COMMONWEALTH OF PENNSYLVANIA

KOBIN COAL CORPORATION and HAZLETON SHAFT CORPORATION	:	BEFORE THE BOARD OF CLAIMS
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF GENERAL SERVICES and DEPARTMENT OF CORRECTIONS	:	DOCKET NO. 4097

FINDINGS OF FACT

1. Kobin Coal Corporation ("Kobin") is a Pennsylvania Corporation, with its principal business address at 980 East Broad Street, Hazleton, Pennsylvania 18201. (Statement of Claim ("Complaint") at ¶ 1; Answer and New Matter at ¶ 1)

2. Kobin is an anthracite coal broker that purchases coal from mining operations and resells the coal to purchasers, including the Commonwealth. (N.T. 1: 48-49, 74[1])

3. Hazleton Shaft Corporation ("Hazleton Shaft") is a Pennsylvania Corporation, with its principal business address at 414 Stockton Mountain Road, Hazleton, Pennsylvania 18201. (Complaint at ¶ 2; Answer and New Matter at ¶ 2)

4. The Pennsylvania Department of General Services ("DGS") is an agency of the Commonwealth with offices located at 555 Walnut Street, Forum Place, 6th Floor, Harrisburg, Pennsylvania 17105. (Complaint at ¶ 7; Answer and New Matter at ¶ 7)

5. The Pennsylvania Department of Corrections ("DOC") is an agency of the Commonwealth with offices located at 1920 Technology Parkway, Mechanicsburg, PA 17050. (Complaint at ¶ 10; Answer and New Matter at ¶ 10)

6. On April 26, 2012, DGS issued an Invitation For Bids ("RFQ") soliciting bids to supply the anthracite and/or bituminous coal requirements for various Commonwealth facilities for the period of July 1, 2012 to June 30, 2013. (N.T. 1: 26-27; Ex. P-3)

[1] The trial transcript/Notes of Testimony (N.T.) comprise two volumes. Volume 1 is the transcript from the first hearing day, October 3, 2017. Volume 2 is the transcript from the second day of hearings, October 4, 2017. Notes of Testimony are cited herein as Volume: Page number. Thus "N.T. 1: 48-49, 74" represents Volume 1, pages 48-49, and 74.

7. The RFQ for anthracite coal included for each Commonwealth facility a spreadsheet listing, inter alia, the size of the coal required for each facility and the estimated annual usage for each facility. (N.T. 1: 39-41; Ex. P-3)

8. The RFQ instructed bidders to fill in information on the provided spreadsheet including the suppliers' name and vendor number, and the bid price per ton for each facility for which a bid was to be submitted. (N.T. 1: 39-41; Ex. P-3)

9. On or about May 16, 2012, Kobin submitted its bid to supply the anthracite coal needs for 17 of the Commonwealth facilities included in the RFQ, including the State Correctional Institute-Camp Hill ("SCI-CH"). (N.T. 1: 41-43; Ex. P-3)

10. On July 11, 2012, DGS awarded to Kobin a Contract, No. 4600014928 ("Contract"), to be the supplier of "the actual requirements of" anthracite coal for several Commonwealth facilities, including SCI-CH. (Complaint at ¶¶ 5, 9; Answer and New Matter at ¶¶ 5, 9; N.T. 1: 25-26; Ex. P-1)

11. Both the RFQ and the Contract documents provide under the heading "CONTRACT SPECIFICATIONS" that the Contract/RFQ "will cover the requirements of the Commonwealth of Pennsylvania for Anthracite and Bituminous Coal." (Exs. P-1, P-3)

12. DGS also provided with the bid and Contract documents a spreadsheet breaking down the annual estimated usage for each facility, including SCI-CH, by month, beginning with July 2012. (Ex. P-5)

13. These estimated quantities are addressed in Part V, "Contract Terms and Conditions," as follows:

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

(Ex. P-1, Part V.11 CONTRACT-007.02)

14. Pursuant to the Contract, the initial Contract term was July 1, 2012 through June 30, 2013 ("Contract Period"), with options to renew for four additional one-year terms. (N.T. 1:26, 141; Exs. P-1, P-3)

15. The estimated quantity of "Barley" coal (3/16"-3/32") required by SCI-CH for the Contract Period was 13,600 tons which Kobin agreed to provide on an "as required" basis at the Contract price of $183 per ton. (N.T. 1: 146-147; Exs. P-1, P-3; P-5)

16. Additionally under the Contract, Kobin was to supply two other institutions, Shippensburg University and SCI-Graterford, with Barley coal, with estimated requirements of 6,500 and 3,400 tons, respectively. SCI-Graterford, SCI-Dallas, and the Clarks Summit State Hospital were also to be supplied under the Contract with differently sized coal (7/16"-3/16"). (Exs. P-1, P-3, P-5)

17. Under the terms of the bid, Kobin, was required to submit a commitment letter from the operator of the breaker and/or mine of any source it intended to utilize in supplying coal to the Commonwealth under the Contract. (N.T. 1: 43, 134; Exs. P-1, P-3)

18. Kobin submitted with its bid a commitment letter from Hazleton Shaft dated May 23, 2012 ("Commitment Letter"), by which Hazleton Shaft agreed to provide Kobin with up to 20,000 tons of Barley coal as required by the Contract. The Commitment Letter submitted and signed by George M. Roskos, III, President of Hazleton Shaft, read as follows:

> Please be advised Hazleton Shaft Corporation will be a provider to Kobin Coal Sales, up to 20,000 ton of anthracite coal, size 3/16" – 3/32" for Shippensburg University; SCI Graterford; SCI Camp Hill. HSC will also provide up to 15,000 ton of anthracite coal, 7/16" – 3/16" for SCI Graterford; SCI Dallas; Clarks Summit State Hospital. This commitment applies for the contract period July 1, 2012 thru [sic] June 30, 2013.

