In this November 10, 2009 letter, Mr. Cochrane wrote that he had "numerous concerns regarding documentation . . . ." He added, "there are almost no certifications for material incorporated in the work [&] there are numerous inconsistencies in the documentation provided . . . ." (Ex. 292)

142. In his November 10, 2009 letter, Mr. Cochrane also referenced pages SI-2 and SI-3 of the Construction Contract. Mr. Cochrane quoted page SI-2 as stating that "All materials, concrete, etc., shall be supplied from Pennsylvania Department of Transportation approved sources. In lieu of this, certified test results from a reputable testing agency indicating the material meets all Pennsylvania Department of Transportation Specifications will be requested." Mr. Cochrane quoted page SI-3 as stating "This project is to be construed in accordance with … and sections of PennDOT Publication 408." (Ex. 292)

143. The full sentence from the Construction Contract specifications quoted in part by Mr. Cochrane (and already addressed by us at Paragraphs 115-119 above) reads: "This project is to be construed in accordance with these specifications and the specified provisions and sections of PennDOT Publication 408." The following page of the specifications lists 14 designated provisions of Publication 408 which were specified as being incorporated therein. (Ex. 15 at pp. 26-27; N.T. 614-20; F.O.F. 115-19)

144. Mr. Cochrane concluded in his November 10, 2009 letter by stating that "Until I am satisfied that the Department's requirements are met, I am unable to release payments to the City of Scranton." (Ex. 292)

145. Mr. Cochrane testified regarding this letter that in requesting "certifications" he meant PennDOT Form CS-4171.[3] He said he was telling Ms. Aebli at the City that if he didn't get Form CS-4171 for all materials used on the Project, the City wouldn't be paid. (Ex. 292; N.T. 614-18; Board Finding)

146. Mr. Cochrane does not recall Form CS-4171 being discussed by PennDOT or provided to the City, Pasonick or Sordoni at the pre-construction conference. He agreed that there is no record that PennDOT gave the City or Sordoni Form CS-4171 to use for documentation or reporting purposes.[4] (N.T. 490-91, 556-58, 1927)

147. On November 23, 2009 and again on February 9, 2010, PennDOT Documentation Specialist Judy Russo conducted documentation review audits for the Project. She prepared written reports of her audits on February 3 and February 22, 2010, respectively. (Ex. 378, 391; N.T. 1778-79)

148. Ms. Russo testified that she found "nothing" during her first audit, which was conducted at Pasonick's field office. She reported that her second audit was "inconclusive"

[3] Form CS-4171 is a standard PennDOT form prescribed in Publication 408 by which contractors provide information specified on the form to PennDOT regarding the materials and products supplied to a PennDOT job. (Exs. 30 at pp. 51 and 107, 505; N.T. 476-83)

[4] PennDOT's Patrick McCabe and Pasonick's Michael Amato also testified they do not recall any discussion of Form CS-4171 at the pre-construction meeting or that PennDOT ever gave a copy of the form to the City or Pasonick for use on the Project. (N.T. 336-39, 1927)

because "the documentation and record-keeping [on the Project] are not typical of a PennDOT project for which we have been trained." (Exs. 378, 391; N.T. 1782)

149. Michael Amato, a project manager for Pasonick on this Project, testified that during Ms. Russo's audits, all the Project records were there in boxes, 3-ring binders or on the wall. He "strongly disagree[d]" with Ms. Russo's statement that no records were there, and suggested that Ms. Russo was looking only for "a PennDOT system or something." (N.T. 1913-17)

150. Mr. Amato carried boxes of records to the second audit, conducted in the trailer/office of PennDOT's Patrick McCabe. (N.T. 1913-17, 1925-26, 1939-43).

151. Mr. Amato testified that Pasonick had, among other things, the concrete tests and steel certifications at this audit: "Whatever submittal we received from the architect." He pointed out documents to Ms. Russo. They went over payment applications. However, Mr. Amato testified, it was still in a fashion Ms. Russo wasn't familiar with. (N.T. 1928-29).

152. Specifically, Mr. Amato testified that he showed several binders of Project records to Ms. Russo, telling her, "this is our documentation." (N.T. 1948-49)

153. Mr. Amato also testified that be believed Ms. Russo was looking for PennDOT documents only. (N.T. 1928-29)

154. Ms. Russo seemed to acknowledge this, testifying that when she does an audit, she looks for PennDOT Form CS-4171. (N.T. 1822-24).

155. Referring to her second audit report, Ms. Russo stated that the Project was not structured the way PennDOT's audit units works. (Ex. 391, including comments from Pat McCabe)

156. Mr. McCabe noted that PennDOT's audit team was not qualified to make a determination on the records as presented at the second audit. Mr. McCabe also noted his thanks to Pasonick for their cooperation in "trying to find records that we [PennDOT] were looking for." (Ex. 391; N.T. 1825-29).

157. At a meeting to discuss Sordoni's outstanding payment applications held December 15, 2009, Pasonick's Mr. Amato and Hemmler + Camayd's Mr. Ruby both told Mr. Cochrane that because the Project was architectural in nature, PennDOT's Publication 408 did not apply (except for the selected sections explicity identified in the Project specifications). (Ex. 356; N.T. 680-81, 1640-41)

158. Nevertheless, PennDOT, particularly Mr. Cochrane, continued to insist that the entirety of Publication 408 applied to the Project. (Ex. 356)

159. Christopher Cepko, PennDOT's quality assurance team leader for PennDOT Districts Four and Five (which include the Scranton area) subsequently conducted a review of documentation for the Project between May 19 and 25, 2010. The Project was nearly complete

by this time as Sordoni had continued its work through the early part of May despite having not been paid on its payment applications since June 2009. (Exs. 465, 760, 785 at pp. 771-75; N.T. 1958-62)

160. Mr. Cepko's purpose in conducting the review was to determine if documentation was provided to justify Sordoni's Payment Applications 6 through 11. (N.T. 1961-62)

161. Mr. Cepko conducted his review at Pasonick's Scranton office, where he was given access to Project documentation by Pasonick's inspector, Bernie Kovacs. (Ex. 465; N.T. 1964-79)

162. In conducting his analysis, Mr. Cepko reviewed the documents provided by Mr. Kovacs to determine whether the documentation complied with PennDOT Publication 408 and/or the Construction Contract specifications. (Ex. 465; N.T. 1965-66)

163. Prior to Mr. Cepko's audit at Pasonick's office, Mr. Kovacs asked for a few weeks to get documents in order. Throughout the audit meeting, Mr. Cepko would ask Mr. Kovacs for more documents and Kovacks would get what Mr. Cepko requested. (N.T. 1961-66)

164. There was no evidence presented at hearing of any writing from Mr. Cepko to the City or Pasonick requesting documentation. (Board Finding)

165. Following his audit, Mr. Cepko prepared a report, dated May 27, 2010, which he submitted to Joseph Robinson, Chief of PennDOT's Quality Assurance Division. (Exs. 465, 471)

166. It was not until Mr. Cepko was asked to perform an analysis of the work documentation provided and/or missing on the Project in May of 2010 (after the Project was nearly complete and Sordoni had initiated an administrative claim at PennDOT) when anyone at PennDOT correctly considered the documentation requirements outlined in the 700 plus pages of specifications provided by Hemmler + Camayd (including the specific Publication 408 provisions explicitly incorporated therein) rather than insisting on application of the full Publication 408 specifications to address this issue. (Exs. 465, 471; N.T. 1965-66, 1973-78; F.O.F. 140-58)

167. At the request of Rebecca Burns (Acting Director of PennDOT's Bureau of Construction and Materials), Mr. Cepko prepared a spreadsheet amending his May 27, 2010 report, which included his analysis of Project documentation and his opinion as to whether payment was justified for work performed on the Project (broken down into 31 discrete pay items) in accordance with the Project specifications. (Exs. 465, 491; N.T. 1968-71)

168. No evidence was presented at trial that Mr. Cepko's report dated May 27, 2010 or his spreadsheet (collectively referred to hereinafter as the "Cepko Report") was presented to Sordoni or the City until after the commencement of Sordoni's claim at the Board. (F.O.F. 163; Board Finding)

169. From the time of PennDOT's refusal to make any payment after Payment Application #5 in June 2009 until the initiation of Sordoni's claim against PennDOT, Sordoni and/or Pasonick undertook a series of attempts to satisfy PennDOT's document expectations for various aspects of Sordoni's work. (Exs. 35, 227, 231, 276, 282, 292; N.T. 780; F.O.F. 140-58)

170. Despite these attempts by Sordoni and/or Pasonick, PennDOT continued to refuse to authorize payments based on its expectation of full Publication 408 document requirements. (Ex. 35; F.O.F. 140-58)

171. The only written request for Project records or documentation by PennDOT was Mr. Cochrane's November 10, 2009 letter to the City. This request is clearly based on the mistaken premise that all of Publication 408's documentation requirements apply to the Project, including the use of PennDOT Form CS-4171 to provide manufacturer representations of product compliance for use on the Project, which he refers to in his letter as the missing "certifications". (Ex. 292; F.O.F. 140-64)

172. In his November 10, 2009 letter to the City, Mr. Cochrane listed 7 "inconsistencies" related to certain concrete records submitted by Sordoni and 7 materials certifications which were allegedly missing. (Ex. 292)

173. Among the concrete "inconsistencies" listed by Mr. Cochrane are asserted discrepancies of 3 ½ to 4 inches in slump values reported between field test cylinder reports and Midlantic's summary reports for pours on five dates (December 16 and 17, 2008, February 16, 2009, and July 8 and 9, 2009) and missing "high-low temperature data for the concrete." (Ex. 292)

174. With respect to the asserted discrepancies in the reported slump values, Project Specification 03300.2.13 requires a slump limit range of 4 inches, plus or minus 1 inch. (Ex. 15, pp. 343-44; N.T. 1234-36)

175. With respect to "high-low temperature data" for concrete, the Construction Contract specifications do not contain a requirement for recording the air or concrete temperature. (Ex. 15; Board Finding)

176. Neither Mr. Cepko nor Mr. Mitchell reported any issues with the records submitted by Sordoni for these slump or temperature items on the dates listed in Mr. Cochrane's November 10, 2009 letter. (Exs. 81, 465)

177. The difference between slump values reported in field test cylinder reports and Midlantic's summary reports for the dates identified by Mr. Cochrane are immaterial. (Exs. 81, 465; F.O.F. 171-76, Board Finding)

178. In addition to the above-asserted "inconsistencies" in Sordoni's concrete submittals, Mr. Cochrane asserted in his November 10, 2009 letter that there were "no

certifications" for epoxy paint, granite stone, bridge decking steel, conduit, anchor bolts, waterproofing material, and structural steel. (Ex. 292)

179. When referring to missing "certifications," Mr. Cochrane was referring to a lack of PennDOT Form CS-4171. (N.T. 614-18; F.O.F. 145)

180. Neither the Construction Contract specifications nor any Publication 408 provision specifically incorporated into the Project specifications require Sordoni to utilize or submit PennDOT Form CS-4171 for materials certifications. (Ex. 15; Board Finding)

181. Except for certain materials certifications for steel products required by the applicable Project specifications (which we discuss below in greater detail), neither Mr. Mitchell nor Mr. Cepko cited any missing materials certifications for the products noted in Mr. Cochrane's letter in their respective reports. (Exs. 81, 292, 465; Board Finding)

182. The specific documentation requested in Mr. Cochrane's November 10, 2009 letter to the City (the lone written request for documentation presented into evidence by PennDOT) was either: 1) simply not required by the applicable Construction Contract specifications and/or 2) subsequently addressed or produced in adequate form no later than the time of Mr. Cepko's review. (Exs. 15, 292, 465; F.O.F. 114-22, 171-81)

183. It is PennDOT's initial and continued insistence on full Publication 408 type documentation (rather than the documentation properly required under the applicable specifications) and its near total failure to identify and request any specific documentation actually required by the Construction Contract through a proper written request (as required by Publication 408, Section 112) which leads the Board to find that there is no factual basis for PennDOT's assertion that Sordoni did not produce relevant Project documentation to PennDOT in a timely manner. (Exs. 15, 292; F.O.F. 103-182; Board Finding)

Sordoni's Documentation and Alleged Deficiencies

184. At hearing, PennDOT's Mr. Cepko presented his analysis of the 31 discrete pay items for work on the Project which he sent to Rebecca Burns on June 25, 2010. (Exs. 465, 491; N.T. 1955-2072)

185. PennDOT also presented at hearing the expert testimony and reports of Thomas Mitchell, P.E. of Urban Engineers, Inc., detailing a "number of submittals [which were] insufficient or missing" from the record. (Exs. 81, 96; N.T. 2353-2510)

186. In response, Sordoni submitted testimony from several witnesses and multiple expert reports of its own. These included a report on the steel issues by Robert McGregor, a report on concrete issues by Timothy Burns and two reports on general documentation compliance prepared by Steven Parashac (an architectural engineer employed by Sordoni and

supervisor on the Project) and Jonathan Reif (Executive Vice President and CEO of Sordoni and holder of a masters degree in civil engineering). All of these individuals also testified at hearing. (Exs. 76, 85, 87, 89; N.T. 1370-1567, 1125-51; 1154-1567, 1585-1613; 1716-69)

187. The Reif/Parashac reports provided item-by-item responses to Mr. Mitchell's initial report and assertions of insufficient or missing submittals as well as 119 pages of supporting documentation related to the alleged insufficient or missing submittals (Exs. 82, 83, 84, 87)

188. The reports of Messrs. McGregor and Burns also addressed points made by Messrs. Cepko and/or Mitchell. (Exs. 80, 85, 89)

189. Mr. Mitchell subsequently prepared a second report responding to Sordoni's reports and documentation which was also presented at hearing. (Ex. 96)

190. The Board's review of the Cepko Report, both of Mr. Mitchell's expert reports, Sordoni's multiple reports with additional documentation, and testimony from all the parties leads us to conclude that the Cepko Report fairly identifies each area of work where documentation issues material to resolution of Sordoni's claim are present. (Exs. 35, 76, 80, 81, 82, 83, 84, 85, 87, 89, 465, 491; F.O.F. 172-77; Board Finding)

191. The Cepko Report also identifies the values reasonably assigned to the various work components (i.e. pay items) affected by these "documentation issues." (Exs. 465, 491; F.O.F. 184-90; Board Finding)

192. In order to facilitate periodic payments on the Construction Contract, Sordoni's work was broken down by 31 specific pay item tasks which apparently was agreeable to the parties. (Exs. 35, 465, 491; N.T. 1972)

193. Mr. Cepko broke down Sordoni's Payment Applications (in accordance with the lump-sum Construction Contract) by 31 specific pay items as follows:

Item #	Original Contract Amount	Estimate #1-5	Estimate #6-11	Y/GY/GN /N	Total Payment Potential
1) General Conditions	$70,215.00	$87,252.00	-$17,037.00	Y	$70,215.00
2) Bond	$21,711.00	$21,711.00	$0	Y	$21,711.00
3) Insurance	$17,610.00	$12,659.74	$4,084.01	Y	$16,743.75
4) Permit	$22,709.00	$22,709.00	$0	Y	$22,709.00
5) Mercantile Tax	$14,305.00	$9,391.64	$4,913.36	Y	$14,305.00
6) Earthwork	$159,095.00	$110,468.00	$48,627.00	GY	$159,095.00
7) Paving/Surfacing	$64,700.00	$0	$64,700.00	N	
8) Landscaping	$32,850.00	$0	$32,850.00	Y	$32,850.00
9) Fence	$53,250.00	$0	$34,650.00	Y	$34,650.00
10) Masonry	$141,500.00	$100,230.00	$41,270.00	N	
11) Masonry Restoration	$190,600.00	$100,600.00	$90,000.00	Y	$190,600.00
12) Concrete FDNS/Piers/GRD Beams	$43,250.00	$43,250.00	$0	GN	
13) Conc. Slabs-Interior	$24,433.00	$9,655.00	$14,788.00	GN	

14) Conc. Ext. Walks/SOG/Steps	$66,485.00	$13,619.00	$52,866.00	GN	
15) Underpinning Concrete	$39,668.00	$39,668.00	$0	GN	
16) Concrete Rebar/WWM	$51,049.00	$44,017.00	$7,032.00	GN	
17) Misc Metals/Structural	$555,000.00	197,278.00	$357,722.00	N	
18) Carpentry	$11,105.00	$0	$9,895.00	Y	$9,895.00
19) Waterproofing	$59.900.00	$14,060	$45,840.00	Y	$59,900.00
20) Caulking	$4,800.00	$0	$4,800.00	N	
21) Doors/Frames/Hardware (L&M)	$7,680.00	$0	$7,680.00	Y	$7,680.00
22) Aluminum Windows	$74,600.00	$0	$74,600.00	GY	$67,140.00
23) Resilient Flooring	$1,430.00	$0	$0		$0
24) Painting	$59,450.00	$0	$56,510.00	Y	$56,510.00
25) Specialties (L&M)	$2,900.00	$0	$0		$0
26) Elevator	$83,000.00	$8,300.00	$74,700.00	GN	
27) HVAC	$8,850.00	$6,705.00	$0		$6,705.00
28) Plumbing	$15,280.00	$6,434.00	$8,846.00	Y	$15,280.00
29) Electrical	$103,000.00	$58,876.00	$44,124.00	GY	$103,000.00
30) Railroad	$53,975.00	$53,975.00	$0	GY	$53,975.00
31) Crane	$33,600.00	$12,900.00	$20,700.00	Y	$33,600.00
TOTAL	$2,088,000.00	$973,758.38	$1,084,160.37		$976,563.75

(Ex. 491; N.T. 1972)

194. In his analysis, Mr. Cepko prepared separate columns for Payment Applications 1-5, totaling $973,758.38, which had been paid (less 10% retainage), and Payment Applications 6-11, totaling $1,084,160.37, which had not been paid. (Exs. 35, 491)

195. For each pay item, Mr. Cepko made a determination based on the documents provided to him as to whether payment was justified pursuant to PennDOT Publication 408 and/or the Construction Contract specifications. (Exs. 465, 491; N.T. 1973-78)

196. Mr. Cepko concluded that payment of specified items was justified if the documentation complied with either Publication 408 or the Construction Contract specifications. (Exs. 465, 491; N.T. 1973-78)

197. For each item, Mr. Cepko indicated as follows: “Y” for “yes” (meaning payment for the item was justified), “GY” for “gray yes” (meaning the documentation “might have been close” to meeting Publication 408 or Construction Contract specification standards), and “GN” or “gray no” (meaning that the standard was not met in his opinion “but maybe they could have done something or provided something to actually meet the specification”). (Ex. 491; N.T. 1973-78)

198. Mr. Cepko testified that an “N” indicated, “no”, that the documentation “did not meet either” the Publication 408 or the Construction Contract the Plaza specifications. (Ex. 491; N.T. 1974-75)

Payment for items not disputed by PennDOT.

199. Consistent with the Cepko Report, as well as PennDOT's testimony at trial, it appears that PennDOT does not now dispute that payment is justified for the following 19 items marked in the Cepko Report "Y" or "GY":

Item #	Y/GY/GN /N	Total Payment Potential
1) General Conditions	Y	$70,215.00
2) Bond	Y	$21,711.00
3) Insurance	Y	$16,743.75
4) Permit	Y	$22,709.00
5) Mercantile Tax	Y	$14,305.00
6) Earthwork	GY	$159,095.00
8) Landscaping	Y	$32,850.00
9) Fence	Y	$34,650.00
11) Masonry Restoration	Y	$190,600.00
18) Carpentry	Y	$9,895.00
19) Waterproofing	Y	$59,900.00
21) Doors/Frames/Hardware (L&M)	Y	$7,680.00
22) Aluminum Windows	GY	$67,140.00
24) Painting	Y	$56,510.00
27) HVAC		$6,705.00
28) Plumbing	Y	$15,280.00
29) Electrical	GY	$103,000.00
30) Railroad	GY	$53,975.00
31) Crane	Y	$33,600.00
TOTAL		$976,563.75

(Exs. 465, 491; N.T. 1961-62, 1971-78)

200. For five of these six pay items (Item Nos. 3, 9, 18, 24 and 27), Sordoni only billed for amounts less than the original contract amount. Accordingly, Mr. Cepko determined that payment was justified only for the lower amounts actually billed. (Exs. 465, 491)

201. Mr. Cepko also reduced the potential payment for Item #22 (Aluminum Windows) to $67,140 based on his determination that even though Sordoni's Payment Applications 6 – 11 included a request for payment of the total Construction Contract amount of $74,600 for this item, only 90% of the work had been completed. His testimony on this item indicates Pasonick's inspector, Bernie Kovacs, agreed with this, and Sordoni has not contested this last adjustment in its claim here. (Ex. 491; N.T. 1871, 2024-25)

202. Mr. Cepko indicated that payment of the Original Construction Contract Amount of $70,215.00 under Item #1, General Conditions, was justified. (Exs. 465, 491)

203. Mr. Cepko noted that Sordoni had been paid (in Payment Applications 1–5) $87,252.00 under "General Conditions," $17,037.00 above the Construction Contract amount for this item. (Exs. 465, 491; N.T. 2023-25)

204. Mr. Cepko testified that Bernie Kovacs of Pasonick told him that "General Conditions" had been "overbilled" and was "a mistake" which was ultimately corrected in an amended Payment Application 6, which showed a credit in the amount of $17,037.00. (Exs. 35, 243, 465, 491; N.T. 2023-25)

205. In accordance with Mr. Cepko's analysis, including the adjustments noted above, and taking into account an additional downward adjustment for unfinished electrical work (which we discuss below at Paragraph 393 to 397), PennDOT does not appear to dispute that payment for work performed by Sordoni is justified in the amount identified for "potential payment" by Mr. Cepko less the aforementioned electrical work adjustment of $10,300 or $966,263.75. (Exs. 465, 491; F.O.F. 193-204, 391-95)

Items for which PennDOT asserts Sordoni's documentation was deficient under the Construction Contract.

206. Mr. Cepko testified, and PennDOT now argues, that, payment was not justified for ten of the remaining twelve pay items: Item #7 (Paving/Surfacing) totaling $64,700; Item #10 (Masonry) totaling $141,500; Item #17 (Miscellaneous Metals/Structural) totaling $555,000; Item #20 (Caulking) totaling $4,800; Items #12 - #16 (various Concrete work) totaling $224,885; and Item #26 (Elevator) totaling $83,000, all listed as "no" or "gray no." (PennDOT's Proposed Findings of Fact at ¶¶ 98-176; Ex. 465; N.T. 1967-2001)

207. For two items in the original bid, Item #23 (Resilient Flooring) totaling $1,430 and Item #25 (Specialties L&M) totaling $2,900, no amount was billed by Sordoni and no amount was considered payable by Cepko/PennDOT. (Exs. 35, 491; N.T. 1973-2001)

#7 – Paving/Surfacing

208. Sordoni seeks payment for Item #7 (Paving/Surfacing) in the total contract amount of $64,700. (Exs. 35, 491)

209. PennDOT asserts that Sordoni did not comply with the specifications for asphalt/paving on the Project and would deny the entire $64,700 allocated to this pay item. (Exs. 80, 465, 491)

210. Specifically, PennDOT argues that the delivery tickets for the asphalt which was actually applied to the Bogart Place alleyway show a different mix design was used than the one which was initially approved by the architect. PennDOT also asserts that required testing of the asphalt was not performed (Exs. 80, 465, 491; N.T. 1979-81, 2369-71)

211. The Construction Contract specifications did not identify a particular asphalt mix design but required the contractor to submit technical data for proposed job mix designs to the architect. (Ex. 15 at Section 02741.1.4.A)

212. Mr. Cepko indicated that Sordoni submitted an asphalt mix design to the architect which was approved in September 2009, but then provided a different mix. (Ex. 465)

213. PennDOT's Mr. Cepko testified that the asphalt mix design used "may be fine" for pedestrian use, but he had concerns about possible "durability issues down the road." Mr. Cepko also acknowledged that "there's a potential that [the higher level mix design used] would be suitable." (N.T. 1980-82, 2057)

214. According to both Mr. Cepko and Mr. Mitchell, the asphalt mix design actually used may have adversely impacted the durability and/or longevity of the paving. (N.T. 1980-82, 2371-72)

215. In response, Pasonick's expert, Mr. Brian Dillman, testified that the asphalt mix actually used was a "stiffer mix" (called "Superpave") which would hold up better to more pedestrian and vehicular traffic than the approved mix design. (N.T. 2554-55)

216. Sordoni's asphalt supplier on the Project was a PennDOT approved supplier. (N.T. 1979)

217. The asphalt on the Project was to be installed on a pedestrian walkway, and the design specifications called for an asphalt design mix which was of a lower level than that which would be used for heavier traffic such as on an interstate highway. (N.T. 1979-81)

218. Pasonick's expert, Mr. Dillman, testified that there would be no reason to expect the higher level asphalt design mix used on the Project to decompact over time. (N.T. 2554-55)

219. PennDOT's expert, Mr. Mitchell, testified that field testing of the asphalt as it was installed on the Project was not performed. (N.T. 2369-71)

220. The Construction Contract specifications for Asphalt Paving at Section 02741.1.5.D calls for compliance "with materials, workmanship, and other applicable requirements of PA DOT Form 408 for asphalt paving work." (Ex. 15 at p. 292; N.T. 2538-42)

221. With respect to the testing of the asphalt, Mr. Dillman testified that testing was not required because of the limited amount and depth of asphalt installed (approximately 115 tons, 1 inch overlay). (Exs. 15, 810; N.T. 2538-42)

222. Mr. Dillman noted that PennDOT's Publication 408 permits visual inspection during installation in lieu of core testing where quantities of less than 400 tons and depths of less than 1.5 inches are installed. We agree. (Ex. 810; N.T. 2541-42; Board Finding)

223. Because the asphalt design mix used on the Project exceeded the approved design mix for strength and durability, and because we agree that the core testing referenced by PennDOT was not required under the applicable specifications for the amount and depth of asphalt installed, we find that Sordoni has shown that it documented and complied with the Construction Contract specifications for the asphalt/paving work here at issue in all material respects. (Exs. 15, 810; F.O.F. 208-222; Board Finding)

224. Because we have found that Sordoni complied with the Construction Contract specifications for asphalt/paving in all material respects, we find that Sordoni has established a factual basis for payment of the $64,700.00 it claims for this item. (Ex. 15; F.O.F. 208-223; Board Finding)

#10 – Masonry

225. With respect to the pay item for masonry (totaling $141,500), Mr. Cepko indicated in his report that Sordoni failed to comply with the Construction Contract specifications under Section 04810, in two particulars: 1) the absence of required submittals including shop drawings required under Para. 1.5.B. and a statement of compressive strength for the masonry required by Para. 1.5.H. and 2) the absence of preconstruction and field quality testing reports for concrete masonry units ("CMUs"), mortar and grout as specified in Paras. 1.6.D. and 3.9. respectively. (Exs. 15, 465)

226. Mr. Cepko indicated in his report that, while Pasonick "had certain things in the file for --- as far as architect approved products," he was unable to locate shop drawings for CMUs, Reinforcing Steel and fabricated flashing, which were required submittals under Para. 1.5.B. Mr. Cepko was also unable to find "a statement of average net-area compressive strength of masonry units, mortar type, and resulting net-area of compressive strength of masonry" required under Para. 1.5.H. (Exs. 15, 465)

227. However, Mr. Mitchell, in his first report (dated April 30, 2011) found that "Sordoni appeared to have provided the required submittal documentation" for masonry, and included copies of documents submitted by Sordoni in his report, including certain shop drawings and a certification from Keystone Concrete Block & Supply Company certifying that the CMUs supplied met the average compressive strength requirements for the Project. (Ex. 81; N.T. 2499-2500)

228. Mr. Cepko did not address the lack of submittals for Para. 1.5.B and 1.5.H in his testimony at hearing. (N.T. 1984-85)

229. Because Mr. Mitchell, in his report issued 11 months after the Cepko Report, found that "Sordoni appeared to have provided the required submittal documentation" for masonry, and included copies of these documents in his report, we conclude that Sordoni has provided the submittals required under Para. 1.5. (Ex. 81; F.O.F. 225-228; Board Finding)

230. Mr. Cepko, in his report, also identified the absence of preconstruction testing of CMUs, mortar and grout as required under Section 04810, Para. 1.6.D., and the absence of field

quality testing of CMUs, mortar and grout as required under Para. 3.9. of the same section in the Construction Contract specifications. (Ex. 465)

231. Mr. Mitchell also noted that there was an absence of field quality control tests by an independent testing agency as required under Para. 3.9. in his report. (Ex. 81 at p. 29)

232. Although not mentioned in his report, Mr. Mitchell also testified that he was unable to find any record of the required preconstruction testing under Para. 1.6.D. having been performed. (N.T. 2509-10)

233. Para. 1.6.D. of Section 4810 of the Construction Contract specifications (addressing Unit Masonry Assemblies) provided that the Owner (i.e. the City) was to "engage a qualified independent testing and inspection agency to perform preconstruction testing" including a concrete masonry unit test, mortar test, and grout test (compressive strength). (Ex. 15 at p. 383)

234. Para. 3.9 provided that the contractor was to engage a "qualified independent testing and inspection agency" to perform certain specified field tests, including a concrete masonry unit test, a mortar test and a grout test. (Ex. 15 at p. 399)

235. Specifically required under this paragraph were field tests of CMUs (Subparagraph 3.9.D.) "per ASTM C 140"; Mortar (Subparagraph 3.9.E.) "per ASTM C 780"; and Grout (Compressive Strength) (Subparagraph 3.9.F.) "per ASTM C 1019." (Ex. 15 at p. 399)

236. The City did not engage a qualified testing agency to perform any of the required preconstruction tests under Para. 1.6.D. for masonry, and no such preconstruction testing was done. (Exs. 81, 465; N.T. 930-31, 1100-01, 2509-10)

237. Sordoni's testing subcontractor, Midlantic, performed field testing of the grout installed in the wall assemblies on February 20, 2009. (Exs. 76 at p. 44, 465; N.T. 1024-25)

238. A report done by Midlantic included field testing results on grout installed in the wall assemblies on February 20, 2009, which showed a 28 day strength of 3378 psi, slightly below the Construction Contract specification requirement of 3500 psi. (Exs. 15, 76 at p. 44; N.T. 1246-50)

239. Sordoni's Project Manager, Mr. Shedlock, testified that the preconstruction testing required under Para. 1.6.D. was not done because the Owner never hired a testing firm, and he was unaware of any masonry field testing under Para. 3.9. having been performed other than the grout tests identified above. (N.T. 930-31, 1024-25)

240. Because no preconstruction testing was performed on the concrete masonry units, mortar and grout as required by Para. 1.6.D of Section 04801 of the Construction Contract specifications and because no field testing of the CMUs or mortar was performed (as required by Para. 3.9.), we find that Sordoni has failed materially to show that it met the Construction

Contract specifications and the requisite documentation for preconstruction and field testing of the masonry work performed on the Project. (F.O.F. 230-239; Board Finding)

241. Because Sordoni failed materially to show that it met the Construction Contract specifications and the requisite documentation for preconstruction and field testing of the masonry work performed on the Project, Sordoni has failed to establish factual support for its $141,500 claim for this masonry work. (F.O.F. 230-240; Board Finding)

#17 – Miscellaneous Metals/Structural (Steel)

242. Sordoni seeks payment in the amount of $555,000 for Item #17, Miscellaneous Metals/Structural. This pay item encompasses essentially all the steel installed on the Project (with the notable exception being the rebar included in the concrete work). (Exs. 35, 465, 491)

243. PennDOT asserts that Sordoni's submittals did not meet the quality assurance or the source documentation requirements for steel installed on the Project and consequently refuses payment on any of the $555,000 for this pay item. (PennDOT's Proposed Findings of Fact at ¶¶ 136-140; Exs. 81, 465, 491)

244. PennDOT identifies three particular areas regarding the steel installed on the Project where it says Sordoni did not comply with the Construction Contract specifications: submittals generally, the federal Buy America Act, and shop testing of fabricated steel items. (Exs. 81, 465, 491)

Steel Documentation and Timing Issues Generally

245. PennDOT asserts generally that Sordoni's steel documentation was incomplete and not properly presented. (PennDOT's Proposed Findings of Fact at pp. 21-22)

246. PennDOT's expert, Mr. Mitchell, complained that, while each section of the Construction Contract specifications for steel (Section 5120 for Structural Steel, Section 5310 for Steel Deck, Section 5511 for Metal Stairs, Section 5521 for pipes and tube steel) had its own submittal requirements, the documentation that was submitted "was intermixed" making his review of the submittal documentation difficult. (Ex. 81; PennDOT's Proposed Findings of Fact at ¶ 137)

247. This "lack of organization of the steel documentation and submittals," PennDOT argues, "make[s] it difficult to 1) ascertain the trail of particular pieces of steel used on the project; and 2) determine whether the submittals or transmittals were sent to the correct entities." (PennDOT's Proposed Findings of Fact at ¶ 138; N.T. 2389-90)

248. PennDOT also asserts that a number of submittals for steel components such as mill certifications and delivery slips were not submitted to PennDOT timely and therefore fail to support Sordoni's payment requests. (PennDOT's Proposed Findings of Fact, ¶ 137)

249. In contrast, Kenneth Ruby, Hemmler + Camayd's project manager for the Project, testified that, among other things, the required steel mill test reports were provided to Hemmler + Camayd for review and approval. (N.T. 1682, 1691-92)

250. Mr. Ruby also concluded that Sordoni provided all submittals necessary to perform its construction work in a satisfactory manner as required by the Project specifications. (N.T. 1682)

251. Robert McGregor, president of Sordoni's steel supplier, McGregor Industries ("McGregor"), and Sordoni's steel expert, presented voluminous records which documented the steel and steel work provided to the Project. This documentation included purchase orders, material/mill reports and certifications, shop drawings, erection drawings and weld and bolt certifications for the Board's consideration. (Ex. 80; N.T. 1383-1444, 1448-1503)

252. As we have previously found, Section 112 of PennDOT Publication 408 (one of the 14 "specially designated provisions of Publication 408 specifically incorporated into the Construction Contract specifications) is the only general documentation provision in the combined Construction Contract/Reimbursement Agreement which can be construed to require the production of construction documents and records to PennDOT (as opposed to the Project architect Hemmler + Camayd) and then only within a "reasonable time" after a written request for same is made by PennDOT. (Exs. 11, 15, 30; F.O.F. 126-29)

253. As we also found previously, the only written request from PennDOT indentifying and requesting documentation presented to the Board at hearing was Mr. Cochrane's letter of November 10, 2009. As Mr. Cochrane then testified, the materials documentation he was requesting in that letter was for PennDOT Form CS-4171 "certifications" (which were not required by the specifications). (Ex. 292; F.O.F. 140-45, 168)

254. With the exception of Section 1105.01(e)(6) which we discuss in Paragraphs 255 to 266 below, none of the Construction Contract specifications relating to submittals for steel installed on the Project even suggested that these submittals were to be made contemporaneously to PennDOT with construction/installation. (Ex. 15 at §§ 5120, 5310, 5500, 5511, 5521; Board Finding)

255. In addition to Section 112, the Construction Contract specifications specifically incorporated Section 1105.01(e)(6) of PennDOT Publication 408. This provision did require Sordoni to provide a PennDOT "shop inspector" with delivery tickets, invoices and mill certificates for steel to be used on the Project at or about the time it arrived at the steel fabrication shop before cutting and assembly. (Exs. 15 at p. 27, 30)

256. Section 1105.01(e)(6) of PennDOT Publication 408 provides as follows:

> **6. Mill Orders and Shipping Statements.** Furnish copies of mill orders and shipping statements, as directed. Show the weights of the individual members on the statement, if directed. Assure that the fabricator presents the

> Department's shop inspector with a copy of the shipping invoice to be stamped for verification of inspection and approval of steel items prior to shipment. Forward the stamped copy with the shipment for the project file. Mill certifications will be reviewed, approved and returned to the fabricator by the shop inspector.

(Exs. 15 at p. 27, 30).

257. The language of Section 1105.01(e)(6) contemplates that a PennDOT shop inspector will be at the steel fabrication shop to review mill orders and shipping statements for the steel being fabricated in order to confirm, inter alia, the U.S. sourcing of these steel items. (Exs. 15 at p. 27, 30; Board Finding)

258. Section 106.10 of Publication 408 (also explicitly incorporated into the specifications) contains a requirement somewhat similar to Section 1105.01(e)(6) by cross-reference to Section 106.01 for steel delivered directly to the worksite. (Exs. 15 at p. 27, 30 at p. 54)

259. This provision contemplates contemporaneous delivery of the mill certifications and shipping invoices to the PennDOT "Inspector-in-Charge" on the job site for steel products delivered directly to the job site. (Ex. 30 at p. 54)

260. PennDOT never identified a shop inspector or "inspector-in-charge" for the Project and never arranged for an inspector to be present when steel was to be delivered or fabricated at McGregor's facility (i.e. the steel fabrication shop for the Project). (N.T. 1442-43; Board Finding)

261. Nonetheless, PennDOT (or at least Mr. Mitchell) seems to argue that Sordoni's (and/or McGregor's) failure to notify PennDOT in advance of steel work beginning at the fabrication shop should preclude Sordoni from later attempts to provide mill certifications, mill test reports, steel invoices and other evidence to establish compliance with the Construction Contract specifications for the steel products used on the Project. (Ex. 81)

262. At job conference #4, held January 20, 2009, Sordoni did discuss and note that structural steel shop drawings would be forthcoming. This indicated that steel fabrication would shortly follow. (Ex. 507 at p. 10; Board Finding)

263. Although no PennDOT representative attended the job conference on January 20, 2009, minutes of that meeting were sent to PennDOT representatives. (Ex. 507 at p. 10)

264. The Construction Contract specifications did not specifically incorporate Section 1105.01(e)(1) of Publication 408. This "complimentary" provision to 1105.01(e)(6) would have required Sordoni to notify PennDOT of when in-shop steel fabrication was to take place so that PennDOT personnel could have been at the shop to inspect delivery and fabrication of the pertinent steel items. (Exs. 15, 30; Board Finding)

265. Because the Construction Contract specifications approved by PennDOT failed to include a provision requiring Sordoni to notify PennDOT in advance of when in-shop steel fabrication was to take place, and because no PennDOT "inspector-in-charge" was ever identified for the job site and no PennDOT "shop inspector" was identified by PennDOT or present at the McGregor facility when steel was delivered and fabricated despite PennDOT's having received Project meeting minutes indicating steel fabrication was imminent, we find that PennDOT's own acts/omissions actively interfered with and prevented Sordoni's ability to comply with Section 1105.01(e)(6) and Section 106.10 in a timely manner. (Exs. 15, 30; N.T. 1442-43; F.O.F. 252-265; Board Finding)

266. Mill certifications, mill test reports and invoices of the type actually required by the specifications were subsequently provided, in substantial part, to Mr. Cepko by the time of his review. (Exs. 80, 89, 465)

267. Mill certifications, test reports and orders together with shipping invoices, other documents and testimony were provided at hearing by the steel fabricator, McGregor, to match the documentation with the steel items actually provided to the Project. (Exs. 80, 81, 89: N.T. 1383-1503; F.O.F. 251, 279-80)

268. Given Mr. Cochrane's mistaken request for PennDOT Form CS-4171 with regard to steel products; the fact that PennDOT's own acts/omissions actively interfered with and prevented the ability of Sordoni or McGregor to timely submit steel documentation to a PennDOT "shop inspector" and/or "inspector-in-charge" who were not made available; the fact that mill certifications and invoices of the type actually required by the applicable Project specifications were subsequently provided, in substantial part, to Mr. Cepko by the time of his review; and the fact that the remaining deficiencies in steel documentation identified in Mr. Cepko's Report (and/or Mr. Mitchell's reports) were not communicated to Sordoni (or the City) until after the filing of Sordoni's claim, we do not find adequate factual basis for PennDOT's assertion that the steel documentation provided to PennDOT during the course of the Project, or to the Board after the Project, is untimely pursuant to Publication 408, Section 112 or any other provision of the Reimbursement Agreement or Construction Contract. (Exs. 80, 81, 465; F.O.F. 142-46, 153-54, 171, 179-80, 251, 253; Board Finding)

269. The steel documentation and testimony presented at hearing from Mr. McGregor and others provided adequate evidence that the steel invoices, mill test reports and certifications Sordoni has offered to PennDOT and the Board actually do tie-in to the steel it used on the Project and, with the exceptions noted below in Paragraphs 271 to 317, show compliance with the applicable Construction Contract steel specifications.[5] (Exs. 80, 81, 85, 465; F.O.F. 265-67, 271-317)

[5] We note agreement with PennDOT that the absence of a PennDOT inspector at the fabrication shop to observe the delivery of the steel to the shop (and its subsequent fabrication) has unduly complicated the process of confirming that the mill test reports and certifications (which include certification of U.S. origin) provided by Sordoni are truly those for the steel products supplied to the Project. Had a PennDOT inspector been at the shop to observe the delivery and fabrication of the steel, he or she could have visibly matched the steel items with the product delivery ticket and mill test reports which accompany the steel items upon delivery (and matched the related sales invoice to the steel items as well). Similarly, the inspector could then have observed these steel items through fabrication.