(Exs. P-2, P-3)

19. Kobin considered Hazleton Shaft to be the primary source of coal for SCI-CH under the Contract. (N.T. 1: 44)

20. Kobin had a contract similar to the 2012-2013 Contract with DGS for the 2010-2011 period. (N.T. 1: 31-33, 45-46, 105-108)

21. Under the terms of the 2010-2011 contract, due to a shortage of anthracite coal in 2010-2011, Kobin was unable to fulfill DGS's coal needs and was consequently responsible for paying DGS approximately $700,000 under that contract to account for the difference between the contract price and the cost to DGS to obtain its coal requirements from other sources. (N.T. 1: 31-33, 105-108)

22. In order to assure that it had an adequate source of Barley coal to fulfill its commitment under the 2012-2013 Contract, Kobin executed a purchase order on July 25, 2012, with Hazleton Shaft to provide the coal for Kobin's Contract with DGS "as available." (N.T. 1: 27-34, 47-48; Ex. P-4)

23. The Contract documents established a general framework whereby the Commonwealth could issue a purchase order as the procurement mechanism under the Contract to satisfy SCI-CH's requirements, as well as those of other institutions. The supplier/contractor, Kobin, was contractually bound to provide the required quantity as identified within any particular purchase order. (N.T. 1: 78-79; 2: 135-136, 171; Exs. P-1, P-3)

24. Pursuant to the foregoing procedure, Kobin made monthly deliveries to SCI-CH in July, August and September 2012, totaling 1,477 tons. This was 123 tons short of the estimated usage for these months. (Ex. P-5; N.T. 1: 50, 96-97, 116, 138, 162-163)

25. At all times relevant to the Contract, SCI-CH had two coal-fired boilers, Boiler #2 and Boiler #3, which were installed in approximately 1938, and two oil-fired boilers (Boiler #1 and Boiler #4). (N.T. 2: 18, 23-24, 104; Exs. P-10, P-33, P-34)

26. Boiler #3 had not functioned and was not operational since March 28, 2012. (N.T. 2: 24; Ex. P-29)

27. On June 20, 2012, Matthew W. Klopotek, the utility plant supervisor at SCI-CH, received an estimate from Trojan Boiler Service of Muncy, PA, ("Trojan"), dated June 11, 2012, to perform required repairs to coal Boiler #2 (i.e. to "furnish labor, equipment and material to completely retube" Boiler #2) at a cost of $536,000. (N.T. 2: 32-34; Ex. P-17)

28. Also on June 20, 2012, Mr. Klopotek received from Munroe, Inc. of Pittsburgh separate estimates to: 1) rebuild/refurnish coal Boiler #3 for $1,400,000; and 2) provide a new natural gas boiler to replace one or both coal boilers for $950,000. (N.T. 2: 34-36; Ex. P. 18)

29. On July 23, 2012, Cannon Boiler Works of New Kensington, PA submitted to Mr. Klopotek an estimate to replace a coal boiler at SCI-CH for $1,050,000. (N.T. 2: 39-41; Ex. P-20)

30. On July 24, 2012, Powerhouse Boiler Equipment of Delanco, NJ submitted to Mr. Klopotek an estimate to provide SCI-CH with a rental boiler capable of burning #2 fuel oil or natural gas for $27,000 per month for a six month rental term or $25,000 per month for a 12 month rental term, plus cost of transportation ($2,900 each way) and installation, start-up, and disconnect costs of $57,000. (N.T. 2: 37-39; Ex. P-19)

31. In 2008, SCI-CH contracted to construct a new conveyance system and silo to move coal from the hopper to the two coal boilers. (N.T. 2: 18-21)

32. SCI-CH experienced problems with the new conveyance system since at least 2010, and the system never worked reliably. (N.T. 2: 21-23)

33. SCI-CH considered the new coal conveyance system to have "failed" as of July 31, 2012, when the surety on the project to construct the new conveyance system determined that it could not repair the new conveyance system. (N.T. 2: 15, 21-23)

34. The problems with, and/or "failure" of, the new conveyance system did not prevent SCI-CH from getting coal to the boilers as they were able to utilize the old conveyance system as a "work-around" utilizing Bobcat loaders. Accordingly, the Board does not find the problems with the new conveyance system to be a material factor in SCI-CH's coal usage for the Contract Period. (N.T. 2: 49, 57-58, 138-141, 143-144; Board Finding)

35. In 2011-2012, SCI-CH utilized both oil and coal to meet its heating needs. (N.T. 1: 150-151; Exs. P-8, P-10)

36. The cost to use oil for heating was substantially higher than the cost to use coal for heating, and natural gas was not available at SCI-CH for the 2012-2013 Contract Period. (N.T. 2: 38-39, 61, 19-70, 93-94, 117, 170; Exs. P-10, P-33, P-34)

37. Under the terms of the Contract, DGS issued purchase orders for, and Kobin delivered to SCI-CH, 329.64 tons of Barley coal in July 2012, 935.37 tons of Barley coal in August 2012, and 211.99 tons of Barley coal in September 2012, a total of 1,477 tons. (N.T. 1: 50, 96-97, 162, 185; Ex. P-5)

38. The total of 1,477 tons of Barley coal delivered to SCI-CH was 123 tons less than the estimated requirements for the first three months of the Contract (400 tons for July, 600 tons for August, and 600 tons for September). (Ex. P-5)

39. It appears from the evidence provided that Coal Boiler #2 was still operable and operating during the time period from April to mid-July of 2012 when DGS issued its RFQ and entered into the Contract for the period July 1, 2012 to June 30, 2013 (i.e. the Contract Period). (N.T. 2: 46-48; 103-106, 121-122)