270. Upon review of: 1) the steel documentation and procedures actually required by the Construction Contract specifications and 2) the steel work submittals, documentation and testimony provided by Sordoni, McGregor and others, coupled with PennDOT's incorrect insistence on full compliance with all Publication 408 steel documentation provisions, cause the Board to find that, with the important exceptions discussed below in Paragraphs 271 to 317, Sordoni has complied with the applicable steel submittal specifications set forth in the Construction Contract. (Exs. 15, 80, 81, 465; N.T. 1383-1503; F.O.F. 104-129, 245-269, 271-317; Board Finding)

Buy America Requirements

271. In addition to its assertion that Sordoni failed to comply with the Construction Contract specifications regarding form and timing of steel product submittals generally, PennDOT asserts that Sordoni has still not shown that it complied with the federal Buy America Act provisions incorporated into the Construction Contract. (PennDOT's Proposed Findings of Fact at ¶¶149-163)

272. The Construction Contract specifications specifically incorporated Section 106.10 of Publication 408 which required compliance with the Buy America Act, 23 U.S.C. § 313. (Ex. 15 at p. 27)

273. The Buy America Act requires that all "steel, iron, and manufactured products" used on projects receiving federal monies be produced in the United States. (Ex. 30, p. 54)

274. Section 106.10 of Publication 408 specifically states that some foreign steel or iron products may be used, "provided the cost of such products as they are delivered to the project does not exceed 0.1% of the total contract amount, or $2,500, whichever is greater." (Ex. 30 at p. 54)

275. This provision is consistent with the federal regulations promulgated under the Buy America Act at 23 C.F.R. 635.410, as cited in Section 106.10 of Publication 408, which provide that the Buy America requirements "do not prevent a minimal use of foreign steel or iron materials, if the cost of such materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or $2,500, whichever is greater." (23 C.F.R. 635.410)

276. PennDOT, through the reports and testimony of Mr. Cepko and Mr. Mitchell, identified problems with steel source documentation provided by Sordoni/McGregor. Specifically, they note the absence of a paper trail to definitely match all the steel pieces used on the Project with all the documentation which would have identified the pieces as U.S. or foreign made. (Exs. 81, 89, 465)

However, we do not agree with PennDOT that because this did not occur, the whole lot of steel work on the Project must be forfeit if Sordoni can provide the Board with persuasive evidence to connect the mill test reports and certifications to the steel used on the Project.

277. Mr. Cepko observed that there is no precise paper trail to match the steel pieces with all the documentation provided by Sordoni/McGregor other than by size of the item (meaning no fool proof paper trail with identifiers such as heat numbers on both product and documents). (Ex. 465 at p. 8)

278. Sordoni, primarily through its steel supplier (McGregor), provided the Board with considerable documentation and testimony respecting the sources of steel used on the Project. This documentation included purchase orders, mill test reports/certifications and shop drawings for various pieces of steel used on the Project, as well as testimony tying in the documentation presented to the steel products covered by Pay Item #17 (Miscellaneous Metals/Structural) used on the Project. (Exs. 80, 89; N.T. 1388-1494)

279. Among other things, Mr. McGregor provided a listing of the "main members" of the steel fabrication provided to the Project and represented that all of these pieces of steel and all of the smaller angle irons, bolts and miscellaneous pieces of steel used in the steel work fabrication (and delivered to the Project site) were covered by the purchase orders, mill test reports and mill certifications presented in his report. (Exs. 80, 89; N.T. 1388-1494)

280. The Board found Mr. McGregor's testimony sufficiently credible to establish that the documentation presented in his report (Ex. 80) covered the steel products actually used on the Project and to establish that this documentation showed the sourcing/origin of the steel used on the Project. This testimony and documentation showed, with two small exceptions, that the steel supplied to the Project was made in the United States. (Exs. 80, 89; N.T. 1388-1494; F.O.F. 278-79; Board Finding)

281. According to the documentation provided by Sordoni and its steel supplier (McGregor), a limited amount of steel used on the Project was manufactured outside the U.S. These pieces originated from Canada and consisted of two steel tubes with a cost of $4,656.71, and miscellaneous bolts with an approximate value of $1,062, for a total value of $5,716.71 attributable to non-United States steel used on the Project.[6] (Ex. 80, pp. 102, 149; N.T. 1434-35; 1527-28, 2219-20, 2417; PennDOT's Proposed Findings of Fact and Brief at pp. 24-25, 58)

282. $5,716.71 is more than double the $2,500 limit for foreign steel allowed under 23 C.F.R. 635.410, and is more than double $2,088, which represents 0.1% of Sordoni's total Construction Contract number of $2,088,000. (Exs. 15 at p. 27, 30, 80; F.O.F. 9, 11, 14, 193, 274-75)

283. PennDOT takes the position that Sordoni's use of non-United States steel violated the Construction Contract specifications, which explicitly incorporated Section 106.10 of Publication 408, because the cost of foreign steel products used on the Project exceeded both 0.1% of the total Construction Contract amount and the $2,500 foreign steel cost limit in Section 106.10 and 23 C.F.R. 635.410. It further asserts that this use of $5,716.71 worth of non-United

[6] PennDOT, in its posthearing brief, stipulated that the foreign steel used on the Project comprised the steel tubes costing $4,656.71 and "fasteners" costing $1,062. (PennDOT's Proposed Findings of Fact and Brief, ¶ 154, pp. 24-25, 58).

States steel on the Project fully justifies its refusal to pay any of the $555,000 worth of steel installed on the Project. (N.T. 2292-94; PennDOT's Proposed Findings of Fact and Brief at pp. 24-25, 60)

284. Sordoni responds that the Buy America Act should not preclude payment for its steel work on the Project, citing two exceptions to its application: 1) Sordoni asserts that application of the Buy America Act requirements to the case at hand would be inconsistent with the public interest and is thus to be excepted from this restriction under 23 U.S.C. § 313(b)(1); and 2) Sordoni also argues to be excepted because the foreign steel products used on the Project were "not produced in the United States in sufficient and reasonably available quantities and of a satisfactory variety" under 23 U.S.C. § 313(b)(2). (Sordoni's Proposed Findings of Fact at ¶¶ 431-442)

285. The Buy America Act, 23 U.S.C. § 313, provides in pertinent part as follows:

> (a) Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or this title and administered by the Department of Transportation, unless steel, iron, and manufactured products used in such project are produced in the United States.
> (b) The provisions of subsection (a) of this section shall not apply where the Secretary finds –
> (1) That their application would be inconsistent with the public interest;
> (2) That such materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory variety; or
> (3) That inclusion of domestic material will increase the cost of the overall project by more than 25 percent.

(23 U.S.C. § 313)

286. The federal regulations promulgated under the Buy America Act at 23 C.F.R. § 635.410(c)(1) provides that a state may request a waiver of the Buy America provisions if:

> (i) The application of those provisions would be inconsistent with the public interest; or
> (ii) Steel and iron materials/products are not produced in the United States in sufficient and reasonably available quantities which are of a satisfactory quality.

(23 .F.R. § 635.410(c)(1))

287. Section 635.410(c)(2) provides that requests for such waivers "must be submitted in writing to the Regional Federal Highway Administrator (RFHWA) through the FHWA Division Administrator." (23 C.F.R. § 635.410(c)(2))

288. The regulation also requires that such waiver requests "must be submitted sufficiently in advance of the need for the waiver in order to allow time for proper review and action on the request." (23 C.F.R. § 635.410(c)(2))

289. Sordoni appears to suggest that PennDOT may have received an FHWA communication along the lines of a waiver on March 19, 2010, in an email Thomas Cutrona of the FHWA sent to Richard Cochrane of PennDOT relative to the Project and the Buy America provisions. The email in question, dated March 19, 2010, reads in its entirety as follows:

> Morning, Dick.
>
> As per your request and inquiry Monday:
>
> 1. "Buy America" does not include aluminum unless it is an alloy containing steel.
> 2. We have not put a "hold" on payments on the Scranton Plaza. Therefore pay as you see fit.

(Ex. 406; N.T. 2350-51)

290. No evidence was offered that Mr. Cutrona, a District Engineer with the FHWA, was the Regional Federal Highway Administrator for the FHWA (i.e. the person authorized to receive waiver requests) and it is far from clear that the memo related in any way to a request to waive the Buy America provisions. (N.T. 396-97, 636)

291. PennDOT did not request a waiver of the Buy America requirements for steel used on the Project to the FHWA. (N.T. 2316-17, 2490)

292. Sordoni has not identified, and the Board has not found, what, if any "public interest" would be harmed by application of the Buy America Act to the Project. (Sordoni's Post Trial Brief at p. 18; Board Finding)

293. On May 1, 2009, McGregor submitted a "Request for Information" to Sordoni stating that it had found the steel tubes in question to be manufactured only in Canada. (Ex.80, p. 157)

294. Robert McGregor did not testify directly what he had done in this case to determine that these tubes were not available domestically. Rather, Mr. McGregor explained his general practice, which was to seek direction from the contractor after contacting six warehouses and finding the needed product was only available from a foreign manufacturer. (N.T. 1420-22)

295. Mr. McGregor did not adequately pursue the waiver requirements process under the Buy America Act. This process includes, inter alia: 1) posting of a notice of a waiver request on the FHWA web site, followed by a 15-day public comment period; and 2) publication in the Federal Register of a notice documenting the FHWA's finding regarding the waiver, followed by a second 15-day public comment period.[7] (See FHWA web page titled "Notice of Buy America Waiver Request" at http://www.fhwa.dot.gov/construction/contracts/waivers.cfm; F.O.F. 293-294; Board Finding)

[7] The FHWA web page titled "Notice of Buy America Waiver Request" (referenced by the FHWA in its Buy America Act Q and A web page), which describes the FHWA Notice, Comment and Review Process for such a waiver.

296. No credible evidence was presented that the foreign-manufactured steel products used on the Project were not available domestically or that anyone requested a waiver from the FHWA on that basis. (N.T. 2316-17, 2490; F.O.F. 293-94; Board Finding)

297. Because the Construction Contract specifications explicitly incorporated Section 106.10 of Publication 408 which required compliance with Buy America Act; the cost of the foreign steel used by Sordoni on the Project exceeded the $2,500 limit for foreign steel allowed under 23 C.F.R. § 635.410; and because insufficient evidence was presented that the foreign-manufactured steel products used were not available domestically or that anyone requested a waiver from the FHWA on that basis, Sordoni did not meet the requirements of the Buy America Act or the Construction Contract specifications with regard to all the steel work on the Project. (F.O.F. 271-96; Board Finding)

298. Because we have found that there was no waiver of the Buy America Act under the "public interest" or the "domestically unavailable" exceptions, Sordoni's use of $5,716.71 worth of non-United States steel on the Project was contrary to Section 106.10 of Publication 408 and the requirements of the Buy America Act, whose terms were specifically incorporated as part of the Construction Contract specifications. (F.O.F. 271-97; Board Finding)

299. In denying reimbursement for the Miscellaneous Metals/Structural pay item on the Project, PennDOT made a determination that Sordoni had not complied fully with the Buy America Act and that, therefore none of the $555,000 worth of steel work supplied to the Project was reimbursable. (N.T. 2292-95)

300. PennDOT's Rebecca Burns testified that she made the determination that no reimbursement could be made for any of the steel on the Project, in part, by referring to questions and answers posted on the FHWA's website regarding the Buy America Act. (N.T. 2292-94)

301. The questions and answers (Q&A) page on the FHWA's website includes the following:

> **Q# 48.** How does FHWA resolve an after-the-fact discovery of an inadvertent incorporation of foreign iron and steel products into a Federal-aid project?
>
> **A# 48**. For resolving an after-the-fact discovery of incorporated foreign iron and steel products exceeding the minimal use amount (the greater amount of $2,500 or 0.1% of the contract value), FHWA will review the following information to determine the appropriate resolution:
>
> i. The state's material certification procedures for determining Buy America compliance.
> ii. Degree of diligence by the State DOT and contracting agency in ensuring Buy America compliance.
> iii. Contract provisions prescribing Buy America requirements.

iv. Availability of domestic iron and steel products or its equivalent at the time when excess foreign iron and steel products were incorporated into the project.
v. Issues associated with removal and replacement with domestic iron and steel products during construction/completion.

With the Headquarters' concurrence, available options based on the conclusion of the reviews include the following:

a. Remove the excess foreign iron and steel products and replace with domestic iron and steel products.
b. Make the non-compliant iron and steel products Federal-aid non-participating.
c. In instances where there is evidence of carelessness, negligence, incompetence, or understaffing on the part of the contracting agency, the Division Office may determine that all project costs are ineligible.

(http://www.fhwa.dot.gov/construction/contracts/buyam_qa.cfm; Board Finding)

302. The foregoing Q&A on the FHWA's website referenced by PennDOT presents options for dealing with an after the fact discovery of foreign iron or steel on a project. These options include finding that the non-compliant iron or steel products be considered non-participating for federal aid. (F.O.F. 300-301)

303. The Board finds the result urged by PennDOT (i.e. requiring Sordoni to forfeit payment for the entire $555,000 in steel work on the Project due to Sordoni's use of foreign steel costing $5,716 or approximately 1% of the total steel work on the Project) would be wildly draconian, in essence constituting a substantial forfeiture or unreasonable penalty upon Sordoni in the instant case for this minor error. The unreasonableness and punitive nature of PennDOT's position is further emphasized by the fact that this result is not required under the express terms of the Buy America Act, its regulations, or the guidance provided by the FHWA. (F.O.F. 299-302; Board Finding)

304. The Board finds that a reasonable adjustment to Sordoni's compensation for the Miscellaneous Metals/Structural pay item would be to consider the cost of the non-domestically produced steel on the Project ($5,716.71) to be "Federal-aid non-participating" and non-conforming to the Construction Contract rather than require Sordoni to forfeit the remaining value of the U.S. steel and steel work provided to the Project ($549,283.29) under the Pay Item #17 (Misc Metals/Structural). (F.O.F. 299-303; Board Finding)

Steel Shop Testing

305. PennDOT also asserts that Sordoni failed to comply with applicable Construction Contract specification requirements related to inspection and testing of steel fabrication work performed in McGregor's shop prior to installation of the steel on the Project. (PennDOT's Proposed Findings of Fact at ¶¶ 141, 142)

306. Most relevantly, PennDOT asserts that Sordoni "had an independent duty to provide independent shop inspection of structural steel" during the shop fabrication process under Section 5120 of the Construction Contract specifications, and that its failure to do so was a material failure precluding Sordoni's right to payment for the steel work on the Project under the Pay Item #17 (Misc Metals/Structural). (PennDOT's Proposed Findings of Fact and Brief at pp. 23-24)

307. Section 05120, Para. 2.8. of the Construction Contract specifications provides that the contractor is to "Engage an independent testing and inspection agency to perform shop tests and inspections and prepare test reports on the structural steel fabrications provided to the Project." (Ex. 15 at p. 409)

308. Subparagraph 2.8.C. specified further that shop-bolted connections were to be tested according to "RCSC's 'Specifications for Structural Joints Using ASTM A 325 or A 490 Bolts'." (Ex. 15 at p. 409)

309. Subparagraph 2.8.D. expressly required that shop-welded connections were to be visually inspected by the independent testing agency and tested by the independent testing agency using one of four specified weld inspection test procedures. Specifically, in addition to visual inspections, shop welded connections were to be tested and inspected in one of the following ways to be chosen at the testing agency's option: 1. Liquid Penetrant Inspection; 2. Magnetic Particle Inspection; 3. Ultrasonic Inspection; or 4. Radiographic Inspection. (Ex. 15 at p. 409)

310. The clear purpose behind the foregoing requirements was to have an independent inspector visually inspect the welded and bolted connections during the steel fabrication process in the shop and perform one of the specified tests on these welded connections in order to ensure the strength and quality of these shop connections before these items of fabricated structural steel were installed on the Project. (Ex. 15 at p. 409; F.O.F. 307-09; Board Finding)

311. PennDOT's Mr. Cepko and Mr. Mitchell both reported that they found no record of independent shop inspections or testing of bolts or welds taking place during the steel fabrication at McGregor's shop. The evidence adduced at hearing confirms that no independent shop-testing agency was retained by Sordoni (or the steel fabricator, McGregor) and no such weld or bolt tests (by an independent testing agency) were done for any of the steel fabrication work performed in the shop. (Exs. 81, 465; N.T. 1014-15, 1902-05, 2192, 2493-94)

312. Sordoni points out that Midlantic was retained to perform in-place steel inspection services, and did perform visual weld and bolt inspections at the Project site. (Ex. 80, pp. 106-107; Sordoni's Proposed Findings of Fact at ¶ 210)

313. Although Midlantic's Mr. Burns testified that Midlantic performed visual inspections of welded and bolted connections performed in the field, he did not report that inspections of such connections performed in the shop were made. Neither did Mr. Burns suggest that the visual inspections he performed in the field complied with specifications 05120.2.8.C. or D. required for the shop fabrications. (N.T. 1160-63)

314. The in-shop bolt testing performed by McGregor and referred to by Mr. McGregor as a "Skidmore" test was not described adequately for the Board to determine if it matched the detail or thoroughness of the bolt tests required by the Construction Contract specifications at 05120.2.8.C and, in any event, was not done by an independent testing entity as required by the specifications. Additionally, no evidence was provided that McGregor or anyone else performed testing of the shop-welds that matched the detailed type and thoroughness prescribed by Specification 05120.2.8.D. (Exs. 15 at p. 409, 80 at pp. 55-62; N.T. 1394-1410, 1417-18, 1436-37)

315. Under the fact and circumstances described above at Paragraphs 305 to 314, we cannot say with any degree of conviction that the structural steel fabricated for the Project with respect to the shop welds and bolted connections complies with the Construction Contract specifications for the structural steel work required on the Project. (F.O.F. 305-314; Board Finding)

316. Neither Sordoni's payment applications nor other evidence presented at hearing included a breakdown or means of distinguishing the cost of the structural steel versus non-structural steel (or the shop fabricated versus field assembled steel) provided for the Project. (Exs. 35, 465, 491; Board Finding)

317. Sordoni's failure to show compliance with the documentation or testing requirements of Section 05120, Para. 2.8 of the Construction Contract specifications, combined with its failure to provide the Board with a breakdown or means of distinguishing the cost of the structural steel versus non-structural steel (or the shop fabricated versus field assembled steel) provided for the Project precludes our ability to distinguish what portion, if any, of the value of Sordoni's work on Pay Item #17 (Misc Metals/Structural) steel work performed on the Project was performed in compliance with the Construction Contract specifications. (F.O.F. 305-316; Board Findings)

#20 – Caulking

318. Mr. Cepko stated in his report that there was "Nothing on file - no catalog cuts, approvals or invoices" for the $4,800.00 caulking payment request. Mr. Cepko says nothing further on this issue in his report and does not address this alleged discrepancy in his testimony at hearing. (Exs. 465, 491; N.T. 1955-2072)

319. Sordoni presented two documents in support of the caulking payment request: a letter from Gibble Construction, Inc., dated May 11, 2010, confirming that they used "four buckets of silicone sealant along with six color backs and four hundred feet of closed cell backer rods on the Project." The letter references the invoice for those materials. Sordoni also presented product descriptions for Vulkem 116 polyurethane sealant used on the Project, which were marked as approved by Ken Ruby of Hemmler + Camayd on August 6, 2009. (Exs. 76 at pp. 88-90, 84 at pp. 60-62; N.T. 938-39, 1595-97)

320. In his supplementary report (Ex. 96) Mr. Mitchell acknowledged the above documents, commenting only that he found "no proof" that the documents were "submitted to the Architect contemporaneously." He did not address Mr. Cepko's comments on caulking in his testimony at hearing. (Ex. 96 at p. 11; N.T. 2353-2510)

321. We find the documentation provided by Sordoni adequately confirms that the caulking in the amount of $4,800.00 complied with the Construction Contract specifications for this item. (Exs. 15, 76, 84; F.O.F. 318-20; Board Finding)

 # 12 - #16 – Concrete

322. Of the payment items marked as "gray no" by Mr. Cepko, PennDOT questioned documentation for various aspects of the concrete work on the Project (Items #12 - #16) totaling $224,885. (Exs. 81, 465, 491)

323. For Items # 12 - #15 (totaling $173,836) PennDOT argues that Sordoni "did not meet the quality assurance specifications for much of the concrete work it performed." (PennDOT Proposed Findings of Fact at ¶ 119)

324. Specifically, both Mr. Cepko and Mr. Mitchell assert that Sordoni failed to comply with the Construction Contract specifications in two particulars: 1) laboratory tests performed on several concrete pours indicated compressive strength which did not meet the Construction Contract specifications at Section 03300, Para. 2.13 and 2) no testing of field-cured concrete was performed as required by Subparagraphs 3.16.C.7. and 8 of this same section. (Exs. 81, 465)

325. Additionally, Messrs. Cepko and Mitchell both complain that Sordoni did not provide adequate proof that the mill certificates/test reports provided by Sordoni for Pay Item #16 (Concrete Rebar/WWM) totaling $51,049 pertained to the concrete rebar and wire mesh actually used on the Project. (Exs. 81, 465)

326. In addition to calling into question the quality of the rebar and mesh supplied to the Project, this failure to connect the mill certificates/test reports presented by Sordoni to the steel rebar and mesh actually used on the Project would represent a failure to show that this steel was of U.S. origin as required by the Buy America Act and Construction Contract specifications. (Exs. 15 at pp. 25-26, 81, 465; F.O.F. 285, 325; Board Finding)

Compressive Strength Issues

327. Section 03300, Para. 2.13. of the Construction Contract specifications required minimum 28-day compressive strengths of 3,000 psi. for footings and 4,000 psi for foundation walls, slabs-on-grade, suspended slabs, and concrete toppings. (Ex. 15 at pp. 343-44)

328. With respect to PennDOT's argument relating to the compressive strength of certain specified pours, PennDOT asserts that concrete tests provided by Sordoni for pours occurring on December 26, 2008; June 4, 2009 and August 5, 2009 failed to meet the

compressive strength required under the Construction Contract specifications. (PennDOT's Proposed Findings of Fact at ¶¶ 123-29)

329. On December 26, 2008, 1 CY of concrete was poured near Building # 518. (Ex. 760 at p. 380)

330. Though the Construction Contract specifications (at Section 02751, Para. 3.16.C.1.) only require concrete testing when a day's pour exceeds 5 CYs, Sordoni prepared test cylinders from the December 26 pour which ultimately tested at compressive strengths of 2,918 psi after 28 days and 3,042 psi after 56 days. (Exs. 15 at p. 356, 76 at pp. 41, 51)

331. The concrete poured on December 26, 2008 was used as a replacement for unsuitable soils. (N.T. 1304-06)

332. While the Project concrete specifications do not address compressive strength requirements for concrete used to replace unsuitable soils, Midlantic's Timothy Burns (also Sordoni's concrete expert) testified without contradiction that industry standards hold that strength of 2,500 psi is adequate for such an application. (N.T. 1303-07)

333. Because the concrete poured on December 26, 2008 was for use as a replacement for unsuitable soils and not for a foundation, slab-on-grade, suspended slab or concrete topping, and because the pour itself was less than 5 CY, we find that neither the testing requirement nor the 3,000 psi or the 4,000 psi compressive strength requirements of Specification 03300.2.13 applied to this pour. (F.O.F. 327-32; Board Finding)

334. Because we have found that the 4,000 psi compressive strength requirement of the specifications did not apply to the December 26, 2008 pour; that industry standards hold that compressive strength of 2,500 psi is adequate for use of concrete as a replacement for unsuitable soils; and that the compressive strength of the concrete poured for that purpose on December 26, 2008, was 2,918 psi after 28 days, the Board finds that this pour was fully adequate for its intended purpose and did not in any way fail to comply with Construction Contract specifications. (F.O.F. 327-33, Board Finding)

335. On June 4, 2009, two 8 CY concrete pours were placed for "Slabs/Porches between buildings." (Ex. 76 at p. 45)

336. The 28-day test of two cylinders on the first June 4, 2009 pour showed compressive strengths of 3,289 and 3,466, both below the Construction Contract specification requirement of 4,000 psi. (Ex. 76 at p. 45)

337. Sordoni argues that, notwithstanding the lower than required compressive strength of the first pour, the average compressive strength combining both June 4th pours exceeded 4,000 psi because the 28-day compressive strength of the two cylinders tested from the second June 4th pour was 4,527 psi and 5,305 psi. (Sordoni's Proposed Findings of Fact at ¶¶ 193-95; Ex. 76 at pp. 45, 52; N.T. 1321-24)

338. The average compressive strength of both June 4, 2009 pours exceeded 4,000 psi because the 28 day compressive strength of the two cylinders tested from the second pour was 4,527 psi and 5,305 psi. (Ex. 76 at pp. 45, 52)

339. Midlantic's Mr. Burns also testified that, in his opinion, the concrete placed on the Project that day met the intent of the Construction Contract specifications, notwithstanding the lower than required compressive strength of the first June 4, 2009 pour. (N.T. 1350-51)

340. He argued, inter alia, that, because Specification 03300.3.16.C.1. required only one composite concrete sample "for each day's pour," it would be reasonable to average the 28-day compressive strengths of the four test cylinders taken from the two June 4, 2009 pours, which average exceeds 4,000 psi. (N.T. 1321-24)

341. However, Mr. Burns also conceded that the specifications do not explicitly provide for such averaging, and does acknowledge that the 28-day average compressive strength from the first pour on June 4 does not meet the specifications for compressive strength.[8] (N.T. 1319-24)

342. Because the 28-day average compressive strength from the first pour on June 4, 2009, does not meet the specifications for compressive strength, we find that this pour did not meet the Construction Contract specification requirements. (Ex. 15 at pp. 343-44 and 356; F.O.F. 335-41; Board Finding)

343. On August 5, 2009, Sordoni poured 4 CY of concrete. (Ex. 76 at p. 47)

344. The 28 day tests of the two test cylinders poured on August 5, 2009, showed compressive strength of 3,820 and 3,890 psi. (Ex. 76 at p. 45)

345. As with the December 26, 2008 pour, this pour was less than the 5 CY threshold for which testing is required under the specifications. (Ex. 15 at p. 356)

346. Subparagraph 3.16.C.10 of the specifications for cast-in-place concrete provides that the strength of the mixture will be considered satisfactory "if every average of three consecutive compressive-strength tests equals or exceeds specified compressive strength and no compressive-strength test value falls below specified compressive strength by more than 500 psi (3.4 MPs)." (Ex. 15 at p. 357)

347. On August 3, 4, and 5, 2009, there were 6 CY, 9 CY and 4 CY (respectively) of slab on grade poured utilizing the same mixture. Pursuant to specification 0330.3.15.C.1., one

[8] Mr. Burns also suggested that industry standards for compressive strength of sidewalks, including those used by PennDOT, require a 28 day compressive strength of only 3,300 psi, which the average strength of the two cylinders tested from the first June 4th pour exceeds (N.T. 1325-26). However, the June 4, 2009 pours are identified in Midlantic's report as being for "Slabs/Porches between Buildings" and not for sidewalks. (Ex. 76 at p. 45).

composite sample was taken on each day for compressive strength testing. (Exs. 15 at p. 356, 76 at pp. 47, 52)

348. The 28 day compressive strength of the August 5, 2009 pour was within 500 psi of the specified strength of 4,000, and the average 28 day compressive strength of the three consecutive pours occurring on August 3, 4 and 5, 2009 was 4,359 psi. (Ex. 76 at pp. 47, 52)

349. Because the 28 day compressive strength of the August 5, 2009 pour was within 500 psi of the specified strength of 4,000; and because the average 28 day compressive strength of the three consecutive pours occurring on August 3, 4 and 5, 2009 was 4,359 psi, we find the 28 day compressive strength results of 3,820 and 3,890 psi for the August 5 concrete pour complied with the specifications under section 3.16.C.10. (Exs. 15 at pp. 356-357, 76 at pp. 47, 52; F.O.F. 343-48; Board Finding)

Testing Issues

350. PennDOT also asserts that Sordoni failed to show compliance with the concrete testing requirements for the concrete pours done on the Project site. Specifically, PennDOT faults Sordoni for failing to create an adequate number of concrete test cylinders and for the failure to field cure any of the cylinders tested. (PennDOT Proposed Findings of Fact at ¶¶ 119-122)

351. Section 03300 at Para. 3.16. of the Construction Contract specifications required Sordoni to engage a "qualified testing and inspecting agency to perform field tests and inspections and prepare test reports" for the numerous concrete pours done on the Project. (Ex. 15 at p. 355)

352. Subparagraph 3.16.C.7. of this section specifically required for each pour that a total of eight standard cylinder specimens be prepared and tested for compressive strength: four to be laboratory cured and four to be cured in the field. Compression test breaks were then to be performed on these core cylinder samples after 7 and 28 days. (Ex. 15 at p. 356)

353. Sordoni hired Midlantic Engineering, Inc. to perform the concrete testing on the Project. (N.T. 1000, 1007, 1157-58, 1171)

354. For each concrete pour for which compressive strength testing was required, Midlantic prepared and laboratory cured five test cylinders. (N.T. 1007)

355. No cylinders were cured in the field. (N.T. 1007)

356. PennDOT argues that the requirement for testing field-cured cylinders rather than just those cured in the laboratory was necessary to determine whether conditions on the job may have impacted the quality of the concrete. (PennDOT's Proposed Findings of Fact at ¶¶ 120-22)

357. Mr. Cepko testified that the reason for the testing of field-cured samples was as follows: "if the concrete was frozen, if it was baked, if it was allowed to dry out during curing

during the period that's specified, those cylinders will let you know that something happened in the field and the product has been damaged." (N.T. 1985-87)

358. Sordoni argues that, notwithstanding Specification 03300.3.16.C.7., the lab testing of the concrete was fully adequate to accurately test the compressive strength of the concrete poured on the Project and that testing of field-cured cylinders was simply not necessary under the circumstances. (Sordoni's Proposed Findings of Fact at ¶¶ 200-201)

359. Sordoni asserts that the purpose of the field-cured testing (as opposed to lab-cured testing) noted in the specifications "is strictly for the contractor to evaluate their operations on protecting and curing in-place concrete." (Sordoni's Proposed Findings of Fact at ¶ 201; N.T. 1343)

360. Hemmler + Camayd's Mr. Ruby testified that the architect received copies of all the concrete tests performed by Midlantic for review, but not for action, unless it found that the test results were not in compliance with the Construction Contract specifications. (N.T. 1652-55)

361. Mr. Ruby further testified that the architect would take no action on the submitted concrete test results if it was satisfied that the results met with the specifications. (N.T. 1651-66)

362. Hemmler + Camayd did not require certain testing in circumstances where it determined such testing was unnecessary to confirm that the technical specifications were met for that item. (N.T. 1657-58)

363. It appears from Mr. Ruby's uncontradicted testimony that the absence of tests performed on field-cured concrete was implicitly accepted by the Project's architect and the exclusive testing of lab-cured concrete samples found to be sufficient to comply with the Construction Contract specifications by the Project's design team. (F.O.F. 350-62; Board Finding)

364. Section 03300.3.16.C.9 of the Construction Contract specifications provides that the contractor must "evaluate operations and provide corrective procedures for protecting and curing in-place concrete" when the strength of the field-cured cylinders is less than 85% of that of the companion laboratory-cured cylinders. (Ex. 15 at p. 356)

365. We agree with Sordoni that the purpose of testing field-cured concrete samples as opposed to lab-cured samples is for the contractor to evaluate whether or not its operations and procedures are sufficient to properly protect and cure poured in-place concrete. (Ex. 15 at p. 356; N.T. 1343; F.O.F. 352, 357, 364; Board Finding)

366. Sordoni has extensive experience in pouring and curing concrete during cold weather in the Scranton area and routinely protected its concrete pours using thermal blankets and other protective procedures (which included the routine monitoring of on-site temperatures, consistent use of thermal blankets to protect pours as necessary, and suspension of pouring

activity on unacceptably cold days) as needed. (Ex. 785; N.T. 1009-10, 1290-94, 1338-43, 1364-66)

367. Sordoni skipped concrete pours on days it determined were too cold and used thermal blankets and other measures to protect the concrete it poured on the Project. (Ex. 785; N.T. 1009-10, 1290-94, 1338-43, 1364-66)

368. The Board finds that Sordoni's experience and procedures for pouring concrete on the Project were adequate to assure the proper curing of these concrete pours. (F.O.F. 366-67; Board Finding)

369. Sordoni's concrete expert, Midlantic's Mr. Burns, testified that in projects of similar size to this Project, he would typically ask the architect whether concrete field testing was necessary.[9] (N.T. 1331-33)

370. Though he did not recall Hemmler + Camayd specifically instructing Midlantic to forego the concrete field testing on this Project, he believes they did since he would not have eliminated the field tests without authorization. (N.T. 1331-36)

371. While we do not find that Hemmler + Camayd waived any of the Construction Contract specifications (or that it could do so on the part of PennDOT), Hemmler + Camayd's acceptance of all these concrete pour tests as well as the circumstances referenced above at Paragraphs 350 to 370 provides convincing evidence that the compressive-strength tests performed for the Project, as conducted, were in material compliance with the specifications in Section 03300 Para. 3.16. (Ex. 15 at pp. 356-57; F.O.F. 350-70; Board Finding)

372. Unlike the situations presented in pay items #10 (Masonry) or # 17 (Miscellaneous Metals/Structural) where no testing at all has been done to confirm the strength of key construction elements on the Project (e.g. concrete blocks and mortar for the masonry or in-shop welds and bolt connections for the fabricated steel structures), substantial compressive strength testing was performed on each of the daily concrete pours with the only issue being the adequacy of testing lab-cured versus field-cured samples. (F.O.F. 225-41, 305-17, 342)

373. Because the only practical purpose for testing field-cured cylinder samples as opposed to lab-cured cylinder samples was to ascertain whether or not the contractor had taken appropriate measures to protect these concrete pours against on-site weather conditions; because Sordoni's experience and procedures for pouring concrete on the Project (which included the routine monitoring of on-site temperatures, consistent use of thermal blankets to protect pours as necessary, and suspension of pouring activity on unacceptably cold days) were adequate to assure the proper curing of these concrete pours; and because Hemmler + Camayd accepted all the concrete pour tests and thus considered these compressive-strength tests, as conducted, to be in material compliance with these particular specifications, we find that Sordoni has

[9] Mr. Burns also testified that, in his opinion, the testing of field-cured samples was not needed on the Project due to "the simplicity of the construction," noting that the concrete on the Project was for "footings on-grade in the ground" and that "[t]here's no exposed concrete . . . no post-tensioning . . . no suspended concrete." N.T. 1342-44.

demonstrated material compliance with the cast-in-place concrete testing requirements contained in the Construction Contract's specifications at 03300.3.16.C. 7 and 8. (Ex. 15 at pp. 356-57; F.O.F. 350-72, Board Finding)

374. We further find that, with the exception of the one pour of 8 CY on June 4, 2009, Sordoni has demonstrated (and documented) compliance with the applicable compressive strength requirements for its concrete pours on the Project. Therefore, because this one isolated concrete pour constituted approximately 1.65% of the total concrete pour on the Project (483.5 CY) with a value of approximately $2,968, we find Sordoni has demonstrated compliance with the Construction Contract specifications for concrete work with a value of $170,968 (out of the total amount of $173,836) for these pay items (#12-15) under the Construction Contract and Reimbursement Agreement. (Exs. 760, 785; F.O.F. 350-73; Board Finding)

Steel Rebar/Wire Mesh Certifications

375. PennDOT additionally argues that the documentation provided for the concrete rebar used on the Project (Item # 16 valued at $51,049) is missing adequate proof that the steel rebar was manufactured in the United States. (Ex. 491; PennDOT Proposed Findings of Fact at ¶ 135)

376. With respect to the rebar and wire mesh, Mr. Cepko stated in his report that mill certifications were presented for all except the #3 rebars; that the mill certificates originated at a PennDOT Bulletin #15 supplier; and that the certificates included a made in USA statement. However, Mr. Cepko also stated that there was no way to tie-in the certificates to what was actually delivered to the Project. (Ex. 465)

377. Mr. Mitchell, in his first report (dated April 30, 2011) also acknowledged the presence of steel certificates and delivery tickets for reinforcing steel and wire mesh in the files, but again emphasized that the certificates could not be matched with the delivery tickets for the steel rebar and mesh used on the Project. (Ex. 81 at pp. 594-624)

378. Sordoni, in the report prepared by Mr. Parashac (dated August 8, 2011), stated that all steel originated from a PennDOT Bulletin #15 supplier and all rebar was accepted by the architect Hemmler & Camayd as meeting the plans and specifications of the Construction Contract. (Ex. 87)

379. However, neither the Parashac report nor any testimony provided by Sordoni stated directly that the steel rebar and wire mesh certificates presented to Mr. Cepko, Mr. Mitchell and/or the Board were the certificates for the steel rebar and wire mesh actually used on the Project or that all the rebar was of U.S. orgin. (Exs. 76, 81; N.T. 1125-51, 1585-1613; Board Finding)

380. In light of the standing criticism leveled by PennDOT (regarding product certifications), we find the omission noted in Paragraph 379 by Sordoni to be significant and in stark contrast to Mr. McGregor's representations regarding the certifications and origin of steel

components in Pay Item #17, Miscellaneous Metals/Structural. (F.O.F. 278-80, 375-79; Board Finding)

381. Because we have found that neither the Parashac report nor any testimony provided by Sordoni stated directly that the steel rebar and wire mesh certificates presented to Mr. Cepko, Mr. Mitchell and/or the Board were the certificates for the steel rebar and wire mesh actually used on the Project, we are unable to find that Sordoni provided appropriate mill certificates for (or confirmed the U.S. origin of) the steel rebar and wire mesh used on the Project. (Ex. 15 at p. 27, 30 at p. 54; F.O.F. 375-80; Board Finding)

382. Because we are unable to find that Sordoni provided appropriate mill certificates for (or confirmed the U.S. origin of) the steel rebar and wire mesh actually used on the Project, we find the evidence inadequate to establish a factual basis to pay Sordoni the amount claimed ($51,049) for Item #16 (Concrete Rebar/WWF). (Ex. 15 at p. 27, 30 at p. 54; F.O.F. 375-80; Board Finding)

#17 - Elevator

383. PennDOT's Mr. Cepko also marked as "gray no" Sordoni's claim for elevator work (Item #26) and rejected payment of the entire amount of $83,000. (Exs. 465, 491)

384. Although Mr. Cepko, in his report, indicated that he found a lack of sufficient documentation (including catalog cuts and operating permit) for the elevator, Mr. Mitchell's first report (dated April 30, 2011) indicates that additional documentation for the elevator work (including product data, shop drawings, certificate of installation and other documentation deficiencies) had been satisfied with the exception of a final operating permit and an operation and maintenance manual. (Exs. 81, 465)

385. PennDOT also claims that, although Sordoni asserts in its payment request that it has completed 100% of the elevator work (contract price $83,000.00), some work on the elevator remains unfinished. (PennDOT Proposed Findings of Fact at ¶¶ 164-67)

386. Mr. Mitchell testified that he visited the Project site on June 19, 2012, and noted that some trim work on the elevator tower was unfinished as was the tower roof, resulting in some deterioration due to exposure to the elements. (Ex. 803; N.T. 2405-07)

387. Mr. Mitchell placed no value on the unfinished elevator work nor did he quantify the damage he alleged was due to exposure to the elements. (Ex. 96 at p.29)

388. Mr. Cepko estimated in his report (Ex. 465) that the elevator was 85% complete. (Ex. 465)

389. Sordoni's Project Manager, Mr. Shedlock, conceded that some work on the elevator, what he termed "punch list items," remained unfinished. (Ex. 95; N.T. 1032-34)

390. Mr. Mitchell also questioned the apparent lack of operation and maintenance data for the elevator. However he conceded that such data is normally provided at or close to the conclusion of a project. (N.T. 2436-37)

391. Stephen Parashac, Sordoni's Operations Manager, testified that work on the elevator was stopped due to non-payment and that the documentation cited by Mr. Mitchell would not have been available until elevator inspection was done which could not be scheduled until the subcontractor received 90% to 95% of its payment. (N.T. 1125-29, 1597-1601)

392. Because both parties appear in basic agreement that work remained to be done on the elevator and that the outstanding documentation would not be available until this work was closer to completion; and because evidence of some deterioration of the elevator due to the unfinished status of this work was presented, we find that Sordoni has shown satisfactory completion of only 85% of the total elevator work, with a value of $70,550. (Exs. 465, 491; F.O.F. 383-91; Board Finding)

 # 29 - Electrical

393. Our review of the Cepko Report and the two reports by Mr. Mitchell indicates there are no outstanding material deficiencies regarding the work documentation provided for this pay item. The only issue here appears to be the percentage completion attained. [10] ((Exs. 81, 96, 465, 491; Board Finding)

394. Mr. Cepko stated in his report that, while Sordoni had claimed the electrical work was 100% complete, the electrical work was approximately 90% complete. (Ex. 465, p. 10)

395. Mr. Cepko listed the $103,000 Original Construction Contract Amount for Electrical (Item #29) as a "gray yes" and <u>included</u> this <u>entire</u> amount in his potential payment column. (Ex. 491)

396. Sordoni does not dispute that some electrical work remains to be done as electrical work was also included on Mr. Shedlock's "punch list" as an item which remained unfinished. (Ex. 95)

397. Because both PennDOT and Sordoni appear in basic agreement that approximately 10% of the electrical work remains unfinished and that these were "punch list" items, we find that Sordoni has not supported its request for payment of the full $103,000 for this work, but only for 90% of the total electrical work cost, or $92,700 of the $103,000 Construction Contract total. [11] (Exs. 465, 491; F.O.F. 393-96, Board Finding)

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[10] Mr. Cepko offered no testimony on the electrical work which he had asserted in his report was unfinished. (Ex. 465).