40. It was not until July 31, 2012 when Boiler #2 was shut down due to problems with the new conveyance system. (N.T. 2: 103-105)

41. Through the Summer of 2012, the condition of Boiler #2 was being investigated. (N.T. 2: 43-47, 104-105, 121-122)

42. At the time the Defendants issued their RFQ (with initial coal usage estimates for SCI-CH and others) and entered into the Contract here at issue, it appears that the Defendants knew that Boiler #3 was not, and would not be, operable for the 2012-2013 Contract Period. However, the status of Boiler #2 was uncertain, and no evidence was provided to show that the effect of these boiler issues on SCI-CH's estimated coal usage of 13,600 tons for the Contract Period could have been quantified at that time. (N.T. 2: 43-47, 103-106; Findings of Fact ("F.O.F.") 24-41, 43-46; Board Finding)

43. On September 26-28, 2012, Trojan, an outside contractor, conducted an inspection of the #2 Boiler at SCI-CH to determine the full nature of the problems, what repairs were needed, and whether the boiler could be operated. (N.T. 2: 70, 124; Ex. P-28)

44. On September 28, 2012 and October 1, 2012, Norm Klinikowski, P.E., Chief Engineer for DOC, exchanged emails with Howard Gouse, the facility maintenance manager at DOC. This exchange described in detail the current state of operations of the boilers at SCI-CH. This exchange included the following salient points:

- Coal Boiler #3 was not operational due to tube failure and would not be available for the 2012 heating season;
- Coal Boiler #2 requires repairs to the stoker that will take approximately 3 months and cost approximately $300,000 in parts;
- With both coal boilers requiring repair, coal use will drop by 80% to 1,800 tons;
- "[B]and-aid" repairs to Boiler #3 are not possible because of extensive damage to the boiler's tubes; and
- Boiler #2 may be made operational to get through the winter season by replacing some wear parts, but all wear parts on the stoker will need to be replaced in the off-season.

(N.T. 2: 80; Ex. P-26)

45. On Sunday, September 30, 2012, Mr. Klinikowski sent an email to Gary Taylor, Director of the DGS Bureau of Engineering and Architecture, informing him that the preceding Friday (September 28), DOC had "just found out about a development with the coal boilers that may affect their ability to operate for the next two or three months." (N.T. 2: 45-49; Ex. P-22)

46. On October 4, 2012, Trojan's Mark Bowersox submitted to Mr. Klopotek of SCI-CH a report on the September 26-28 inspection of the #2 Boiler. The inspection report revealed, inter alia, that Boiler #2 and stoker were "in operational condition" and that the stoker was "able to be operated via the drive motor." The report also indicated, however, that the boiler was experiencing a number of problems attributable to wear that required attention and for which repairs were possible at an estimated cost of $500,000. Without any repairs, the Trojan inspector concluded, the boiler could be run as is, though it was not known for how much longer. (Ex. P-28)

47. During the course of the Contract, George Landis, a Commodity Specialist with DGS, was the primary point of communications for the Commonwealth with Kobin. (N.T. 1: 51-53, 157-159, 161-163; Exs. P-9, P-13)

48. On October 5, 2012, Mr. Klinikowski sent an email to George Landis, a Commodity Specialist with DGS, and Gregory Knerr, a commodity manager for procurements at DGS, stating that it is likely that SCI-CH would be using more fuel oil as a supplement to coal because, "Right now, Camp Hill cannot burn coal." (N.T. 1: 150-152; 2: 75; Ex. P-8)

49. Mr. Landis replied to Mr. Klinikowski's email on October 5, 2012, stating as follows:

> Thanks. The coal bid estimate for Camp Hill is 13,600 tons for the year, and the supplier has put up money to hold this tonnage. If we are not burning coal or a reduced amount then I need to inform the supplier. So what should I tell the supplier? Based on your e-mail it appears we will not be taking any coal at least through December, 2012. Per the facility estimates this amount is 5,700 tons. The supplier has dollars at risk if we take no coal so we need to provide them a reduced estimated [sic]. So should I tell Kobin Coal the awarded supplier we are not taking any coal from Camp Hill through December and will provide them an update on the remaining usage before the end of the year? What are your thoughts?

(Ex. P-8)

50. On October 22, 2012, Mr. Landis sent a follow-up email to Messrs. Klinikowski and Gouse, with copies sent to Mr. Knerr and others, asking if "we have an update on the coal situation at Camp Hill?" (Ex. P-8)

51. Mr. Gouse, also on October 22, 2012, sent the following reply email to Mr. Landis (with copies sent to Messrs. Klinikowski, Knerr, and others):

> George, as you stated, please contact Kobin Coal, and let them know we won't be taking any coal through December at a minimum. This is based on the fact that our stockpile areas are full, and both of our coal fired boilers are down for extensive repairs to the stokers and tubes. Further, there is no firm date to remedy the problems to repair the coal delivery system as of this date. Therefore, I cannot give you a firm date to resume any coal deliveries at this time. Unfortunately, we had no way to predict that we would be dealing with a problem this long with respect to the coal silo project, as well as dealing with the tube failures and associated wear on equipment.

(Ex. P-8)

52. Following Mr. Gouse's email response to him, Mr. Landis sent an email on October 22, 2012, to Daniel Nester, Vice President of Kobin, and Alexander Oren, also of Kobin, advising them as follows:

> Dan and Alex:
>
> Camp Hill has informed us that the boilers are down for extensive repairs (stokers, steam tubes, and coal handling system) and the facility will not be taking coal through December, 2012 and they cannot provide a start-up date at this time. As

> soon as I receive additional [sic] I will forward it to you. The Commonwealth appreciates your patience in this matter. If you have any questions do not hesitate to contact me.

(N.T. 1: 53-55, 157-158; Ex. P-9)

53. Given the status of the boilers at SCI-CH at this point in time (Boiler #3 down, Boiler #2 operable but needing some level of repair) as well as what appears to be indecision among DOC parties as to how best to proceed (e.g. operate Boiler #2, proceed with some repairs and operate Boiler #2, supplement or replace the coal boilers with additional oil or gas heat, etc.) we consider Mr. Landis's October 22, 2012 email to Kobin to be an accurate update of the then current situation at SCI-CH. Accordingly, the Board does not find Mr. Landis's October 22, 2012 email to be false or misleading. (N.T. 1:53-55, 157-158; 2: 18, 23-24, 80, 104; Exs. P-8, P-9, P-10, P-28, P-29, P-26, P-33, P-34; F.O.F. 25-30, 41-52; Board Finding)

54. Plaintiffs have failed to establish that Defendants' initial estimate of 13,600 tons of coal use for SCI-CH during the 2012-2013 Contract Period, although later proven to be false, was either an "actual misrepresentation" (i.e. known to be false at the time) or the result of either "gross mistake or arbitrary action" on the part of Defendants. (Exs. P-1, P-3, P-5; F.O.F. 11-13, 15, 25-40; Board Finding)

55. Plaintiffs have failed to establish that Mr. Landis's email to Mr. Nester of October 22, 2012, was false or misleading. (F.O.F. 25-53)

56. After receiving Mr. Landis's October 22, 2012 email, Mr. Nester informed George Roskos, President and owner of Hazleton Shaft, that SCI-CH would not be taking any more deliveries of coal through December due to problems with the coal boilers. (N.T. 1: 81-82, 192-193)

57. On November 13, 2012, Carol Piontkowski, P.E., an Environmental Engineer Consultant for DOC, sent a letter to the Environmental Engineer Manager at the Department of Environmental Protection ("DEP") informing DEP that SCI-CH's coal Boiler #3 had been deactivated and coal Boiler #2 required repairs to be operational. Ms. Piontkowski also informed DEP that in the meantime, SCI-CH was operating two oil-fired boilers that will be supplemented with an additional oil boiler "through the winter season, until the Coal Boiler #2 can be repaired and made operational." This is the earliest documentary evidence that a decision had been made to add an additional oil-fired boiler to supplement SCI-CH's heating capacity in lieu of utilizing coal Boiler #2. (N.T. 2: 26-27, 49; Ex. P-29; Board Finding)

58. On November 15, 2012, Trojan sent Mr. Klopotek an estimate to "furnish and install" pipe and insulation for the Powerhouse rental oil-fired boiler (see: F.O.F. 30) for SCI-CH for a price of $48,825. (N.T. 2: 71-72; Ex. P-30)

59. On November 21, 2012, Mr. Gouse sent an email to Mr. Landis of DGS informing him that Boiler #3 was in the process of being deactivated, Boiler #2 was in need of extensive stoker repairs, and DOC did not anticipate any coal deliveries to SCI-CH until at least February. (N.T. 1; 159-160; Ex. P-12)

60. On November 26, 2012, Mr. Landis sent an email to Messrs. Nester and Oren at Kobin advising them that SCI-CH does not anticipate taking any coal deliveries until at least February 2013. Mr. Landis also stated that "we are reducing the annual estimate at SCI Camp Hill by 4,100 tons to 9,500 tons." (N.T. 1: 161; 2: 188; Ex. P-13)

61. With his November 26, 2012 email, Mr. Landis also provided a "revised estimate sheet" showing the following estimated coal deliveries (in tons) to SCI-CH:

July 2012	400
August 2012	600
September 2012	600
October 2012	0
November 2012	0
December 2012	0
January 2013	1,800
February 2013	1,700
March 2013	1,500
April 2013	1,300
May 2013	800
June 2013	800
Total	9,500

(Ex. P-13)

62. Although Mr. Landis clearly stated in the text of his November 26, 2012 email that there would be no coal deliveries to SCI-CH until at least February, his attached "revised estimate sheet" included an estimated delivery of 1,800 tons in January 2013. (Ex. P-13)

63. Expenditures in excess of $300,000 (such as to complete all the repairs needed to coal Boiler #2) require a capital appropriation by the General Assembly. (N.T. 2: 42, 73-74, 84, 125-128, 146-147, 154)

64. Even if DGS/DOC had capital funding in place to perform all the extensive repairs required for coal Boiler #2 in November 2012, the repair work could not have been completed before the end of the Contract Period in June 2013. (N.T. 2: 159-160)

65. Given DOC's assessment of Boiler #2's capabilities at the time, as well as the lack of communication between DOC and Mr. Landis, we conclude that Mr. Landis's revised estimate of 9,500 tons stated in his November 26, 2012 email to Mr. Nester amounts to a misrepresentation

of SCI-CH's anticipated future coal requirements through gross mistake or arbitrary action by him as a representative of DGS and agent of DOC. (F.O.F. 57-64; Board Finding)

66. On December 7, 2012, Mr. Gouse sent a detailed email to the SCI-CH superintendent, Laurel Harry, under the reference line "Status update for boiler plant equipment/request for direction and funding appropriation." (Ex. P-33)

67. In his December 7, 2012 email, Mr. Gouse reported to Superintendent Harry the following:

- SCI-CH is currently burning 6,000 gallons of fuel oil per day in the two operating oil boilers;
- An additional rental oil boiler is "set in place" but not operational pending action on several bids to install and connect the rental boiler;
- Coal Boiler #2 needs to have the "stoker/traveling grates" rebuilt at a cost of $593,750; and
- Coal Boiler #3 requires more extensive work at a total cost of $1,400,000.