[11] This finding that Sordoni has justified payment of only 90% of the $103,000 Construction Contract total for electrical work requires a deduction of $10,300 from the total potential payment of $976,653.75 cited by Mr. Cepko, since he included in that total payment of the full $103,000 for electrical work (Item # 29). (Ex. 491; Board Finding)

398. Work on the Project was substantially complete by the time Sordoni left the Project. (Exs. 11, 15, 35, 76, 81, 85, 87, 89, 96, 465, 491; F.O.F. 102, 132-33, 159-67, 184-397; Board Finding)

PennDOT's Waiver of Submittal Requirements

399. Sordoni asserts in its brief that "PennDOT, by its course of conduct, has waived any obligations which Sordoni may have had to provide additional submittals." (Sordoni's Brief at p. 10)

400. To the extent Sordoni is arguing that PennDOT waived any requirement that submittals be provided in conjunction with its payment applications (the first five of which were paid by PennDOT without such documentation), this point is moot since we have already determined that the applicable Construction Contract specifications required Sordoni to make its submittals to the Project architect, Hemmler + Camayd, and not to PennDOT. (Ex. 15 at pp. 170-73; F.O.F. 132-38; Board Finding)

401. As discussed above, Section 112 of Publication 408, which was expressly incorporated into the Construction Contract specifications, provides only that Sordoni is to retain all Project records used to record work progress for a period of three years, and that Sordoni is required to make these records available to PennDOT upon written notice by PennDOT. This section does not identify any specific submittals, impose any specific time frame for making any submittals and contains no requirement whatsoever that submittals regarding products or materials used on the Project, or tests done on the Project, be submitted to the City or PennDOT with payment requests. (Ex. 15; F.O.F. 126-128, 183, 252)

402. We have also found, as discussed above, that PennDOT made only one specific written request for documentation in accordance with Section 112 of Publication 408. This request was made by Mr. Cochrane on November 10, 2009. The documentation requested was either provided or was of a type not required by the Construction Contract specifications. (F.O.F. 171-82, 253)

403. In addition to its apparent argument that PennDOT waived any requirement that submittals be provided to PennDOT in conjunction with its payment applications, it appears that Sordoni may also asserting that PennDOT waived all submittal and documentation requirements contained in the Construction Contract specifications. (Sordoni's Post Trial Brief at pp. 10-11)

404. Sordoni claims initially that PennDOT did not notify it of alleged deficiencies in its submissions until the first Mitchell report was presented in April 2011. (Sordoni's Brief at p. 10)

405. PennDOT first notified the City generally of concerns about the adequacy of Sordoni's submissions in July 2009 (even though this concern was misfocused on full Publication 408 reporting requirements), and the City subsequently requested Pasonick to provide additional justifications to PennDOT. (Ex. 201A; N.T. 198-202, 571-72)

406. PennDOT approved payments over a course of several months before raising general concerns about the sufficiency of Sordoni's submissions. (F.O.F. 19-23, 140-44, 171, 405)

407. The Construction Contract specifications provided that payments made were estimates of amounts due subject to later review, and that a failure by the City to enforce a requirement would not constitute a waiver of same. (Exs. 15 at p. 72 ¶ 132, 929 at p. 8)

408. Similarly, the Reimbursement Agreement also provided that work on the Project was subject to later review. (Ex. 927 at p. 16)

409. The provisions of the Construction Contract specifications governing submittals to the architect of documents relating to product data and material testing are not ambiguous. Sordoni does not identify any ambiguity in these specifications which would give rise to differing interpretations as to their meaning. (Ex. 15, pp. 170-73; F.O.F. 131; Board Finding)

410. Hemmler + Camayd's Mr. Ruby, who administered Sordoni's submissions under the Project's specifications for the architect, could not identify any provision for waiving the submittal requirements identified in these specifications. (N.T. 1690)

411. Because we have found that: 1) the Construction Contract specifications (including Section 112 of Publication 408 which was expressly incorporated into the specifications) contain no requirement whatsoever that submittals regarding products or materials used on the Project, or tests done on the Project, be submitted to the City or PennDOT with payment requests; 2) PennDOT first notified the City generally of concerns about the adequacy of Sordoni's submissions in July 2009; 3) the Construction Contract specifications and the Reimbursement Agreement provided that payments made were estimates of amounts due subject to later review; 4) the Construction Contract specifications explicitly provided that a failure by the City to enforce a requirement would not constitute a waiver of same; 5) the provisions of the Construction Contract specifications governing submittals to the architect of documents relating to product data and material testing are not ambiguous, nor does Sordoni identify any ambiguity in these specifications which would give rise to differing interpretations as to their meaning; and 6) the architect could not identify any provision of the specifications for waiving these submittal requirements, we find no factual basis for Sordoni's assertion that PennDOT waived the Construction Contract specification requirements governing submittals (to the architect) relating to product data and material testing. (Ex. 15; F.O.F. 399-410; Board Finding)

D. Change Order Items – Payment Application 14

412. In or around April 2010, Sordoni submitted Payment Application 14 in the amount of $82,966.73, in which it sought payment for change orders/extra work it performed on the Project. (Ex. 35 at p. 254)

413. Sordoni's Payment Application 14 lists eight change orders requests:

- COR#2-R1 – ASI ppc-1 Stamped Concrete - $2,601.00
- COR#3-R1 – ASI ppc-2 Added Dampproofing - $4,809.00
- COR#4-R1 – Alt. No. 5 Snow Melt System - $36,276.00
- COR#5-R1 – Alt. No. 6 Trench Drain - $6,096.00
- COR#8-R1 – ASI ppc-3 Revised Concrete Stairs - $2,965.00
- COR#12-R1 – ASI ppc-6 Nyoplast Snout - $3,970.00
- COR#15-R1 – ASI ppc-10 Rev. Bridge Grating - $10,439.00
- COR#17-R1 – Alt. No. 4 Rev. Stamped Pavement - $18,098.00

(Ex. 35 at p. 254)

414. On December 9, 2008, the architect issued Architect's Supplemental Instruction PPC-1, ("ASI ppc-1") directing Sordoni to delete certain Plaza architectural concrete pavers provided for in the original drawings and replace them with cast-in-place stamped and colored concrete. (Ex. 35D at p. 1)

415. The architect issued additional ASIs December 12, 2008, February 19, 2009, May 15, 2009, and July 2, 2009, directing changes for added dampproofing (ASI ppc-2), revised concrete stairs (ASI ppc-3), Nyoplast snout (ASI ppc-6), and revised bridge grating (ASI ppc-10). (Ex. 35D)

416. The Project architect, Hemmler + Camayd, directed the extra work for the five ASIs. (Exs. 35, 35D)

417. Hemmler + Camayd was hired and paid by the 500 Lackawanna Avenue Company, a private developer involved in redeveloping property adjacent to the Project. Hemmler + Camayd was not hired, paid nor acting under the control or direction of the City or PennDOT. (N.T. 1615, 1625, 1631, 1683-84; F.O.F. 3, 134)

418. On April 16, 2009, Sordoni forwarded to the City requests for change orders relative to each of the architect's ASIs. (Ex. 35D)

419. In addition to the change order requests relative to the ASIs, Sordoni also submitted to the City change order requests to increase the amounts cited in Alternate Nos. 4, 5, and 6 of its bid. (Ex. 35D)

420. Alternate No. 4 proposed to add $8,000.00 to the Construction Contract amount for alternate asphalt paving. Alternate No. 5 proposed to add $35,000.00 for a snow melt system, and Alternate No. 6 proposed to add $5,000.00 for a trench drain. (Ex. 35D)

421. Sordoni's change orders sought to increase the amounts of the above alternates to $18,089.00, $36,376.00, and $6,096.00, respectively. (Ex. 35D)

422. Sordoni submitted the change order requests relative to Alternate Nos. 5 and 6 with the ASI change orders on April 16, 2009. (Ex. 35D)

423. The change order request relative to Alternate No. 4 was submitted September 1, 2009. (Ex. 35D)

424. Sordoni subsequently submitted to the City revised change order requests for each of the above eight change orders on October 5, 2009, October 30, 2009, and November 23, 2009. (Ex. 35D)

425. Sordoni's Mr. Shedlock testified that the November 23, 2009 revisions reduced overhead and markup after discussions with PennDOT's Mr. Cochrane, who directed Mr. Shedlock that the combined overhead and markup should be capped at 6%. (N.T. 1037-41, 1107-12)

426. Section 109(b) of the Construction Contract specifications provides that, except for emergency situations, the contractor may not execute any additional work without the City's written approval. (Ex. 15 at p. 60)

427. The City gave no written authorization for any of Sordoni's change order requests included in Sordoni's Payment Application 14. (N.T. 261-70)

428. PennDOT never approved any of the extra work included in Sordoni's Payment Application 14. (N.T. 197-98, 2095-97)

429. Sordoni concedes that neither PennDOT nor the City provided written authorization for the extra work for which it is now seeking payment. (Sordoni's Proposed Findings of Fact at ¶¶ 254-290, Sordoni's Brief at p. 40; Ex. 244; N.T. 990-91)

430. Nevertheless, Sordoni argues that PennDOT (and the City), by their course of conduct, waived the Construction Contract terms requiring written authorization for these change orders/extra work. (Sordoni's Proposed Findings of Fact at ¶ 291)

431. Neither PennDOT nor the City requested that Sordoni complete any of the extra work included in Sordoni's Payment Application 14, nor did PennDOT or the City promise that payment for the work would be forthcoming. (N.T. 197-98, 261-70, 2095-97)

432. PennDOT did not commit to reimburse the City for any of the extra work included in Sordoni's Payment Application 14. (F.O.F. 431)

433. On September 17, 2009, the City, in a letter from Mrs. Aebli to April Hannon of PennDOT, formally requested PennDOT's approval of change orders including the extra work included in Sordoni's Payment Application 14. (Ex. 228; N.T. 132-33)

434. Much of the extra work included in Sordoni's Payment Application 14 had been completed by the time the City requested PennDOT's approval of the change order requests. (Ex. 507)

435. With respect to the City, Sordoni has also failed to identify any conduct by the City or Pasonick its agent, which would give factual support for a waiver of the requirement that change orders be approved in writing. (F.O.F. 412-34)

436. Sordoni concedes that the City's Mrs. Aebli did not approve, orally or in writing, the change orders. (Sordoni's Post Trial Brief at p. 4)

437. Mrs. Aebli's responsibility with respect to the Payment Applications was largely limited to passing them along to Pasonick and PennDOT for approval. (N.T. 261-70; F.O.F. 426-33; Board Finding)

438. Mrs. Aebli did not request the change order work or promise to pay for it. (N.T. 261-70; F.O.F. 431, 435-36)

439. Sordoni proceeded with the change order work knowing that there was no written approval to proceed from PennDOT or the City. (Ex. 244; N.T. 1040-41)

440. Because the Construction Contract expressly requires written approval by the City for any extra work on the Project; and because neither the City nor PennDOT ever provided written or oral approval of Sordoni's change order requests included in Payment Application 14 nor did either request that the work be performed by Sordoni or promise to pay for that work, the Board finds no factual basis for Sordoni's assertion that either PennDOT or the City waived the requirement for written approval of change orders or extra work on the Project. (F.O.F. 412-39; Board Finding)

Sordoni Claim Summary

441. In summary, the Board finds that Sordoni has met the Construction Contract specification requirements for work and documentation for the following items:

Work Identified for Potential Payment in Cepko Report:	
(Items 1-6, 8-9, 11, 18-19, 21-22, 24, 27-28, 30-31)	$976,564
Less adjustment for unfinished work:	
Item #29 – Electrical (only 90%)	(10,300)
Plus adjustment for improperly rejected work:	

Item #7 – Paving/Surfacing	64,700
Item # 20 – Caulking	4,800
Item #12 - #15 – Various Concrete Work	170,968
Item # 26 – Elevator (85% complete)	70,550
Total	**$1,277,282**

(F.O.F. 188-390, 405-33)

442. The parties have stipulated that Sordoni has been paid $876,382.55.[12] (N.T. 298, 2038-40; F.O.F. 25)

443. Deducting the amount paid ($876,383, rounded to the nearest dollar) from the total value of work completed by Sordoni in compliance with the Construction Contract specifications results in a principal amount of $400,899. (F.O.F. 441-42; Board Finding)

Procurement Code Payment Provisions

444. Sordoni also asserts that it is entitled to additional remedies provided under Sections 3932, 3934 and 3935 of the Procurement Code. (62 Pa.C.S. §§ 3932, 3934, 3935; Sordoni's Brief at pp. 12-16)

445. Specifically, Sordoni claims that, since the Reimbursement Agreement does not specify when PennDOT is obligated to make payment for Sordoni's work, Section 3932 of the Procurement Code applies. (Sordoni's Brief at pp. 12-13)

446. Section 3932(b) requires, absent a contract term establishing time for payment, that payment (less retainage) be made within 45 days of receipt of the payment application. Section 3932(c) then provides for interest to be paid on amounts not satisfied within 45 days. (62 Pa.C.S. § 3932(b) and (c))

447. Sordoni also asserts that PennDOT did not comply with Section 3934, which permits a government agency to withhold payment for deficiency items according to terms of the contract, provided that it gives notice of the deficiency items within 15 days of receipt of the payment application. (Sordoni's Brief at p. 14; 62 Pa.C.S. § 3934)

448. In addition, Sordoni seeks penalties and attorneys' fees under Section 3935, asserting that PennDOT's withholding of payment for Payment Applications 6 through 11 and 14 was done in bad faith.[13] (Sordoni's Brief at pp. 15-16)

449. PennDOT responds that Chapter 39 of the Procurement Code (which includes Sections 3932, 3934 and 3935) is not applicable to this claim for several reasons: 1) the

[12] This amount represents PennDOT's actual payments on Payment Applications #1 - #5 (i.e. $973,758.38 less 10% retainage withheld by PennDOT).

[13] Section 3935 of the Procurement Code permits the Board to award interest and attorney fees on contract amounts withheld in bad faith, defined as withholding which is arbitrary or vexatious. (62 Pa.C.S. § 3935).

Reimbursement Agreement is a "grant" and therefore not a contract subject to the Procurement Code; 2) the Reimbursement Agreement is not a contract "for construction"; 3) the Reimbursement Agreement is not a contract "entered into by a government agency through competitive sealed bidding or competitive sealed proposals"; 4) Chapter 39 relates only to payments to be made to a contractor providing construction services but the Reimbursement Agreement only requires payments to be made to the City; 5) the Reimbursement Agreement does not involve "progress payments" at all, but only reimbursement to the City; and 6) Chapter 39 and the Prompt Payment Act itself clearly states at Section 3939 that it does not create any obligation to third parties for any claim. (PennDOT's Brief at pp. 50-53)

450. Section 3901 of the Procurement Code provides that Chapter 39 "applies to contracts entered into by a government agency through competitive sealed bidding or competitive sealed proposals." (62 Pa.C.S. § 3901(a))

451. The Reimbursement Agreement was not entered into through a competitive sealed bid or competitive sealed proposal process. (N.T. 2099-2100, 2130-35; F.O.F. 2-5)

452. Section 3939(a) of the Procurement Code expressly states that Chapter 39 does not create obligations to third parties. (62 Pa.C.S. § 3939(a))

453. Sordoni's claim against PennDOT is made as a third party beneficiary of the Reimbursement Agreement. (Ex. 1)

454. Section 3934 of the Procurement Code permits a government agency to withhold payment for deficiency items according to terms of the contract, provided that it gives notice of the deficiency items within 15 days of receipt of the payment application. (62 Pa.C.S. § 3934)

455. PennDOT first notified the City of its concerns about the adequacy of Sordoni's submissions in July of 2009. (Ex. 201A; N.T. 198-202, 571-72)

456. PennDOT's notification to the City of its concerns over the adequacy of Sordoni's submissions in July 2009 occurred before Sordoni's 6th and subsequent payment applications, and was not untimely because it is these payment applications which represent the monies withheld on the Project under Section 3934 of the Procurement Code. (Ex. 35; F.O.F. 405, 455)

457. PennDOT's decision to stop payment was based on its perceived lack of compliance by Sordoni (and Pasonick) with Publication 408 and the Construction Contract specifications as well as to PennDOT's concerns that it was unable to substantiate the quality of the construction. (Exs. 292, 465; N.T. 673-74, 678, 1965, 1973-78; F.O.F. 105)

458. Though mistaken, PennDOT's initial belief that Publication 408 applied to the Project in its entirety was not unreasonable because the language of the Reimbursement Agreement was unclear on this point. (Ex. 927; F.O.F. 104-120; Board Finding)

459. Because PennDOT's belief that all of Publication 408 applied to the Project was not unreasonable even though mistaken; because PennDOT notified the City of its concerns over

Sordoni's compliance with Publication 408 and the Construction Contract specifications in July 2009, about the time of the City's submission of Payment Application 6; because some required work documentation was not supplied to PennDOT until after work on the Project had stopped; and because Sordoni did fail, materially, to comply with some significant Construction Contract specifications in its work on the Project (e.g. steel shop inspections and masonry testing), we find there were legitimate disputes as to whether Sordoni had complied in all material respects with the Construction Contract specifications. (Exs. 11, 15, 927; F.O.F. 104-138, 208-397, 455-58; Board Finding)

460. Given the foregoing, we do not find that PennDOT's decision to withhold payments as it did was arbitrary, vexatious or done in bad faith. (Exs. 11, 15, 927; F.O.F. 104-38, 208-397, 455-59; Board Finding)

461. Section 1751 of the Procurement Code provides that "Interest on amounts ultimately determined to be due shall be payable at the statutory interest rate applicable to judgments from the date the claim was filed with the contracting officer." (62 Pa.C.S. § 1751)

462. The interest calculation prescribed by Section 3932(c) (which appears to apply generally to Commonwealth, county and municipal entities alike) is at odds with Section 1751 of the Procurement Code. (62 Pa. C.S. § 3932(c), 62 Pa. C.S. § 1751; Board Finding)

463. Because Section 1751 of the Procurement Code is located in the same chapter as, and immediately following, the Board's enabling provisions, and makes references to "amounts ultimately determined to be due" "judgments" and claims "filed with the contracting officer", we find that Section 1751 is the more specific interest calculation provision applicable to Board awards. (62 Pa. C.S. § 1751, 62 Pa. C.S. § 3932(c); F.O.F. 461-62; Board Finding)

PennDOT's Cross-Claim vs. the City

464. In its Cross Claim against the City, PennDOT asserts a right to indemnification from the City under the Reimbursement Agreement, asserting that under a "save harmless" provision of the Reimbursement Agreement, the City is required to "indemnify, save harmless and defend PennDOT from all suits, actions or claims of any type." (PennDOT's Cross Claim and Joinder of Additional Defendant at pp. 4, 6)

465. PennDOT asserts in its Cross Claim that the City failed in its duty under the Reimbursement Agreement to adequately inspect Sordoni's work, which it alleged prevented PennDOT from confirming that Sordoni's work on the Project met applicable Project specifications and prevented PennDOT from paying Sordoni the full amount under the Reimbursement Agreement and Construction Contract. (PennDOT's Cross Claim and Joinder of Additional Defendant at ¶¶ 8, 9, 14, 15, 17, 31)

466. The City denies that the "save harmless" provision of the Reimbursement Agreement relied upon by PennDOT "requires the City to indemnify, save harmless and defend

PennDOT" from the claims in the instant case, arguing that the damages PennDOT claims for against the City arise out of PennDOT's own breach of the Reimbursement Agreement (including PennDOT's refusal to make timely reimbursement payments thereunder to the City). It argues such damages are not covered by the "save harmless" clause here at issue.[14] (The City's Response and Answer to PennDOT's at ¶ 21)

467. The Reimbursement Agreement's "save harmless" provision relied upon by PennDOT reads as follows:

> The [City] shall indemnify, save harmless and (if requested) defend the Commonwealth, the DEPARTMENT, the FHWA and all of their officers, agents and employees from all suits, actions or claims of any character, name or description, including, but not limited to, those in eminent domain or otherwise relating to title to real property, brought for or on account of any injuries or damages received or sustained by any person, persons or property, arising out of, resulting from or connected with the planning, development, design, acquisition, construction, completion, occupancy, use, operation and/or maintenance of the Project or the improvements that it comprises, by the [City] and/or the [City's] consultant(s) and/or contractor(s) and their officers, agents, employees, whether the same be due to defective title, defective materials, defective workmanship, neglect in safeguarding the work, or by or on account of any act, omission, neglect or misconduct of the [City] and/or the [City's] consultant(s) and/or contractor(s), their officers, agents and employees, during the performance of the work or thereafter, or to any other cause whatever.

(Ex. 927)

468. The foregoing "save harmless" clause, by its express language, requires the City to indemnify PennDOT for any "injury or damages" caused to any person "arising out of [or] resulting from" 1) any act or omission of the City, its consultants and/or its contractors in connection with the Project (from the planning stages through to completion) or 2) which are due "to any other cause whatsoever." (Ex. 927; Board Finding)

469. The Board's award to Sordoni and against PennDOT is based entirely on PennDOT's own actions taken in breach of the Reimbursement Agreement. That is to say, the award here made against PennDOT is only for work done on the Project which the Board has found to have been properly performed and documented in material compliance with the terms of the Construction Contract and the Reimbursement Agreement. No award has been made against PennDOT for any work claimed on this Project which was not adequately performed and

[14] The City also asserts in its Answer to PennDOT's Cross Claim that PennDOT, and not the City, failed in its duty to oversee the Project, alleging that PennDOT did not fully follow its own procedures for the administration of locally sponsored projects set forth in PennDOT Publication 39. (City's Answer to PennDOT's Cross Claim and Counterclaim against PennDOT; Ex. 29). The Reimbursement Agreement does not place responsibility on PennDOT to perform inspections of the work on the Project nor does it make reference to PennDOT Publication 39. (Ex. 927).

documented or which resulted from any failure of the City, its consultants or its contractors on this Project. (F.O.F. 208-397)

470. Because we have found, as discussed above, no liability under the Reimburement Agreement on PennDOT's behalf for any claims that were not adequately performed and documented, PennDOT, as a matter of fact, has incurred no damages here that were caused by the City, the City's consultants or the City's contractors. (F.O.F. 208-397)

471. PennDOT, as a matter of fact, has incurred no damages here that were caused by the City, the City's consultants or the City's contractors, and the "save harmless" clause relied upon by PennDOT (including the language to extend indemnification for any asserted damage claim due to "any other cause whatsoever,") does not purport in clear and unambiguous terms to indemnify PennDOT from the consequences of PennDOT's own actions. (Ex. 927; F.O.F. 208-397, 467-70; Board Finding)

472. Because the damages incurred by PennDOT are solely a result of its own actions not a result of a failure by the City, its consultants or its contractors, we find no factual basis to apply the "save harmless" clause PennDOT seeks to invoke. (Ex. 927; F.O.F. 203-390, 464-68; Board Finding)

The City's Counterclaim vs. PennDOT

473. In its Counterclaim against PennDOT, the City alleges that PennDOT breached the Reimbursement Agreement by failing to release funds for Sordoni's unsatisfied payment applications and is liable to reimburse the City for any and all costs of the construction work on the Project performed by Sordoni. (City's Answer to PennDOT's Cross Claim and Counterclaim against PennDOT)

474. In its Answer to the City's Counterclaim, PennDOT denies that it breached the Reimbursement Agreement and reasserts that it declined to release funds to the City because the City failed to adequately inspect and document Sordoni's the work on the Project. (PennDOT's Answer to the City's Counterclaim)

475. Because we have found that PennDOT is liable to Sordoni (as a third party beneficiary under the Reimbursement Agreement) only for the work Sordoni performed on the Project for which it provided adequate documentation as required by the Construction Contract specifications; and because we found that neither PennDOT nor the City is responsible for Sordoni's claims for extra work set forth in Payment Application 14; and because we have made an award directly from PennDOT to Sordoni as third party beneficiary of the Reimbursement Agreement based on the foregoing findings, a second award to the City from PennDOT under the Reimbursement Agreement for Sordoni's work on the Project for which it provided adequate documentation as required by the Construction Contract specifications would be duplicative. (F.O.F. 49-397; Board Finding)

476. In the event that the Board's award from PennDOT to Sordoni, as third party beneficiary of the Reimbursement Agreement, is revoked on appeal, the Board's findings in this

case provide factual support for: A) an award to the City in the same amount as was awarded to Sordoni and B) an award in the same amount to Sordoni from the City. (F.O.F. 49-397; Board Finding)

The City v. Sordoni

477. The City has asserted a claim against Sordoni for indemnification under the Construction Contract in the event that the City is found liable to PennDOT on PennDOT's cross-claim. (The City's Answer and new Matter to PennDOT's Cross Claim and Cross Claim v. Sordoni)

478. Because the Board found the damages incurred by PennDOT are solely a result of its own actions not a result of a failure by the City, its consultants or its contractors, we find no factual basis to apply the "save harmless" clause PennDOT seeks to invoke and that the City is not liable to PennDOT, there is no factual basis for the City's indemnity claim against Sordoni. (F.O.F. 475; Board Finding)

Sordoni v. the City

479. Sordoni filed a counterclaim against the City which is comprised of four counts alleging: 1) breach of the Construction Contract by failing to pay for work Sordoni performed; 2) unjust enrichment; 3) quantum meruit; and 4) account stated. (Sordoni's Answer to the City's Cross Claim and Counterclaim against the City)

480. The City denied that it breached the Construction Contract, asserting that it fully complied with its responsibility under the Construction Contract, which required it to make payments to Sordoni for work performed from PennDOT payments only after it received payment for that work from PennDOT. (The City's Answer to Sordoni's Counterclaim)

481. Because we have found that PennDOT is liable to Sordoni, as a third party beneficiary under the Reimbursement Agreement only for the work Sordoni performed on the Project for which it provided adequate documentation as required by the Construction Contract specifications; and because we found that neither PennDOT nor the City is responsible for Sordoni's claims for extra work set forth in Payment Application 14, to find additional liability on the City's part to Sordoni for this same work would duplicate the award already granted to Sordoni from PennDOT. (F.O.F. 49-397; Board Finding)

482. With respect to Sordoni's unjust enrichment, quantum meruit, and account stated counts, the City denies any liability to Sordoni beyond the express terms of the Construction Contract. In addition, the City reasserted its indemnification claim to the extent that Sordoni did not fully comply with its responsibilities under the Construction Contract and is not entitled to payment from PennDOT. (The City's Answer to Sordoni's Counterclaim)

483. The relationship between the City and Sordoni respecting Sordoni's work on the Project was fully addressed and governed by the Construction Contract. (Ex. 11; F.O.F. 49-397; Board Finding)

484. Because in its claim for "account stated" Sordoni included no proposed findings of fact relevant to this issue nor did Sordoni brief or provide any case/legal authority to support its application to this case, and because we find no indication in the record that both parties agree that one owes the other a stated amount on a debt (i.e. we see no agreement between the two that the City owes Sordoni any monetary settled amount),[15] we find no factual basis to support Sordoni's claim for "account stated." (Sordoni's Answer to the City's Cross Claim and Counterclaim against the City; F.O.F. 478-83; Board Finding)

The City v. Pasonick

485. The City also joined Pasonick as an additional defendant and asserts an indemnification claim against Pasonick under the terms of their inspection services contract should the City be found liable to PennDOT. (The City's Joinder of Pasonick as an Additional Defendant; F.O.F. 40)

486. Because the Board found the damages incurred by PennDOT are solely a result of its own actions not a result of a failure by the City, its consultants or its contractors, we find no factual basis to apply the "save harmless" clause PennDOT seeks to invoke and that the City is not liable to PennDOT, there is no factual basis for the City's indemnity claim against Pasonick is moot. (F.O.F. 475; Board Finding)

Pasonick v. the City and Pasonick v. Sordoni

487. Pasonick filed a counterclaim against the City and against Sordoni in which Pasonick asserts unspecified indemnification obligations owing by the City and Sordoni to Pasonick. (Pasonick's Answer to the City's Joinder Complaint, Counterclaim against the City, and /Counterclaim against Sordoni at ¶¶ 63, 74)

488. The only indemnification provision in the City-Pasonick inspection services agreement provides that Pasonick will indemnify the City, not vice versa. (Ex. 932)

489. Pasonick has no contract with Sordoni from which a contractual indemnification obligation might flow. (Board Finding)

490. Because the Board has found that neither the City nor Sordoni is liable for damages to any other party, and that Pasonick has no contract liability to the City or Sordoni, Pasonick's Counterclaim against the City and /Counterclaim against Sordoni are without factual basis. (F.O.F. 486-489; Board Finding)

[15]Rather, at best, it appears the City agrees that PennDOT (another party) owes Sordoni for work performed on the Project.

491. Applying six percent per annum to the principal amount due Sordoni from PennDOT ($400,899) from February 11, 2010 to the date of this order yields a total prejudgment interest due Sordoni from PennDOT in the amount of $98,259, for a total award (principal plus interest) of $499,158. [16] (62 Pa.C.S. § 1751; F.O.F. 32, 436, 460)

[16] 6% per annum or .06 x $400,899 = $24,054 (annual interest) x 4 years and 31 days = $98,259, the total prejudgment interest amount.

CONCLUSIONS OF LAW

1. 62 Pa. C.S. § 1724 provides, inter alia, that:

> The board shall have exclusive jurisdiction to arbitrate claims arising from . . . [a] contract entered into by a Commonwealth agency in accordance with [the Procurement Code] and filed with the board in accordance with section 1712.1 (relating to contract controversies).

62 Pa. C.S. § 1724

2. In order for the Board to exercise jurisdiction over a claim we must find:

a) the claim "arises" from a contract entered into by a Commonwealth agency;
b) the contract has been entered into "in accordance with" the Procurement Code; and
c) the claim has been filed with the Board "in accordance with" Section 1712.1 of the Procurement Code.

62 Pa. C.S. § 1724

3. Whether or not a claim "arises" from a contract entered into by a Commonwealth agency has been read by the courts broadly to include claims sounding in contract by third parties where the facts show these claims to "arise" from the contract at issue. Brocker Manufacturing & Supply Company, Inc. v. United Bonding & Insurance Company, 301 A.2d 438, 440 (Pa. Cmwlth. 1993)(recognizing that a subcontractor's claims against the Commonwealth can be filed in the Board of Claims even where the subcontractor is not a signatory to the contract with the agency because the claim arises out of a Commonwealth contract); Armour Rentals, Inc. v. General State Authority, 287 A.2d 863, 867-68 (Pa. Cmwlth. 1971)(recognizing that a claimant's action in assumpsit properly sat with the Board of Claims even though the claimant was not a signatory to the contract).

4. In order to establish that it has a claim arising from a contract as a legitimate third party beneficiary of that contract, a party must first satisfy the two-part test set forth by the Pennsylvania Supreme Court as follows:

> There is thus a two part test for determining whether one is an intended third party beneficiary: (1) the recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and (2) the performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

Guy v. Liederbach, 459 A.2d 744, 751 (Pa. 1983) (quoting Restatement (Second) of Contracts, § 302 (1979)).

5. The Restatement (Second) of Contracts § 302 (1979) states as follows:

> § 302. Intended and Incidental Beneficiaries
>
> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) of Contracts § 302 (1981).

6. A third party beneficiary of a contract may bring suit on the contract as a real party in interest, so long as the third party beneficiary is an intended beneficiary of the contract. Guy, 459 A.2d at 749-51.

7. A third party beneficiary may be intended without being specifically or individually named. Id., 459 A.2d at 750 (citing Spires v. Hanover Fire Insurance Co., 70 A.2d 828, 831 (Pa. 1950)).

8. The Supreme Court further elucidated the framework for analyzing third party beneficiary claims in Scarpitti v. Weborg, a case where the appellant argued that the holding in Guy was intended to have very limited application and that the Restatement (Second) of Contracts, § 302 (1979) applied only to the specific factual pattern found in Guy. Scarpitti v. Weborg, 609 A.2d 147, 151 (Pa. 1992).

9. A party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intentions of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. Id., 609 A.2d at 150-151.

10. In Scarpitti, the Supreme Court opined that "[i]t is clear from the language of the opinion in Guy that the Court was adopting the Restatement (Second) of Contracts, § 302 (1979) as the law of Pennsylvania." Id., 609 A.2d at 150.

11. The Court in Scarpitti continued as follows:

> [A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, Spires v. Hanover Fire Ins. Co., 70 A.2d 828 (Pa. 1950), unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intentions of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. Guy, at 751.

Id., 609 A.2d at 151-152.

12. In Clifton v. Suburban Cable TV Co., Inc., 642 A.2d 512 (Pa. Super. 1994), a case involving a prison inmate who sued a cable television provider to enjoin it from raising its subscription prices above those specified under a contract between the prison and the cable provider, the Superior Court applied a more stringent test for determining third party beneficiary status than that stated in Scarpitti, where a government contract is involved:

> Government contracts, such as the one in this case, pose unique difficulties in the area of third-party beneficiary rights because, to some extent, every member of the public is directly or indirectly intended to benefit from such a contract. The Commonwealth/Bureau of Corrections enters into contracts for food, services, equipment, clothing, etc., to regulate and maintain its correctional facilities. The public at large benefits from these government contracts to the extent that they assure that those who ought to be incarcerated will be incarcerated, and that those who are already incarcerated will pay their debts to society. To grant all members of the public, including those incarcerated, standing to enforce such government contracts, however, would be contrary to public policy of this Commonwealth. Consequently, the courts of this Commonwealth must take a more narrow view of third-party beneficiary status in this context and apply a more stringent test to determine whether a third party qualifies for beneficiary status.

Clifton v. Suburban Cable TV Co., Inc., 642 A.2d 512, 515 (Pa. Super. 1994).

13. In Drummond v. University of Pennsylvania, 651 A.2d 572, 578 (Pa. Cmwlth, 1994), the Commonwealth Court cited Clifton in denying third party beneficiary status to a member of the public who sought to enforce a city ordinance against the University. Drummond v. University of Pennsylvania, 651 A.2d 572, 578 (Pa. Cmwlth, 1994).

14. Based on the Reimbursement Agreement, the Construction Contract and our Findings of Fact at Paragraphs 1-30, 49-70 and 76-96, including our findings, inter alia: that the primary purpose of the Reimbursement Agreement was, in fact, to procure construction of the Project here at issue; that the Reimbursement Agreement contemplated and required a second agreement (i.e. the Construction Contract between the City and Sordoni) to accomplish this goal; that the Reimbursement Agreement (which preceded the Construction Contract) was specifically referenced in (and attached to) the Construction Contract (which was entered into by the City

and Sordoni with the understanding that PennDOT was contractually committed through the Reimbursement Agreement to fund the Project); that the Reimbursement Agreement expressly provided that the City would submit certified periodic invoices for work performed on the Project by the City's contractor to PennDOT, PennDOT would then reimburse the City for these costs of constructing the Project and the City would then pay these monies to the Project contractor (i.e. Sordoni) for its work on the Project; that there were no provisions in the Reimbursement Agreement that precluded a third party beneficiary; that PennDOT's role in the construction of the Project, as contemplated by the Reimbursement Agreement, was integral and ongoing; that the purpose of this Reimbursement Agreement was to provide money to pay the contractor selected to perform the construction of the Project; that both parties to the Reimbursement Agreement intended the contractor selected for the Project (i.e. Sordoni) to receive the benefit of PennDOT's payments under the Reimbursement Agreement; that performance of the Reimbursement Agreement by PennDOT satisfies the City's obligation to pay money to Sordoni for construction of the Project; and that the circumstances referenced above are so compelling that recognition of Sordoni's right to receive PennDOT's payments under the Reimbursement Agreement is appropriate to effectuate the intentions of both the City and PennDOT to give Sordoni the benefit of the promised performance by PennDOT, the Board concludes that Sordoni is an intended third party beneficiary of the Reimbursement Agreement with a right to file a claim thereon. Exs. 11, 927; See also Conclusions of Law ("C.O.L.") at ¶¶ 3-13.

15. Because Sordoni is not any "member of the general public," but the Project's primary contractor and, as such, Sordoni was specifically contemplated by, and referenced in, the Reimbursement Agreement (by position rather than name) to be the ultimate recipient of funds under this agreement, we find that Clifton and Drummond do not preclude our finding that Sordoni is a third party beneficiary of the Reimbursement Agreement. Exs. 11, 927; C.O.L. 3-14.

16. Because Sordoni is a third party beneficiary of the Reimbursement Agreement (a contract entered into by PennDOT), Sordoni has a right to file its amended claim with the Board in accordance with 62 Pa.C.S. § 1712.1 as a claim based on a controversy "arising" from a contract entered into by an agency of the Commonwealth. 62 Pa.C.S. § 1712.1; See Brocker, 301 A.2d at 440; Armour, 287 A.2d at 867-68; C.O.L. 1-15.

17. In order for the Board to exercise jurisdiction over Sordoni's claim which arises from a contract entered into by a Commonwealth agency (i.e. PennDOT) we must also find that the claim was filed with the Board "in accordance with" Section 1712.1 of the Procurement Code. 62 Pa. C.S. § 1724(a)(1); C.O.L. 1-2.

18. PennDOT's challenges to the Board's jurisdiction based on the filing requirements of Section 1712.1 were raised by preliminary objection and denied by the Board pursuant to our Order of October 15, 2010. The Board found, inter alia, that Sordoni's claim was filed with the Board in accordance with Section 1712.1 for the reasons stated therein. Board Records at Docket No. 3992.

19. Finally, to exert jurisdiction over a contract claim against a Commonwealth agency, the contract must be one entered into "in accordance with" the Procurement Code. 62 Pa. C.S. § 1724(a)(1).

20. It is appropriate and required by recognition of the Board's remedial purpose, its history and the long line of standing case law to read those provisions affecting the Board's jurisdiction in as broad a manner as possible so as not to deprive those who contract with a Commonwealth agency of a forum in which to resolve disputes arising from such contracts. Employers Insurance of Wausau v. Department of Transportation, 865 A.2d 825, 832-33 (Pa. 2005); Lowry v. Commonwealth, 76 A.2d 363 (Pa. 1950); Hanover Insurance Company v. SWIF, 35 A.3d 849, 852 (Pa. Cmwlth. 2012); Department of Health v. Data-Quest, Inc., 972 A.2d 74, 78-79 (Pa. Cmwlth. 2009).

21. In Hanover, the Commonwealth Court held that the Board had jurisdiction over a claim by an indemnitee/third party beneficiary of an insurance policy issued by SWIF (i.e. a non-Procurement Code contract). Hanover, 35 A.3d at 856.

22. The Supreme Court, in its recent decision in Scientific Games International, Inc. v. Com., Department of Revenue, et al., noted that the Commonwealth Court's en banc decision in Hanover remains the prevailing law of Pennsylvania. Scientific Games International, Inc. v. Com., Department of Revenue, et al., 66 A.3d 740, 753 (Fn. 16) (Pa. 2013).

23. The primary purpose of statutory interpretation is to effectuate the intent of the General Assembly. 1 Pa.C.S. § 1921(a). See also Griffiths v. WCAB (Seven Stars Farm, Inc.), 943 A.2d 242, 255-56 (2008)(applying many of the salient principles of statutory construction to effectuate the intent and remedial nature of the act at issue).

24. Although the ultimate principle of statutory interpretation remains to effectuate the intent of the General Assembly, the penultimate principle of statutory construction states that "when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b).

25. Pennsylvania case law provides for use of standard dictionary definitions to interpret general terms utilized in Pennsylvania statutes where such terms are not otherwise defined therein. See e.g. Griffiths v. WCAB, 943 A.2d at 255 (supporting use of standard dictionary definitions for general terms).

26. Webster's New World College Dictionary defines the word "accordance" to mean "agreement", "harmony" or "conformity."[17] Accordingly, the literal meaning of the operative phrasing "in accordance with" does not necessarily mean "under the authority of" or "in strict

[17] Webster's New World College Dictionary (4th ed. 2008).

compliance with" but requires only that contracts subject to Board jurisdiction be made in harmony with the Procurement Code and filed in harmony with Section 1712.1. Therefore, this new phrasing in Section 1724(a)(1) still allows for jurisdiction over non-Procurement Code contracts since non-Procurement Code contracts need not be made under the Procurement Code in order to be "in harmony" with same, and claims filed "in harmony" with Section 1712.1 need to provide an opportunity for a meaningful administrative review by the contracting Commonwealth entity within the time frame outlined by Section 1712.1 before a claim is filed with the Board, but need not be filed "under the authority of" Section 1712.1 to be "in harmony" with this section. 62 Pa. C.S. § 1724(a)(1); C.O.L. 19-25

27. Recent support for this broad a reading of Section 1724(a)(1) is found, among other places, in Scientific Games where the Pennsylvania Supreme Court states at the very beginning of its discussion:

> As noted, we are presented with issues of statutory construction, as to which our task is to determine the intent of the Legislature. The language of the statute at issue (here, the Procurement Code) is the primary guide. See 1 Pa.C.S. § 1921 (a), (b). Where ambiguities exist, we may resort to principles of construction, including, among other considerations, evaluation of the occasion and necessity for the statute under review, the object to be attained, and the consequences of the particular interpretation. See id. § 1921(c)(1), (4), (6). [Emphasis added].

Scientific Games, 66 A.3d at 753.

28. Because the phrasing "in accordance with" now utilized in Section 1724(a)(1) can be read as "in harmony with" as well as "under authority of" we find that the multiple principles of statutory construction discussed above require us to interpret the language of Section 1724(a)(1) so as to maintain Board jurisdiction over Procurement Code contracts and other contracts entered into "in accordance with" the Procurement Code (i.e. contracts entered into by Commonwealth agencies "in harmony with" but not necessarily "pursuant to" or "under authority of" the Procurement Code). This interpretation acknowledges the Board's historical purpose, serves the public interest and avoids the potential for disruption to existing Commonwealth business and commercial interests should the validity of its non-Procurement Code contractual relations be called into doubt.[18] 62 Pa. C.S. § 1724(a)(1); C.O.L. 19-27

[18] A broad reading of the Board's jurisdiction (to encompass non-Procurement Code contracts as well) ultimately serves the best interest of the Commonwealth by providing parties contracting with a Commonwealth agency assurance that they may rely upon the agency to fulfill its obligations as well, avoiding the economic disruption that may result from public knowledge of a contrary holding. This latter point is, unfortunately, often disregarded by those narrowly focused on defending a singular claim against a Commonwealth entity brought before the Board.

29. Although we believe it is appropriate and required to construe those provisions affecting the Board's jurisdiction broadly so as to maintain Board jurisdiction over not only Procurement Code contracts but other contracts entered into "in accordance with" the Procurement Code as well, where the plain language of the statutory provisions at issue clearly and explicitly precludes Board coverage of such contracts (as in the case of claims arising from medical assistance programs or employment and collective bargaining agreements) such contracts cannot be considered "in harmony with" or "in accordance with" the Procurement Code and are excluded from the Board's jurisdiction. 62 Pa. C.S. §§ 102, 103, 1724(a)(1); Dubaskas v. Com., Department of Corrections, 81 A.3d 167, 176-77 (Pa. Cmwlth. 2013); Tome v. Department of Public Welfare, B.O.C. Dkt. No. 3918, Order of February 29, 2008, aff'd Tome v. Department of Public Welfare, 2009 Pa. Commw. Unpub. LEXIS 488 (Pa. Cmwlth 2009).

30. Our reading of Section 1724(a)(1) to include Procurement Code contracts and other contracts made "in accordance with" (i.e. in harmony with) the Procurement Code within the Board's jurisdiction, while excluding those clearly and explicitly excluded from application of Board jurisdiction by reason of other provisions in the Procurement Code, is consistent with existing appellate case law on this topic. See e.g. Scientific Games, 66 A.3d at 753-54; Employers Insurance of Wausau, 865 A.2d at 832-33; Hanover, 35 A.3d at 856; Dubaskas, 81 A.3d at 176-77.

31. Section 102(f) of the Procurement Code provides as follows:

> (f) Application to grants.—This part does not apply to grants. For the purpose of this part, a grant is the furnishing of assistance by the Commonwealth or any person, whether financial or otherwise, to any person to support a program. The term does not include an award whose primary purpose is to procure construction for the grantor. Any contract resulting from such an award is not a grant but a procurement contract.

62 Pa. C.S. § 102(f).

32. Written agreements entered into by Commonwealth agencies for the purpose of procuring construction are Procurement Code contracts. 62 Pa. C.S. § 103.

33. Whether or not the Board has jurisdiction over Sordoni's contract claim arising from the Reimbursement Agreement therefore depends on whether or not the Reimbursement Agreement is properly considered a "grant" (and therefore explicitly excluded from Board jurisdiction) or is properly considered a Procurement Code contract (or, alternatively, some other type of contract entered into "in accordance with" the Procurement Code) and therefore within the Board's jurisdiction. 62 Pa. C.S. §§ 102(f) and 1724(a)(1); C.O.L. 1-32.

34. Based on the Reimbursement Agreement, the Construction Contract and our Findings of Fact at Paragraphs 1-30 and 49-96, including our findings, inter alia: that application of the FHWA funding to the Project through the Reimbursement Agreement satisfies PennDOT's mandate from the FHWA to use the funding which underlies the Reimbursement Agreement for "transportation enhancement activities"; that in order to be considered for use of

the above funding from the FHWA, the Project had first to be selected and pre-approved by PennDOT and selected by a regional MPO (in which selection PennDOT also participated); that the primary purpose of the Reimbursement Agreement was, in fact, to procure construction of the Project here at issue; that the Reimbursement Agreement contemplated and required a second agreement be bid and awarded in accordance with the Procurement Code (i.e. the Construction Contract between the City and Sordoni) to accomplish this goal; that PennDOT reviewed and approved all the bidding documents, plans, policies, procedure and specifications for this Project, including the Construction Contract, before the Project was put out for competitive bidding by the City as required by the Reimbursement Agreement; that the Reimbursement Agreement obligated PennDOT to reimburse the City for the costs of constructing the Project which PennDOT had approved, using federal transportation funds received by PennDOT for that purpose; that PennDOT's role in the construction of the Project, as contemplated by the Reimbursement Agreement, was integral and ongoing in that PennDOT retained and exercised authority to review and approve Sordoni's work on the Project before making payments under the Reimbursement Agreement; that Sordoni made ongoing efforts during and after its work on the Project to satisfy PennDOT's documentation requests in order to obtain payment from PennDOT on the Reimbursement Agreement; that the foregoing shows Sordoni's work on the Project was, in fact, done under the ultimate control and direction of PennDOT; and that the evidence adduced at hearing, including that noted above, clearly establishes that the construction of the Project was, in fact, done "for PennDOT"; and because PennDOT itself, in multiple instances other than its briefing for this case, states that the type of funding provided by it through the Reimbursement Agreement "is not a grant", the Board concludes that the Reimbursement Agreement was not a "grant" as defined in 62 Pa. C.S. § 102(f) but must be considered a Procurement Code contract (or, alternatively, a contract entered into "in accordance with" the Procurement Code). Exs. 11, 15, 32, 35, 622, 927; C.O.L. 19-33.

35. Because we have found that the primary purpose of the Reimbursement Agreement was to procure construction of the Project for the grantor (i.e. PennDOT) and that the Reimbursement Agreement is, therefore, not a "grant" under Section 102(f) but is a procurement contract (or, alternatively, a contract entered into "in accordance with" the Procurement Code); and because Sordoni's claim arises from the Reimbursement Agreement as an intended third party beneficiary of this agreement (a contract entered into by PennDOT); and because Sordoni filed its claim at the Board in accordance with 62 Pa.C.S. Section 1712.1, we conclude that the Board has jurisdiction over Sordoni's claim against PennDOT. 62 Pa.C.S. §§ 102(f) and 1724(a)(1); C.O.L. 1-34.

36. The Board does not have authority to determine constitutional issues respecting the validity of its current enabling statute or the effectiveness of Act 142's repeal of the Board of Claims Act of 1937. See Dep't. of General Services v. The Board of Claims, et al., 881 A.2d 14, 19-21 (Pa. Cmwlth. 2005); See also Ruszin et al. v. Cmwlth. of Pa., Dep't of Labor & Industry, et al., 675 A.2d 366, 370-371 (Pa. Cmwlth. 1996).

37. Although the Board is without authority to address a constitutional challenge to our enabling provisions, we are nonetheless required to construe these provisions so as to avoid potential constitutional challenges. See e.g. Boettger v. Loverro 502 A.2d 1310, 1313 (Pa. Super. 1985).

38. Article III, Section 3 of the Pennsylvania Constitution provides that "No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof." Constitution of the Commonwealth of Pennsylvania, Art. III, § 3.

39. A failure to read the Board's current enabling provisions broadly so as to preserve, generally its historical jurisdiction over claims arising from Commonwealth contracts and, in specific, to preserve its jurisdiction over the Reimbursement Agreement here at issue, raises significant issues as to the propriety of Act 142's passage and adoption under Article III, Section 3 of the Pennsylvania Constitution because of the misleading nature of the bill's title when acted upon by the Pennsylvania Senate. Telwell, Inc. v. PSERS and Grandbridge Real Estate Capital, LLC, B.O.C. Dkt. No. 4030, Opinion and Order of September 11, 2013; See also Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 404-10 (Pa. 2005) (In addition to the single subject requirement, Article III, Section 3, of the Pennsylvania Constitution also mandates that the subject of the bill must be clearly expressed in its title); City of Philadelphia v. Commonwealth, 838 A.2d 566, 590-93 (Pa. 2003)(bills making substantive legal changes not considered codifying or compiling laws subject to exception from Article III, Section 3 requirements); Scudder v. Smith, 200 A. 601, 604 (Pa. 1938) ("The purpose of the constitutional requirements relating to the enactment of laws was to put the members of the Assembly and others interested on notice, by the title of the measure submitted, so they might vote on it with circumspection."); Harvey v. Ridley Tp., 38 A.2d 13 (Pa. 1944)(portion of bill omitted from title found unconstitutional).

40. Under the basic principles of contract interpretation, the entire contract should be read as a whole and in a manner to give effect to all its provisions. See, e.g., Harrity v. Continental-Equitable Title & Trust Co., 124 A. 493, 494-495 (Pa. 1924); Pritchard v. Wick, 178 A.2d 725, 727 (Pa. 1962); Capitol Bus Co. v. Blue Bird Coach Lines, Inc., 478 F.2d 556, 560 (3d Cir. 1973).

41. The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties. Where the contract is free from ambiguity, the parties' intent is to be determined from the express language of the contract. LJL Transportation, Inc. v. Pilot Air Freight Corporation, 962 A.2d 639, 647 (Pa. 2009); Chester Upland School District v. Edward J. Meloney, Inc., 901 A.2d 1055, 1059 (Pa. Super. 2006).

42. When interpreting a contract, the trial court must determine the intention of the parties. Where an ambiguity exists, the courts are free to construe the terms against the drafter and to consider extrinsic evidence in so doing. Molag, Inc. v. Climax Molybdenum Co., 637 A.2d 322, 323 (Pa. Super. 1994), citing Raiken v. Mellon, 582 A.2d 11 (Pa. Super. 1990).

43. A written instrument is ambiguous if it is reasonably or fairly susceptible of more than one construction. When a contract is ambiguous, it is undisputed that the rule of contra proferentem requires the language to be construed against the drafter and in favor of the other party if the latter's interpretation is reasonable. Com., State Public School Building Authority v. Noble C. Quandel Co., 585 A.2d 1136, 1144 (Pa. Cmwlth. 1991); See also Dep't of Transp. v.

Semanderes, 531 A.2d 815, 818 (Pa. Cmwlth. 1987). See also Department of General Services v. Pittsburgh Building Co., 920 A.2d at 989 (citing Jay Twp. Auth v. Cummins, 773 A.2d 828, 832 n.3 (Pa. Cmwlth. 2001).

44. The only references in the Reimbursement Agreement to Publication 408 are contained in Paragraphs 3 (relating to design) and 10 (relating to inspections). Ex. 927.

45. Paragraph 3 of the Reimbursement Agreement provides that the contemplated Project design "shall be in accordance with plans, policies, procedures, criteria and specifications prepared or approved by the DEPARTMENT [PennDOT] and the FHWA, including: but not limited to . . . Publication 408 Specifications . . . [Emphasis added]." Ex. 927 at ¶ 3.

46. Paragraph 10 of the Reimbursement Agreement includes a similar reference to Publication 408, providing for the City to "inspect and supervise all construction work in accordance with approved plans and specifications, including, but not limited to, the Publication 408 Specifications . . . [Emphasis added]." Ex. 927 at ¶ 10.

47. Paragraphs 3 and 10 of the Reimbursement Agreement, by their plain language, address items to be included by the City in the design plans or specifications of the Project and made part of the Construction Contract (as approved by PennDOT). Neither these paragraphs nor any other provision in the Reimbursement Agreement purport to incorporate any part of Publication 408 into the Reimbursement Agreement itself. Exs. 11, 15, 927.

48. The Project's design specifications were approved by PennDOT and made part of the Construction Contract in conformance to Reimbursement Agreement requirements. Exs. 11, 15, 927.

49. Under the heading "SPECIAL PROVISIONS", the Construction Contract specifications at page ST-3 state:

> This project is to be constructed in accordance with these specifications and the specified special provisions and sections of PENNDOT Publication 408.

Ex. 15 at p. 26 or ST-3.

50. Because the grammatical structure of the foregoing sentence would have us properly apply the word "specified" to the entire phrase "special provisions and sections of PENNDOT Publication 408"; and because we have found that: the Construction Contract specifications (on the very next page at ST-4) go on to expressly identify 14 "designated special provisions" of PennDOT Publication 408 as being applicable to the Project; there are other explicit references to discrete portions of Publication 408 interspersed among these 700 pages of specification text making these discrete portions of Publication 408 applicable to the Project; and such a special designation of 14 provisions of Publication 408 plus explicit mention of additional discrete portions of Publication 408 would be completely unnecessary and mere surplusage if all of Publication 408 was made applicable to the Project by reason of the sentence/provision cited in Conclusion of Law 49 above, we conclude that only those specified provisions (the

specifically designated 14 provisions of Publication 408 plus the other explicit references to discrete portions of Publication 408 interspersed among these 700 pages of specification text), not the entirety of Publication 408, have been made applicable to the Project by the Construction Contract. Exs. 11, 15; C.O.L. 40-49.

51. Because, inter alia: the plans, specifications and Construction Contract approved for the Project by PennDOT did not incorporate the entirety of Publication 408; Paragraphs 3 and 10 of the Reimbursement Agreement are unclear and ambiguous at best as to their intent to require all or only some of the Publication 408 provisions be incorporated into the Construction Contract specifications; PennDOT drafted the Reimbursement Agreement; and because of the principle of contra proferentum (as well as PennDOT's own actions in effectuating the Reimbursement Agreement by approving a Construction Contract and specifications which incorporated only certain enumerated provisions of Publication 408), we conclude that the Reimbursement Agreement requires only the portions of Publication 408 explicitly designated in the approved plans and specifications (not all of Publication 408) be included in the Construction Contract specifications for the Project. Exs. 11, 15, 927; C.O.L. 40-50.

52. The Board is the ultimate finder of fact and is charged with determining the credibility and persuasiveness of witness testimony, including that of expert witnesses. James Corp. v. North Allegheny School District, 938 A.2d 474, 495 n. 21 (Pa. Cmwlth. 2007).

53. As the finder of fact, the Board is charged with the duty of determining the credibility of evidence and resolving conflicting testimony. It may believe all, or part, or none of the testimony of any witness. The Board's findings need not be supported by uncontradicted evidence, so long as they are supported by substantial evidence. Department of General Services v. Pittsburgh Building Co., 920 A.2d 973, 989 (Pa. Cmwlth. 2007); A.G. Cullen Const. Co, Inc. v. State System of Higher Education, 898 A.2d 1145, 1155 (Pa. Cmwlth. 2006); Com. v. Holtzapfel, 895 A.2d 1284, 1249 (Pa. Cmwlth. 2006); Miller v. C.P. Centers, Inc., 483 A.2d 912 (Pa. Super. 1984).

54. In asserting a claim for recovery on a breach of contract, it is the asserting party's burden to show that the facts exist to support the requested recovery. Paliotta v. Department of Transportation, 750 A.2d 388 (Pa. Cmwlth. 1999).

55. Under Pennsylvania law, in order to recover on a breach of contract claim, the plaintiff must prove by a preponderance of the evidence: (1) the existence of a valid and binding contract to which plaintiff and defendant were parties; (2) the essential terms of the contract; (3) that plaintiff compiled in all material respects with the contract's terms; (4) that the defendant breached a duty imposed by the contract; and (5) that damages resulted from the breach. Technology Based Solutions, Inc. v. Electronics College, Inc., 168 F. Supp. 2d 375, 381 (2001); A.G. Cullen Const. Co., Inc., 898 A.2d at 1161.

56. A contractor who substantially completes a construction project is entitled to payment for that work which it has shown was performed in compliance with the contract specifications under the contract and is not entitled to payment for that work which it has not

shown to comply with the contract specifications. See e.g. A.G. Cullen Const. Co., Inc. v. State System of Higher Education, 898 A.2d 1145 (Pa. Cmwlth. 2006); Wayne Knorr, Inc. v. Department of Transportation, 973 A.2d 1061 (Pa. Cmwlth. 2009); Bruner & O'Connor on Construction Law, Vol. 3 § 8:25.

57. Based on our Findings of Fact at Paragraphs 14 to 17, 126 to 133, 140 to 144, 171 to 183 and 265 (among others), including our findings: that the Construction Contract required Sordoni to provide the City with the services provided for in the Project specifications; that the only Project specification related to the general issue of work documentation on the Project to be provided to PennDOT was one of the "specially designated provisions" of Publication 408 incorporated into the specifications (i.e. Section 112); that Section 112 does not prescribe the form content or type of information which is to be provided, nor does it contain any requirement whatsoever that document submittals regarding products or materials used on the Project (or tests done on the Project) be submitted to the City or PennDOT with Sordoni's payment requests or on any other regular basis; that Section 112 provides, in relevant part, that all project records used to record work progress are to be retained for 3 years after receipt of final payment and are to be made available to PennDOT at a reasonable time and place upon written notice from PennDOT; that the only written request for documentation by PennDOT (Mr. Cochrane's November 10, 2009 letter to the City) is clearly based on the mistaken premise that all of Publication 408's documentation requirements apply to the Project; that the specific documentation requested in this lone written request from PennDOT was either: 1) simply not required by the applicable Construction Contract specifications and/or 2) subsequently addressed or produced in adequate form by the time of Mr. Cepko's review; that Section 01330 of the Construction Contract specifications set forth the Project's submittal process and provided, inter alia, that material and test submittals were to be made to the Project architect and (consistent with industry practice) the Project's architect would determine if the submittal was acceptable and contained information sufficient to show compliance with the specifications; that the Project's architect determined Sordoni had provided the submittals necessary to show it performed its construction work in a satisfactory manner as required by the Project specifications and voiced no complaint regarding the timing of these submittals; and because we have found that PennDOT itself actively interfered with (and prevented) Sordoni's timely compliance with submission of certain steel product documentation to PennDOT (as discussed below), we conclude that there is no merit to PennDOT's assertion that Sordoni failed to comply with the timing requirements of the Construction Contract for submittals or document production to PennDOT. Exs. 11, 15; C.O.L. 48-53, 58-60.

58. The Construction Contract specifications specifically incorporated only two provisions of Publication 408 with specific timing sensitivity, Section 1105.01(e)(6) and Section 106.l0 of PennDOT Publication 408. Section 1105.01(e)(6) provided as follows:

> **6. Mill Orders and Shipping Statements.** Furnish copies of mill orders and shipping statements, as directed. Show the weights of the individual members on the statement, if directed. Assure that the fabricator presents the Department's shop inspector with a copy of the shipping invoice to be stamped for verification of inspection and approval of steel items prior to shipment. Forward the stamped copy with the shipment for the project file.

> Mill certifications will be reviewed, approved and returned to the fabricator by the shop inspector.

Section 106.10 incorporated federal "Buy America Act" provisions and referenced Section 106.01 which stated, in relevant part that:

> With each shipment of steel products delivered to the project site, except fabricated steel (see Section 1105.01(e)(6), provide the Inspector-in-Charge the following:
>
> - For unidentified steel products, documentation such as invoices, bills of lading, and mill certification that the steel was melted and manufactured in the United States.
>
> - For a steel product identifiable from its face, certification that Section 4 of the Act has been complied with.

Exs. 15, 30.

59. A contractor's duties under a construction contract may be discharged where (1) there is an affirmative or positive interference by the owner with the contractor's work, or (2) there is a failure on the part of the owner to act in some essential matter necessary to the prosecution of the work. See generally, Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park, 506 A.2d 862, 865 (Pa. 1986). See also A.G. Cullen Const. Co., Inc. v. State System of Higher Education, 898 A.2d 1145, 1153, 1170-71 (Pa. Cmwlth. 2006) (Owner's omission of notice in specifications of the existence of lead paint in a building resulted in a delay to the contractor's removal of the lead paint, discharging the contractor's duty to comply with the project schedule for this delay); Wayne Knorr, Inc. v. Department of Transportation, 973 A.2d 1061, 1083-84 (Pa. Cmwlth. 2009) (PennDOT's failure to act in five particulars actively interfered with contractor's ability to comply with the project schedule and discharged contractor from responsibility for this delay). Bruner & O'Connor on Construction Law, Vol. 1, §4:31 (American jurisprudence implies in all contracts a duty to cooperate in the performance of the contract).

60. Because we have found, inter alia, that: the Construction Contract specifications approved by PennDOT failed to include a provision requiring Sordoni to notify PennDOT in advance of when in-shop steel fabrication was to take place; no PennDOT shop inspector was identified by PennDOT or present at the McGregor facility when steel was delivered and fabricated despite PennDOT's having received Project meeting minutes indicating steel fabrication was imminent; no Inspector-In-Charge was identified by PennDOT or present at the job site; PennDOT's own acts/omissions actively interfered with, and prevented, Sordoni's ability to comply with Section 1105.01(e)(6) and Section 106.10 in a timely manner; mill certifications and invoices of the type actually required by the specifications were subsequently provided, in substantial part, to Mr. Cepko by the time of his review; and that additional documentation and testimony at hearing from Mr. McGregor and others also presented evidence that the steel invoices, mill test reports and certifications it has subsequently offered to PennDOT and the Board actually do tie-in to the steel it used on the Project, we conclude that Sordoni's failure to comply with the timing requirements of Sections 1105.01(e)(6) and 106.01 for steel

documentation production to PennDOT must be excused. Exs. 15, 30; C.O.L. 48-50, 52-53, 58-59.

61. Based on our Findings of Fact at Paragraphs 126 to 132 and 208 to 398 (among others), including our findings: that Sordoni substantially completed work on the Project; that the only Project specification related to the general issue of work documentation on the Project to be provided to PennDOT was one of the "specially designated provisions" of Publication 408 incorporated into the specifications (i.e. Section 112); that Section 112 does not prescribe the form content or type of information which is to be provided, nor does it contain any requirement whatsoever that document submittals regarding products or materials used on the Project (or tests done on the Project) be submitted to the City or PennDOT with Sordoni's payment requests or on any other regular basis; that Section 112 provides, in relevant part, that all project records used to record work progress are to be retained for 3 years after receipt of final payment and are to be made available to PennDOT at a reasonable time and place upon written notice from PennDOT; that the only written request for documentation by PennDOT (Mr. Cochrane's November 10, 2009 letter to the City) is clearly based on the mistaken premise that all of Publication 408's documentation requirements apply to the Project; that the specific documentation requested in this lone written request was either: 1) simply not required by the applicable Construction Contract specifications and/or 2) subsequently addressed or produced in adequate form by the time of Mr. Cepko's review; that Section 01330 of the Construction Contract specifications set forth the Project's submittal process and provided, inter alia, that material and test submittals were to be made to the Project architect and (consistent with industry practice) the Project's architect would determine if the submittal was acceptable and contained information sufficient to show compliance with the specifications; that the Project's architect determined Sordoni had provided the submittals necessary to show it performed its construction work in a satisfactory manner as required by the Project specifications and voiced no complaint regarding the timing of these submittals; and because we have found that PennDOT itself actively interfered with (and prevented) Sordoni's timely compliance with submission of certain steel product documentation to PennDOT; and because we have found that, with the specific exceptions noted below, Sordoni complied in all material respects with the submittal and documentation requirements of the applicable Project specifications (and that this documentation shows the associated work to have been performed in accordance with Project specifications), we conclude that Sordoni has shown that it complied with the applicable terms of the Construction Contract and the Reimbursement Agreement with regard to the specific pay items set forth below and is entitled to payment thereon from PennDOT as intended third party beneficiary of the Reimbursement Agreement. Exs. 11, 15, 927; C.O.L. 4-15, 48-60, 62-95.

62. Because PennDOT does not dispute the adequacy of documentation (or work) for 19 of the 31 pay items under the Construction Contract, totaling $966,264, the Board concludes that payment in this amount is justified under the Construction Contract and due to Sordoni from PennDOT under the Reimbursement Agreement.[19] Exs. 11, 15, 491, 927; C.O.L. 4-15, 48-57.

[19] This is the $976,567.75 identified for potential payment in the Cepko Report, reduced by $10,300 for unfinished electrical work and rounded to nearest dollar.

63. Because we have found, inter alia, that: the asphalt design mix actually used on the Project exceeded the approved design mix for strength and durability; field testing of the asphalt was not required by the specifications because of the limited depth and volume of asphalt used; and that Sordoni substantially complied with the Construction Contract specifications for asphalt/paving in all material respects, the Board concludes that Sordoni has shown that it complied with the applicable terms of the Construction Contract and the Reimbursement Agreement with regard to Sordoni's claim in the amount of $64,700.00 for paving/resurfacing (Pay Item #7) and is entitled to payment thereon from PennDOT as intended third party beneficiary of the Reimbursement Agreement. Exs. 11, 15, 491, 927; C.O.L. 4-15, 48-57.

64. Because we have found, inter alia, that: Construction Contract Specification 04810.1.6 (related to unit masonry assemblies) provided that the Owner was to "engage a qualified independent testing and inspection agency to perform preconstruction testing" including a concrete masonry unit test, mortar test, and grout test (compressive strength); Specification 04810.3.9 provided that the contractor was to engage a "qualified independent testing and inspection agency" to perform certain specified field tests, including a concrete masonry unit test, a mortar test and a grout test; the City did not engage a qualified testing agency to perform any of the required preconstruction tests for masonry; no field testing of concrete masonry units or mortor was done and field testing of masonry grout performed by Sordoni's testing subcontractor, Midlantic, indicated a 28 day compressive strength of 3,378 psi, which was below the compressive strength required by the Construction Contract specifications; and that Sordoni and the City therefore failed materially to comply with the preconstruction and field testing requirements of the Construction Contract specifications, the Board concludes that Sordoni has failed to establish entitlement under the Construction Contract or the Reimbursement Agreement to payment of its $141,500 claim for this masonry work (Pay Item #10). Exs. 11, 15, 491, 927; C.O.L. 4-15, 48-57.

65. The Construction Contract specifications specifically incorporated Section 106.10 of Publication 408 which required compliance with the Buy America Act, 23 U.S.C. § 313. Exs. 15, 30; C.O.L. 50.

66. Section 106.10(a) of Publication 408, mirroring Buy America Act regulations, provides as follows:

> (a) **Buy America Provisions**. Furnish steel or iron materials, including coating for permanently incorporated work according to 23 CFR 635.410 and as follows:
>
> - Pig iron and processed, pelletized, and reduced iron ore manufactured outside of the United States is acceptable for use in domestic manufacturing process for steel and/or iron materials.
> - All manufacturing processes of steel or iron materials in a product, including coating; and any subsequent process that alters the steel or iron material's physical form or shape, or changes its chemical composition; are to occur within the

United States. This includes rolling, extruding, machining, bending, grinding, drilling, and coating. Coating includes all processes that protect or enhance the value of the material, such as epoxy coatings, galvanizing or painting.

- Provide certification to the Inspector-in-Charge, that all manufacturing processes for steel and iron materials in a product, including coating, have occurred in the United States; certify as specified in Section 106.01.

Products manufactured of foreign steel or iron materials may be used, provided the cost of such products as they are delivered to the project does not exceed 0.1% of the total contract amount, or $2,500, whichever is greater. [Emphasis added].

Exs. 15, 30; 23 C.F.R. § 635.410(c)(2).

67. The federal Buy America Act, 23 U.S.C. § 313, provides in pertinent part as follows:

(c) Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or this title and administered by the Department of Transportation, unless steel, iron, and manufactured products used in such project are produced in the United States.

(d) The provisions of subsection (a) of this section shall not apply where the Secretary finds –

(4) That their application would be inconsistent with the public interest;

(5) That such materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory variety; or

(6) That inclusion of domestic material will increase the cost of the overall project by more than 25 percent.

23 U.S.C. § 313.

68. Federal regulations promulgated under the Buy America Act provide that a state may request a waiver of the Buy America provisions if:

(i) The application of those provisions would be inconsistent with the public interest; or

(ii) Steel and iron materials/products are not produced in the United States in sufficient and reasonably available quantities which are of a satisfactory quality.

23 C.F.R. § 635.410(a)(1).

69. Mabey Bridge & Shore, Inc. v. Schoch, 666 F.3d 862 (3d Cir. 2012), cited by Sordoni as support for a "public interest" exception to application of the Buy America Act

requirements to this Project did not involve the grant of a "public interest" waiver under 23 U.S.C. § 313(b)(1) but rather addressed the issue of whether the Pennsylvania Steel Products Procurement Act ("Steel Act")(73 P.S. §§ 1881-1887) is preempted by the federal Buy America Act. The court held that the Buy America Act did not preempt the Pennsylvania Steel Act to the extent that the mandates of the Pennsylvania law concerning the use of foreign steel on public projects were more stringent than those of the federal law. However, the case does not identify or discuss the necessary grounds for, or availability of, a "public interest" waiver under § 313(b), and, in fact, makes no reference to the public interest basis for waiver beyond the mere recitation of the statutory language as part of its discussion of preemption. Mabey Bridge & Shore, Inc. v. Schoch, 666 F.3d 862, 869 (3d Cir. 2012).

70. The Buy America Act regulations also provide that requests for waivers "must be submitted in writing to Regional Federal Highway Administrator (RFHWA) through the FHWA Division Administrator." The regulation also requires that such waiver requests "must be submitted sufficiently in advance of the need for the waiver in order to allow time for proper review and action on the request." 23 C.F.R. § 635.410(c)(2).

71. Because we have found, inter alia, that: the Construction Contract specifications specifically incorporated Section 106.10 of Publication 408 which required compliance with the Buy America Act; the cost of the foreign steel used by Sordoni on the Project exceeded the $2,500 limit for foreign steel allowed under 23 C.F.R. § 635.410; and because insufficient evidence was presented that the foreign-manufactured steel products used were not available domestically or that anyone requested a waiver on that or on a "public interest" basis, we conclude that Sordoni did not meet the requirements of the Buy America Act or the Construction Contract specifications with regard to all the steel work and product provided to the Project under Pay Item #17 (Misc Metals/Structural). 23 U.S.C. § 313; 23 C.F.R. § 635.410(c)(2); Exs. 15, 30; C.O.L. 65-70.

72. Because we have found that there is no factual basis for a waiver of the Buy America Act requirements under the "public interest" or the "domestically unavailable" exceptions, Sordoni's use of $5,716.71 worth of non-United States steel on the Project was contrary to the requirements of the Buy America Act and the Construction Contract specifications at Section 106.10(a) of Publication 408 which incorporated the Buy America Act requirements. 23 U.S.C. § 313; 23 C.F.R. § 635.410(c)(2); Exs. 15, 30; C.O.L. 65-71.

73. The measure of damages for breach of contract is compensation for the loss sustained, the aim of the law being to put the injured party in the position he or she would have been in had there been no breach. In re: Kellett Aircraft Corp., 191 F.2d 231, 231 (3d Cir. Pa. 1951); ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659, 668 (3rd Cir. Pa., 1998); Moorehead v. Crozer Chester Medical Center, 765 A.2d 786, 790; Maxwell v. Schaefer, 112 A2d 69, 73 (Pa. 1955); P.L.E. Damages § 61.

74. Punitive damages generally are not recoverable in breach of contract actions. Thorsen v. Iron & Glass Bank, 476 A.2d 928, 932 (Pa. Super. 1984); DeLuca v. Fidelity Bank, 422 A.2d 1159, 1161 (Pa. Super. 1980); P.L.E. Damages § 61.

75. Forfeitures and/or unreasonable penalties for a party's failure to fully perform its contract obligations, in place of reasonable damages to fairly compensate the non-breaching party, is not favored and Pennsylvania courts will not order contract damages to the extent that such damages amount to a penalty/forfeiture rather than a reasonable approximation of the loss. Wayne Knorr, Inc. v. Department of Transportation, 973 A.2d 1061, 1091 (Pa. Cmwlth. 2009); Brinich v. Jencka, 757A.2d 388, 402 (Pa. Super. 2000); Restatement (Second) of Contracts, § 356 (1981).

76. Rulings, interpretations and opinions of an agency, while not controlling upon the courts by reason of their authority, "do constitute a body of experience and informed judgment to which the courts may properly resort for guidance." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). The weight to be given such opinions depends, inter alia, on their reasoning and power to persuade. Id. See also Christensen v. Harris County, 529 U.S. 576, 587 (2000).

77. Because we have found, among other things, that the FHWA on its website addressing Buy America Act requirements notes that, where there is an after the fact discovery of foreign iron or steel on a project, the non-compliant iron or steel products may be considered non-participating for federal aid; and because we have found that denying payment for the entire amount of $555,000 worth of steel and steel fabrication work supplied to this Project under Pay Item #17 (Misc Metals/Structural) because it contains only $5,716.71 worth of non-compliant Canadian steel constitutes a forfeiture and/or a penalty on Sordoni of a punitive nature rather than reasonable damages and compensation to the non-breaching party, we conclude that a reasonable and appropriate adjustment to Sordoni's compensation for Pay Item #17 (Misc Metals/Structural) is to consider the cost of the non-domestically produced steel on the Project ($5,716.71) to be "Federal-aid non-participating" and non-conforming to the Construction Contract and to reduce Sordoni's claim on this pay item to $549,283.29 because of its failure to comply with Construction Contract Specification 106.10 of Publication 408. Exs. 15, 30; C.O.L. 52-56, 65-76.

78. However, because we have also found: that Section 05120, Para. 2.8 of the Construction Contract specifications provides that the contractor was to "[e]ngage an independent testing and inspection agency to perform shop tests and inspections and prepare test reports," for the steel fabricated for the Project and required the contractor to provide the independent testing agency "with access to places where the structural steel work is being fabricated or produced to perform tests and inspections"; that specified inspections and tests of shop-bolted and welded connections were to be performed by the independent testing and inspection agency; that no independent inspection or testing was done of the in-shop steel fabrication shop welds and/or bolt connections; that no inspection or testing (independent or otherwise) was done of the in-shop steel fabrication shop welds and/or bolt connections

matching the detailed and thorough nature described in Specification 05120.2.8; that Sordoni failed materially to comply with Section 05120, Para. 2.8 of the Construction Contract specifications; that, as a result, we cannot say with any degree of conviction that the structural steel fabricated for the Project with respect to the welds and bolted connections done in-shop complies with the Construction Contract specifications for the structural steel work required on the Project; and because Sordoni failed to provide the Board with a breakdown or means of distinguishing the cost of the structural steel versus non-structural steel (or the shop fabricated versus field assembled steel) provided for the Project, we conclude that Sordoni has not established entitlement to any payment under the Construction Contract or the Reimbursement Agreement for Sordoni's claim of $555,000 for the steel and steel work under Pay Item #17 (Misc Metals/Structural) performed on the Project. Exs. 11, 15, 491, 927; C.O.L. 52-56, 79-80.

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

80. The general rule of law applicable to a claim for damages in a contract action allows such damages only where: (1) there is evidence to establish them with reasonable certainty; (2) there is evidence to show that they were the proximate consequence of the wrong; and (3) these damages were reasonably foreseeable. Company Image Knitware, LTD v. Mothers Work, Inc., 909 A.2d 324, 336 (Pa. Super. 2006); Dep't of Transportation v. Brozzetti, 684 A.2d 658, 665-66 (Pa. Cmwlth. 1996); Quinn v. Bupp, 955 A.2d 1014, 1021 (Pa. Super. 2008).

81. Because we have found, inter alia, that: Sordoni presented sufficient documentation to confirm the quantity and types of sealant used on the Project; that these product descriptions for the sealant were acceptable to the architect; and that Sordoni has submitted documentation which complied materially with the Construction Contract specifications for caulking (joint sealants) we conclude that Sordoni has shown that it complied with the applicable terms of the Construction Contract and the Reimbursement Agreement with regard to $4,800 of caulking work (Pay Item #20 – Caulking) performed by Sordoni on the Project and is entitled to payment thereon from PennDOT as intended third party beneficiary of the Reimbursement Agreement. Exs. 11, 15, 491, 927; C.O.L. 52-56.

82. Based on our Findings of Fact at Paragraphs 350 to 374 (among others), including our findings: that the Construction Contract specifications at Section 03300, Para. 3.16.C.7. call for a total of eight standard cylinder specimens to be prepared and tested for each cast-in-place concrete pour with four cylinders to be laboratory cured and four to be cured in the field, but only five standard cylinder specimens were prepared for each cast-in-place concrete pour and all of these were laboratory cured as opposed to laboratory and field cured; that the only practical purpose for testing field-cured cylinder samples as opposed to lab-cured cylinder samples was to ascertain whether or not the contractor had taken appropriate measures to protect these concrete pours against on-site weather conditions; that Sordoni's experience and procedures for pouring concrete on the Project (which included the routine monitoring of on-site temperatures, consistent use of thermal blankets to protect pours as necessary, and suspension of pouring

activity on unacceptably cold days) were adequate to assure the proper curing of these concrete pours; that the Project architect, Hemmler + Camayd, accepted all these concrete pour tests and thus considered these compressive-strength tests, as conducted, adequate to show compliance with the Construction Contract specifications; and because we find the foregoing testing regimen actually employed on the Project to be in material compliance with these applicable concrete pour specifications at Specification 03300.3.16.C. 7 and 9, we conclude that Sordoni has demonstrated material compliance with the concrete pour testing requirements of the Construction Contract. Exs. 15, 39, 76, 760, 785; C.O.L. 52-56.

83. Because we have found, inter alia, that the testing regimen for concrete pours actually employed on the Project to be in material compliance with the applicable specifications and concluded that Sordoni has demonstrated material compliance with the concrete pour testing requirements of the Construction Contract; that, with the exception of a single pour of 8 CY on June 4, 2009, Sordoni has documented and shown compliance with the applicable compressive strength requirements for all its concrete pours on the Project as required by the specifications; that this one pour on June 4, 2009 constituted approximately 1.65% of the total concrete pour on the Project (483.5 CY), we conclude that Sordoni has shown that it complied with the applicable terms of the Construction Contract and the Reimbursement Agreement with regard to payment of $170,968 out of the total amount of $173,836 for these Pay Items (#12-15) and is entitled to payment thereon from PennDOT as intended third party beneficiary of the Reimbursement Agreement. Exs. 15, 39, 76, 491, 760, 785; C.O.L. 52-56, 79-80.

84. Because we have found that steel certificates and delivery tickets for reinforcing steel and wire mesh presented by Sordoni could not be matched with the delivery tickets for the steel rebar and mesh actually used on the Project; and because we are unable to find that Sordoni provided appropriate mill certificates for (or confirmed the U.S. origin of) the steel rebar and wire mesh actually used on the Project, we conclude that Sordoni has not established entitlement to payment of $51,049 on Pay Item # 16 (Concrete Rebar/WWF) and no award for this pay item will be made. Exs. 15, 30, 491; C.O.L. 52-56.

85. Because we have found, inter alia, that: Sordoni has submitted requests for payment of 100% of the elevator work ($83,000.00); both parties appear in agreement that work remained to be done on the elevator and that the outstanding documentation would not be available until this work was closer to completion; evidence of some deterioration due to the unfinished status of this work was presented; and that Sordoni has shown satisfactory completion of only 85% of the total elevator work (with a value of $70,550), the Board concludes that Sordoni has shown that it complied with the applicable terms of the Construction Contract and the Reimbursement Agreement with regard to 85% of the total elevator cost, or $70,550 on Pay Item #26 (Elevator) and is entitled to payment thereon from PennDOT as intended third party beneficiary of the Reimbursement Agreement. Exs. 11, 15, 491, 975; C.O.L. 52-56, 79-80.

86. Because we have found, inter alia, that: Sordoni has submitted requests for payment of 100% of the electrical work ($103,000.00); both PennDOT and Sordoni agree that approximately 10% of the electrical work remained unfinished and that these were “punch list” items (which would be covered by the money held in retention); and that Sordoni has not

supported its request for payment of the full $103,000 for this work, but only approximately 90% of the total electrical work cost, the Board concludes that Sordoni has shown that it complied with the applicable terms of the Construction Contract and the Reimbursement Agreement with regard to 90% of the total electrical work cost, or $92,700 on Pay Item #29 (Electrical) and is entitled to payment thereon from PennDOT as intended third party beneficiary of the Reimbursement Agreement. This finding that Sordoni is entitled to payment of only 90% of the $103,000 Construction Contract total for electrical work requires a deduction of $10,300 from the total potential payment of $976,653.75 cited by Mr. Cepko, since he included in that total payment of the full $103,000 for electrical work (Item # 29). Exs. 11, 15, 491, 975; C.O.L. 52-56, 79-80.

87. Because we have found that: the Construction Contract specifications (including Section 112 of Publication 408 which was expressly incorporated into the specifications) contained no requirement whatsoever that submittals regarding products or materials used on the Project, or tests done on the Project, be submitted to the City or PennDOT with payment requests or on some other regular basis, Sordoni's argument that PennDOT waived such requirement is moot because there was no such requirement in the Construction Contract specification. Ex. 15; C.O.L. 52-56.

88. Because we have found, inter alia, that: PennDOT first notified the City generally of concerns about the adequacy of Sordoni's work documentation in July 2009; the Construction Contract specifications and the Reimbursement Agreement provided that payments made were estimates of amounts due subject to later review; the Construction Contract specifications explicitly provided that a failure by the City to enforce a requirement would not constitute a waiver of same; the provisions of the Construction Contract specifications governing submittals to the architect of documents relating to product data and material testing are not ambiguous, nor does Sordoni identify any ambiguity in these specifications which would give rise to differing interpretations as to their meaning; the architect did not identify any provision of the specifications for waiving these submittal requirements; and because we found no factual basis for Sordoni's assertion that PennDOT waived the Construction Contract specification requirements governing submittals (to the architect) relating to product data and material testing, we conclude that PennDOT has not waived the Construction Contract specification requirements governing submittals (to the architect) relating to product data and material testing. Ex. 15; C.O.L. 52-56; See also, Westinghouse Electric Corporation/CBS v. Workers' Compensation Appeals Board (Korach), 883 A.2d 579, 586-87 (Pa. 2005) (discussing grounds for waiver of contract terms and denying request for same).

89. A party may be deemed to have waived a contract requirement that written authorization is required for any changes to the scope of the work where the party orally requested the changes, was aware that the changes would cost extra, and promised to pay for the changes. Universal Builders, Inc. v. Moon Motor Lodge, Inc., 244 A.2d 10, 15 (Pa. 1968) (holding that waiver was found where the agent's owner requested the changes, was aware that there would be an extra cost, and promised to pay the extra cost).

90. A party is deemed to have waived a contract requirement that written authorization was required for extra work where the party has orally requested that the extra

work be performed and assured the party performing the extra work that a written change order was not required notwithstanding contract terms to the contrary. Wagner v. Graziano Construction Co., 136 A.2d 82, 83 (Pa. 1957) (where a contractor was held liable to a subcontractor for extra work where the contractor's superintendant orally requested the extra work and assured the subcontractor that the change order need not be in writing notwithstanding the contract provision that written authorization was required).

91. Contract ambiguity and significant changes in the contract specifications' scope of work are factors to be considered in determining whether the parties intended to modify a contract provision disclaiming liability for extra work performed. Consolidated Tile & Slate Company v. Fox, 189 A.2d 228, 229-230 (Pa. 1963).

92. Because we have found, inter alia, that: Sordoni seeks payment for eight items of extra work totaling $85,254.00 by way of Payment Application 14; the Construction Contract expressly requires written approval by the City for any extra work on the Project; neither the City nor PennDOT ever provided written or oral approval of Sordoni's change order requests included in Payment Application 14, requested that the work be performed by Sordoni, promised to pay for that work or assured Sordoni that a written change order was not required, the Board concludes that neither PennDOT nor the City waived the Construction Contract requirement that written approval was necessary for change orders and that this Construction Contract requirement precludes payment to Sordoni for these amounts. Accordingly, Sordoni is not entitled to payment for any of the change order work included in Payment Application 14. Universal Builders, Inc. v. Moon Motor Lodge, Inc., 244 A.2d 10 (Pa. 1968) (holding that waiver was found where the agent's owner requested the changes, was aware that there would be an extra cost, and promised to pay the extra cost); Wagner v. Graziano Construction Co., 136 A.2d 82 (Pa. 1957), (where a contractor was held liable to a subcontractor for extra work where the contractor's superintendant orally requested the extra work and assured the subcontractor that the change order need not be in writing notwithstanding the contract provision that written authorization was required). Exs. 11, 15, 35; C.O.L. 52-56, 89-92.