(Ex. P-33)

68. Mr. Gouse also noted in his December 7, 2012 email that the cost of fuel oil for one month is approximately $585,000, slightly less than the cost to repair Boiler #2, and the cost of fuel oil for four months was greater than the cost to repair both coal boilers. (Ex. P-33)

69. Approximately December 21, 2012, Advanced Industrial Services, Inc. was awarded the bid to install the rental oil-fired boiler at SCI-CH. (Ex. P-31)

70. On December 24, 2012, Mr. Landis sent an email to various Commonwealth facilities that burn coal, including SCI-CH, including a spreadsheet listing monthly coal usage estimates for the entire year (July 1, 2012 to June 30, 2013) and actual coal deliveries through October 2012. Mr. Landis requested that each facility notify DGS if they plan to deviate from their annual estimates by more than 10%. (N.T. 1: 169-170; Ex. P-14)

71. The spreadsheet attached to Mr. Landis's December 24, 2012 email listed a total actual coal delivery to SCI-CH of 1,447 tons through October 2012. (Ex. P-14)

72. Mr. Landis's intent in soliciting updated coal usage estimates in his December 24, 2012 and earlier emails was to keep the coal suppliers under contract informed as to estimates of the facilities' continued anticipated needs. (N.T. 1: 170-171)

73. In an apparent response to Mr. Landis's December 24, 2012 request for information from facilities about anticipated changes to their estimated coal usage for the 2012-2013 season, Mr. Klinikowski sent an email on January 14, 2013 to Mr. Gouse. Mr. Klinikowski asked if it was "reasonable" for DGS to estimate coal usage below 1,450 tons at SCI-CH "for the next heating

season." However, Mr. Klinikowski gave somewhat conflicting testimony as to whether he meant usage for the 2012-2013 Contract year or the following year. Because, among other things, this estimate was in response to Mr. Landis's query regarding the 2012-2013 season, and because this amount was roughly the equivalent of the actual deliveries to SCI-CH from July to September 2012, the Board believes this estimate was for the 2012-2013 heating season. (N.T. 2: 29-30, 161-162; Exs. P-5, P-14; Board Finding)

74. On January 22, 2013, State Senator David Argall convened a meeting to address coal usage by DOC, particularly SCI-Dallas and SCI-CH. (N.T. 1: 60, 66-68; Exs. P-16, P-32)

75. Present at the January 22, 2013 meeting were representatives of DGS, DOC, the Governor's office, the Pennsylvania Anthracite Council, and several coal companies including Kobin, which was represented by Mr. Nester. (N.T. 1: 60; Ex. P-16)

76. Representing DOC at the January 22, 2013 meeting were Mr. Klinikowski, Deputy Secretary Tim Ringler, and Deputy Secretary Michael D. Klopotoski. (Ex. P-16; Board Finding)

77. At the January 22, 2013 meeting, a representative of DOC told Kobin's Mr. Nester that SCI-CH would not be ordering any more coal deliveries for the remainder of the 2012-2013 Contract Period. (N.T. 1: 62-64; 2: 88-91, 134-136; Ex. P-34)

78. Shortly after the January 22, 2013 meeting, Mr. Nester informed Mr. Roskos of Hazleton Shaft that a DOC representative had said at the meeting that SCI-CH would not be ordering any more coal for the Contract Period. (N.T. 1: 216-218)

79. Up until the January 22, 2013 meeting, virtually all communications between the Defendants and the Plaintiffs occurred exclusively between Mr. Landis of DGS and Mr. Nester of Kobin. (N.T. 1: 51-53, 157-159, 161-163; Exs. P-9, P-13)

80. Mr. Roskos testified that despite being told by Mr. Nester that he had learned that no more coal deliveries would be made to SCI-CH, he believed more coal shipments might be made to SCH-CH starting in February 2013. (N.T. 1: 216-218)

81. DOC's notice to Kobin at the January 22, 2013 meeting that no more coal deliveries would be required to SCI-CH for the remainder of the Contract term corrected Mr. Landis's November 26, 2012 errant estimate of 9,500 tons. (N.T. 1: 60, 62-64, 66-68, 161; 2: 88-91, 188, 134-136; Exs. P-13, P-16, P-32; F.O.F. 60-62, 74-77; Board Finding)

82. No coal deliveries were ordered by SCI-CH after September 2012. (N.T. 1: 50-51, 162; Ex. P-5)

83. Sometime in April or May 2012, while preparing facilities coal usage estimates for the 2013-2014 year, Mr. Landis communicated with Kobin informing it again that no more coal would be shipped to SCI-CH under the 2012-2013 Contract. (N.T. 1: 173-174)

84. Mr. Klinikowski testified at trial that DOC had not, as of September 28, 2012 or thereafter, given up on the possibility of continuing to burn coal at SCI-CH during the term of the Contract. (N.T. 2: 131)

85. Beginning on July 25, 2012, when Kobin placed its blanket purchase order for coal with Hazleton Shaft to cover the requirements under its Contract for SCI-CH, Mr. Roskos testified that Hazleton Shaft began to stockpile or hold back Barley coal to fill SCI-CH's orders. (N.T. 1: 201)

86. Hazleton Shaft was able to produce coal in sizes as needed by configuring its crushing equipment. (N.T. 1: 201-210)

87. Hazleton Shaft could not say precisely how much Barley coal it had in stockpile before it got the purchase order from Kobin to cover the requirements for SCI-CH. Accordingly the Board cannot determine with reasonable certainty how much Barley coal Hazleton Shaft actually produced in reliance on the usage estimates proffered for SCI-CH. (N.T. 1: 201-210, 250)

88. On January 6, 2014, Kobin and Hazleton Shaft filed a Statement of Claim ("Complaint") with the Board against DGS and DOC relating to the Contract. (Complaint)

89. The Defendants filed an answer and new matter on February 6, 2014, denying all claims. (Answer and New Matter)

90. Section 2306(a) of the Pennsylvania Uniform Commercial Code ("PA-UCC"), 13 Pa.C.S. § 2306(a), provides as follows:

§ 2306. Output, requirements and exclusive dealings

> (a) Quantity measured by…requirements.—A term which measures the quantity by…the requirements of the buyer means such actual…requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior…requirements may be tendered or demanded.

13 Pa.C.S. § 2306(a).

91. Section 1304 of the PA-UCC provides as follows:

§ 1304. Obligation of good faith

Every contract or duty within this title imposes an obligation of good faith in its performance and enforcement.

(13 Pa.C.S. § 1304)

92. Although the Board believes Mr. Landis's revised estimate of 9,500 tons was made arbitrarily (i.e. without factual support) we find his communications to Kobin were motivated by a good faith desire to keep Kobin apprised of the circumstances at SCI-CH as best he could. Accordingly, we see no bad faith on the part of the Defendants with respect to these communications. (13 Pa.C.S. § 2306(a); N.T. 2: 38-39, 49, 57-58, 61, 69-70, 93-94, 131-141, 143-144, 170; Exs. P-1, P-3, P-5, P-8, P-9, P-10, P-13, P-18, P-26, P-28, P-29, P-31, P-34; F.O.F. 47-65, 70-72; Board Finding)

93. Although the Defendants' original estimate of 13,600 tons of Barley coal for SCI-CH proved to be inaccurate, the Plaintiffs have failed to establish that this estimate was arrived at in bad faith. (13 Pa.C.S. §§ 1304, 2306(a); N.T. 2: 49, 57-58, 92-94, 131-141, 143-144, 170; Exs. P-1, P-3, P-8, P-9, P-10, P-13, P-18, P-26, P-28, P-29, P-31, P-34; F.O.F. 25-39; Board Finding)

94. The Plaintiffs have not established that the Defendants failed to act in good faith in determining the actual coal requirements of SCI-CH, or in providing the coal usage estimates proffered to Kobin. (F.O.F. 92-93; Board Finding)

95. Pursuant to the Contract the Defendants agreed to purchase only, and Kobin agreed to provide only, the Barley coal that was required by, SCI-CH; the Defendants purchased only, and Kobin sold to the Defendants only, the Defendants actual Barley coal requirements for SCI-CH. (N.T. 1: 50, 96-97, 116, 138, 162-163; Exs. P-1, P-3, P-5; F.O.F. 6-11, 13, 15, 23-24, 37-38, 90; Board Finding)

96. In Count I, the Plaintiffs seek damages in the amount of $890,800. This calculation is apparently based on an anticipated profit under the Contract in the amount of $65.50 per ton, which is the Contract price per ton ($183) reduced by the production cost per ton ($105) and the shipping cost per ton ($12.50) for the original estimated quantity of 13,600. (Complaint at ¶¶ 34-36)

97. Hazleton Shaft's overall cost to stockpile Barley-sized coal was $105 per ton. This includes $94 per ton production cost plus debt service and other general costs of operation. (N.T. 1: 189, 202)

98. The average price at which Hazleton Shaft sold Barley-sized coal between January and December 2012 was $157.60 per ton. (N.T. 1: 247-249; Ex. P-7)

99. The average price at which Hazleton Shaft sold Barley-sized coal between January and December 2013 was $153.42 per ton. (N.T. 1: 247-250; Ex. P-7)

100. The market price for Barley-sized coal dropped precipitously, to between $90 per ton and $115 per ton, in the April-May-June timeframe of 2013. (N.T. 1: 190-191)

101. Although Hazleton Shaft was aware that DOC had informed Kobin on January 22, 2013 that SCI-CH would not be ordering any more coal deliveries under the 2012-2013 Contract, Hazleton Shaft did not attempt to sell any of the Barley-sized coal it had allegedly produced and stockpiled for SCI-CH until after the market price declined precipitously in the April, May, June timeframe of 2013. (N.T. 1: 191-208)

102. Hazleton Shaft ultimately sold approximately 40 tons of Barley-sized coal allegedly produced and stockpiled for SCI-CH at $150 per ton between January and March 2014, and approximately 9,460 tons of this coal at $115 per ton between May and November of 2014. (N.T. 1: 188-189, 231; Exs. P-6, P-7)

103. Mr. Roskos testified at hearing that the Plaintiffs are entitled to damages in the amount of the difference between the Contract price of coal ($183 per ton) less trucking costs ($12.50 per ton), $170.50 per ton net, for the 9,500 tons not ordered by DGS ($1,619,750), reduced by the amount that Hazleton Shaft was able to realize from the ultimate sale of 9,500 tons in 2014 ($1,093,903$525,) for a total loss on the coal held by Hazleton Shaft and later sold of $525,847. No shipping costs for these subsequent sales was identified or provided. (N.T. 1: 188-189; Exs. P-6, P-7; Board Finding)

104. Hazleton Shaft's overall cost for the 9,500 tons of Barley-sized coal it allegedly produced, stockpiled and held in its inventory for SCI-CH was $105 per ton. Hazleton Shaft ultimately sold approximately 40 tons of this Barley-sized coal at $150 per ton between January and March 2014, and approximately 9,460 tons at $115 per ton between May and November of 2014. No cost of trucking or delivering was provided for this coal. Accordingly, Hazleton Shaft has failed to establish that it suffered financial harm due to reliance on Mr. Landis's November 26, 2012 revised coal requirements estimate of 9,500 tons. (N.T. 1: 188-189, 231; Exs. P-6, P-7; F.O.F. 78, 97, 102-103; Board Finding)