93. In summary, the Board concludes that Sordoni has shown that it complied with the applicable terms of the Construction Contract and the Reimbursement Agreement with regard to the following items and is entitled to payment thereon from PennDOT as intended third party beneficiary of the Reimbursement Agreement:

Work Identified for Potential Payment in Cepko Report:	
(Items 1-6, 8-9, 11, 18-19, 21-22, 24, 27-28, 30-31)	$976,564
Less adjustment for incomplete work:	
Item #29 – Electrical	(10,300)
Plus adjustment for rejected work:	
Item #7 – Paving/Surfacing	64,700
Item # 20 – Caulking	4,800
Item #12 - #15 – Various Concrete Work	170,968
Item # 26 – Elevator (85% complete)	70,550
Total	**$1,277,282**

Exs. 11, 15, 927; C.O.L. 3-14, 52-56, 61-92.

94. The parties have agreed that Sordoni has been paid $876,382.55.[20] N.T. 298, 2038-40.

95. Deducting the amount paid (rounded to the nearest dollar) from the total value of work documented and completed by Sordoni in compliance with the Construction Contract specifications results in a principal amount of $400,899 which is still due and owing to Sordoni from PennDOT as intended third party beneficiary under the Reimbursement Agreement. Exs. 11, 15, 927; C.O.L 3-14, 52-56, 61-93.

96. Section 3932 of the Procurement Code (captioned "Government agency's progress payment obligations") requires, absent a contract term establishing time for payment, that payment (less retainage) be made within 45 days of receipt of the payment application, and that interest be paid on amounts not satisfied within 45 days. 62 Pa.C.S. § 3932(b) and (c).

97. Section 3934 of the Procurement Code permits a government agency to withhold payment for deficiency items according to terms of the contract, provided that it gives notice of the deficiency items within 15 days of receipt of the payment application. 62 Pa.C.S. § 3934.

98. Section 3935 of the Procurement Code permits the Board to award a penalty and attorney fees on contract amounts withheld in bad faith, defined as withholding which is arbitrary or vexatious. 62. Pa.C.S. § 3935.

99. Chapter 39 of the Procurement Code (which includes Sections 3932-3935) does not create any obligation on the part of government agencies to third parties. 62 Pa.C.S. § 3939.

100. Because we have found, inter alia, that: PennDOT's belief that all of Publication 408 applied to the Project was not unreasonable even though mistaken; PennDOT gave notification to the City of its concerns over Sordoni's compliance with documentation requirements under Publication 408 and the Construction Contract specifications in July 2009 (before the time of the City's submission of Payment Application 6 which was PennDOT's first refusal to make payments); Sordoni did fail, materially, to comply with some significant Construction Contract specifications in its work on the Project (e.g. steel shop inspections and testing of welds and bolts and masonry testing) and did not show compliance with other work documentation requirements of the Construction Contract specifications until after work on the Project had stopped; there were legitimate disputes as to whether Sordoni had complied in all material respects with the Construction Contract specifications; and because we did not find PennDOT's decision to withhold payments as it did to be arbitrary, vexatious or done in bad faith, we conclude that Sordoni is not entitled to an award of attorneys' fees or penalties here under Section 3935. 62. Pa.C.S. §§ 3932, 3934, 3935; Department of General Services v. Pittsburgh Building Co., 920 A.2d at 980; C.O.L. 52-56, 64, 78, 84, 96-99.

[20] This amount represents PennDOT's actual payments on Payment Applications #1 - #5 (i.e. $973,758.38 less 10% retainage withheld by PennDOT).

101. Because Sordoni brings this claim as a third party beneficiary of the Reimbursement Agreement the penal provisions of Sections 3932, 3934, and 3935 of the Procurement Code, and Chapter 39 provisions do not apply to Sordoni's claim in any event. 62 Pa.C.S. § 3939.

102. Section 1751 of the Procurement Code provides for the award of interest "on amounts ultimately determined to be due shall be payable at the statutory rate applicable to judgments from the date the claim was filed with the contracting officer." 62 Pa.C.S. § 1751.

103. The interest calculation prescribed by Section 3932(c) of the Procurement Code (which appears to apply generally to Commonwealth, county and municipal entities alike) is at odds with Section 1751 of the Procurement Code. 62 Pa. C.S. § 3932(c), 62 Pa. C.S. § 1751.

104. Because Chapter 39 provisions do not apply to Sordoni's claim; and because Section 1751 of the Procurement Code is located in the same chapter as, and immediately following, the Board's enabling provisions, and makes references to "amounts ultimately determined to be due" "judgments" and claims "filed with the contracting officer"; and because Section 1751 is the more specific interest calculation provision applicable to Board awards, we conclude that interest on awards in this case are properly calculated in accordance with Section 1751 of the Procurement Code. 1 Pa. C.S. § 1933; 62 Pa. C.S. §§ 1751, 3932, 3939; C.O.L. 93-103.

105. The Reimbursement Agreement's "Save Harmless" provision reads as follows:

> The [City] shall indemnify, save harmless and (if requested) defend the Commonwealth, the DEPARTMENT, the FHWA and all of their officers, agents and employees from all suits, actions or claims of any character, name or description, including, but not limited to, those in eminent domain or otherwise relating to title to real property, brought for or on account of any injuries or damages received or sustained by any person, persons or property, arising out of, resulting from or connected with the planning, development, design, acquisition, construction, completion, occupancy, use, operation and/or maintenance of the Project or the improvements that it comprises, by the [City] and/or the [City's] consultant(s) and/or contractor(s) and their officers, agents, employees, whether the same be due to defective title, defective materials, defective workmanship, neglect in safeguarding the work, or by or on account of any act, omission, neglect or misconduct of the [City] and/or the [City's] consultant(s) and/or contractor(s), their officers, agents and employees, during the performance of the work or thereafter, or to any other cause whatever.

Ex. 927.

106. The Reimbursement Agreement's "Save Harmless" clause, by its express language, requires the City to indemnify PennDOT for any "injury or damages" caused to any person "arising out of [or] resulting from" 1) any act or omission of the City, its consultants and/or its contractors in connection with the Project (from the planning stages through to completion) or 2) which are due "to any other cause whatsoever." Ex. 927.

107. If parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own conduct, they must do so in clear and unequivocal language. The closing words of the "save harmless" clause in the Reimbursement Agreement purporting to extend indemnification for any asserted damage claim due to "any other cause whatsoever" does not constitute the sort of clear and unequivocal language required for such indemnification. Ex. 927; See also Greer v. City of Philadelphia, 795, A.2d 376, 378 (Pa. 2002); Ruzzi v. Butler Petroleum Company, 588 A.2d 1, 6 (Pa. 1991).

108. Because we have found no liability under the Reimbursement Agreement on PennDOT's behalf for any work that was not adequately performed and documented by Sordoni in accordance with the Construction Contract and its specifications; because PennDOT, as a matter of fact, has incurred no damages here that were caused by the City, the City's consultants or the City's contractors; and because the "Save Harmless" clause relied upon by PennDOT does not purport in clear and unambiguous language to extend indemnification to PennDOT for PennDOT's own conduct; and because the damages incurred here by PennDOT are due to its own acts/omissions in breaching the Reimbursement Agreement, we conclude that the "Save Harmless" clause does not provide for indemnification of PennDOT by the City under the facts and holdings of this case. Exs. 11, 927; C.O.L. 61-95, 105-107.

109. Because we have found that the damages incurred by PennDOT are solely a result of its own actions not a result of a failure by the City, its consultants or its contractors, and there is no factual basis to apply the "save harmless" clause it seeks to invoke, we conclude that PennDOT's cross-claim against the City must be denied. C.O.L. 61-95, 105-108.

110. Because we have found that PennDOT is liable to Sordoni (as a third party beneficiary under the Reimbursement Agreement) for Sordoni's work on the Project which was adequately performed and documented as required by the Construction Contract specifications (but excluding compensation for work which Sordoni failed to complete or failed to show that it performed and documented as required by the Construction Contract specifications); and because neither PennDOT nor the City is responsible for Sordoni's claims for extra work set forth in Payment Application 14, we would find PennDOT equally liable to the City under the Reimbursement Agreement for the same reasons we found PennDOT liable to Sordoni, but for the fact that we have made an award directly from PennDOT to Sordoni as third party beneficiary of the Reimbursement Agreement. However, we conclude that a second award to the City from PennDOT under the Reimbursement Agreement for this same unpaid work of Sordoni would be duplicative. C.O.L. 61-95.

111. Because we have made an award directly from PennDOT to Sordoni on the Reimbursement Agreement; and because a second award to the City from PennDOT for this same work of Sordoni's would be duplicative, we do not make an additional, duplicative award to the City on its Counterclaim against PennDOT. C.O.L. 61-95, 108-110.

112. Rule 1042.3 of the Pennsylvania Rules of Civil Procedure, requires a party whose action is based upon an allegation of professional misconduct to file a certificate of merit

supporting a finding that the licensed professional had deviated from accepted professional standards. Pa.R.C.P. 1042.3.

113. Rule 1042.3 of the Pennsylvania Rules of Civil Procedure applies only to professional liability claims against licensed professionals. Zokaites Contracting Inc. v. Trant Corporation, 968 A.2d 1282, 1289 (Pa. Super. 2009).

114. Because the City, in its claim against Pasonick, seeks indemnification under the inspection services contract for a failure to perform inspection duties set forth in the agreement (rather than for violation of some professional standard of care) the requirement for a Certificate of Merit under Rule 1042.3 does not apply. Id.

115. Because the Board found that the City is not liable to PennDOT, the City's claim for indemnification from Sordoni is moot. C.O.L. 105-109.

116. Because we have found that PennDOT is liable to Sordoni under the Reimbursement Agreement for Sordoni's work on the Project which was adequately performed and documented as required by the Construction Contract specifications; and because neither PennDOT nor the City is responsible for Sordoni's claims for extra work set forth in Payment Application 14 (since neither the City nor PennDOT gave written approval for that extra work as required under the terms of the Construction Contract or otherwise requested or indicated their approval by their conduct), to grant an award from the City's to Sordoni for this same work on the Construction Contract would duplicate the award already granted to Sordoni from PennDOT. Accordingly, this claim is denied. C.O.L. 61-95.

117. Because we found no persuasive evidence that the City ever requested Sordoni to provide the extra work beyond the scope of the Construction Contract for which Sordoni makes claim and the express terms of the Construction Contract between Sordoni and the City fully addressed and governed Sordoni's remaining work on the Project; and because we already make an award to Sordoni in this case to the extent that Sordoni complied with its responsibilities under the Construction Contract, we conclude that Sordoni's counterclaim against the City for unjust enrichment and quantum meruit must be denied. C.O.L. 61-95, 110-116; Wilson Area School District v. Skepton, 895 A.2d 1250, 1255 (Pa. 2006), citing Third National & Trust Company of Scranton v. Lehigh Valley Coal Company, 44 A.2d 571, 574 (Pa. 1945) (no award made in quantum meruit for matters addressed by existing contract).

118. Because we find no factual basis to support Sordoni's claim for "account stated" in its counterclaim against the City, we conclude that this portion of Sordoni's counterclaim against the City for "account stated" must also be denied. F.O.F. 479-484.

119. Because we make no award from the City to PennDOT or Sordoni, we conclude that the City's indemnity claim against Pasonick is moot. C.O.L. 105-109, 116-118.

120. Because the only indemnification provision in the City-Pasonick inspection services agreement provides that Pasonick will indemnify the City, not vice versa; and because Pasonick has no contract with Sordoni (or any other party in this proceeding) from which a

contractual indemnification obligation might flow, we conclude that we have no jurisdiction over Pasonick's Counterclaim against the City or its Counterclaim against Sordoni as they are without contractual bases. Ex. 932; Department of General Services v. Limbach Company and Penn Transportation Services, Inc., 862 A.2d 713, 718-20 (Pa. Cmwlth. 2004)

121. Based on the facts of this case and applicable case law we make no awards on any of the claims, counterclaims or crossclaims filed by the parties in this case other than the award to Sordoni from PennDOT as set forth above. C.O.L. 1-120.

OPINION

Introduction.

This action centers on a construction project undertaken by the City of Scranton ("City") Office of Economic and Community Development ("OECD"), known as the "Park, Plaza and Pedestrian Court Project" ("Project"). Work on the Project involved three primary elements: construction of a pedestrian court connecting Lackawanna Avenue with Bogart Place, a pedestrian walkway, and a park located on land owned by the National Park Service. The Project was one portion of a larger renewal effort in the area of 500 Lackawanna Avenue in the City of Scranton.

The Project was funded by the U.S. Department of Transportation, Federal Highway Administration ("FHWA") under the federal Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"). This act provided funds to the Commonwealth of Pennsylvania, Department of Transportation ("PennDOT"), as well as other state transportation departments, for statewide "transportation enhancement activities."

On August 5, 2008,[21] PennDOT and the City entered into a Transportation Enhancements Federal Aid Reimbursement Agreement ("Reimbursement Agreement") by which PennDOT agreed to reimburse the City for the costs associated with construction of the Project. Having secured this funding, the City then put the Project out for bid in accordance with the Reimbursement Agreement and retained Sordoni Construction Company, Inc. ("Sordoni") to construct the Project. As described in the bid proposal and specifications, work included:

[21] The Reimbursement Agreement was signed by the Mayor of Scranton and the City Solicitor on July 3, 2008, the executive director of the OECD and the City Controller on July 7, 2008, and various PennDOT officials culminating with the Comptroller's certification that funds for the Project were available on August 5, 2008.

> . . . asphalt paving, concrete paving, individual concrete pavers, storm drainage, fencing, seeding, earthwork and topsoil; repairs to existing cast-in-place concrete retaining wall, masonry, foundations and walls, structural steel framing, steel stairs and railings, ornamental metal work, waterproofing, some roofing, doors and frames, glass and aluminum curtain wall, elevator, electrical power and lighting systems, minor HVAC systems and minor plumbing work.

(Exs. 15, p. 24, 120).

The total cost of the Project was to be $2,338,560.00.[22] Sordoni commenced work on the Project November 24, 2008.

In accordance with both the Project Construction Contract between the City and Sordoni (hereinafter the "Construction Contract") and the Reimbursement Agreement, Sordoni was to submit periodic payment applications to the City's inspector, which would review the payment applications and forward them to the City, which would in turn submit the payment applications to PennDOT. PennDOT would then review the payment applications and, if approved, send payment in the payment application amount to the City. The City would then deposit the payment from PennDOT and prepare a check in the same amount to Sordoni in payment for its work completed on the Project. (NT 46-47, 83-84). On or about October 14, 2008, the City contracted with Michael J. Pasonick Jr., Inc. ("Pasonick") to act as its inspector on the Project.

Following the procedure described above, Sordoni submitted Payment Applications 1 through 5 to Pasonick from February 9, 2009, to June 1, 2009. Each payment application was approved by Pasonick and sent to the City, which submitted the applications to PennDOT for payment in accordance with the Reimbursement Agreement. For each of the Payment Applications 1 through 5, PennDOT paid the City the amounts included in the respective

[22] PennDOT's initial commitment in the Reimbursement Agreement was to reimburse the City up to $2,000,000 for construction and construction inspection. That total was subsequently increased to $2,338,560 in a change order approved by PennDOT September 9, 2008. The change order specified that $2,088,000 of the $2,338,560 was dedicated to construction of the Project.

payment applications, and the City then paid Sordoni. The total amount paid by PennDOT to the City (and subsequently by the City to Sordoni) was $876,382.55.

Sordoni submitted its 6th Payment Application to Pasonick on July 8, 2009. (Exs. 35 at p. 46). Payment Applications 7 though 18 followed. However, PennDOT did not approve any payment application after Payment Application 5. PennDOT claimed that its initial decision to stop payment was based on what it considered Sordoni's and Pasonick's lack of compliance with PennDOT's documentation procedures specified in PennDOT Publication 408, and its concern that PennDOT was unable to substantiate the quality of the construction work (N.T. 673-74, 678). As a result of PennDOT's non-payment on Payment Application 6 and thereafter and its subsequent unsuccessful efforts to satisfy PennDOT's documentation requirements, Sordoni left the job near (but before) full completion of its work on the Project.

Sordoni asserts its claim against PennDOT with an amended complaint filed August 3, 2010, seeking payment of the remaining Construction Contract balance (and for several change order requests) less a small allowance for unfinished work as a third party beneficiary of the Reimbursement Agreement. PennDOT filed an answer to the amended complaint and new matter on November 15, 2010, denying that Sordoni was a third party beneficiary to the Reimbursement Agreement, asserting that the City violated the terms of the Reimbursement Agreement concerning inspection and documentation of the Project, and otherwise denying that the Board has jurisdiction over Sordoni's claim.[23] PennDOT also filed a cross-claim joining the City. In it, PennDOT seeks indemnification from the City under the Reimbursement Agreement alleging that the City breached the terms of this agreement by failing to adequately inspect and

[23] In addition to refuting Sordoni's status as a legitimate third party beneficiary, PennDOT asserts that the Board lacks jurisdiction because the Reimbursement Agreement is not a Procurement Code contract and because Sordoni did not file its claim timely with the Board under 62 Pa. C.S. § 1712.1.

supervise construction of the Project, including a failure to submit certifications and documentation of materials incorporated into the work on the Project as required by contract.

On December 15, 2010, the City filed an answer and new matter to PennDOT's joinder, denying that it had failed to comply with the terms of the Reimbursement Agreement. The City also asserted that PennDOT had waived (and is estopped from proceeding with) its claims against the City by having accepted and paid Sordoni's first five payment requests. In addition, the City counterclaimed against PennDOT (alleging that PennDOT breached the Reimbursement Agreement by failing to reimburse the City for work performed by Sordoni) and cross-claimed against Sordoni for indemnification under the Construction Contract. The City also joined Pasonick as an additional defendant, seeking indemnification from Pasonick under its inspection services contract.

On December 30, 2010, Sordoni filed an answer denying the City's cross-claim and a counterclaim against the City for breach of the Construction Contract (by not paying for work performed by Sordoni) and for unjust enrichment/quantum meruit. PennDOT filed a response to the City's new matter and cross-claim, denying that it breached the Reimbursement Agreement and reasserting that the City had breached the Reimbursement Agreement's inspection provisions. Pasonick filed an answer with new matter to the City's joinder complaint, denying that it breached the terms of its inspection contract with the City. Pasonick also counterclaimed against the City and cross-claimed against Sordoni, asserting a general right to indemnification from both. The City filed an answer to Sordoni's counterclaim, denying liability to Sordoni under the Construction Contract beyond any reimbursement it receives from PennDOT under the Reimbursement Agreement. Sordoni filed an answer to Pasonick's new matter and cross-claim, denying that Pasonick has a right to indemnification by Sordoni. The City filed answers to

PennDOT's and Pasonick's new matter and counterclaims, again denying that it breached the Reimbursement Agreement with PennDOT, and denying that Pasonick had any right to indemnification by the City.

Summary of Issues/Arguments

The primary action in this case presents several issues for the Board's determination. First, does the Board have jurisdiction over this action. Second, if the Board has jurisdiction, has Sordoni provided sufficient evidence to establish that it satisfactorily performed its construction responsibilities on the Project and that sufficient documentation of same has been provided to PennDOT so that it should be paid under the Reimbursement Agreement. Third, is Sordoni also entitled to payment for extra-contractual work performed on the Project under a number of alleged change orders.

Jurisdiction - Generally

Sordoni asserts that it is entitled to bring this action before the Board as an intended third party beneficiary of PennDOT's Reimbursement Agreement with the City. PennDOT denies that Sordoni is an intended third party beneficiary so that it lacks a contract with the Department on which to base its claims. In addition, PennDOT argues that the Board lacks jurisdiction over non-Procurement Code contracts and that the Reimbursement Agreement is a "grant" and therefore not a "contract" under the Procurement Code. PennDOT also asserted in its initial response to Sordoni's claim that Sordoni did not timely file its statement of claim with the Board pursuant to Section 1712.1.

In order to determine whether or not it has jurisdiction over these actions, the Board must address two primary issues. First, is Sordoni an intended third party beneficiary of the

Reimbursement Agreement. Second, is the Reimbursement Agreement a contract under the Procurement Code or one which nonetheless remains subject to Board jurisdiction after the passage of the Act of December 3, 2002, P.L. 1147, No. 142 ("Act 142"). The Board need not now address PennDOT's "timeliness" objection to Sordoni's claim at the Board as we have already done so in our Order of October 15, 2010.[24]

For the reasons set forth below, the Board finds in the affirmative on each of these issues. Specifically, we find that: 1) Sordoni is an intended third party beneficiary under the Reimbursement Agreement; 2) the Reimbursement Agreement is a Procurement Code contract; 3) the Reimbursement Agreement is a contract entered into "in accordance with" the Procurement Code; and 4) consistent with fundamental principles of statutory construction and more than 200 years of case law decisions both before and after the re-establishment of the Board by Act 142, the Board retains jurisdiction over claims based on these types of contracts as they are clearly designed to procure construction to be awarded and performed in accordance with the Procurement Code under the ultimate direction and control of PennDOT.

Jurisdiction: Third Party Beneficiary Issue

Sordoni avers that it is a third party beneficiary of the Reimbursement Agreement between the City and PennDOT. As such, it asserts that the Board has jurisdiction over its claims pursuant to Sections 1712.1 and 1724(a)(1) of the Procurement Code. 62 Pa.C.S. §§ 1712.1 and 1724(a)(1).

[24] In our Order of October 15, 2010, we found PennDOT's letter of February 26, 2010 inadequate to constitute a denial of Sordoni's administrative claim and start the 15 day period to file at the Board. We do, however, note that subsequent testimony from Ms. Rebecca Burns, author of the February 26, 2010 letter, further confirmed our holding on this issue. See Ex. 700; N.T. 2314-15.

To begin our analysis of this issue, we note that Section 1712.1 of the Procurement Code provides that a contractor may file a claim "for controversies arising from a contract entered into by the Commonwealth" and Section 1724(a)(1) provides that the Board has jurisdiction over "claims arising from . . . [a] contract entered into by a Commonwealth agency. . . ." Id. Case law precedent indicates that both these phrases are to be read literally and broadly to include claims sounding in contract by third parties where the facts show their claims to "arise" from the Commonwealth contract at issue. See e.g. Brocker Manufacturing & Supply Company, Inc. v. United Bonding & Insurance Company, 301 A.2d 438, 440 (Pa. Cmwlth. 1993)(recognizing that a subcontractor's claims against the Commonwealth can be filed in the Board of Claims even where the subcontractor is not a signatory to the contract with the agency because the claim arises out of a Commonwealth contract); Armour Rentals, Inc. v. General State Authority, 287 A.2d 863, 867-68 (Pa. Cmwlth. 1971)(recognizing that a claimant's action in assumpsit properly sat with the Board of Claims even though the claimant was not a signatory to the contract). Accordingly, if Sordoni can show itself to be a third party beneficiary of the Reimbursement Agreement, it has contractual rights arising from this contract made with a Commonwealth agency, and the Board may assert jurisdiction over the claim.

In order to establish that it is a third party beneficiary of the Reimbursement Agreement between PennDOT and the City, Sordoni must first satisfy the two-part test set forth by the Pennsylvania Supreme Court in Guy v. Liederbach, 459 A.2d 744, 751 (Pa. 1983) (quoting Restatement (Second) of Contracts, § 302 (1979)):

> There is thus a two part test for determining whether one is an intended third party beneficiary: (1) the recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and (2) the performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the

> circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

The Supreme Court further elucidated the framework for analyzing third party beneficiary claims in Scarpitti v. Weborg, 609 A.2d 147 (Pa. 1992), a case where the appellant argued that the holding in Guy was intended to have very limited application and that the Restatement (Second) of Contracts, § 302 (1979) applied only to the specific factual pattern found in Guy. In Scarpitti, the Supreme Court opined that "[i]t is clear from the language of the opinion in Guy that the Court was adopting the Restatement (Second) of Contracts, § 302 (1979) as the law of Pennsylvania." 609 A.2d at 150. The Court in Scarpitti continued as follows:

> [A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, Spires v. Hanover Fire Ins. Co., 70 A.2d 828 (Pa. 1950), unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intentions of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. Guy, at 751.

609 A.2d at 151-152. The Guy and Scarpitti cases, together with the Restatement (Second) of Contracts § 302, provide the guidelines for analysis of third party beneficiary claims in Pennsylvania.

Although the Reimbursement Agreement does not expressly state an intent to benefit Sordoni by name, there are clearly circumstances in this case compelling recognition that PennDOT and the City intended Sordoni to receive the benefit of payment for its services from the money provided by PennDOT pursuant to the Reimbursement Agreement. To begin with, Paragraph 11(d) of the Reimbursement Agreement provided that the City would submit to PennDOT certified periodic invoices for work performed on the Project by the City's contractor,

and that PennDOT would reimburse the City "for the proportionate share [100%] of the approved charges." The Reimbursement Agreement also required that the City pay the money received through the Reimbursement Agreement to its contractor (i.e. Sordoni) within ten days of the date of PennDOT's reimbursement check. Additionally, the Reimbursement Agreement (which preceded the Construction Contract) was attached to the Construction Contract between Sordoni and the City, and was specifically referenced in the Construction Contract at "Article 2: Compensation." This article provides, inter alia, that, following "PennDOT's approval" and inspection of the Project contractor's work by a "designated qualified inspector," the City was to submit invoices to PennDOT pursuant to the Reimbursement Agreement and pay the Project contractor from the money received from PennDOT.[25] This circumstance and other references effectively incorporated the payment terms of the Reimbursement Agreement into Sordoni's Construction Contract with the City, giving Sordoni (as the Project contractor) not only the benefit of the payments to be made by PennDOT but also a basis for relying on PennDOT's contractual obligation to pay for the Project. In addition, the Reimbursement Agreement required, among other things, that all Project bid documents used to solicit contractors to bid on the Project (which documents would include the Construction Contract itself as well as all Project plans and specifications) would need to be pre-approved by PennDOT. The

[25] The exact phrase we refer to from Article 2 was:

> Following PennDOT's approval and inspected by a designated qualified inspector, OECD shall submit the invoice to PennDOT for payment using the **Transportation Enhancements Program following the guidelines of the attached Reimbursement Agreement**, **Exhibit B**. OECD will pay the CONTRACTOR upon receipt of monies from PennDOT . . . .

We believe "inspection" to be intended by the word "inspected" in the foregoing quote and note that "OECD" is simply a bureau within the City. We further note that this contract language seems to contemplate some type of PennDOT participation by way of an "approval" as well as a third-party inspection of Project work before the submission of invoices by the City to PennDOT. This process appears to have been followed by PennDOT for the first five payment applications as exemplified by Mr. McCabe's review of these early payment applications (which were paid by PennDOT) before his subsequent refusal to continue this activity (a termination that does not appear to have been explained to Sordoni or the City at the time).

Reimbursement Agreement also contemplated that contractors would have to be pre-qualified by PennDOT or that PennDOT would have to waive this pre-qualification requirement. In sum, these documents make it clear that PennDOT was to reimburse the City for the cost of Sordoni's work on the Project and the City was then to pay the money received through the Reimbursement Agreement to the contractor chosen for the Project (i.e. Sordoni).

In accordance with the Reimbursement Agreement, PennDOT pre-approved all bid documents for the Project, including the Project's Construction Contract as well as the specifications developed by the City in consultation with PennDOT's engineer. PennDOT eventually addressed the pre-qualification requirement for contractors on the Project by waiving same for Sordoni. Also in accordance with the Reimbursement Agreement, the City submitted Sordoni's payment applications to PennDOT which approved the first five such applications for which payment was made by PennDOT to the City and passed on to Sordoni.

Despite the foregoing circumstances, PennDOT argues that Sordoni cannot be considered a third party beneficiary because, in its view, the Reimbursement Agreement expressly precludes third party beneficiary claims. In order to find such preclusion language, PennDOT asserts that the Reimbursement Agreement "expressly incorporates PennDOT's Publication 408" which disclaims third party liability under "[c]ontracts covered by these specifications . . . ."

We find no basis in fact for the foregoing assertion by PennDOT. Specifically, neither Paragraphs 3 or 10 of the Reimbursement Agreement (nor any other language in this agreement) even purports to incorporate any part of Publication 408 into the Reimbursement Agreement

itself.[26] Moreover, as explained more fully below, the Board finds that only certain enumerated provisions of Publication 408, and not the publication in its entirety, were made applicable to the Project under the Construction Contract specifications approved by PennDOT. Among the Publication 408 provisions not incorporated into the Construction Contract was the Publication 408 provision which disclaims third party beneficiary rights. Accordingly, the disclaimer of third party beneficiary rights found in § 107.29 of Publication 408 was not made a part of the Reimbursement Agreement (or the Construction Contract) and does not preclude a finding that Sordoni is a third party beneficiary under the Reimbursement Agreement.

PennDOT also asserts that the preclusion of third party claims it finds in Publication 408 is "reinforced" by the Reimbursement Agreement's "save harmless clause." (Ex. 927 ¶ 16). This clause, however, merely provides that the City will indemnify PennDOT from a third party claim. Contrary to precluding a third party claim, this provision actually seems to contemplate the potential occurrence of one. In any event, the language in the "save harmless clause" does not prohibit such a claim.

Finally, PennDOT cites Clifton v. Suburban Cable TV Co., Inc., 642 A.2d 512 (Pa. Super. 1994), and Drummond v. University of Pennsylvania, 651 A.2d 572, 578 (Pa. Cmwlth, 1994) for the proposition that a more stringent test than that stated in Scarpitti should be applied when the parties to the agreement are governmental bodies. In Clifton, a prison inmate sued a cable television provider to enjoin it from raising its subscription prices above those specified under a contract between the prison and the cable provider. The Superior Court noted the reason

[26] Paragraph 3 and 10 of the Reimbursement Agreement, at most, address items to be included by the City in the design plans or specifications of the Project and made part of the Construction Contract (as approved by PennDOT) not provisions to be incorporated into the Reimbursement Agreement.

for a more stringent test to determine third party beneficiary status when a Commonwealth contract is involved:

> Government contracts, such as the one in this case, pose unique difficulties in the area of third-party beneficiary rights because, to some extent, every member of the public is directly or indirectly intended to benefit from such a contract. The Commonwealth/Bureau of Corrections enters into contracts for food, services, equipment, clothing, etc., to regulate and maintain its correctional facilities. The public at large benefits from these government contracts to the extent that they assure that those who ought to be incarcerated will be incarcerated, and that those who are already incarcerated will pay their debts to society. To grant all members of the public, including those incarcerated, standing to enforce such government contracts, however, would be contrary to public policy of this Commonwealth. Consequently, the courts of this Commonwealth must take a more narrow view of third-party beneficiary status in this context and apply a more stringent test to determine whether a third party qualifies for beneficiary status.

Id. at 515. In Drummond, the Commonwealth Court cited Clifton in denying third party beneficiary status to a member of the public who sought to enforce a city ordinance against the University. Drummond, 651 A.2d at 578.

The Board has no disagreement with PennDOT that Clifton and Drummond are good case law. That said, we find the facts of the instant case to be significantly different than those in Clifton and Drummond. Unlike those two cases, Sordoni is not any "member of the general public," but the Project's primary contractor. As such, Sordoni was specifically contemplated by, and referenced in, the Reimbursement Agreement (by position rather than name) to be the ultimate recipient of funds under this agreement. Clifton and Drummond are simply inapposite to this case.

The Board finds it clear from the provisions of the Reimbursement Agreement and the factual circumstances surrounding its formation and (partial) performance referenced above that the purpose of this agreement was to procure construction of the Project by providing money to

pay the contractor selected to build the Project and that both PennDOT and the City intended the contractor selected for the Project (i.e. Sordoni) to receive the benefit of PennDOT's payments under the Reimbursement Agreement. Specifically, the Reimbursement Agreement imposes an explicit obligation upon PennDOT to pay the City the cost of Sordoni's work on the Project and upon the City to pay Sordoni from the money received from PennDOT under the Reimbursement Agreement. This intent is further reinforced by reference to these payment terms in the Construction Contract which was reviewed and approved by PennDOT.

PennDOT's ongoing role in the Project, as contemplated by the Reimbursement Agreement, also supports Sordoni's claim of third party beneficiary status. We refer here to PennDOT's retention of pre-approval authority for Project bid documents used to solicit and control Sordoni's participation in the Project (which documents included the Construction Contract and all applicable construction plans and specifications) as well as the authority retained by PennDOT to approve or reject payment applications for work done on the Project by Sordoni. See Scarpitti, Id.

In consideration of the plain language of the Reimbursement Agreement (including the express requirement that the City pass on PennDOT's payments to the Project contractor) and the accompanying Construction Contract (which was approved by PennDOT) as well as PennDOT's integral and ongoing participation during Project construction, we find that the circumstances are so compelling that recognition of Sordoni's rights to PennDOT payments under the Reimbursement Agreement is appropriate to effectuate the intentions of the parties thereto. We further find that the performance of the Reimbursement Agreement by PennDOT satisfies an obligation of the City to pay money to Sordoni and that the circumstances indicate that both PennDOT and the City intended to give Sordoni the benefit of the promised performance by

PennDOT. Accordingly, because Sordoni is an intended third party beneficiary of the Reimbursement Agreement (a contract entered into by PennDOT), Sordoni has a right to file its amended claim with the Board in accordance with Sections 1712.1 and 1724(a)(1) as a claim based on a controversy "arising" from a contract entered into by an agency of the Commonwealth. 62 Pa. C.S. §§ 1712.1 and 1724(a)(1). See also Brocker, 301 A.2d at 440; Armour, 287 A.2d at 867-68.

Jurisdiction: Procurement Code Contract or Grant

PennDOT also asserts a lack of Board jurisdiction over this matter because: 1) the Board's jurisdiction is strictly limited to Procurement Code contracts and 2) the Reimbursement Agreement is not a "contract" under the Procurement Code but is instead a "grant." Although the Board believes it retains jurisdiction over at least some non-Procurement Code contracts (as we discuss below), we nevertheless find, based on the facts presented at hearing, that the Reimbursement Agreement upon which Sordoni's claim is based is a Procurement Code contract and not a "grant" as PennDOT would have us conclude.

Section 102(f) of the Procurement Code states that the code does not apply to "grants" by providing as follows:

> **(f) Application to grants.—**This part does not apply to grants. For the purpose of this part, a grant is the furnishing of assistance by the Commonwealth or any person, whether financial or otherwise, to any person to support a program. The term does not include an award whose primary purpose is to procure construction for the grantor. Any contract resulting from such an award is not a grant but a procurement contract.

62 Pa. C.S. § 102(f).

To determine whether the Reimbursement Agreement is a "grant" or a "procurement contract" we must determine: (1) does the Reimbursement Agreement involve merely "the furnishing of assistance. . . to support a program" (and is thus a "grant") or (2) is its primary purpose "to procure construction for the grantor" (and is therefore a "procurement contract"). Id.

In order to preclude any possibility that it might be held responsible for its actions in this matter based on the substantive merits of Sordoni's claim, PennDOT argues here that the Reimbursement Agreement is not a "contract" but a "grant" under the foregoing Procurement Code definition. In support of this position, PennDOT asserts that the primary purpose of the Reimbursement Agreement was not to procure construction, but was simply to pass on federal funds to the City of Scranton. That is to say, PennDOT asks the Board to look at the Reimbursement Agreement as if it existed in complete isolation rather than take into account the reason for its existence and/or the factual circumstances surrounding its creation and performance. It also argues that any procurement of construction which resulted in this case was not "for the grantor" because: (1) PennDOT is the "grantor" in this case and (2) the construction did not benefit PennDOT.

Sordoni argues to the contrary, asserting that the evidence adduced at hearing shows the primary purpose of the Reimbursement Agreement was, in fact, "to procure construction for the grantor" because: (1) the Commonwealth should be considered the "grantor" in this case and (2) the Commonwealth most decidedly did benefit from this construction. It also points out that PennDOT itself, except as suits its purpose in this case, asserts in its literature and on its website that these types of reimbursement agreements are not grants. See e.g. Exs. 32, 620, 621, 622.

Although our analysis differs somewhat from Sordoni's, we are ultimately unable to agree with PennDOT's narrow interpretation of the factual circumstances of this case or of the statutory provisions here at issue. Specifically, we conclude that the primary purpose of the Reimbursement Agreement was, in fact, to procure construction of the Project and that this construction was done "for" PennDOT in the very real sense that: (1) the Reimbursement Agreement satisfied PennDOT's obligation to the FHWA to use these federal funds for a "transportation enhancement" activity; (2) PennDOT pre-qualified the Project for initial eligibility and actively participated in the final selection of this Project; (3) PennDOT dictated the terms of the Reimbursement Agreement and the Construction Contract which, combined, subjected all work performed on the Project to the ultimate direction and approval of PennDOT; and (4) PennDOT's role in the Project was integral and ongoing as it actively asserted ultimate direction and control over the Project. Accordingly, we find that the Reimbursement Agreement is not a "grant" but a "procurement contract" pursuant to the plain terms of Section 102(f) and conclude that the Board does have jurisdiction over Sordoni's claim. 62 Pa. C.S. §§ 102(f) and 1724(a)(1).

To begin this portion of our discussion, we first note that neither party has been able to direct the Board to any case law on this particular question and that we have found none pursuant to our own legal research. Second, we find it abundantly clear from the evidence produced at hearing regarding the circumstances of its formation and performance, as well as the plain language of the Reimbursement Agreement itself, that the "primary purpose" of this agreement was, in fact, to procure construction of the Project.[27] Accordingly, the remaining determination to be made is whether or not this construction was done "for the grantor." On this last point, we

[27] See our Findings of Fact at Paragraphs 1-31 and 49-96.

also find that the evidence establishes this construction was procured "for the grantor" whether we consider the "grantor" to be the Commonwealth or PennDOT.

Given the apparent absence of case law interpreting Section 102(f), we turn to basic principles of statutory construction. Here we acknowledge that 200 plus years of Board history, exemplary public policy and case law direct a broad reading be given to statutory provisions affecting the Board's jurisdiction so as not to deprive those who contract with a Commonwealth agency of a forum in which to resolve disputes arising from such contracts. Employers Insurance of Wausau v. Department of Transportation, 865 A.2d 825, 832-33 (Pa. 2005); Lowry v. Commonwealth, 365 Pa. 474, 76 A.2d 363 (1950); Hanover Insurance Company v. SWIF, 35 A.3d 849, 852 (Pa. Cmwlth. 2012); Department of Health v. Data-Quest, Inc., 972 A.2d 74, 78-79 (Pa. Cmwlth. 2009).[28] This principle alone suggests that Sordoni's interpretation of the term "grantor" in Section 102(f) to mean "the Commonwealth" rather than "PennDOT" is both reasonable and appropriate in order to sustain Board jurisdiction over the matter at hand. Because these transportation enhancement projects, including the Project in this case, clearly

[28] In Hanover, for instance, the Commonwealth Court held that the Board had jurisdiction over a claim by an indemnitee/third party beneficiary of an insurance policy issued by SWIF (i.e. a non-Procurement Code contract). Citing Employers Insurance of Wausau v. Department of Transportation, 865 A.2d 825 (Pa. 2005), the Commonwealth Court in Hanover reaffirmed that Pennsylvania courts have broadly construed the Board's jurisdiction under the Procurement Code. Hanover, 35 A.3d at 852. The Court also cited the 2009 case of Department of Health v. Data-Quest, Inc., 972 A.2d 74 (Pa. Cmwlth. 2009) for the proposition that the Board's subject matter jurisdiction was largely unchanged:

> **The Board was established in furtherance of a public policy extending more than 200 years ago to allow claimants who ordinarily would have been barred by sovereign immunity to have a method of redress against the Commonwealth**. Lowry v. Commonwealth, 365 Pa. 474, 76 A.2d 363 (1950). The Supreme Court in Wausau construed the Board's equity jurisdiction under the Procurement Code and expounded on its legislative scheme as follows:
>
> [The legislature] recognized that claims arising from contracts involving the Commonwealth could sound in both assumpsit and equity, and expressly provided that, regardless of form, these claims should be decided by the Board of Claims. It is thus readily apparent that Pennsylvania's legislative scheme intended to vest the Board of Claims with expansive jurisdiction to decide disputes concerning contracts involving the Commonwealth. . . .

Hanover, 35 A.3d at 854, quoting Data-Quest 972 A.2d at 78-79, quoting Wausau, 865 A.2d at 832-33 (emphasis added by the Court in Hanover).

benefit the municipality and region in which they are constructed and, by logical extension, the Commonwealth of which such political subdivisions are a part, reading "grantor" as the Commonwealth confirms the Reimbursement Agreement to be a procurement contract as described in the third sentence of Section 102(f). 62 Pa. C.S. § 102(f).

Although we believe that Sordoni's reading of "grantor" to reference the "Commonwealth" is both reasonable and appropriate, we also find that the same principles and case law, coupled with the facts adduced at hearing, lead us to affirm the Board's jurisdiction in this case even if we consider PennDOT to be the "grantor." That is to say, these same principles of statutory interpretation most certainly mean that we should not add unwritten words to the plain language of Section 102(f) in order to make it more restrictive of the Board's jurisdiction, as is requested here by PennDOT.

Specifically, PennDOT wants us not only to consider PennDOT as the "grantor" but also to add the unwritten phrase "the benefit of" into the third sentence of Section 102(f) as follows:

> (f) Application to grants. – This part does not apply to grants. For the purpose of this part, a grant is the furnishing of assistance by the Commonwealth or any person, whether financial or otherwise, to any person to support a program. The term does not include an award whose primary purpose is to procure construction for **[the benefit of]** the grantor. Any contract resulting from such an award is not a grant but a procurement contract.

62 Pa.C.S. § 102(f) [Bracketed words added].

Inserting this unwritten phrase then allows PennDOT to argue that, because PennDOT is the "grantor" but did not receive any direct benefit from the Reimbursement Agreement, this agreement did not procure construction for PennDOT. Accordingly, PennDOT argues, the

Reimbursement Agreement does not fit into the exclusion from the term "grant" and is not a Procurement Code contract subject to the Board's jurisdiction.[29]

However, when we decline to add PennDOT's unwritten phrase, the plain language of the exclusion from the term "grant" states as follows:

> . . . an award whose primary purpose is to procure construction for the grantor.

Id.

When Section 102(f) is read without insertion of the unwritten requirement that the construction benefit the grantor (as we believe appropriate), the Reimbursement Agreement here at issue readily fits into the exclusion carved out from the term "grant". Specifically, the Reimbursement Agreement clearly effectuates an "award whose primary purpose" was "to procure construction" for PennDOT in the very real sense that the Project was first pre-approved and selected for eligibility by PennDOT, finally selected by a local planning organization with PennDOT's participation and then built subject to PennDOT's ultimate direction and control, all in order to satisfy PennDOT's obligation to appropriately distribute federal funding for transportation enhancement projects within the Commonwealth. This, in fact, is what occurred.

The funding which underlies the Reimbursement Agreement was provided to PennDOT by the U.S. Department of Transportation's Federal Highway Administration ("FHWA") for "transportation enhancement activities." Although local entities initially apply for transportation enhancement project ("TIP") funding, it is PennDOT which reviews the proposed projects and

[29]PennDOT argues, inter alia, that because the Project is not being constructed on a state right-of-way, the construction does not benefit PennDOT. Although we will not here expound further, we believe PennDOT also gives the concept of "benefit" a very narrow reading. For instance, its argument assumes that PennDOT does not benefit from these transportation enhancement projects by way of improving public access to or between its state-owned roadways or by generation of good will or improved reputation in areas where it selects to pursue and complete these projects.

selects which ones it will pre-approve for eligibility as a TIP. PennDOT then takes a further role in determining what projects ultimately receive these transportation enhancement funds by participating in the regional planning organization which finally selects the Projects to receive these federal funds. (Ex. 32; N.T. 2130-35). PennDOT then enters into a reimbursement agreement (of its own drafting) with the appropriate local entity as the first step toward constructing the chosen project. These reimbursement agreements then contemplate and require a second step, that PennDOT itself will either create or "review and approve" all the bidding documents, plans, policies, procedures and specifications needed for the project to be put out for competitive bid by the local entity. (N.T. 54-57, 61). These same reimbursement agreements then obligate PennDOT to pass on the federal funding to reimburse the designated portion of the costs of such projects which have been approved by PennDOT.

After PennDOT pre-approved the Project here for eligibility and participated in its final selection by the local planning organization,[30] it then reviewed and approved all the bidding documents, plans, policies, procedures and specifications for this Project (including the Construction Contract) before the Project was put out for competitive bidding. These actions conformed to the Reimbursement Agreement which required the Project to be bid and awarded in accordance with state and federal laws (including the Procurement Code) and specified that the design and construction of the Project was to be "in accordance with plans, policies, procedures and specifications prepared and/or approved by" PennDOT. The Reimbursement Agreement then obligated PennDOT to reimburse the City for the costs of constructing the Project which PennDOT had approved, using federal transportation funds received by PennDOT. In fact, by this Reimbursement Agreement, PennDOT was not merely providing funds to the

[30] The local planning organization in the Scranton area is referred to as the Metropolitan Planning Organization or "MPO" comprised of representatives from PennDOT and other government entities in the Scranton area.

City, but was fulfilling its obligation to distribute the federal funding it received from the FHWA to a "transportation enhancement" activity (i.e. the Project) which PennDOT had approved, and over which PennDOT exercised ongoing and ultimate direction and control by way of the Reimbursement Agreement and Construction Contract combination. Thus, we find that the Reimbursement Agreement, in fact, procured construction for PennDOT in that the Project was pre-approved for eligibility by PennDOT, finally selected with PennDOT participation and built subject to PennDOT's ongoing and ultimate direction and approval in order to fulfill PennDOT's obligation to apply the FHWA funding provided to it for construction of transportation enhancement activities in the Commonwealth.

Further supporting the finding that the Reimbursement Agreement is not a grant but a procurement contract are PennDOT's own express representations made in its publications and on its website. In these, PennDOT states flatly that transportation enhancement projects such as the instant Project are "cost reimbursement programs, not grant programs. [Emphasis added]."[31] (Exs. 32, 620, 621, 622).

For all the foregoing reasons, we conclude that the Reimbursement Agreement is a "procurement contract" not a "grant" pursuant to the plain terms of 62 Pa.C.S. § 102(f). As such, it is expressly included in (not excluded from) coverage under the Procurement Code, and is therefore within the Board's jurisdiction as a Procurement Code contract. See 62 Pa.C.S. §§ 102(f), 103, 1724(a)(1).

Jurisdiction: Non-Procurement Code Contracts

[31] We believe this description by PennDOT highlights another important distinction between the circumstance of this case and those of a grant situation. Namely, in the typical grant scenario money is provided to the recipient first and then spent as specified. If the grant money doesn't come, it isn't spent. Here, the City has already undertaken the expense and Sordoni has already provided the construction service in reliance on PennDOT's commitment to reimburse these costs.

Although we believe the foregoing analysis adequately confirms the Board's jurisdiction over Sordoni's claim against PennDOT as being based on a Procurement Code contract pursuant to the plain terms of the applicable Code definitions, we also believe the Board has jurisdiction over this claim even if one considers the Reimbursement Agreement not to be a Procurement Code contract. This alternative basis for Board jurisdiction stems from the acknowledgment that the Reimbursement Agreement nonetheless remains a contract entered into "in accordance with" the Procurement Code.

To begin here, we express our disagreement with PennDOT's assertion that the Board's jurisdiction, since the passage of Act 142 of 2002, is strictly limited to Procurement Code contracts. As noted before, such a narrow reading of Section 1724(a)(1) would materially reduce the Board's jurisdiction and contravene 200 plus years of exemplary public policy by depriving parties who contract with a Commonwealth agency of a forum for resolution of their contractual disputes. Such a narrow reading as PennDOT suggests is also contrary to principles of statutory construction and is not supported by controlling case law. We instead believe it appropriate to read our current enabling provisions literally but broadly so as to include within our jurisdiction claims made on contracts formed and filed "in accordance with" the Procurement Code (i.e. claims made on contracts entered into "in harmony with" but not necessarily "under the authority of" the Code). We further believe this jurisdictional concept to be relevant here because of the unique nature of the Reimbursement Agreement and the role it plays as the first of two co-dependent agreements entered into to procure construction of the Project in conformance with Procurement Code requirements and subject to PennDOT control.

Prior to Act 142 of 2002, the Board's jurisdictional provision (Board of Claims Act of 1937, as amended) stated:

> The Board of Claims shall have exclusive jurisdiction to hear and determine all claims against the Commonwealth arising from contracts hereinafter entered into with the Commonwealth, where the amount in controversy amounts to $300 or more. The Board shall also have exclusive jurisdiction to hear and determine those claims authorized by the Act of March 30, 1811 (P.L. 145, Ch. XCIX), entitled "An act to amend and consolidate several acts relating to the settlement of the public accounts and the payment of the public monies, and for other purposes," and continued by Article X, Act of April 9, 1929 (P.L. 343, No. 176), known as "the fiscal code," Auditor General and State Treasurer were granted power to adjust and settle certain claims against the Commonwealth.

72 P.S. § 4651-4 (1978)(repealed).

After the codification of the Board of Claims Act of 1937 (as amended) brought about by Act 142, the Board's jurisdictional provision, now contained at 62 Pa.C.S. § 1724, states in pertinent part as follows:

> (a) Exclusive jurisdiction. – The board shall have exclusive jurisdiction to arbitrate claims arising from all of the following:
>
> (1) A contract entered into by a Commonwealth agency in accordance with this part and filed with the board in accordance with section 1712.1 (relating to contract controversies).
> (2) A written agreement executed by a Commonwealth agency and the Office of Attorney General in which the parties expressly agree to utilize the board to arbitrate disputes arising from the agreement.
> (3) Unless otherwise provided by law, a contract entered into by a Commonwealth agency involving real property interests in which the Commonwealth agency is the respondent.
>
> (b) Concurrent jurisdiction. – The board shall have concurrent jurisdiction to arbitrate claims arising from all of the following:
>
> (1) A contract entered into by a Commonwealth agency in accordance with this part in which the Commonwealth agency is the claimant.
> (2) Unless otherwise provided by law, a contract entered into by a Commonwealth agency involving real property interests in which the Commonwealth agency is the claimant.
>
> (c) Limitations. – The board shall have no power and exercise no jurisdiction over a claim asserted under subsection (a)(1) unless it is filed with the board in accordance with section 1712.1. The board shall have no power and exercise no jurisdiction over a claim asserted against a Commonwealth agency

> under subsection (a)(2) or (3) unless the claim was filed with the board within six months after it accrued. The board shall have no power and exercise no jurisdiction over claims for payment or damages to providers of medical assistance services arising out of the operation of the medical assistance program established by the act of June 13, 1967 (P.L. 31, No. 21), known as the Public Welfare Code.
>
> (d) Nonmonetary relief. – Nothing in this section shall preclude a party from seeking nonmonetary relief in another forum as provided by law.
> 2002, Dec. 3, P.L. 1147, No. 142, § 12.2.

62 Pa.C.S. § 1724 (2002) [Emphasis added].

Those who maintain that 62 Pa.C.S. § 1724(a)(1) mandates a reduction in Board jurisdiction point to the phrases, "in accordance with this part" and "in accordance with § 1712.1" which they read to say that the contracts under the Board's jurisdiction must be made "under the authority of" this part (i.e. the Procurement Code) and that claims on same must be made "in strict compliance" with 62 Pa.C.S. § 1712.1. Although the Board understands this interpretation and was initially seduced by its appeal, we would point out that the literal meaning of the word "accordance" does not require this narrow a reading and that history, public policy, principles of statutory construction and existing case law all point to a broader reading of the Board's current jurisdictional provision.

It is beyond dispute that the polestar and pre-eminent purpose of all statutory interpretation is to effectuate the intent of the General Assembly. 1 Pa.C.S. § 1921(a). See also Griffiths v. WCAB (Seven Stars Farm, Inc.), 596 Pa. 317, 338-39, 943 A.2d 242, 255-56 (2008)(applying many of the salient principles of statutory construction to effectuate the intent and remedial nature of the act at issue). A review of Act 142's legislative history provides considerable evidence that the General Assembly did not intend to materially alter the Board's long-standing jurisdiction, but only to modify it in the two minor ways (i.e. by eliminating Board

jurisdiction over medical assistance claims and by allowing nonmonetary relief in another forum to the extent provided by law). To this point we note, inter alia, that there is no mention in any draft of the bill which became Act 142 of an effort to modify, change, or reduce the long-standing exception to sovereign immunity for claims against the Commonwealth arising from contract, an exception contiguous with Board jurisdiction.[32] In fact, the legislative history of the bill which eventually became Act 142 of 2002 throws significant (if not conclusive) doubt on any intention to effect a material change to the Board's jurisdiction, as we will discuss in more detail below.

Although the ultimate principle of statutory interpretation remains to effectuate the intent of the General Assembly, we are, of course, aware of the penultimate principle of statutory construction, i.e. "when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). However, the language changes made in Act 142's codification of the Board's enabling provisions do not require a reading that makes significant and unintended material changes to the Board's jurisdiction (and the scope of sovereign immunity) at least when it comes to contract claims made against Commonwealth agencies.[33]

[32] See Scientific Games International, Inc. v. Com., Department of Revenue, et al., 66 A.3d 740, 754-55 (Pa. 2013) (The scope of the Board's jurisdiction and the statutory relief from sovereign immunity for contract actions against the Commonwealth are one and the same).

[33] The Board recognizes that the additional qualifier in Section 1724(a)(1) that references only contracts entered into by a "Commonwealth agency [emphasis supplied]" may well be read to preclude claims against the legislative or judicial branches of government. However, we believe the remaining qualifiers "in accordance with" do not require so strict an application as to leave entirely without recourse or forum those who contract with a Commonwealth agency for matters traditionally subject to Board jurisdiction, like this one involving a contractual dispute over appropriate construction methods and documentation.

Webster's New World College Dictionary defines the word "accordance" to mean "agreement," "harmony" or "conformity."[34] Therefore, the literal meaning of the operative phrasing "in accordance with" does not necessarily mean "under the authority of" or "in strict compliance with" but requires only that contracts subject to Board jurisdiction be made in harmony with the Procurement Code and filed in harmony with Section 1712.1. In other words, the new phrasing in Section 1724(a)(1) still allows for jurisdiction over non-Procurement Code contracts since non-Procurement Code contracts need not necessarily be made under the Procurement Code in order to be "in harmony" or "in accordance" with same. Similarly, claims filed "in harmony" with Section 1712.1 need to provide an opportunity for a meaningful administrative review by the contracting Commonwealth agency within the specified time frames before a claim is filed with the Board but need not be filed "under the authority of" Section 1712.1 to be filed "in accordance" with this section.

Case law on this topic also fails to support PennDOT's position that the 2002 codification of the Board's enabling provisions into the Procurement Code narrowed its jurisdiction to only Procurement Code contracts. In 2012, the Commonwealth Court held that the Board retained jurisdiction over a claim based on a non-Procurement Code contract in the case of Hanover Ins. Co. v. SWIF, 35 A.3d 849 (Pa. Cmwlth. 2012). Even more recently, the Supreme Court, in Scientific Games International, Inc. v. Com., Department of Revenue, et al., 66 A.3d 740 (Pa. 2013), noted that the Commonwealth Court's en banc decision in Hanover remains the prevailing law of Pennsylvania. Id. at 753 (Fn. 16).

This literal but remedial approach to Section 1724(a)(1) also takes into account those recent cases which have found Board jurisdiction lacking. For instance, in case of Joseph D.

[34] Webster's New World College Dictionary (4th ed. 2008). See also Griffiths v. WCAB, 596 Pa. at 338, 943 A.2d at 255 (supporting use of standard dictionary definitions for general terms).

Dubaskas v. Commonwealth, Dept. of Corrections et al., the Commonwealth Court (affirming the Board's decision) found that we had no jurisdiction over disputes arising from an alleged Commonwealth employment agreement because the language and definitions in the surrounding Procurement Code provisions, which explicitly excluded employment and collective bargaining agreements from coverage, indicated a legislative intent to exclude these types of contracts from the Board's jurisdiction. Joseph D. Dubaskas v. Commonwealth, Dept. of Corrections et al., 81 A.3d 167 (Pa. Cmwlth. 2013). In Dubaskas and other cases where the Board has found its jurisdiction lacking, it has been due to a clear and explicit exclusion of those contracts from application of the Procurement Code (and hence the Board's enabling provisions) because such explicitly excluded contracts cannot easily be said easily to have been entered into "in harmony with" the Code. However, where there is no such clear and explicit exclusion, the broader definition of "in accordance" or "in harmony with" may reasonably be applied to preserve Board jurisdiction and the only available forum for those who contract with the Commonwealth to resolve a dispute.

In sum, we believe it to be consistent with the 200 plus years of history, public policy and case law acknowledged in Hanover and elsewhere, to read the applicable statutory provisions broadly so as to find that the Board retains jurisdiction over claims made on Procurement Code contracts and other contracts entered into "in accordance with" (i.e. in harmony with) the Procurement Code. Accordingly, we find it appropriate to assert jurisdiction over the claim here before the Board on the alternative basis that the Reimbursement Agreement is, at very least, a contract entered into "in accordance" with the Procurement Code.

This alternative holding is based on our factual findings and discussion above which establish that the Reimbursement Agreement is clearly not a "grant" per Section 102(f), so is not

expressly excluded from Board jurisdiction. It is also based on the reality that, contrary to PennDOT's suggestion that the Reimbursement Agreement be viewed in isolation simply as a funding agreement sans construction element, the Reimbursement Agreement entered into by PennDOT and the City is utterly useless and without meaning unless and until the Construction Contract is also bid out and awarded. It is for this reason that the plain language of the Reimbursement Agreement repeatedly references the procurement of construction services to build this Project, and requires these construction services be bid, let and contracted in accordance with Procurement Code (as well as other applicable state and federal requirements) and performed according to all applicable policies, procedures, plans and specifications as reviewed and approved by PennDOT. The circumstances of this case also show that the City of Scranton and Sordoni then entered into the Construction Contract to build the Project in reliance on PennDOT's contractual commitment to fund the Project through the Reimbursement Agreement, confirming that the Reimbursement Agreement is the first half of two co-dependent written agreements entered into for the clear purpose of obtaining construction services to build the Project. To view the Reimbursement Agreement as something entirely separate and apart from the bidding, letting and performance of the Construction Contract flies in the face of the overwhelming weight of evidence produced in this case.

Because the Reimbursement Agreement is clearly not a "grant" but, instead, is the first half of two co-dependent written agreements entered into for the sole purpose of obtaining construction services to build the Project; because these construction services were required by the Reimbursement Agreement to be bid, awarded and contracted for in accordance with Procurement Code standards and performed under the ultimate direction and control of PennDOT, a Commonwealth agency; because this did, in fact, occur, pursuant to the

Construction Contract (i.e. the required second half of the two co-dependent contracts in this case); and because of the co-dependent relationship between the two contracts, we believe it appropriate to consider the Reimbursement Agreement as a contract entered into "in harmony with" or "in accordance with" the Procurement Code even if one does not find it to be a Procurement Code contract per se. It therefore remains that, even with a more limited view of the Reimbursement Agreement's individual function, a claim based on this agreement is still subject to the Board's jurisdiction pursuant to the literal language of 62 Pa.C.S. § 1724(a)(1).

Finally, we express our belief that the Board is required to read the applicable provisions of the Procurement Code as we do here, to include Sordoni's claim on the Reimbursement Agreement as within the Board's jurisdiction as either a Procurement Code contract or a contract entered into "in accordance with" the Procurement Code, in order to avoid subjecting the Board's current enabling provision to constitutional challenge. As we have explained in detail by way of our recent opinion in Telwell, Inc. v. PSERS and Grandbridge Real Estate Capital, LLC, B.O.C. Dkt. No. 4030, Opinion and Order of September 11, 2013, a failure to read the Board's current enabling provisions broadly so as to substantially preserve its historical jurisdiction over claims arising from all Commonwealth contracts raises significant issues as to the propriety of Act 142's passage and adoption under Article III, Section 3 of the Pennsylvania Constitution because of the misleading nature of the bill's title when acted upon by the Pennsylvania Senate.[35] See also Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 404-10 (Pa. 2005) (In addition to the single subject requirement, Article III, Section 3, of the Pennsylvania Constitution also mandates that the subject of the bill

[35] A review of Act 142's legislative history shows, inter alia, that the title of the bill presented to and passed by the Pennsylvania Senate indicated provisions affecting the Board of Claims had been deleted from the bill, when, in fact, they had not. For a full review of this legislative history see our recent opinion in Telwell, supra.

must be clearly expressed in its title: No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof); City of Philadelphia v. Commonwealth, 838 A.2d 566, 590-93 (Pa. 2003)(bills making substantive legal changes not considered codifying or compiling laws subject to exception from Article III, Section 3 requirements); Scudder v. Smith, 200 A. 601, 604 (Pa. 1938) ("The purpose of the constitutional requirements relating to the enactment of laws was to put the members of the Assembly and others interested on notice, by the title of the measure submitted, so they might vote on it with circumspection."); See also Harvey v. Ridley Tp., 38 A.2d 13 (Pa. 1944)(portion of bill omitted from title found unconstitutional).

Although the Board is without authority to address a constitutional challenge to our enabling provisions,[36] we nonetheless believe we are required to construe these provisions so as to avoid same. See e.g. Boettger v. Loverro 502 A.2d 1310, 1313 (Pa. Super. 1985) Accordingly we find this consideration yet another reason to conclude that we maintain jurisdiction over Sordoni's claim as here presented.

In sum, we find that existing case law, principles of statutory construction and, most significantly, the facts and circumstances of this case, as well as the language of the Reimbursement Agreement itself (and its companion Construction Contract) establish that the primary purpose of the Reimbursement Agreement was to procure construction for PennDOT. The Reimbursement Agreement is, therefore, not a grant, pursuant to the plain terms of Section 102(f) of the Procurement Code but is, in fact, a Procurement Code contract (or, at very least, a

[36] It does not appear that the Board has authority to determine constitutional issues respecting the validity of its current enabling statute or the effectiveness of Act 142's repeal of the Board of Claims Act of 1937 so it would not have been appropriate for Sordoni to have raised this issue at the Board in any event. See Dep't of General Services v. The Board of Claims, et al., 881 A.2d 14, 19-21 (Pa. Cmwlth. 2005); See also Ruszin et al. v. Cmwlth. of Pa., Dep't of Labor & Industry, et al., 675 A.2d 366, 370-371 (Pa. Cmwlth. 1996).

contract made "in accordance with" the Procurement Code) and the claim made thereon is subject to Board jurisdiction. 62 Pa.C.S. §§ 102(f) and 1724(a)(1).

PROJECT BACKGROUND.

Under the Reimbursement Agreement, PennDOT agreed to reimburse the City 100% of the construction costs of the Project, part of a larger multi-phase redevelopment project called the Park Plaza Project. PennDOT's initial commitment in the Reimbursement Agreement was to reimburse the City up to $2,000,000 for construction.

Following execution of the Reimbursement Agreement and PennDOT's approval of the bid documents, the City issued an invitation to bid on the Project. The bids were opened on June 13, 2008. (Ex. 120). Sordoni was the lowest (and only) bidder on the Project with a base bid in the amount of $2,088,000. (Ex. 121).

As a result of this funding shortfall, PennDOT's commitment was subsequently increased to $2,338,560 in a change order to the Reimbursement Agreement approved by PennDOT on September 9, 2008 and not here at issue. (Exs. 12, 928). The change order specified that $2,088,000 of the $2,338,560 was to be dedicated to construction of the Project with the bulk of the remainder used to offset the cost of professional inspection of Project work.

On October 14, 2008, Sordoni and the City entered into a construction services agreement ("Construction Contract") under which Sordoni was to perform construction and related services to build the Project in consideration of payment by the City in the amount of $2,088,000. (Ex. 11). Also on October 14, 2008, the City entered into a contract with Michael J. Pasonick, Jr., Inc. ("Pasonick") to perform the requisite inspection services on the Project. On November 19, 2008, the City issued a Notice to Proceed to Sordoni, effective November 18,

2008, to begin construction on the Project. (Ex.141A). Construction actually began on the Project on November 24, 2008.

Sordoni's claim against PennDOT, as set forth in its amended claim, was originally for $1,305,916.55 represented by Payment Applications 6 through 11, 14, 17 and 18 plus 10% retainage on Payment Applications 1 through 11 and 14 (which retainage had been deducted from the amount requested in the original applications). Payment Applications 17 and 18 relate to changes requested by the developer of the larger multi-phase redevelopment. Payment Application 17 has been satisfied by the developer and has been withdrawn by Sordoni with respect to PennDOT. (Stipulation Ex. 815). Payment Application 18 relates to retainage on the change order amount requested in Payment Application 17 (also attributable to the developer). Thus, the remaining principal amount now claimed by Sordoni against PennDOT is $1,241,311.45 consisting of Payment Applications 6 through 11 and 14, plus retainage, less $32,400 (which latter amount Sordoni asserts is the value of unfinished work remaining on the Project).

SORDONI'S PERFORMANCE

With regard to the issue of whether or not Sordoni is entitled to payment under the Reimbursement Agreement we note that (with the few exceptions identified later in this opinion) the weight of evidence presented by PennDOT at hearing did not show faulty workmanship or materials present on the Project. Instead, PennDOT's refusal to make payments on the Reimbursement Agreement after Payment Application 5 "because it [did] not believe the work was performed in accordance with the policies, plans, and specifications approved by PennDOT" was (and is) based primarily on the alleged failure of Sordoni (and the City through its inspection

agent Pasonick) to provide adequate documentation that work on the Project was performed in compliance with Project specifications.[37] Because the requisite level of documentation required by the Reimbursement Agreement is set forth by reference to the Construction Contract specifications "as approved by PennDOT"; and because we found no persuasive evidence that the City (or its inspection agent Pasonick) withheld from PennDOT any construction documentation provided by Sordoni, Sordoni's entitlement to further payment for its work on the Project as a third party beneficiary of the Reimbursement Agreement therefore depends largely on whether or not Sordoni has produced sufficient documentation to comply with its documentation responsibilities under the Construction Contract specifications.

Documentation Requirements

PennDOT asserts initially that Sordoni failed to comply with the general documentation and submittal requirements of the Construction Contract specifications, including those set forth in PennDOT Publication 408, which PennDOT claims was incorporated into the Construction Contract specifications in its entirety. Sordoni counters that the Construction Contract specifications did not incorporate Publication 408 in its entirety but, to the contrary, expressly incorporated only specific provisions of Publication 408. Sordoni further asserts that PennDOT pre-approved all the Construction Contract specifications and that Sordoni has complied with all these specifications.

Publication 408 Applicability

PennDOT has identified a number of specific Project areas where it claims Sordoni's work documentation and submittals were deficient under PennDOT Publication 408 and,

[37] See e.g., PennDOT's Proposed Finding of Fact, ¶¶73-111.

therefore, not in compliance with the Construction Contract specifications. In fact, PennDOT plainly states that its initial decision to stop payments was based on its perceived lack of full compliance with Publication 408 by Sordoni and the City's inspector, Pasonick. (PennDOT's Proposed Finding of Fact ¶ 94; N.T. 673-74, 678). This, of course, raises the question of whether or not the entirety of Publication 408, in fact, applied to the Project.

Our analysis of this issue begins with the Reimbursement Agreement which contains relevant language at two places, Paragraph 3 (relating to design) and Paragraph 10 (relating to inspections). Paragraph 3 provides that the contemplated Project design "shall be in accordance with plans, policies, procedures, criteria and specifications prepared or approved by the DEPARTMENT [PennDOT] and the FHWA, including: but not limited to . . . Publication 408 Specifications . . . [Emphasis added]." Paragraph 10 of the Reimbursement Agreement includes a similar reference to Publication 408, providing for the City to "inspect and supervise all construction work in accordance with approved plans and specifications, including, but not limited to, the Publication 408 Specifications . . . [Emphasis added]."

PennDOT would have the Board read these two provisions of the Reimbursement Agreement as requiring the City and Sordoni: 1) to comply with the Project "plans and specifications" and 2) to comply with the entirety of PennDOT Publication 408. The problem with this reading, however, is that the "plans and specifications" which were prepared for the Project in consultation with PennDOT's engineers, approved by PennDOT, and set forth in detail in the Construction Contract specifically incorporate only a relatively small portion of Publication 408, not the entire publication. In fact, contrary to PennDOT's position, both common sense and principles of contract interpretation require us to read Paragraphs 3 and 10 of the Reimbursement Agreement to say that only those provisions of Publication 408 which were

made applicable to the Project by way of the Project's plans and specifications, as reviewed and approved by PennDOT, apply to the Project, not all Publication 408.

Publication 408 was and is a voluminous document comprising over 1,000 pages of specifications designed to address issues covering the full gamut of PennDOT construction projects (including construction of roadways, bridges, dams, airports and other heavy or specialized contruction). Because Publication 408 addresses all these potential types of PennDOT construction, all of the Publication 408 provisions rarely, if ever, apply to one particular project. For this reason alone, common sense dictates that Paragraphs 3 and 10 were not intended to make all provisions of Publication 408 applicable to this Project but were intended only to make those Publication 408 provisions identified in the Construction Contract plans and specifications, as approved by PennDOT, applicable to this Project. Moreover, PennDOT's own conduct in approving Project plans and specifications which expressly did not incorporate all of Publication 408, but only certain discrete provisions thereof (as discussed below), cause us to conclude that the Reimbursement Agreement required the incorporation of Publication 408 provisions, but only to the extent identified in the Project plans and specifications approved by PennDOT.

Turning to the Project plans and specifications approved by PennDOT and made part of the Construction Contract, we note that they comprise over 700 pages of highly detailed requirements for the various construction elements specific to the Project (even without counting the pages in any of the specific Publication 408 provisions actually incorporated by reference). These Construction Contract specifications were drafted by the Project designer Hemmler + Camayd Architects ("Hemmler + Camayd") in consultation with PennDOT engineers, and were then approved by PennDOT to become part of the Project bid documents.

Under the heading "SPECIAL PROVISIONS", the Construction Contract specifications state:

> This project is to be constructed in accordance with these specifications and the specified special provisions and sections of PENNDOT Publication 408.

(Ex. 15 at p. 26 or SI-3).

Although this sentence, in isolation, is arguably capable of being read two different ways,[38] the Construction Contract SPECIAL PROVISIONS go on to list (on the next page) 14 "designated special provisions" of PennDOT Publication 408 as being applicable to the Project. Other references to discrete portions of Publication 408 are also interspersed among these 700 pages of specification text. Such a special designation and listing as well as the specific textual references would be logically unnecessary and pure surplusage if all of Publication 408 was made applicable to the Project by the previous sentence quoted above (as PennDOT seems to assert). Contrary to PennDOT's position, reading each part of the SPECIAL PROVISIONS together and so as to give effect to each, as well as basic logic, leads us to conclude that only the 14 "designated special provisions" of PennDOT Publication 408 as well as the specific references interspersed throughout the text were made applicable to the Project, not all of Publication 408. This reading is the only one consistent with the language of the Reimbursement Agreement, the Construction Agreement and the plans and specifications approved by PennDOT prior to commencement of the Project.

Our review of the designated Publication 408 provisions actually made applicable to the Project reveals that only one, Section 112, addresses the general issue of work documentation.[39]

[38] The word "specified" can be read most properly to modify the phrase "special provisions and sections of PennDOT Publication 408" or more loosely to modify only the term "special provisions." We consider the latter reading less appropriate grammatically because it would create a sentence with two conjunctive "ands" rather then listing three components in a series with the first two items separated by a comma.

[39] In addition to incorporation by reference to Section 112 of Publication 408 (which describes general record-keeping requirements), the "designated special provisions" and other discrete references in the specifications did

This section provides, in relevant part, that all project records used to record work progress are to be retained for 3 years after receipt of final payment and are to be made available to PennDOT at a reasonable time and place upon written notice from PennDOT. It further notes that repeated failure to do so may be grounds for default. (Ex. 30 at p. 102). However, among the things that Section 112 of Publication 408 does not do is prescribe the form, content or type of information which is to be provided. Additionally, this section contains no requirement whatsoever that document submittals regarding products or materials used on the Project, or tests done on the Project, be submitted to the City or PennDOT with progress payment requests or on any other regular basis.

To the contrary, the content of Project submittals and the type of information on products and materials used, or tests done, as part of the requisite documentation for work on the Project was instead set forth in the applicable sections of the 700 plus pages of detailed specifications provided by Hemmler + Camayd, not by general incorporation of all of PennDOT's Publication 408 requirements (as was continually asserted by PennDOT as a basis for cessation of payments on the Project). In addition to the content requirements for the various submittals (which were arranged throughout these 700 plus pages of specifications by major task), the submittal process itself was set forth generally in Section 01330 of the Construction Contract specifications (as approved by PennDOT). These applicable Construction Contract specifications provided, inter alia, that product and testing information submittals required to be made by Sordoni would be made to the Project architect and designer (Hemmler + Camayd) and that it would be Hemmler +

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incorporate some small portions of Publication 408 which identify, inter alia, specific requirements for application of asphalt paving and source documentation relating to steel products required under the federal Buy America Act. We discuss these specific documentation provisions separately from the general documentation requirements of Publication 408 later in this opinion.

Camayd, as the Project designer, who would determine whether or not these submittals were sufficient to show compliance with the Project plans and specifications. (Ex. 15 at pp. 170-173).

An additional procedure (not expressly required by the approved Project plans or specifications) was also established whereby Hemmler + Camayd would provide copies of documentation and submittals it received from Sordoni to Pasonick, the company engaged by the City to perform the City's Project inspection and supervision duties pursuant to the Reimbursement Agreement at Paragraph 10. (N.T. 1694-97) However, insofar as this inspection and supervision was to be performed "in accordance with the approved plans and specifications" we do not see it as altering the content of the Project documentation or the procedure for Project submittals as we have described them above (i.e. all submittals to be made to, and reviewed or acted upon by Hemmler + Camayd and all documentation content to be as prescribed in the 700 plus pages of detailed specifications provided by Hemmler + Camayd, not as prescribed by an all-encompassing reference to Publication 408).

This additional procedure (Hemmler + Camayd forwarding copies of submitted information to Pasonick) was reasonably calculated to fulfill the only contractual commitment Sordoni or the City had to PennDOT with regard to Project documentation and submittals. This responsibility was to retain copies of the documentation and submittals required by the Construction Contract specifications and to produce this documentation at a reasonable time and place upon written request by PennDOT, if and when such request was made, pursuant to Section 112 of Publication 408. What Sordoni and/or the City was not required to do by contract was provide documentation and/or submittals in accordance with any provision of Publication 408 not among those specifically enumerated in the approved Construction Contract specifications.

Nothwithstanding this foregoing limitation, PennDOT refused to make any further payments after Payment Application #5 based on its position that the Project was not being fully documented as required by Publication 408. This continued insistence on Publication 408 type documentation was apparent from communication during the Project and subsequent testimony of several PennDOT employees, including Richard Cochrane (PennDOT's District 4 Assistant District Executive for Construction)[40] and Judy Russo (PennDOT District 4 Documentation Specialist). In fact, Ms. Russo conducted two audits of the Project's documentation and ignored materials provided by Pasonick on each occasion because the information was not on PennDOT forms or compiled as prescribed by Publication 408. (Ex. 391; N.T. 1822-24).

This mistaken insistence on complete compliance with Publication 408 reporting and documentation requirements, rather than compliance with the applicable documentation/submittal requirements in the actual Construction Contract specifications, continued even after Pasonick (correctly) pointed out to Mr. Cochrane that the Project itself was more "architectural" than "transportation" in nature, and therefore not compatible with a full application of Publication 408 requirements.[41] Rather, it was not until Christopher Cepko (Quality Assurance Team Leader for PennDOT Districts 4 and 5) was asked to perform an analysis of the work documentation provided and/or missing on the Project in May of 2010 (after the Project was nearly complete and work had essentially stopped for non-payment) when anyone at PennDOT correctly considered the documentation requirements outlined in the 700 plus pages of specifications provided by Hemmler + Camayd (including the specific Publication

[40] It appears further that Mr. Cochrane was also serving as the Acting District Executive for District 4 at times relevant to this construction.

[41] Both the style and format of the approved plans and specifications, as well as several elements of construction validate Pasonick's point that the Project was more "architectural" than "transportation" in nature and not conducive to full application of all Publication 408 requirements. See Board Findings of Fact at 155 to 166.

408 provisions explicitly incorporated therein) rather than the full Publication 408 specifications to address this issue.

Unfortunately, it appears that Mr. Cepko's comprehensive analysis and report (the "Cepko Report") was not presented to Sordoni or the City upon its completion. Instead, what transpired from the time of PennDOT's refusal to make any payment after Payment Application #5 in June 2009 until the initiation of Sordoni's claim against PennDOT is a series of attempts by Sordoni and/or Pasonick to satisfy PennDOT's document expectations for various aspects of Sordoni's work, and PennDOT's rejection of same based on full Publication 408 requirements. In short, written documentation requests based on the actual specifications did not occur until PennDOT provided Sordoni with the Cepko Report and additional reports from its expert witness, Thomas Mitchell, P.E., as part of the claims process.

Indeed, it is PennDOT's initial and continued insistence on full Publication 408 type documentation (rather than the documentation properly required under the applicable specifications) and its near total failure to identify and request any specific documentation actually required by the Construction Contract through a proper written request (as required by Publication 408, Section 112) which leads the Board to reject PennDOT's argument that Sordoni's claims should be denied because Sordoni did not produce relevant documentation in a timely manner. In fact, the only written request for documentation by PennDOT brought to our attention is Mr. Cochrane's November 10, 2009 letter to the City (Ex. 292), and it is clearly based on the mistaken premise that all of Publication 408's documentation requirements apply to the Project (including the use of PennDOT Form CS-4171 to provide manufacturer representations of product compliance for use on the Project, which he refers to in his letter as the missing "certifications"). Moreover, the specific documentation requested in this lone

written request was either: 1) simply not required by the applicable Construction Contract specifications and/or 2) subsequently addressed or produced in adequate form by the time of Mr. Cepko's review. Under these circumstances, the Board found it appropriate to evaluate all the documentation and materials produced at hearing by Sordoni, as well as PennDOT's explanations of what documentation remained missing, in order to determine whether or not Sordoni (and the City) have satisfied the documentation requirements under the Construction Contract and Reimbursement Agreement.[42]

Sordoni's Documentation and Alleged Deficiencies

At hearing, PennDOT presented the Cepko Report (Ex. 465) as well as testimony from Mr. Cepko in order to identify the instances of deficient documentation it asserts occurred on the Project. In addition to testimony from several other witnesses, PennDOT also presented the expert testimony and report of Thomas Mitchell, P.E. (Ex. 81), detailing a "number of submittals [which were] insufficient or missing" from the record. In response, Sordoni submitted testimony from several witnesses and multiple expert reports of its own. These included a report on the steel issues by Robert McGregor, a report on concrete issues by Timothy Burns and two reports on general compliance prepared by Steven Parashac (an architectural engineer employed by Sordoni and supervisor on the Project) and Jonathan Reif (Executive Vice President and CEO of Sordoni and holder of a masters degree in civil engineering), all of whom testified at trial.

The Reif/Parashac reports (Exs. 82 and 83) provided item-by-item responses to Mr. Mitchell's initial report and assertions of insufficient or missing submittals as well as 119

[42] While not crucial to our holdings here, the Board is also loath to deny a contractor payment where it appears the work itself is done properly and timely with the only complaint being that the documentation (which shows the work properly done) is "late." This is particularly so where the timing requirements for presentation of such documentation are as unspecific as they are in Section 112 of Publication 408.

pages of supporting documentation related to the alleged insufficient or missing submittals. (Ex. 84). The reports of Messrs. McGregor and Burns also address points made by Messrs. Cepko and/or Mitchell. Mr. Mitchell subsequently prepared a second report (Ex. 96) responding to Sordoni's reports and documentation which was also presented at hearing.

The Board's review of the Cepko Report, both of Mr. Mitchell's expert reports, Sordoni's multiple reports with additional documentation, and testimony from all the parties leads us to conclude that the Cepko Report accurately identifies each area of work where documentation issues material to resolution of Sordoni's claim are present. It further identifies the values reasonably assigned to the various work components affected by these "documentation issues." Accordingly, we will utilize the Cepko Report and the summary spreadsheet therein to aid our analysis and resolution of these outstanding documentation issues, addressing problems raised by Mr. Cepko, Mr. Mitchell and/or other PennDOT personnel where appropriate. This summary spreadsheet states as follows:

Item #	Original Contract Amount	Estimate #1-5	Estimate #6-11	Y/GY/GN /N	Total Payment Potential
1) General Conditions	$70,215.00	$87,252.00	-$17,037.00	Y	$70,215.00
2) Bond	$21,711.00	$21,711.00	$0	Y	$21,711.00
3) Insurance	$17,610.00	$12,659.74	$4,084.01	Y	$16,743.75
4) Permit	$22,709.00	$22,709.00	$0	Y	$22,709.00
5) Mercantile Tax	$14,305.00	$9,391.64	$4,913.36	Y	$14,305.00
6) Earthwork	$159,095.00	$110,468.00	$48,627.00	GY	$159,095.00
7) Paving/Surfacing	$64,700.00	$0	$64,700.00	N	
8) Landscaping	$32,850.00	$0	$32,850.00	Y	$32,850.00
9) Fence	$53,250.00	$0	$34,650.00	Y	$34,650.00
10) Masonry	$141,500.00	$100,230.00	$41,270.00	N	
11) Masonry Restoration	$190,600.00	$100,600.00	$90,000.00	Y	$190,600.00
12) Concrete FDNS/Piers/GRD Beams	$43,250.00	$43,250.00	$0	GN	
13) Conc. Slabs-Interior	$24,433.00	$9,655.00	$14,788.00	GN	
14) Conc. Ext. Walks/SOG/Steps	$66,485.00	$13,619.00	$52,866.00	GN	
15) Underpinning Concrete	$39,668.00	$39,668.00	$0	GN	
16) Concrete Rebar/WWM	$51,049.00	$44,017.00	$7,032.00	GN	
17) Misc Metals/Structural	$555,000.00	197,278.00	$357,722.00	N	
18) Carpentry	$11,105.00	$0	$9,895.00	Y	$9,895.00
19) Waterproofing	$59.900.00	$14,060	$45,840.00	Y	$59,900.00
20) Caulking	$4,800.00	$0	$4,800.00	N	

21) Doors/Frames/Hardware (L&M)	$7,680.00	$0	$7,680.00	Y	$7,680.00
22) Aluminum Windows	$74,600.00	$0	$74,600.00	GY	$67,140.00
23) Resilient Flooring	$1,430.00	$0	$0		$0
24) Painting	$59,450.00	$0	$56,510.00	Y	$56,510.00
25) Specialties (L&M)	$2,900.00	$0	$0		$0
26) Elevator	$83,000.00	$8,300.00	$74,700.00	GN	
27) HVAC	$8,850.00	$6,705.00	$0		$6,705.00
28) Plumbing	$15,280.00	$6,434.00	$8,846.00	Y	$15,280.00
29) Electrical	$103,000.00	$58,876.00	$44,124.00	GY	$103,000.00
30) Railroad	$53,975.00	$53,975.00	$0	GY	$53,975.00
31) Crane	$33,600.00	$12,900.00	$20,700.00	Y	$33,600.00
TOTAL	$2,088,000.00	$973,758.38	$1,084,160.37		$976,563.75

In order to facilitate progress payments on the Construction Contract, Sordoni's work on the Project was broken down by 31 specific pay item tasks. (N.T. 1972). In his report, Mr. Cepko utilized these agreed upon pay item classifications and amounts to begin his analysis. He then prepared separate columns for Payment Applications 1-5 (totaling $973,758.38) which had been billed and paid (less 10% retainage) and Payment Applications 6-11 (totaling $1,084,160.37) which had not been paid. For each pay item, Mr. Cepko made a determination as to whether payment of the item was justified based on the documents provided to him at that point. Mr. Cepko concluded that payment of specified items was justified if the documentation complied with either Publication 408 or the Construction Contract specifications. (N.T. 1973-78). For each item, Mr. Cepko indicated as follows: "Y" for "yes" (meaning payment for the item was justified), "GY" for "gray yes" (meaning the documentation "might have been close" to meeting Publication 408 or Construction Contract specification standards) and "GN" or "gray no" (meaning that the standard was not met in his opinion "but maybe they could have done something or provided something to actually meet the specification"). Mr. Cepko testified that an "N" indicated, "no", that the documentation did not meet either the 408 or the Construction Contract specifications. (N.T. 1974-75).