105. Mr. Roskos did not provide the Board with evidence that the resale value of any of the 13,600 tons of Barley coal originally estimated for use by SCI-CH was below its overall production/stockpiling cost of $105 per ton and therefore failed to establish that it suffered any financial damages in reliance on any of the alleged misrepresentations regarding estimated Barley coal requirements for SCI-CH provided by Defendants. (N.T. 1: 188-189; Exs. P-6, P-7; Board Finding)

106. Kobin appears to have purchased from Hazleton Shaft only what coal it actually resold to DGS/DOC. (N.T. 1: 47-49, 181-184, 233-236; Ex. P-4; Board Finding)

107. Because Kobin has not established that it paid anything to Hazleton Shaft for any coal that was not delivered to SCI-CH and paid for by Defendants (including the 9,500 tons of Barley-sized coal Hazleton Shaft allegedly produced, stockpiled and held in inventory for, but never delivered to SCI-CH); and Hazleton Shaft ultimately sold approximately 40 tons of Barley-sized coal at $150 per ton between January and March 2014, and approximately 9,460 tons at $115 per ton between May and November of 2014, all to parties other than Kobin, Kobin has therefore failed to establish that it suffered financial harm due to reliance on Mr. Landis's November 26, 2012 revised coal requirements estimate of 9,500 tons for SCI-CH. (F.O.F. 102-106; Board Finding)

108. Because Kobin only purchased from Hazleton Shaft the coal that was actually delivered to SCI-CH and paid for by DGS/DOC, Kobin did not incur any damages in reliance on any of the alleged misrepresentations regarding estimated Barley coal requirements for SCI-CH provided by the Defendants. (F.O.F. 102-107; Board Finding)

109. Because Hazleton Shaft has failed to establish that it could not sell the Barley-sized coal that it may have produced and stockpiled for shipment to SCI-CH at prices higher than its overall production and stockpiling cost, and because Kobin did not establish that it bought any Barley-sized coal for resale to Defendants for SCI-CH which was not purchased by Defendants, the Board is unable to find that the Plaintiffs have suffered financial harm due to their reliance on any of the alleged misrepresentations as to the estimated coal quantities identified in their claims based on constructive fraud. (F.O.F. 102-108; Board Finding)

110. Because any "unconsummated" potential sales of coal by Kobin due to the alleged reliance on Mr. Landis's November 26, 2012 estimate of 9,500 tons would only be measured for the brief period from November 26, 2012 until the January 22, 2013 meeting when Kobin was told SCI-CH would not be taking anymore coal for the Contract Period, the Board has insufficient evidence from which to calculate what these supposed lost sales might be with any reasonable certainty. (F.O.F. 60, 74-77, 105; Board Finding)

111. While the Plaintiffs appear to claim that Hazleton Shaft initially produced the original 13,600 tons estimated and/or 9,500 tons of Barley-sized coal in order to meet Mr. Landis's November 26, 2012 revised estimate, Mr. Roskos never testified clearly that either such amount was actually produced in reliance on these estimates. (N.T. 1: 201-210, 250; F.O.F. 87; Board Finding)

112. Because the average price at which Hazleton Shaft sold Barley-sized coal between January and December 2012 was $157.60 per ton; the average price at which Hazleton Shaft sold Barley-sized coal between January and December 2013 was $153.42 per ton; Hazleton Shaft became aware in January 2013 that SCI-CH would not be ordering any more coal deliveries under the 2012-2013 Contract, and Hazleton Shaft did not attempt to sell any of the Barley coal it had allegedly produced and stockpiled until after the market price collapsed in the April-May-June 2013 time frame, we find that Hazleton Shaft's failure to attempt to mitigate its claimed damages by attempting to sell any Barley coal that was stockpiled beginning in January 2013 rather than waiting until the market, in their words "collapsed" prevents the Board from determining Hazleton

Shaft damages with reasonable certainty. (N.T. 1: 191-208, 247-250; Exs. P-6, P-7; F.O.F. 98-102; Board Finding)

113. Because we have found that Kobin was advised, as of January 22, 2013 (and Hazleton Shaft shortly thereafter) that SCI-CH would not require any more deliveries of coal under the Contract; and because neither Kobin or Hazleton Shaft took action to mitigate their alleged damages by selling any coal that Hazleton Shaft had stockpiled for potential delivery to SCI-CH until after the market price for coal had "collapsed" in April, May and June of 2013, the Board finds that the Plaintiffs have not established any alleged breach of contract damages with reasonable certainty. (N.T. 1: 191-208, 247-250; Exs. P-6, P-7; F.O.F. 77-78, 98-102, 112; Board Finding)

CONCLUSIONS OF LAW

1. Under Section 1724(a)(1) of the Commonwealth Procurement Code ("Procurement Code"), 62 Pa.C.S. §§ 101-4604, the Board has 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 of the Procurement Code. 62 Pa.C.S. §§ 1712.1, 1724(a)(1).

2. Because the Contract was entered into by Kobin Coal and DGS, a Commonwealth agency, in accordance with the Procurement Code; because the claim arises from said Contract, and because all requirements of Section 1712.1 of the Procurement Code have been met, the Board has jurisdiction in this matter with respect to Plaintiffs' claim against Defendants. 62 Pa.C.S. §§ 1712.1, 1724(a)(1).

3. 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 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 Constr. Inc., 898 A.2d at 1161.

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

5. It is within the purview of the Board, acting as finder of fact, to draw all reasonable inferences from the evidence presented at trial. Barylak v. Montgomery County Tax Claim Bureau, 74 A.3d 414, 417 (Pa. Cmwlth. 2013); Warner-Vaught v. Fawn Twp., 958 A.2d 1104, 1109 (Pa. Cmwlth. 2008); Ellis v. City of Pittsburgh, 703 A.2d 593, 594 (Pa. Cmwlth. 1997).