Payment for items not disputed by PennDOT.

Consistent with the Cepko Report, as well as PennDOT's testimony at trial and post-trial briefings, it appears that PennDOT does not now dispute the adequacy of documentation for 19 of the 31 pay items under the Construction Contract. Specifically, Mr. Cepko's "Total Payment Potential" column, totaling $976,563.75, represents work performed by Sordoni for which Mr. Cepko found adequate documentation. That total includes items marked "Y" and "GY" and reflects six downward adjustments to the original contract amounts applied by Mr. Cepko which have not been contested by Sordoni.[43] Also included in Mr. Cepko's "Total Payment Potential" column was payment for the total Construction Contract amount of $70,215 under Item #1 (General Conditions). Here, Mr. Cepko noted that Sordoni had been paid (in Payment Applications 1 – 5) $87,252 under "General Conditions", which was $17,037 above the Construction Contract amount for this item. Mr. Cepko testified that Mr. Kovacs of Pasonick told him that amount had been "overbilled" and was a mistake. That "mistake" was formally acknowledged by Sordoni in an amended Payment Application 6, which showed a credit in the amount of $17,037 for this item. In accordance with Mr. Cepko's analysis, including the adjustments noted above, and excepting an additional downward adjustment of $10,300 for unfinished electrical work (which we discuss below), PennDOT does not appear to dispute that payment for work performed by Sordoni is justified in the amount identified for "potential payment" by Mr. Cepko.[44]

Items for which PennDOT asserts Sordoni's documentation was deficient under the Construction Contract.

[43] For five of these six pay items, Sordoni only billed for the lower amounts utilized by Mr. Cepko (Item Nos. 3, 9, 18, 24 and 27). Mr. Cepko also reduced the potential payment for Item #22 (Aluminum Windows) to $67,140 based on his determination that even though Sordoni's Payment Applications 6 – 11 included a request for payment of the total Construction Contract amount of $74,600 for this item, only 90% of the work had been completed. His testimony on this item indicates Pasonick's inspector, Bernie Kovacs, agreed with this, and Sordoni has not contested this last adjustment in its claim here.

[44] With the additional downward adjustment for unfinished electrical work, the undisputed pay amount (rounded to the nearest dollar) is $966,264.

Mr. Cepko testified, and PennDOT now argues, that no payment is justified for ten of the remaining twelve pay items: Item #7 (Paving/Surfacing) totaling $64,700; Item #10 (Masonry) totaling $141,500; Item #17 (Miscellaneous Metals/Structural) totaling $555,000; Item #20 (Caulking) totaling $4,800; Items #12 - #16 (various concrete work) totaling $224,885; and Item #26 (Elevator) totaling $83,000, all listed as "no" or "gray no." For two items in the original bid, Item #23 (Resilient Flooring) totaling $1,430 and Item #25 (Specialties L&M) totaling $2,900, no amount was billed by Sordoni and no amount was considered payable by Cepko/PennDOT. The disputed items are now addressed individually below.

Item #7 – Paving/Surfacing

PennDOT asserts that Sordoni did not comply with the specifications for asphalt/paving on the Project and would deny the entire $70,215 allocated to this pay item. Specifically, PennDOT argues that the delivery tickets for the asphalt actually applied to the Bogart Place alleyway show a different mix design was used than the one which was initially approved by the architect (N.T. 1979-81) and that required testing of the asphalt was not performed. (N.T. 2369-71).

With regard to the first issue, we note that the Construction Contract specifications did not identify a particular asphalt mix design but required the contractor to submit technical data for proposed job mix designs to the architect. Mr. Cepko indicated that Sordoni submitted an asphalt mix design to the architect which was approved in September 2009, but then provided a different mix. According to both Mr. Cepko and Mr. Mitchell, the asphalt mix design actually used may have adversely impacted the durability and/or longevity of the paving. (NT 1980-82, 2371-72). In response, Pasonick's expert, Mr. Brian Dillman, testified that the asphalt mix

actually used was a "stiffer mix" which would hold up better to more pedestrian and vehicular traffic than the approved mix design. (N.T. 2554-55).

With respect to the testing of the asphalt, the specifications included in the Construction Contract at Section 02741.1.5 ("Quality Assurance") required compliance with "materials, workmanship, and other applicable requirements of PA DOT Form 408" for asphalt work. Addressing this issue, Mr. Dillman noted that testing was not required under these specifications because of the limited amount and depth of asphalt installed on the Project (approximately 115 tons applied as a 1 inch stamped overlay). He noted here that PennDOT's Publication 408 permitted visual inspection during installation in lieu of core testing where quantities of less than 400 tons and depths of less than 1.5 inches are installed. (N.T. 2541-42).

On both these issues, the Board found Mr. Dillman's testimony convincing. Because we find that the asphalt mix actually installed exceeded the approved design mix for strength and durability, and because we agree that the core testing referenced by PennDOT and Mr. Cepko was not required under the applicable specifications for the amount and depth of asphalt installed, we also find that Sordoni complied with the Construction Contract specifications for the asphalt/paving work here at issue in all material respects. The requested payment for this item under the Construction Contract and Reimbursement Agreement in the amount of $64,700.00 is therefore justified.

Item #10 – Masonry

PennDOT also denies the entire $141,500 with respect to the pay item for masonry. The Cepko Report indicated that Sordoni failed to comply with the Construction Contract specifications under Section 04810, in two particulars: 1) the absence of required submittals

including shop drawings required under Para. 1.5.B. and a statement of compressive strength of masonry required by Para. 1.5.H. and 2) the absence of preconstruction and field quality testing reports for concrete masonry units ("CMUs"), mortar and grout as specified in Paras. 1.6.D. and 3.9. respectively. In his report (dated May 27, 2010) Mr. Cepko wrote that, while Pasonick "had certain things in the file for --- as far as architect approved products," he was unable to locate shop drawings for CMUs, Reinforcing Steel and fabricated flashing, which were required submittals under Para. 1.5.B., as well as "a statement of average net-area compressive strength of masonry units, mortar type, and resulting net-area of compressive strength of masonry" required under Para. 1.5.H. However, PennDOT's Mr. Mitchell, in his later report dated April 30, 2011, found that "Sordoni appeared to have provided the required submittal documentation" for masonry.[45] Mr. Mitchell's report and testimony confirmed his finding that the masonry submittals indentified as the first category of missing materials in the Cepko Report had subsequently been provided. (N.T. 2499-2500). Mr. Cepko did not address the lack of submittals in his testimony. Accordingly, we conclude that Sordoni did provide the submittals required under Para. 1.5.

More significantly, Mr. Cepko noted the absence of preconstruction testing of CMUs, mortar and grout required under Section 04810, Para. 1.6.D., and the absence of field quality testing of CMUs, mortar and grout required under Para. 3.9.B. of the same section in the Construction Contract specifications. Mr. Mitchell also noted the absence of field quality control tests by an independent testing agency under Para. 3.9. in his report. (Ex. 81 at p. 29). Although

[45] Mr. Mitchell included with his April 30, 2011 report (Ex. 81) copies of documents submitted by Sordoni, including certain shop drawings and a certification from Keystone Concrete Block & Supply Company certifying that the CMUs supplied met the average compressive strength requirements for the Project. (Ex. 81).

not mentioned in his report, Mr. Mitchell also testified that he was unable to find any record of the required preconstruction testing under Para. 1.6.D. having been performed. (N.T. 2509-10).

Paragraph 1.6.D. of Section 04810 for Unit Masonry Assemblies provided that the Owner (i.e. the City) was to "engage a qualified independent testing and inspection agency to perform preconstruction testing" including a concrete masonry unit test, a mortar test, and a grout test for each type of unit and mix. Para. 3.9 required the contractor to engage an independent testing agency to perform field testing of concrete masonry units, mortar, and grout. PennDOT's Mr. Cepko stated in his report that, while Sordoni's subcontractor, Midlantic, performed compressive strength field testing on the grout, the other field tests (on CMUs and mortar) were not performed.[46]

Sordoni's project manager, Andrew Shedlock, testified that the preconstruction testing required under Para. 1.6.D. wasn't done because the Owner never hired a testing firm (N.T. 930-31), Mr. Shedlock also testified that he was not aware of any masonry field testing other than that performed by Midlantic on the grout. (N.T. 1024-25).

Because the Construction Contract specifications clearly required preconstruction and field testing of CMUs, mortar and grout, and because this testing was not performed (with the exception of some grout field testing), we find that Sordoni (and the City) failed materially to meet the Construction Contract specifications and the requisite documentation for preconstruction and field testing of the masonry work performed on the Project. Accordingly, Sordoni has failed to establish entitlement under the Reimbursement Agreement to payment of its $141,500 claim for this masonry work.

[46] Mr. Cepko noted in his report that field testing results submitted by Midlantic on grout installed on the masonry wall indicated one instance of failure to meet a required strength standard. Although we also note this issue, it is not material to our overall finding on Item #10 Masonry given the more significant failures to conduct any required testing of the CMU and mortar components.

Item #17 – Miscellaneous Metals/Structural

PennDOT asserts that Sordoni's submittals did not meet the quality assurance or the source documentation requirements for the steel installed on the Project and refuses payment of the entire $555,000 for this pay item. Here PennDOT identifies three particular areas regarding the steel installed on the Project where it says Sordoni did not comply with the Construction Contract specifications: submittals generally, the federal Buy America Act, and shop testing of fabricated steel items.

Steel Submittals Generally

PennDOT asserts generally that Sordoni's steel documentation was incomplete and not properly presented. For instance, PennDOT's expert, Mr. Mitchell, complained that, while each specific section of the Construction Contract specifications for steel (Section 05120 for Structural Steel, Section 05310 for Steel Deck, Section 05511 for Metal Stairs, Section 05521 for pipes and tube steel) had its own submittal requirements, the documentation that was submitted "was intermixed" making his review of the submittal documentation difficult. This "lack of organization of the steel documentation and submittals," PennDOT argues, "make[s] it difficult to 1) ascertain the trail of particular pieces of steel used on the project; and 2) determine whether the submittals or transmittals were sent to the correct entities."[47] PennDOT also asserts that a number of submittals for steel components such as mill certifications and delivery slips were not submitted to PennDOT timely and therefore fail to support Sordoni's payment requests.

[47] PennDOT's Proposed Findings of Fact at ¶ 138; N.T. 2389-90.

At trial, Robert McGregor, president of Sordoni's steel supplier, McGregor Industries (and Sordoni's steel expert) presented voluminous records including purchase orders, mill reports and certifications, shop drawings, erection drawings and weld and bolt certifications. Additionally, Kenneth Ruby, Hemmler + Camayd's project manager for this Project, testified generally that Sordoni had submitted to the architect all the documentation required by Hemmler + Camayd for review and/or approval. He specifically stated that these submittals included steel mill test reports provided to Hemmler + Camayd for review and/or approval. Mr. Ruby concluded that Sordoni provided all the submittals necessary to evidence performance of this construction work in a satisfactory manner as required by the specifications.

Given the nature of the testimony provided by both sides regarding the overall adequacy of the steel work documentation, the voluminous written materials presented to the Board regarding this pay item, and PennDOT's incorrect insistence on full compliance with all Publication 408 steel documentation provisions, the Board has conducted its own review of: 1) the steel documentation and procedures actually required by the Construction Contract specifications and 2) the steel work submittals and documentation provided by Sordoni. This review, along with the parties' testimony leads us to find that, with the important exceptions discussed below, Sordoni has complied in most material respects with the applicable steel specifications set forth in the Construction Contract. Accordingly, we will turn to a discussion of the specific objections by PennDOT which we find material to a determination as to what amount, if any, is due and payable to Sordoni on this Item #17 Miscellaneous Metals/Structural.

Timing Issues with Steel Documentation

With regard to PennDOT's assertion that some steel work documentation was not provided "timely" and so should be disregarded, we have already discussed PennDOT's mistaken belief that all of Publication 408 applied to this Project when, in fact, only those portions explicitly incorporated by reference were applicable. This means, with regard to steel supplied to the Project, that the Publication 408 provisions with timing elements actually made applicable to the Project were limited to Section 112 (the general document retention/production provision); Section 106.01 (regarding steel delivered directly to the job site) and Section 1105.01(e)(6) (regarding steel mill certifications and shipping statements for steel delivered to the fabrication shop). We address each of these in turn.

As the Board discussed earlier, Section 112 is the only general documentation provision in the combined Construction Contract/Reimbursement Agreement which can be construed to require the production of construction documents and records to PennDOT (as opposed to the Project architect Hemmler + Camayd) and then only within a "reasonable time" after a written request for same is made by PennDOT. As we also recognized earlier, the only written request from PennDOT indentifying and requesting documentation presented to the Board at hearing was Mr. Cochrane's letter of November 10, 2009. As Mr. Cochrane then testified, the documentation he was requesting in that letter was for PennDOT Form CS-4171 "certifications" (which were not required by the specifications). Nothwithstanding Mr. Cochrane's mistaken request, we note further that mill certifications and invoices of the type actually required by the specifications were subsequently provided, in substantial part, to Mr. Cepko by the time of his review. Given this circumstance, and the fact that the remaining deficiencies in steel documentation identified in Mr. Cepko's Report (and/or Mr. Mitchell's reports) were not communicated to Sordoni (or the City) until after the filing of Sordoni's claim, we do not find any of the steel documentation

provided to PennDOT during the course of the Project, or to the Board after the Project, to be untimely pursuant to Publication 408, Section 112.

However, unlike most of the other pay items on this Project, the steel work here did have additional Publication 408 reporting requirements explicitly attached to it. One of these, Section 1105.01(e)(6) of Publication 407, does contain a time sensitive requirement to provide a PennDOT "shop inspector" with delivery tickets, invoices and mill certificates for steel to be used on the Project at or about the time it arrived at the steel fabrication shop before cutting and assembly.

PennDOT's main problem with its complaint here, however, is that it never identified or supplied a "shop inspector" to receive such documentation and no such person even appeared at McGregor's facilities. Notwithstanding this, PennDOT (or at least Mr. Mitchell) seems to assert that this was Sordoni's (and/or McGregor's) fault because of their failure to notify PennDOT in advance of steel work beginning at the fabrication shop. Accordingly, PennDOT still argues that this should preclude Sordoni from later attempts to provide the mill certifications, steel invoices and other evidence to establish compliance with the Construction Contract specifications for the steel products used on the Project.

To begin here, we note agreement with PennDOT that the absence of a PennDOT inspector at the fabrication shop to observe the delivery of the steel to the shop (and its subsequent fabrication) has unduly complicated the process of confirming that the mill test reports and certifications (which include certification of U.S. origin) provided by Sordoni are truly those for the steel products supplied to the Project. Had a PennDOT inspector been at the shop to observe the delivery and fabrication of the steel, he or she could have visibly matched the

steel items with the product delivery ticket and mill test reports which accompany the steel items upon delivery (and matched the related sales invoice to the steel items as well). Similarly, the inspector could then have observed these steel items through fabrication. However, we do not agree with PennDOT that because this did not occur, the whole lot of steel work on the Project must be forfeit.

The additional problem PennDOT has on this particular issue stems once again from the Construction Contract specifications which it approved. These specifications explicitly incorporated Publication 408 Section 1105.01(e)(6) but plainly left out Section 1105.01(e)(1). Publication 408, Section 1105.01(e)(1) required Sordoni to notify PennDOT of when in-shop steel fabrication was to take place so that PennDOT personnel could have been at the shop to inspect delivery and fabrication of the pertinent steel items. As a result of this oversight in the specifications, confusion reigned; Sordoni never notified PennDOT of impending steel delivery to McGregor's shop; and PennDOT never identified a shop inspector to visit McGregor during steel delivery or fabrication. PennDOT, of course, suggests that Section 1105.01(e)(6) implicitly required Sordoni to give it advance notice of steel delivery. Sordoni disagrees and suggests, inter alia, that, if PennDOT had shown any contemporaneous interest in direct involvement in the Project, identified a PennDOT inspector or attended job conference meetings it would have been aware of impending steel work, but did not do so.

With regard to this failure to have a PennDOT shop inspector present for steel delivery and fabrication, we believe the bulk of the fault here lies with PennDOT. Specifically, we believe PennDOT's failure to identify and/or provide a "shop inspector" to receive the documentation prescribed by Section 1105.01(e)(6) and its failure/omission to include Section 1105.01(e)(5) in the specifications to put Sordoni on notice that it had to notify PennDOT in

advance of its steel fabrication at very least actively interfered with Sordoni's (and/or McGregor's) ability to provide PennDOT with the documentation contemporaneously. As a result, we believe it appropriate to allow Sordoni the opportunity to present its evidence that the steel invoices, mill test reports and mill certifications it has subsequently offered to PennDOT and the Board actually do tie-in to the steel used on the Project and show compliance with the remaining Construction Contract steel specifications.

Section 106.10 of Publication 408 (also explicitly incorporated into the specifications) contained a requirement somewhat similar to Section 1105.01(e)(6) by cross-reference to Section 106.01 for steel delivered directly to the worksite. This provision prescribes contemporaneous delivery of the mill certifications and shipping invoices to the "Inspector-in-Charge" on the job site. Certainly PennDOT never identified one of its employees to fill this role. Given PennDOT's consistent absence from the job site, we believe this provision would only require this documentation be given contemporaneously to Pasonick who subsequently provided this documentation to Mr. Cepko. Accordingly, we see no "timing" problem with this item either.[48]

Buy America Requirements

In addition to its assertion that Sordoni failed to comply with the Construction Contract specifications regarding submittals generally, PennDOT asserts that Sordoni has still not shown that it complied with the federal Buy America Act provisions incorporated into the Construction Contract. These provisions require the contractor to document that substantially all the steel installed on the Project was produced in the United States. Here, we agree with PennDOT that the Construction Contract specifications <u>specifically</u> incorporated Section 106.10 of Publication

[48] This issue affects only the concrete rebar which we deny for other reasons as addressed below.

408. This section, in turn, required compliance with the Buy America Act, found at 23 U.S.C. § 313 et seq.

In essence, the Buy America Act requires that all "steel, iron, and manufactured products" used on federally funded projects be produced in the United States. Section 106.10 of Publication 408 specifically states that some foreign steel or iron products may be used, "provided the cost of such products as they are delivered to the project does not exceed 0.1% of the total contract amount, or $2,500, whichever is greater." This provision is consistent with the federal regulations promulgated under the Buy America Act at 23 C.F.R. 635.410 (cited in Section 106.10 of Publication 408) which provide that the Buy America requirements "do not prevent a minimal use of foreign steel or iron materials, if the cost of such materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or $2,500, whichever is greater."

Sordoni, primarily through its steel supplier (McGregor), provided the Board with considerable documentation and testimony respecting the sources of steel used on the Project. This included purchase orders, mill test reports/certifications and shop drawings for various pieces of steel used on the Project, as well as testimony tying these items together. Additionally, Mr. McGregor provided a listing of what he considered to be all the "main members" of the steel fabrication and represented that all of these pieces of steel and all of the smaller angle iron, bolts and miscellaneous pieces of steel used in the steel work fabrication (and delivered to the Project site) were covered by the purchase orders, mill test reports and mill certifications presented in his report. This documentation showed, with two small exceptions, that the steel supplied to the Project was made in the United States.

Comparing Mr. McGregor's testimony and documentation to the problems identified with the steel documentation by Messrs. Cepko and Mitchell, we find ourselves in agreement with Mr. Cepko's observations that there is no precise paper trail to match the steel pieces with all the documentation other than by size of the item (meaning no fool proof paper trail with continuous heat numbers or other identifiers). That said, and acknowledging the shared fault between Sordoni and PennDOT for the absence of a PennDOT inspector at the fabrication shop, we do not find a specific requirement for such a fool proof paper trail as PennDOT seems here to demand. More significantly, however, though we found parts of Mr. McGregor's testimony unpersuasive, we appreciated his candor with regard to the two pieces of Canadian steel utilized on the Project (discussed below) and found his testimony as to the source and documentation of the steel used on the Project credible. Accordingly, we found adequate documentation and evidence to confirm that all but a limited amount of steel used on the Project was produced inside the United States.

Excepting for later discussion the steel rebar for concrete delivered directly to the worksite, the only steel we find used on the Project that was not produced in the United States consisted of two steel tubes with a combined cost of $4,656.70 and miscellaneous bolts with an approximate value of $1,062. These items were manufactured in Canada, making the total value of non-United States steel used on the Project $5,716.71. (Ex. 80 at pp. 102 and 149). Although this amount is small, it is still more than double the $2,500 limit for foreign steel allowed under 23 C.F.R. 635.410, and well in excess of the $2,088 mark which represents 0.1% of Sordoni's total Construction Contract number of $2,088,000. Accordingly, this discrepancy presents a problem for Sordoni.

As a result of the foregoing, PennDOT takes the position that Sordoni's use of non-United States steel violated the Construction Contract specifications, which explicitly incorporated Section 106.10 of Publication 408, because the cost of foreign steel products used on the Project exceeded both 0.1% of the total Construction Contract amount and the $2,500 foreign steel cost limit in Section 106.10 and 23 C.F.R. 635.410. It further asserts that this use of $5,716.71 worth of non-United States steel on the Project fully justifies its refusal to pay any of the $555,000 worth of steel installed on the Project.

Sordoni responds that the Buy America Act should not preclude payment for its steel work on the Project, citing two exceptions to its application. First, Sordoni asserts that application of the Buy America Act requirements to the case at hand would be inconsistent with the public interest and is thus excepted from this restriction under 23 U.S.C. § 313(b)(1). It also argues to be excepted because the foreign steel products used on the Project were "not produced in the United States in sufficient and reasonably available quantities and of a satisfactory variety" under 23 U.S.C. § 313(b)(2).

The Buy America Act, 23 U.S.C. § 313, provides in pertinent part as follows:

> (a) Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or this title and administered by the Department of Transportation, unless steel, iron, and manufactured products used in such project are produced in the United States.
>
> (b) The provisions of subsection (a) of this section shall not apply where the Secretary finds –
>
> (1) That their application would be inconsistent with the public interest;
>
> (2) That such materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory variety; or
>
> (3) That inclusion of domestic material will increase the cost of the overall project by more than 25 percent.

23 U.S.C. § 313.

Paralleling 23 U.S.C. § 313(b)(1) and (2) is 23 C.F.R. § 635.410(c)(1), which provides that a state may request a waiver of the Buy America provisions if:

> (i) The application of those provisions would be inconsistent with the public interest; or
>
> (ii) Steel and iron materials/products are not produced in the United States in sufficient and reasonably available quantities which are of a satisfactory quality.

23 C.F.R. § 635.410(c)(1).

Section 635.410(c)(2) provides that requests for waivers "must be submitted in writing to Regional Federal Highway Administrator (RFHWA) through the FHWA Division Administrator."

To support its first argument (i.e. the "public interest" exception), Sordoni cites to Mabey Bridge & Shore, Inc. v. Schoch, 666 F.3d 862 (3d Cir. 2012). However, Mabey did not involve the grant of a "public interest" waiver under 23 U.S.C. § 313(b)(1) but rather addressed the issue of whether the Pennsylvania Steel Products Procurement Act ("Steel Act")(73 P.S. §§ 1881-1887) is preempted by the federal Buy America Act. The case does not identify or discuss the necessary grounds for, or availability of, a "public interest" waiver under § 313(b). In fact, it makes no reference to the public interest basis for waiver beyond the mere recitation of the statutory language as part of its discussion of preemption.[49] Moreover, Sordoni fails, as a matter

[49] At issue in Mabey was a regulation promulgated under the Buy America Act (23 C.F.R. § 635.410(b)(1)) which appeared to exempt application of the Buy America Act to projects which include "no permanently incorporated steel or iron materials." The plaintiff in Mabey asserted that this provision preempted the Pennsylvania Steel Act's more stringent requirement that only United States steel products be used on all projects, including a temporary bridge proposed by the plaintiff. The Mabey case held, in effect, that the Buy America Act did not preempt the Pennsylvania Steel Act to the extent that the mandates of the Pennsylvania law concerning the use of foreign steel on public projects were more stringent than those of the federal law. 666 F.3d at 869.

of fact, to identify what it deems to be the "public interest" it is asserting here to justify a waiver of the Buy America Act.

Regarding its second argument (i.e. application of the "non-availability" waiver), Sordoni again fails to provide a legal or factual basis for same. Although McGregor did submitt a "Request for Information" to Sordoni on May 1, 2009 (Ex.80 at p. 157) stating that it had found the steel tubes in question to be manufactured only in Canada, Mr. McGregor did not testify directly at hearing what, if anything, he had done in this case to determine that the tubes were not available domestically. Rather, Mr. McGregor explained his general practice in such circumstances, which was to seek direction from the contractor after contacting six warehouses and finding the needed product was only available from a foreign manufacturer (N.T. 1420-22). Moreover, his testimony did not address the procedure for seeking a waiver under the Buy America Act and its accompanying regulations. For instance, see the FHWA web page titled "Notice of Buy America Waiver Request" (referenced by the FHWA in its Buy America Act Q and A web page), which describes the FHWA Notice, Comment and Review Process for such a waiver. This process includes, inter alia: 1) posting of a notice of a waiver request on the FHWA web site, followed by a 15-day public comment period; and 2) publication in the Federal Register of a notice documenting the FHWA's finding regarding the waiver, followed by a second 15-day public comment period. None of this was done.

Despite the foregoing, Sordoni seems to assert that an email from one Thomas Cutrona of the FHWA to Mr. Cochrane of PennDOT constitutes a waiver by the FHWA of the applicable Buy America provisions. The email in question (Ex. 406), dated March 19, 2010, reads in its entirety as follows:

Morning, Dick.

As per your request and inquiry Monday:

1. "Buy America" does not include aluminum unless it is an alloy containing steel.
2. We have not put a "hold" on payments on the Scranton Plaza. Therefore pay as you see fit.

Among other things, no evidence was offered that Mr. Cutrona was the Regional Federal Highway Administrator for the FHWA, or some other person authorized to receive and/or grant Buy America Act waiver requests.[50] Moreover, it is far from clear that this email related in any way to a written request to waive the Buy America Act provisions. Additionally, as noted above, no persuasive evidence was presented that the foreign-manufactured steel products used were not available domestically.

Because we have found that there was no waiver request of the Buy America Act under either provision suggested by Sordoni, nor sufficient proof of any factual basis for such a waiver, we agree with PennDOT that Sordoni's use of $5,716.71 worth of non-United States steel on the Project was in violation of the Buy America Act. Therefore, because the terms of this act were incorporated into the Construction Contract specifications by specific reference to Section 106.10 of Publication 408 in these specifications, this was also a breach of the Construction Contract and the Reimbursement Agreement. That said, we do not agree with PennDOT's proposed remedy for this failure.

As noted above, PennDOT takes the position that because Sordoni used $5,716.71 of foreign steel on the Project without properly processing a waiver for these items; and because this cost of foreign steel products used on the Project exceeded both .1% of the cost of all the

[50] The Buy America Act regulations at 23 C.F.R. § 635.410(c)(2) provide that waiver requests "must be submitted in writing to the Regional Federal Highway Administrator (RFHWA) through the FHWA Division Administrator."

steel on the Project and $2,500, then none of the $555,000 worth of steel work supplied to the Project is reimbursable. PennDOT cites no case law in support of this position nor does it identify any specific language in either the Buy America Act or its accompanying regulations requiring such a draconian outcome. Instead, PennDOT's Rebecca Burns (Acting Director of PennDOT's Bureau of Construction and Materials at the time)[51] testified that PennDOT's position relies on statements found on a "question and answer" page of the FHWA web site. (N.T. 2292-94)

Following-up on Ms. Burns' testimony, the Board takes judicial notice that the FHWA maintains a web page at http://www.fhwa.dot.gov/construction/contracts/buyam_qa.cfm, captioned "FHWA's Buy America Q and A for Federal-aid Program." Pertinent to the issue raised here is the following question posed in this Q and A: "How does FHWA resolve an after-the-fact discovery of an inadvertent incorporation of foreign iron and steel products into a Federal-aid project?" In answer, the FHWA states that, in order to determine the appropriate resolution, it will review the state's material certification procedures for determining Buy America compliance, the state's and contracting agency's diligence in ensuring compliance, contract provisions prescribing Buy America requirements, as well as case-by-case factors such as the availability of domestic products where foreign products are used, and issues associated with removal and replacement of the foreign products. The FHWA then concludes that "available options" to deal with this type of problem include the following:

a. Remove the excess foreign iron and steel products and replace with domestic iron and steel products.
b. Make the non-compliant iron and steel products Federal-aid non-participating.

[51] Ms. Burns was subsequently made Director of the Bureau of Construction and Materials and was titled Chief of the Innovation and Support Service Division of the Bureau of Project Delivery at the time of her testimony.

c. In instances where there is evidence of carelessness, negligence, incompetence, or understaffing on the part of the contracting agency, the Division Office may determine that all project costs are ineligible.

http://www.fhwa.dot.gov/construction/contracts/buyam_qa.cfm.

Contrary to Ms. Burns' testimony and PennDOT's position, the FHWA's commentary on ways to deal with an after-the-fact discovery of non-United States steel on a federally funded project not only appears flexible and circumstance-driven, but explicitly includes an option to make the foreign steel installed on a project "Federal-aid non-participating." As we understand it, this option effectively permits removal of the non-compliant steel components from eligibility for reimbursement but allows reimbursement for the remainder of the cost of the conforming, domestically produced steel supplied to the subject project even where some foreign steel has been installed.

In the absence of specific language in the Buy America Act or case law which would prohibit payment for any steel on a project where, as here, it has been discovered after installation that a minimal amount of installed steel was not produced in the United States (i.e. approximately 1% by cost), a resolution such as that permitted by the FHWA in its Q and A Response b (i.e. that the non-compliant steel products be made Federal-aid non-participating) makes sense here.[52] Such a resolution avoids what we would consider to be a wholly

[52] Rulings, interpretations and opinions of an agency, while not controlling upon the courts by reason of their authority, "do constitute a body of experience and informed judgment to which the courts may properly resort for guidance." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). The weight to be given such opinions depends, inter alia, on their reasoning and power to persuade. Id. Although entitled to less deference than a formally adopted regulation, an agency's statutory interpretations in formats such as opinion letters are entitled to respect to the extent that those opinions have the power to persuade. Christensen v. Harris County, 529 U.S. 576, 587 (2000). We find the option given by the FHWA, allowing non-compliant iron and steel products to be deemed "Federal-aid non-participating" to be persuasive where, as is the case here, the noncompliant steel amounts to approximately 1% of all steel used on the Project and where we make no findings of carelessness, negligence, incompetence or understaffing on PennDOT's part.

unreasonable penalty requiring Sordoni to forfeit nearly $550,000 over an error affecting 1% of the entire value of the steel work it performed for the Project.

Because the result urged by PennDOT would be draconian, in essence constituting a substantial penalty and/or forfeiture upon Sordoni in the instant case, and is not required under the express terms of the Buy America Act, its regulations, or the instructions provided by the FHWA, the Board concludes that the cost of the non-domestically produced steel on the Project ($5,716.71) may be considered "Federal-aid non-participating" and non-conforming to the Construction Contract. Accordingly, this amount ($5,716.71) is properly deducted from the total Miscellaneous Metals/Structural claim of $555,000 (Item #17) due to Sordoni's failure to comply with the Buy America Act for these very few items of non-United States steel used on the Project.

Were the two arguments raised above by PennDOT its only grounds for refusal to pay Sordoni for the steel work and product supplied to this Project, the Board would be finding in favor of Sordoni on this pay item (subject to the relatively small deduction for the non-conforming steel noted above). However, because we find ourselves in agreement with PennDOT that Sordoni failed, materially, to comply with the Construction Contract specifications requiring independent shop testing of structural steel fabricated for use on the Project, and because Sordoni has not provided us with an itemization of steel work sufficient to distinguish the costs of shop versus field fabricated steel or structural versus non-structural steel used on the Project, we are unable to award any of the Miscellaneous Metals/Structural steel costs claimed by Sordoni.

Steel Shop Testing

In addition to PennDOT's assertions concerning the inadequacy of steel submittals generally and non-conformance with the Buy America Act, PennDOT argues that Sordoni failed to comply with applicable Construction Contract specification requirements related to inspection and testing of steel fabrication work performed in McGregor's shop prior to installation on the Project. Here, PennDOT asserts that Sordoni failed to comply with both the shop inspection requirements of Publication 408 and with those expressly spelled out in the Construction Contract specifications. Accordingly, we will address both portions of the specifications in order. The first issue here, lack of a PennDOT shop inspector at the steel fabrication shop, relates back to our prior discussion regarding which parts of Publication 408 Section 1105.01(e) were incorporated into the Construction Contract specifications. Despite PennDOT's assertions, Section 1105.01(e)(1) was not one of the provisions of Publication 408 which were incorporated into the Construction Contract specifications. Accordingly, PennDOT's argument based on this provision is unavailing.

What was incorporated into the Construction Contract specifications was Section 1105.01(e)(6) of Publication 408, which provides as follows:

> **6. Mill Orders and Shipping Statements.** Furnish copies of mill orders and shipping statements, as directed. Show the weights of the individual members on the statement, if directed. Assure that the fabricator presents the Department's shop inspector with a copy of the shipping invoice to be stamped for verification of inspection and approval of steel items prior to shipment. Forward the stamped copy with the shipment for the project file. Mill certifications will be reviewed, approved and returned to the fabricator by the shop inspector.

It is apparent from the language of Section 1105.01(e)(6) that one of the purposes behind this particular provision was to have a PennDOT shop inspector review mill orders and shipping

statements for the steel being fabricated in order to confirm the U.S. sourcing of these steel items. However, because we have found that the mill orders, shipping invoices, other documents and testimony provided at hearing by the steel fabricator, McGregor, were adequate to match the documentation with the steel items provided to the Project (and since the notice requirement of Publication 408, Section 1105.01(e)(1) did not apply to the Project), we conclude that PennDOT's arguments in this area remain unpersuasive.

In addition to the Publication 408, Section 1105.01(e)(6) requirement that Sordoni submit mill orders and shipping statements to a PennDOT "shop inspector," PennDOT also asserts that Sordoni "had an independent duty to provide independent shop inspection of structural steel" during the shop fabrication process under Section 05120 of the Construction Contract specifications. It further asserts that this was a material failure precluding Sordoni's right to payment for the steel work on the Project. We agree.

Sordoni's duty with regard to in-shop steel fabrication is set forth expressly at Section 05120, Para. 2.8 of the Construction Contract specifications. It provides that the contractor is to "Engage an independent testing and inspection agency to perform shop tests and inspections and prepare test reports" and requires the contractor to provide the independent testing agency "with access to places where the structural steel work is being fabricated or produced to perform tests and inspections." Subparagraph 2.8.C. specified further that shop-bolted connections were to be tested according to "RCSC's 'Specifications for Structural Joints Using ASTM A 325 or A 490 Bolts'." Subparagraph 2.8.D. expressly required that shop-welded connections were to be

visually inspected and tested by the testing agency performing one of four specified weld inspection test procedures.[53]

The clear purpose behind the foregoing requirements was to have an independent inspector visually inspect the welded and bolted connections during the shop fabrication process and perform one of the specified tests on these welded connections in order to ensure the strength and quality of these shop connections before these items of fabricated structural steel were installed on the Project. PennDOT's Mr. Cepko and Mr. Mitchell both reported that they found no record of independent shop inspections or testing of bolts and welds taking place during the steel fabrication at McGregor's shop. The evidence adduced at hearing confirms that no independent shop-testing agency was retained by Sordoni (or the steel fabricator, McGregor) and no such independent tests were done for any of the steel fabrication work performed in the shop.

Sordoni, for its part, points out that Midlantic was retained to perform in-place steel inspection services, and did perform visual weld and bolt inspections at the Project site. However, we found no credible evidence to suggest that these Project site inspections were made of the shop welds or bolting connections, but appear only to be done for the limited number of on-site welds and bolting connections. In any event, such visual field inspections do not comply with the specific requirements of Section 0512, Para. 2.8.D.[54] Moreover, no evidence was provided that McGregor or anyone else performed in-shop weld testing of the detailed nature and thoroughness prescribed by Specification 05120.2.8.D, and the "Skidmore" testing of shop bolts

[53] Specification 05120.2.8.D. provided that, in addition to visual inspections, shop welded connections were to be tested and inspected in one of the following ways to be chosen at the testing agency's option: 1. Liquid Penetrant Inspection; 2. Magnetic Particle Inspection; 3. Ultrasonic Inspection; or 4. Radiographic Inspection. (Ex. 15 at p.409).

[54] Midlantic's Timothy Burns did not testify that the visual inspections done at the Project site included inspection of the shop welds and bolts and did not suggest that this procedure would satisfy Section 05120, Para. 2.8.D. requirements for one of the four additional testing procedures listed therein to be done.

done by McGregor was not described adequately for the Board to determine if it conformed to the bolt testing methods required by Specification 05120.2.8.C.

Under the foregoing circumstances, and because no independent inspection or testing was done during the in-shop steel fabrication of shop welds and/or bolt connections, we cannot say with any degree of conviction that the structural steel fabricated for the Project with respect to the shop welds and bolted connections complies with the Construction Contract specifications for the structural steel work required on the Project. Sordoni's failure to comply with Section 05120, Para. 2.8 of the Construction Contract, combined with its failure to provide the Board with a breakdown or means of distinguishing the cost of the structural steel versus non-structural steel (or the shop fabricated versus field assembled steel) provided for the Project ultimately does preclude our ability to award anything on Sordoni's payment requests for the Miscellaneous Metals/Structural steel work performed on the Project.

#20 – Caulking

Mr. Cepko, in his report (Ex. 465), stated that there were no "catalog cuts, approvals or invoices" to justify payment of the $4,800 in this pay item. Sordoni presented two documents in support of the caulking payment request: a letter from Gibble Construction, Inc., dated May 11, 2010, confirming that they used "four buckets of silicone sealant along with six color backs and four hundred feet of closed cell backer rods." The letter references an invoice for those materials. Sordoni also presented product descriptions for the Vulkem 116 polyurethane sealant used, which were marked as approved by Ken Ruby of Hemmler + Camayd on August 6, 2009. These documents adequately support payment of the Construction Contract amount of $4,800 for this pay item.

 # 12 - #16 – Various Concrete Items

Of the payment items marked as "gray no" in the Cepko Report, PennDOT questioned Sordoni's documentation of various claims for concrete work (Items #12 - #16) totaling $224,885 and refused to pay any amount on this item as well. More specifically, for Items #12-#15 (valued at $173,836), PennDOT argues that Sordoni "did not meet the quality assurance specifications for much of the concrete work it performed." (PennDOT Proposed Finding at ¶ 119). Here both Mr. Cepko and Mr. Mitchell assert that Sordoni failed to comply with the Construction Contract specifications in that: 1) laboratory tests performed on several concrete pours indicated compressive strength which did not meet Section 03300, Para. 2.13 of the Construction Contract specifications and 2) no testing of field-cured concrete was performed as required by Subparagraphs 3.16.C.7. and 8 of this same section. Additionally, Messrs. Cepko and Mitchell both complain that Sordoni did not provide adequate proof that the mill certificates/test reports provided by Sordoni for Pay Item #16 (Concrete Rebar/WWM) totaling $51,049 actually pertained to the concrete rebar and wire mesh used on the Project. In addition to calling into question the quality of the rebar and mesh supplied to the Project, this failure to connect the mill certificates/test reports presented by Sordoni to the steel rebar and mesh actually used on the Project would represent a failure to show that this steel was of U.S. origin.

Compressive Strength Issues

Section 03300 at Para. 2.13. of the Construction Contract specifications requires minimum 28-day compressive strengths of 3,000 psi. for footings and 4,000 psi for foundation walls, slabs-on-grade, suspended slabs, and concrete toppings. With respect to PennDOT's

argument relating to the compressive strength of certain specified pours, PennDOT asserts that concrete tests provided by Sordoni for pours occurring on December 26, 2008; June 4, 2009 and August 5, 2009 failed to meet the compressive strength required under the Construction Contract specifications.

On December 26, 2008, 1 CY of concrete was poured near Building # 518. Sordoni prepared test cylinders from the December 26 pour which ultimately tested at compressive strengths of 2,918 psi after 28 days and 3,042 psi after 56 days. At trial, Sordoni offered credible testimony that this concrete pour on December 26th was not for a foundation, slab-on-grade, suspended slab or concrete topping but was used merely as a replacement for unsuitable soils. While the specifications do not address compressive strength requirements for such concrete use, Midlantic's Timothy Burns (also Sordoni's concrete expert) testified without contradiction that industry standards hold that strength of 2,500 psi is standard for such an application. In addition, the Construction Contract specifications at Section 02751, Para. 3.16.C.1, only require concrete testing when a day's pour exceeds 5 CYs. Because the concrete poured on December 26, 2008, was for use as a replacement for unsuitable soil and not for a foundation, slab-on-grade, suspended slab or concrete topping; and because the pour for that day was 1 CY, we conclude that neither the 3,000 or 4,000 psi compressive strength requirements of Specification 03300.2.8. applied to this pour. Accordingly, we find this pour was fully adequate for its intended purpose and did not in any way fail to comply with Construction Contract specifications.

The second concrete test "failure" cited by PennDOT relates to the first of two 8 CY pours which occurred on June 4, 2009, identified as having been poured for "Slabs/Porches between buildings." The 28-day test of two cylinders on the first pour showed compressive

strengths of 3,289 and 3,466, both below the Construction Contract specification requirement of 4,000 psi.

Sordoni argues that, notwithstanding the lower than required compressive strength of the first pour, the average compressive strength combining both June 4th pours exceeded 4,000 psi because the 28-day compressive strength of the two cylinders tested from the second pour was 4,527 psi and 5,305 psi. Midlantic's Mr. Burns also testified that, in his opinion, the concrete placed on the Project that day met the intent of the Construction Contract specifications (N.T. 1350-51), notwithstanding the lower than required compressive strength of the first June 4, 2009 pour. He argued, inter alia, that, because Specification 03300.3.16.C.1. required only one composite concrete sample "for each day's pour," it would be reasonable to average the 28-day compressive strengths of the four test cylinders taken from the two June 4, 2009 pours, which average exceeds 4,000 psi. However, Mr. Burns also conceded that the specifications do not explicitly provide for such averaging, and does acknowledge that the 28-day average compressive strength from the first pour on June 4 does not meet the specifications for compressive strength.[55] (N.T. 1319-24) Accordingly, we find that this first pour of 8 CY on June 4, 2009, did not meet Construction Contract requirements.

The third concrete test "failure" cited by PennDOT relates to a 4 CY pour on August 5, 2009, where 28-day tests of two test cylinders showed compressive strengths of 3,820 and 3,890 psi. As with the December 26, 2008 pour, this pour was less than the 5 CY threshold for which testing was required under the specifications (Ex. 15 at p. 356, Specification 02751.3.16.C.1). In addition, notwithstanding the 28-day compressive strength results of 3,820 and 3,890 psi, the

[55] Mr. Burns also suggested that industry standards for compressive strength of sidewalks, including those used by PennDOT, require a 28 day compressive strength of only 3,300 psi, which the average strength of the two cylinders tested from the first June 4th pour exceeds (N.T. 1325-26). However, the June 4, 2009 pours are identified in Midlantic's report as being for "Slabs/Porches between Buildings" and not for sidewalks. (Ex. 76, p. 45).

pour complied with Subparagraph 3.16.C.10 of this section, which provides that the strength of the mixture will be considered satisfactory "if every average of three consecutive compressive-strength tests equals or exceeds specified compressive strength and no compressive-strength test value falls below specified compressive strength by more than 500 psi (3.4 MPs)." The 28-day compressive strength of the August 5, 2009 pour was within 500 psi of the specified strength of 4,000, and the average 28-day compressive strength of the three pours occurring on August 3, 4 and 5, 2009, was 4,359 psi. Therefore, the test results of the August 5, 2009 concrete pour met with the Construction Contract specifications.

Testing Issues

PennDOT also asserts that Sordoni failed to show compliance with the concrete testing requirements for the concrete pours done on the Project site. It faults Sordoni for failing to create an adequate number of concrete test cylinders and for its failure to field cure any of the cylinders tested.

Section 03300 at Para. 3.16. of the Construction Contract specifications required Sordoni to engage a "qualified testing and inspecting agency to perform field tests and inspections and prepare test reports" for the numerous concrete pours done on the Project. Subparagraph 3.16.C.7. of this section specifically required for each pour that a total of eight standard cylinder specimens be prepared and tested for compressive strength: four to be laboratory cured and four to be cured in the field. (Ex. 15 at p. 356) Compression test breaks were then to be performed on these core cylinder samples after 7 and 28 days.

As required by these specifications, Sordoni hired Midlantic Engineering, Inc. to perform the concrete testing on the Project. The evidence presented at trial also shows that Midlantic

performed compressive strength testing on each pour which it was required to test. However, for each concrete pour, Midlantic prepared only five test cylinders and laboratory-cured all of these. No cylinders were cured in the field. Accordingly, the issue presented to the Board is whether or not Sordoni's failure to field cure concrete cylinder samples for testing constituted a material failure to comply with the concrete testing requirements in the Construction Contract.

PennDOT argues that the requirement for testing field-cured cylinders rather than just those cured in the laboratory was necessary to determine whether conditions on the job may have impacted the quality of the concrete. Mr. Cepko explained the reason for the testing of field-cured samples as follows: "if the concrete was frozen, if it was baked, if it was allowed to dry out during curing during the period that's specified, those cylinders will let you know that something happened in the field and the product has been damaged." (N.T. 1985-87)

Sordoni argues that, notwithstanding Specification 03300.3.16.C.7., the lab testing of the concrete was fully adequate to accurately test the compression strength of the concrete poured on the Project and that testing of field-cured cylinders was simply not necessary under the circumstances. Sordoni offers several reasons for this. To begin with, Sordoni asserts that the purpose of the testing field-cured (as opposed to lab-cured) concrete samples, as noted in this Section of the specifications, "is strictly for the contractor to evaluate their operations on protecting and curing in-place concrete." Sordoni further asserts that it has extensive experience in pouring and curing concrete during cold weather in the Scranton area and that it routinely protected its concrete pours using thermal blankets as needed.[56] (N.T. 1343). Sordoni further supports its position by testimony from Mr. Burns (its concrete expert and the principal of

[56] Sordoni's procedures and use of thermal blankets to protect the cast-in-place concrete during curing is noted in Pasonick's field reports (Ex. 785) and testified to by Mr. Parashac (N.T. 1290-94), Mr. Burns (N.T. 1338-40, 1364-66), and Mr. Shedlock (N.T. 1009-10).

Midlantic, the independent entity which performed the compression strength testing on all the concrete pours for the Project) and from Mr. Ruby (Hemmler+Camayd Project Manager).

Mr. Ruby testified that the architect received copies of all the concrete tests performed by Midlantic for review, but not for action unless it found that the test results were not in compliance with the Construction Contract specifications. (N.T. 1652-55). He further testified that the architect would take no action on the submitted test results if it was satisfied that the results met with the specifications (N.T. 1651-66). Mr. Ruby also stated that the architect routinely did not require certain testing in circumstances where it determined such testing was unnecessary to confirm that the technical specifications were met for that item (N.T. 1657-60). Thus it appears from Mr. Ruby's uncontradicted testimony that the absence of tests performed on field-cured concrete was implicitly accepted by the architect and the exclusive testing of lab-cured concrete samples was found to be sufficient to comply with the Construction Contract specifications by the Project's design team.

Midlantic's President, Timothy Burns, further reinforced this point. Mr. Burns testified that in projects of size similar to this Project, he would typically ask the architect whether testing concrete cured in the field was necessary. Though he did not recall a specific instruction from Hemmler + Camayd to forego the testing of field-cured samples on this Project, he believes they did since he would not have eliminated the field tests without authorization. (N.T. 1331-36)

The Board has carefully considered the testimony, materials and arguments presented on this issue by all the parties in this action. Although we believe this to be a close question, we ultimately find ourselves in agreement with Sordoni.

To begin with, this is not a situation like that presented in pay items #10 (Masonry) or # 17 (Miscellaneous Metals/Structural) where no testing at all has been done to confirm the strength of key construction elements on the Project (e.g. concrete blocks and mortar for the masonry or in-shop welds and bolt connections for the fabricated steel structures). Here, instead, substantial compressive strength testing was performed on each of the daily concrete pours with the only issue being the adequacy of testing lab-cured versus field-cured samples.

Second, we agree that the only practical purpose for testing field-cured cylinder samples as opposed to lab-cured cylinder samples was to ascertain whether or not the contractor had taken appropriate measures to protect these concrete pours against on-site weather conditions. In this regard, the Board finds that Sordoni's experience and procedures for pouring concrete on the Project (which included the routine monitoring of on-site temperatures, consistent use of thermal blankets to protect pours as necessary, and suspension of pouring activity on unacceptably cold days) were adequate to assure the proper curing of these concrete pours. Moreover, while we do not find that Hemmler+Camayd waived any of the Construction Contract specifications (or that it could do so on the part of PennDOT), Hemmler+Camayd's acceptance of all these concrete pour tests provides convincing evidence that the Project's designer (and primary source of the specification here at issue) considered these compressive-strength tests, as conducted, to be in material compliance with these particular specifications.

Accordingly, it is for all these reasons that we find Sordoni to have demonstrated material compliance with the cast in place concrete testing requirements contained in the Construction Contract's specifications at 03300.3.16.C. 7 and 8. We further conclude that, with the exception of the one pour of 8 CY on June 4, 2009, Sordoni has demonstrated (and documented) compliance with the applicable compressive strength requirements for its concrete pours on the

Project. Therefore, because this one pour constituted approximately 1.65% of the total concrete pour on the Project (483.5 CY), we conclude that payment of $170,968 out of the total amount of $173,836 for these pay items (#12-15) has been justified and is due Sordoni under the Construction Contract and Reimbursement Agreement.

With regard to the additional issue of whether or not the steel rebar and wire mesh used to reinforce the concrete pours was adequately documented as originating from a U.S. source (Item #16 valued at $51,049), we must agree with PennDOT that it was not. Specifically, we found the lack of any direct testimony stating that the steel certificates presented to the Board were the certificates for the steel rebar and wire mesh used on the Project to be fatal to this portion of Sordoni's claim.

With respect to the rebar and wire mesh, Mr. Cepko had stated in the Cepko Report of 5/27/10 that mill certifications were presented for all except the #3 rebars; that the mill certificates originated at a PennDOT Bulletin #15 supplier; and that the certificates included a made in USA statement. However, Mr. Cepko also stated that there was no way to tie the certificates to what was actually delivered to the Project. The first Mitchell Report, dated April 30, 2012, also acknowledged the presence of steel certificates and delivery tickets for reinforcing steel and wire mesh in the files, but again emphasized that the certificates could not be matched with the delivery tickets for the steel rebar and mesh used on the Project.

In response to this particular problem raised by PennDOT, the Sordoni/Parashac report presented to the Board stated that all steel originated from a PennDOT Bulletin #15 supplier and all rebar was accepted by the architect Hemmler & Camayd as meeting the plans and specifications of the Construction Contract. However, neither the report nor any testimony

provided by Sordoni stated directly that the steel rebar and wire mesh certificates presented to Mr. Cepko, Mr. Mitchell and/or the Board were the certificates for the steel rebar and wire mesh actually used on the Project. In light of the standing criticism leveled by PennDOT, we find this omission by Sordoni significant and in stark contrast to Mr. McGregor's representations regarding the certifications and origin of steel components in Pay Item #17. Consequently, we are unable to find that Sordoni provided appropriate mill certificates for (or confirmed the U.S. origin of) the steel rebar and wire mesh used on the Project. Accordingly, we find the evidence inadequate to pay Sordoni for Item #16 (Concrete Rebar/WWF).

#26 – Elevator

PennDOT's Mr. Cepko also marked as "gray no" Sordoni's claim for elevator work (Item #26) and rejected payment of the entire amount of $83,000. His report indicates that he found a lack of sufficient documentation (including catalog cuts and operating permit) for the elevator. Mr. Mitchell's first report on the elevator work indicates that additional documentation including product data, shop drawings, certificate of installation and other documentation deficiencies had been satisfied with the exception of a final operating permit and an operation and maintenance manual.

PennDOT also claims that, although Sordoni asserts in its payment request that it has completed 100% of the elevator work (contract price $83,000.00), some work on the elevator remains unfinished. Mr. Mitchell testified that he visited the Project site on June 19, 2012, and noted that some trim work on the elevator tower as well as the tower roof was unfinished and that this had resulted in some deterioration to this structure due to exposure to the elements. Mr. Mitchell placed no value on the unfinished work nor did he quantify the damage he alleged was

due to exposure. He also questioned the apparent lack of operation and maintenance data for the elevator, but conceded that such data is normally provided at or close to the conclusion of such a project (N.T. 2436-37). Mr. Cepko estimated in his May 27, 2010 report (Ex. 465) that the elevator was 85% complete.

Sordoni's project manager, Mr. Shedlock, conceded that some work on the elevator (what he termed "punch list items") remained unfinished. (Ex. 95; N.T. 1032-34) Mr. Parashac testified that work on the elevator was stopped due to non-payment, and that the documentation still cited as missing by Mr. Mitchell would not have been available until elevator inspection was done, which would not be scheduled until the subcontractor received 90% to 95% of its payment. (N.T. 1597-1601)

Both parties appear in agreement that work remained to be done on the elevator and that the outstanding documentation would not be available until this work was closer to completion. Given the testimony as a whole, including the evidence of some deterioration due to the unfinished status of this work, we find that Sordoni has justified payment of only 85% of the total elevator cost, or $70,550.

 # 29 - Electrical

Our review of the Cepko Report and the two reports by Mr. Mitchell indicates there are no outstanding material deficiencies regarding the work documentation provided for this pay item. The only issue here appears to be the percentage completion attained.

Mr. Cepko listed the $103,000 Original Construction Contract Amount for Electrical (Item #29) as a "gray yes" and <u>included</u> this entire amount in his potential payment column. However, he stated in the body of his report that, while Sordoni had claimed as if the electrical

work was 100% complete, he believed the work was only about 90% complete. Sordoni does not dispute that some electrical work remained to be done, as electrical work was also included on Mr. Shedlock's "punch list" as an item which remained unfinished. Mr. Cepko offered no testimony at hearing on the electrical work which he had asserted in his report was unfinished.

We see basic agreement between Mr. Shedlock's testimony that what remained of the electrical work here at issue were "punch list" items (which would be covered by any money held in retention) and Mr. Cepko's evaluation of the work completed. As a result, we find that Sordoni has not justified payment of the full $103,000 for this work item but only 90% of the total electrical work cost on this Construction Contract pay item, or $92,700. This finding therefore requires a deduction of $10,300 to the $976,563.75 cited for potential payment by Mr. Cepko in the summary of this report.

PennDOT's Waiver of Submittal Requirements

Sordoni asserts in its brief that "PennDOT, by its course of conduct, has waived any obligations which Sordoni may have had to provide additional submittals."[57] To the extent Sordoni is arguing that PennDOT waived any requirement that submittals be provided in conjunction with its payment applications (the first five of which were paid by PennDOT without such documentation) we have already determined that the applicable Construction Contract specifications required Sordoni to make its submittals to the Project architect, Hemmler + Camayd, and not to PennDOT. Accordingly, this point is moot. If, on the other hand, Sordoni is asserting that PennDOT waived all submittal and documentation requirements contained in the Construction Contract specifications, we find no support for such a waiver.

[57] Sordoni's Brief, p. 10.

As discussed above, Section 112 of Publication 408, which was expressly incorporated into the Construction Contract specifications, provides only that Sordoni is to retain all Project records used to record work progress for a period of three years, and that Sordoni is required to make these records available to PennDOT upon written notice by PennDOT. This section does not identify any specific submittals, impose any specific time frame for making any submittals and contains no requirement whatsoever that submittals regarding products or materials used on the Project, or tests done on the Project, be submitted to the City or PennDOT with progress payment requests. Because we have also found, as discussed supra, that PennDOT made no specific written request in accordance with Section 112 of Publication 408 for any particular submittals in conjunction with its review of Sordoni's payment applications, we agree with Sordoni that regular submittal with pay applications was not required. Its argument that such a requirement was waived is, therefore, moot.

However, Sordoni also appears to assert that PennDOT waived all the Construction Contract specifications' substantive submittal requirements that relate to product data and material testing by failing to timely communicate its concerns about the lack of such submittals to Sordoni. Sordoni claims initially that PennDOT did not notify it of alleged deficiencies in its submissions until the first Mitchell report was presented in April 2011. However, the record shows that PennDOT first notified the City generally of concerns about the adequacy of Sordoni's submissions in July 2009 (even though this concern was misfocused on full Publication 408 reporting requirements) and that the City subsequently requested Pasonick to provide additional justifications to PennDOT. Moreover, the Construction Contract specifications provided that payments made were estimates of amounts due subject to later review (Ex. 15 at p. 72 ¶ 132), and that a failure by the City to enforce a requirement would not

constitute a waiver of same. (Ex. 929 at p. 8). Similarly, the Reimbursement Agreement also provided that work on the Project was subject to later review (Ex. 927 at p. 16).

Sordoni argues that when a party has multiple opportunities to object but fails to do so, such conduct is given great weight in interpretation of the contract, citing Westinghouse Electric Corporation/CBS v. Workers' Compensation Appeal Board, 829 A.2d 387 (Pa Cmwlth. 2003). That case was reversed by the Supreme Court in Westinghouse Electric Corporation/CBS v. Workers' Compensation Appeal Board (Korach), 883 A.2d 579 (Pa. 2005). Sordoni also cites Section 202(4) of the Restatement (Second) of Contracts, which provides as follows:

> (4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in interpretation of the agreement.

However, examples of "Course of performance" given as part of Restatement (Second) § 202 illustrate this concept of waiver by acceptance without objection for "25 years" and "several years". In the instant case, PennDOT approved payments over a course of several months before raising general concerns about the sufficiency of Sordoni's submissions. Moreover, both the Westinghouse case and the Restatement section cited therein relate to interpreting ambiguous contract terms and not the waiver of express, non-ambiguous requirements. The provisions of the Construction Contract specifications at issue here, those governing submittals to the architect of documents relating to product data and material testing, are not ambiguous, nor does Sordoni identify any ambiguity in these specifications which would give rise to differing interpretations as to their meaning. Finally, Hemmler + Camayd's Mr. Ruby, who administered Sordoni's submissions under the specifications for the architect, could not identify any provision of the specifications for waiving these submittal requirements (N.T. 1690). For these reasons, we find

no factual or legal basis for Sordoni's assertion that PennDOT waived the Construction Contract specifications' requirements governing submittals (to the architect) relating to product data and material testing.

Change Order Items – Payment Application 14

In addition to the original work it completed on the Project under the Construction Contract, Sordoni seeks payment in the amount of $82,966.73 for change order/extra work it performed on the Project. PennDOT argues that, under the Reimbursement Agreement, it is not responsible for any additional or extra work beyond what is specified in the Construction Contract which was done without PennDOT's prior, written approval. The Construction Contract General Conditions provide at Section 109(b) that, except for emergency situations, the contractor may not perform any additional work without the City's written approval. (Ex. 15 at p. 60).

Sordoni concedes that neither PennDOT nor the City provided written authorization for the extra work for which it is now seeking payment. Nevertheless, Sordoni argues that PennDOT (and the City), by their course of conduct, waived the Construction Contract terms requiring written authorization for these change orders/extra work.

The extra work for which Sordoni is seeking payment is reflected in its Payment Application 14 (Ex. 35 at p. 254) which Sordoni submitted to the City in or about April 2010. Payment Request 14 lists eight change orders requests as follows:

- COR#2-R1 – ASI ppc-1 Stamped Concrete - $2,601.00
- COR#3-R1 – ASI ppc-2 Added Dampproofing - $4,809.00
- COR#4-R1 – Alt. No. 5 Snow Melt System - $36,276.00

- COR#5-R1 – Alt. No. 6 Trench Drain - $6,096.00
- COR#8-R1 – ASI ppc-3 Revised Concrete Stairs - $2,965.00
- COR#12-R1 – ASI ppc-6 Nyoplast Snout - $3,970.00
- COR#15-R1 – ASI ppc-10 Rev. Bridge Grating - $10,439.00
- COR#17-R1 – Alt. No. 4 Rev. Stamped Pavement - $18,098.00

On December 9, 2008, the architect issued Architect's Supplemental Instruction PPC-1, ("ASI ppc-1") directing Sordoni to delete certain Plaza architectural concrete pavers provided for in the original drawings and replace them with cast-in-place stamped and colored concrete. (Ex. 35D at p.1) The architect issued additional ASI's on December 12, 2008; February 19, 2009; May 15, 2009 and July 2, 2009. These ASI's directed changes for added damp-proofing, revised concrete stairs, Nyoplast snout, and revised bridge grating. On April 16, 2009, Sordoni forwarded to the City requests for change orders relative to each of the architect's ASIs.

In addition to the change order requests relative to the ASIs, Sordoni also submitted to the City change order requests to increase the amounts cited in Alternate Nos. 4, 5, and 6 of its bid. Alternate No. 4 proposed to add $8,000.00 to the Construction Contract amount for alternate asphalt paving; Alternate No. 5 proposed to add $35,000.00 for a snow melt system; and Alternate No. 6 proposed to add $5,000.00 for a trench drain. Sordoni's change orders sought to increase the amounts of the above alternates to $18,098, $36,276, and $6,096, respectively. Sordoni submitted the change orders relative to Alternate Nos. 5 and 6 with the ASI change orders on April 16, 2009. The change order relative to Alternate No. 4 was submitted September 1, 2009.

Sordoni subsequently submitted to the City revised change order requests for each of the above eight items on October 5, 2009; October 30, 2009 and November 23, 2009. Sordoni's Mr. Shedlock testified that the November 23, 2009 revisions reduced overhead and markup after discussions with PennDOT's Mr. Cochrane, who directed Mr. Shedlock that combined overhead and markup should be capped at 6%.

In seeking payment from PennDOT for the change order requests included in Payment Application 14 despite the fact that neither PennDOT nor the City had approved the requests in writing, Sordoni has asserted PennDOT and the City, by their course of conduct, waived the Construction Contract terms requiring written authorization for those change orders. As factual support, Sordoni claims that Mr. Shedlock "was advised by both Cochrane and Aebli that Sordoni would be paid" for the extra work, and that Sordoni relied on those representations.[58] In addition, Sordoni asserts that its planned or continued work on each of the change order items was discussed at various job conferences.

To supply legal support for its position that PennDOT waived the requirement that change order requests be approved in writing, Sordoni cites several cases, including Universal Builders, Inc. v. Moon Motor Lodge, Inc., 244 A.2d 10 (Pa. 1968). In Universal, the Pennsylvania Supreme Court found the owner liable for extra work despite the absence of written change orders where an agent of the owner requested the changes be made, was aware that they would cost extra, and nevertheless promised to pay for them. Id., 244 A.2d at 15.

In the instant case, however, neither Mr. Cochrane nor anyone else from PennDOT requested the change order work, directed Sordoni to proceed with the work or promised to pay

[58] Mr. Cochrane was PennDOT's District 4 Assistant District Executive for Construction. Ms. Aebli was the executive director of the City's Office of Economic and Community Development.

for this work. At most, upon reviewing Sordoni's change order requests, Mr. Cochrane merely gave Sordoni indication as to the amount of overhead and markup which could be charged on such a change order request. Notably, much of the change order work had already been completed by the time PennDOT was first sent the change order requests in September 2009.

Sordoni also cites Wagner v. Graziano Construction Co., 136 A.2d 82 (Pa. 1957), and Consolidated Tile & Slate Company v. Fox, 189 A.2d 228 (Pa. 1983) in support of its argument that PennDOT waived the requirement that change order requests be approved in writing. In Wagner, the court held that a contractor was liable to a subcontractor for extra work where the contractor's superintendant orally requested the extra work and assured the subcontractor that the change order need not be in writing notwithstanding the contract provision that written authorization was required. Id. at 84. In Consolidated Tile contract ambiguity and significant changes in the contract specifications were factors leading the Court to conclude that the parties did not intend that a contract provision purportedly disclaiming liability for the cost of any extra work would be applied. Id. at 229-30. Here again, in the contrast, Mr. Cochrane, unlike the contractor in Wagner, neither requested that Sordoni perform the extra work nor told Sordoni that change orders need not be approved in writing. Unlike Consolidated Tile, there is no ambiguity over the Construction Contract provisions requiring prior written approval of change orders.

The cases relied upon by Sordoni are factually inapposite to the facts in this case, and do not support a finding that PennDOT waived the requirement that change order requests be approved in writing. Because the Construction Contract expressly requires written approval for change orders, no written change orders were issued by either the City or PennDOT for the eight items which comprise Payment Application 14, and PennDOT's conduct did not constitute a

waiver of the requirement that change orders be approved in writing, we conclude that PennDOT is not liable to Sordoni for the amount claimed in Payment Application 14.

With respect to the City, Sordoni has also failed to identify any conduct by the City or its agents which would give rise to a waiver of the requirement that change orders be approved in writing. Sordoni concedes that the City's Mrs. Aebli did not approve, orally or in writing, the change orders. Her responsibility with respect to the Payment Applications was largely limited to passing them along to Pasonick and PennDOT for approval. She did not request the change order work or promise to pay for it. Rather, the Project architect, Hemmler + Camayd, directed the extra work for the five ASIs. Hemmler + Camayd was hired by the private developer involved in the Project, 500 Lackawanna Avenue Company, not the City or PennDOT. Sordoni proceeded with the change order work knowing that there was no written approval to proceed from PennDOT or the City.

The cases discussed above apply equally to the City as to PennDOT in this instance. Since the City's conduct with respect to Sordoni's change order requests do not give rise to a waiver of the requirement for written approval of extra work under the case law cited, we find that the City is not liable to Sordoni for the amount claimed in Payment Application 14.

Sordoni Claim Summary

In summary, the Board finds that Sordoni has justified, and is entitled to, payment pursuant to the Construction Contract and the Reimbursement Agreement for the following items:

Work Identified for Potential Payment in Cepko Report:

Items #1-6, 8-9, 11, 18-19, 21-22, 24, 27-28, 30-31	$976,564

Less adjustments for unfinished work:	
Item #29 – Electrical	(10,300)
Plus adjustment for rejected work:	
Item #7 – Paving/Surfacing	64,700
Item # 20 – Caulking	4,800
Items # 12-15 – Various Concrete Work	170,968
Item # 26 – Elevator (85% complete)	70,550
Total	**$1,277,282**

The parties have stipulated that Sordoni has actually been paid $876,382.55.[59] Deducting the amount paid (rounded to the nearest dollar) from the total amount we find due Sordoni on the Reimbursement Agreement, we conclude that Sordoni is owed $ 400,899 in principal on its claim here against PennDOT.

Procurement Code Payment Provisions

Sordoni also asserts that it is entitled to additional remedies provided under Sections 3932, 3934 and 3935 of the Procurement Code. 62 Pa.C.S. §§ 3932, 3934, 3935. Specifically, Sordoni claims that, since the Reimbursement Agreement does not specify when PennDOT is obligated to make payment for Sordoni's work, Section 3932 of the Procurement Code applies. Section 3932(b) requires, absent a contract term establishing time for payment, that payment (less retainage) be made within 45 days of receipt of the payment application. Section 3932(c) then provides for interest to be paid on amounts not satisfied within 45 days. Sordoni also asserts that PennDOT did not comply with Section 3934, which permits a government agency to

[59] This amount represents PennDOT's actual payments on Pay Applications #1-#5 (i.e. $973,758.38 less 10% retainage withheld by PennDOT).

withhold payment for deficiency items according to terms of the contract, provided that it gives notice of the deficiency items within 15 days of receipt of the payment application. In addition, Sordoni seeks penalties and attorneys' fees under Section 3935, asserting that PennDOT's withholding of payment for Payment Applications 6 through 11 and 14 was done in bad faith.

PennDOT responds that Chapter 39 of the Procurement Code (which includes Sections 3932, 3934 and 3935) are not applicable to this claim for several reasons. These reasons include: the Reimbursement Agreement is a "grant" and therefore not a contract subject to the Procurement Code; the Reimbursement Agreement is not a contract "for construction"; the Reimbursement Agreement is not a contract "entered into by a government agency through competitive sealed bidding or competitive sealed proposals"; Chapter 39 relates only to payments to be made to a contractor providing construction services but the Reimbursement Agreement only requires payments to be made to the City; the Reimbursement Agreement does not involve "progress payments" at all, but only reimbursement to the City; and, Chapter 39 and the Prompt Payment Act itself clearly states at Section 3939 that it does not create any obligation to third parties for any claim.

As discussed earlier in this Opinion, we believe that the factual circumstance of this case precludes PennDOT's argument that the Reimbursement Agreement is a "grant" rather than a contract whose primary purpose is to procure construction for PennDOT. However, we also believe it clear that Chapter 39, as expressly stated in Section 3939, does not create any obligation on the part of PennDOT to Sordoni as a third party suing on the Reimbursement Agreement. 62 Pa. C.S. § 3939 Moreover, we agree that the Reimbursement Agreement does not involve "progress payments" and that it was not entered into through a competitive sealed

bid or proposal. 62 Pa. C.S. § 3901 Accordingly, we find that Chapter 39 of the Procurement Code is not applicable to Sordoni's claims as presented in this case.

Even if Chapter 39 was applicable, we do not find the factual predicate of bad faith on the part of PennDOT necessary to support an award of penalties or attorneys' fees. Although we have found that Publication 408 did not apply to the Project in its entirety (as asserted by PennDOT) but only those 408 provisions specifically identified in the Construction Contract specifications, PennDOT's initial belief that all of Publication 408 applied, though mistaken, was not unreasonable given the ambiguous language of the Reimbursement Agreement. Moreover, we find that PennDOT had reason to question whether Sordoni was complying with the Construction Contract specifications, as much documentation which Sordoni had submitted to the architect was not readily available for review at Pasonick's offices, and some documentation was only provided to PennDOT after work on the Project had stopped and the instant action commenced. We also found that Sordoni did fail, materially, to comply with some significant Construction Contract specifications in its work on the Project (e.g. steel shop inspections and masonry testing). There were, therefore, several legitimate disputes as to whether Sordoni provided PennDOT with all the documentation required under the Construction Contract specifications. Given the foregoing, we do not find the factual predicate necessary to award attorneys' fees or penalties here in any event. Department of General Services v. Pittsburgh Building Company, 920 A.2d 973, 990-991 (Pa. Cmwlth. 2007).

Finally, with regard to Sordoni's claim that interest on any award made to it should be calculated pursuant to Section 3932, we disagree for several reasons. First, of course, is our conclusion that none of Chapter 39 is applicable to the claims made here by Sordoni, as explained above. We also find the interest calculation prescribed by Section 3932(c) (which

appears to apply generally to Commonwealth, county and municipal entities alike) to be at odds with Section 1751 of the Procurement Code. This latter statutory prescription for interest rate calculation is located in the same chapter as, and immediately following, the Board's enabling provisions. Moreover, we believe its references to "amounts ultimately determined to be due" "judgments" and claims "filed with the contracting officer" further confirm that Section 1751 is the more specific interest calculation provision applicable to Board awards. 62 Pa. C.S. § 1751

PennDOT's Cross-Claim vs. the City

PennDOT joins and cross-claims against the City, seeking the City to "defend and indemnify PennDOT for all costs" arising from Sordoni's claim, plus costs and attorneys' fees.[60] As asserted by PennDOT this cross-claim is based on a "save harmless" provision of the Reimbursement Agreement, which PennDOT says requires the City to "indemnify, save harmless and defend PennDOT from all suits, actions or claims of any type." In its argument, however, PennDOT focuses on its premise that the City failed in its duty under the Reimbursement Agreement to adequately inspect Sordoni's work which allegedly precluded PennDOT from confirming that Sordoni's work on the Project met applicable requirements under the specifications and prevented PennDOT from paying Sordoni the full amount under the Reimbursement Agreement and Construction Contract.[61]

The City denies that the "save harmless" provision of the Reimbursement Agreement relied upon by PennDOT "requires the City to indemnify, save harmless and defend PennDOT"

[60] PennDOT's Cross-Claim and Joinder of Additional Defendant, p. 6.

[61] See PennDOT's Cross-Claim and Joinder of Additional Defendant at ¶ 21. Although PennDOT alleges in its Cross-Claim that the City failed in its duty under the Reimbursement Agreement to adequately inspect Sordoni's work which allegedly resulted in a lack of confirmation that the work meets applicable requirements, the Cross-Claim does not include a cause of action for breach of the Reimbursement Agreement by the City but seeks only to enforce the "save harmless" clause noted above.

from the claims in the instant case.[62] It argues that the damages PennDOT claims for against the City arise out of PennDOT's own breach of the Reimbursement Agreement (including PennDOT's refusal to make timely reimbursement payments thereunder to the City), which damages are not covered by the "save harmless" clause here at issue.

The Reimbursement Agreement's "save harmless" provision relied upon by PennDOT reads as follows:

> The [City] shall indemnify, save harmless and (if requested) defend the Commonwealth, the DEPARTMENT, the FHWA and all of their officers, agents and employees from all suits, actions or claims of any character, name or description, including, but not limited to, those in eminent domain or otherwise relating to title to real property, brought for or on account of any injuries or damages received or sustained by any person, persons or property, arising out of, resulting from or connected with the planning, development, design, acquisition, construction, completion, occupancy, use, operation and/or maintenance of the Project or the improvements that it comprises, by the [City] and/or the [City's] consultant(s) and/or contractor(s) and their officers, agents, employees, whether the same be due to defective title, defective materials, defective workmanship, neglect in safeguarding the work, or by or on account of any act, omission, neglect or misconduct of the [City] and/or the [City's] consultant(s) and/or contractor(s), their officers, agents and employees, during the performance of the work or thereafter, or to any other cause whatever.

Ex. 927 at pp. 18-19.

Essentially, this "save harmless" clause, by its express language, requires the City to indemnify PennDOT for any "injury or damages" caused to any person "arising out of [or] resulting from" 1) any act or omission of the City, its consultants and/or its contractors in connection with the Project (from the planning stages through to completion) or 2) which are due "to any other cause whatsoever."

[62]The City's Response and Answer to PennDOT's Cross-Claim at ¶ 21.

To begin our analysis of PennDOT's cross-claim based on this indemnification clause we first note that the Board's award to Sordoni and against PennDOT is based entirely on PennDOT's own actions taken in breach of the Reimbursement Agreement. That is to say, the award here made against PennDOT is only for work done on the Project which the Board has found to have been properly performed and documented in material compliance with the terms of the Construction Contract and the Reimbursement Agreement. No award has been made against PennDOT for any work claimed on this Project which was not adequately performed and documented or which resulted from any failure of the City, its consultants or its contractors on this Project. Because we have found, as discussed above, no liability on PennDOT's behalf for any claims for which adequate performance and documentation has not been found, PennDOT, as a matter of fact, has incurred no damages here that were caused by the City, the City's consultants or the City's contractors. To the contrary, PennDOT has instead incurred its damage solely as a result of its own decision not to pay for work on the Project properly done and documented. Accordingly, because the damages incurred by PennDOT are solely a result of its own actions not a result of a failure by the City, its consultants or its contractors, there is no factual basis to apply the "save harmless" clause it seeks to invoke. Therefore, this cross-claim against the City must be denied.[63]

The City's Counterclaim vs. PennDOT

[63]To the extent PennDOT can be seen as asserting that the City has agreed to indemnify PennDOT from the consequences of PennDOT's own actions (i.e. using the language referring to "any other cause whatsoever") we believe that the "save harmless" clause does not provide for such broad indemnification. If parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own conduct, they must do so in clear and unequivocal language. See: Greer v. City of Philadelphia, 795, A.2d 376, 378 (Pa. 2002); Ruzzi v. Butler Petroleum Company, 588 A.2d 1, 6 (Pa. 1991). The closing words of the "save harmless" clause, purporting to extend indemnification for any asserted damage claim due to "any other cause whatsoever" does not constitute the sort of clear and unequivocal language required for such indemnification. Id.

The City counterclaimed against PennDOT alleging that PennDOT breached the Reimbursement Agreement in failing to release the funds for Sordoni's unsatisfied Payment Applications. PennDOT denies that it breached the Reimbursement Agreement, stating that where it declined to release funds to the City it did so because there was inadequate documentation to support the payment applications.

The Board's analysis of the City's claim against PennDOT for failure to release funds to the City in accordance with the Reimbursement Agreement is largely identical to our preceding discussion as to the substantive merits of Sordoni's claims against PennDOT. That is to say, where we have found PennDOT liable to Sordoni (as a third party beneficiary under the Reimbursement Agreement) for work Sordoni performed on the Project for which it provided adequate documentation to show compliance with the Construction Contract specifications, PennDOT would be held liable to the City for the cost of this work (were it not for the fact that we are making the award for this work directly to Sordoni). Similarly, where we have found Sordoni's documentation inadequate to establish that its work on the Project met Construction Contract specifications (as in the case of the steel and masonry work), PennDOT will not be held liable to either the City or Sordoni under the Reimbursement Agreement. Also, as discussed above, neither PennDOT nor the City is responsible for Sordoni's claims for extra work set forth in Payment Application 14, since neither the City nor PennDOT gave written approval for that extra work, nor did they otherwise request or indicate their approval of extra work by their conduct.

In sum, for the same reasons we found PennDOT liable to Sordoni (as a third-party beneficiary under the Reimbursement Agreement) for the work Sordoni performed on the Project and adequately documented, we find PennDOT equally liable to the City under the

Reimbursement Agreement. However, because we have made an award directly from PennDOT to Sordoni as third party beneficiary of the Reimbursement Agreement, we will not make a second, duplicative award to the City from PennDOT.[64] Similarly, where we have found no liability on the part of PennDOT to Sordoni because of Sordoni's failure to show compliance with the Construction Contract specifications, we find no liability on the part of PennDOT to the City (or by the City to Sordoni).

The City v. Sordoni

The City has asserted a claim against Sordoni for indemnification under the Construction Contract in the event that the City was found liable to PennDOT on PennDOT's cross-claim. Because the Board finds that the City is not liable to PennDOT, the City's indemnity claim against Sordoni is moot.

The City vs. Pasonick

The City also joined Pasonick as an additional defendant and asserts an indemnification claim against Pasonick under the terms of the inspection services contract between them for any amounts the City might be found owing to PennDOT and/or Sordoni. Because the Board makes no award from the City to PennDOT or Sordoni on the actions before us, the City's indemnity claim against Pasonick is moot. [65]

[64]In the event that the Board's award from PennDOT to Sordoni, as third party beneficiary of the Reimbursement Agreement, is disturbed on appeal, we would award the City the same amount awarded to Sordoni, which the City would then be required to pay to Sordoni under the Reimbursement Agreement and Construction Contract.

[65] Pasonick argues in its Post-Trial Brief that the City's claim against it should be dismissed because the City did not file a Certificate of Merit in accordance with Pa.R.C.P. 1042.3. Rule 1042.3 applies only to professional liability claims against licensed professionals. Zokaites Contracting Inc. v. Trant Corporation, 968 A.2d 1282, 1289 (Pa. Super. 2009). Because the City, in its claim against Pasonick, seeks indemnification under the inspection services contract for a failure to perform inspection duties set forth in the agreement (rather than violation of some professional standard of care) the requirement for a Certificate of Merit under Rule 1042.3 does not apply. Id.

Sordoni v. the City

Sordoni's counterclaim against the City is stated in four counts alleging: 1) breach of the Construction Contract by failing to pay for work Sordoni performed; 2) unjust enrichment; 3) quantum meruit; and 4) account stated. The City denied that it breached the Construction Contract, asserting that it fully complied with its responsibility thereunder which required it to make payments to Sordoni for work performed only after it received payment for that work from PennDOT. With respect to Sordoni's counts for unjust enrichment, quantum meruit and account stated, the City denies any liability to Sordoni beyond the express terms of the Construction Contract. In addition, the City reasserted its indemnification claim against Sordoni to the extent that Sordoni did not fully comply with its responsibilities under the Construction Contract and is not found to be entitled to payment from PennDOT.

As discussed at length above, we have found that PennDOT is liable to Sordoni (as a third party beneficiary) under the Reimbursement Agreement for the work Sordoni performed on the Project for which Sordoni provided adequate documentation to show compliance with the Construction Contract specifications. Also as discussed above, we have found that neither PennDOT nor the City is responsible for Sordoni's claims for extra work as set forth in Payment Application 14. Because we award damages to Sordoni on its amended claim against PennDOT for all the work it performed and documented in accordance with the Construction Contract, we make no additional, duplicative award from the City to Sordoni. Likewise, because we make no award to Sordoni for work it performed on the Project for which it did not provide adequate documentation as required by the Construction Contract, we find no merit in any further claim by Sordoni against the City under the Construction Contract.

Moreover, because the relationship between the City and Sordoni respecting Sordoni's work on the Project was fully addressed and governed by the Construction Contract (and we found no basis for a further claim of extra-contractual work) we find no merit to Sordoni's remaining claims against the City based on unjust enrichment and/or quantum meruit. Likewise, we find Sordoni's claim for "account stated" to be without merit. Although Sordoni asserted this count in its claim against the City, it included no proposed findings of fact relevant to this issue nor did Sordoni brief or provide any case/legal authority to support its application to this case. Even more significant, the Board's understanding of the concept of "account stated" is that both parties must agree that one owes the other a stated amount on a debt. This concept however does not appear applicable as we see no agreement between the two that the City owes Sordoni any monetary settled amount. Rather, at best, it appears the City agrees that PennDOT (another party) owes Sordoni for work performed on the Project.

Pasonick v. the City and Pasonick v. Sordoni

In its counterclaim against the City and its cross-claim against Sordoni, Pasonick appears to seek dismissal of actions filed against Pasonick due to what it asserts are the City's and Sordoni's unspecified indemnification obligations owing to Pasonick.[66] The only indemnification provision in the City-Pasonick inspection services agreement (Ex. 932) provides that Pasonick will indemnify the City, not vice versa. Additionally, Pasonick has no contract with Sordoni from which an indemnification obligation subject to the Board's jurisdiction might

[66]Pasonick's Answer to the City's Joinder Complaint, Counterclaim against the City, and Cross-Claim/Counterclaim against Sordoni.

flow.[67] Pasonick's Counterclaim against the City and Cross-claim/Counterclaim against Sordoni must be dismissed.

[67]The Board has no ancillary jurisdiction over Pasonick's indemnification claim against either the City or Sordoni, as the asserted indemnification is not based on a contract. See e.g. Limbach, 862 A.2d at 719.

ORDER

AND NOW, this 14th day of March, 2014, **IT IS ORDERED** and **DECREED** that judgment be entered in favor of Sordoni Construction Company, Inc. ("Sordoni") and against the Commonwealth of Pennsylvania, Department of Transportation ("PennDOT"), in the sum of $499,158. This sum consists of $400,899, the net principal amount owed to Sordoni for damages as third-party beneficiary of the Reimbursement Agreement, and $98,259 in prejudgment interest on that amount. No further awards are made to Sordoni, PennDOT, the City of Scranton and/or its Office of Economic and Community Development ("the City") or to Michael J. Pasonick, Jr., Inc. ("Pasonick") on any other claim, counterclaim or cross-claim asserted in this action.

Sordoni is further awarded post-judgment interest on the outstanding amount of this judgment at the statutory rate for judgments (6% per annum) beginning on the date of this Order and continuing until said judgment is paid in full. Each party herein will bear its own costs and attorney fees.

BOARD OF CLAIMS

_____
Jeffrey F. Smith
Chief Administrative Judge

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

_____
Andrew Sislo
Citizen Member