6. 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, 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. Wayne Knorr, Inc. v. Dep't of Transp., 973 A.2d 1061, 1078 (Pa. Cmwlth. 2009); Dep't of Gen. Servs. v. Pittsburgh Building Co., 920 A.2d 973, 989 (Pa. Cmwlth. 2007); A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ., 898 A.2d 1145, 1155 (Pa. Cmwlth. 2006); Commonwealth v. Holtzapfel, 895 A.2d 1284, 1249. (Pa. Cmwlth. 2006); Miller v. C.P. Centers, Inc., 483 A.2d 912, 915 (Pa. Super. 1984).

7. The Procurement Code provides as follows:

> § 104. General principles of law otherwise applicable.
>
> Unless displaced by the particular provisions of this part, existing Pennsylvania law, including Title 13 (relating to commercial code) shall supplement the provisions of this part.

62 Pa.C.S. § 104.

8. Under the Pennsylvania enactment of Article 2 of the Uniform Commercial Code, "goods" are defined, in relevant part, as follows:

> (a) "Goods".—"Goods means all things, including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, …. "Goods" also includes…other identified things attached to realty as described in section 2107 (relating to goods to be severed from realty; recording).

13 Pa.C.S. § 2105(a)(20).

9. Section 2107 of the Pennsylvania enactment of Article 2 provides, in relevant part, as follows:

> § 2107. Goods to be severed from realty; recording
>
> (a) Minerals and structures.—A contract for the sale of minerals or the like (including gas or oil) or a structure or its materials to be removed from realty is a contract for the sale of goods within this division if they are to be severed by the seller…

13 Pa.C.S. § 2107(a).

10. Section 1304 of the Pennsylvania enactment of Article 2 provides, in relevant part, as follows:

> § 1304. Obligation of good faith
>
> Every contract or duty within this title imposes an obligation of good faith in its performance and enforcement.

13 Pa.C.S. § 1304

11. Section 2306 of the Pennsylvania enactment of Article 2 provides, in relevant part, as follows:

> § 2306. Output, requirements and exclusive dealings
>
> (a) Quantity measured by output or requirements.--A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

13 Pa.C.S. § 2306(a).

12. The "good faith" requirement in Section 2306 of the Uniform Commercial Code, by its terms, requires that the buyer act in good faith in establishing its requirements under the contract. Id.

13. In a requirements contract, the seller assumes the risk of all good faith variations in the buyer's requirements, even to the extent of a determination to discontinue the business. Brisbin v. Superior Valve Co., 398 F.3d 279, 291 (3d Cir. 2005); Reilly Foam Corp. v. Rubbermaid Corp., 206 F.Supp.2d 643, 657-658 (E.D. Pa. 2002).

14. Both the RFQ and the Contract documents provide under the heading "CONTRACT SPECIFICATIONS" that the Contract/RFQ "will cover the requirements of the Commonwealth of Pennsylvania for Anthracite and Bituminous Coal." Exs. P-1, P-3.

15. Part V of the Contract, "Contract Terms and Conditions," provides as follows:

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

Ex. P-1, Part V.11 CONTRACT-007.02.

16. Because the Contract documents provide expressly that the Defendants agree to purchase, and Claimant Kobin agrees to provide, only such coal as is required by each facility, including SCI-CH, it is a requirements contract under 13 Pa.C.S. § 2306(a). The sale of coal by Kobin to DGS/DOC pursuant to the Contract here at issue is a sale of goods pursuant to a requirements contract and is subject to the provisions of the Pennsylvania Uniform Commercial Code ("PA UCC") at 13 Pa.C.S. Section 1101 et seq., including Sections 1304 and 2306(a). 13 Pa.C.S. §§ 1304 and 2306(a).

17. In order to establish a cause of action for "constructive fraud" a claimant is required to establish the following elements:

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

Acchione and Canuso, Inc. v. Dep't of Trans., 461 A.2d 765, 768-769 (Pa. 1983); Dep't of Gen. Servs. v. Pittsburgh Bldg. Co., 920 A.2d 973, 984-986 (Pa. Cmwlth. 2007).

18. The fourth element of "constructive fraud" requires the claimant to establish that the alleged misrepresentation: 1) is false or misleading and 2) results from A) an "actual misrepresentation" (i.e. a representation known to be false at the time) or B) "what amounts to a misrepresentation" made through either "gross mistake" or "arbitrary action" on the part of the agency. Id.

19. The fifth element of a "constructive fraud" claim requires the claimant to establish that he suffered "financial harm due to his reliance on" the alleged misrepresentation(s) by the governmental agency. Accordingly, the remedy prescribed for a breach of contract pursuant to the case law concept of "constructive fraud" is that of reliance damages (i.e. the actual harm suffered by reliance on these alleged misrepresentations) not the full "benefit of the bargain" as with a typical breach of contract action. Id.

20. Facts necessary to support a finding of constructive fraud are not necessarily sufficient to support a finding of bad faith. Lichtenstein v. Kidder, Peabody & Co., Inc., 777 F.Supp. 423, 428 (W.D. Pa. 1991).

21. Although Pennsylvania case law recognizes the implied duty of good faith and fair dealing, it may not be found where it would result in defeating a party's express contractual rights specifically covered in the written contract by imposing obligations that the party contracted to avoid. Agrecycle, Inc. v. City of Pittsburgh, 783 A.2d 863, 867 (Pa. Cmwlth. 2001).

22. Typically, an injured party in a breach of contract action is entitled to recover damages (1) that would naturally and ordinarily result from the breach or (2) were reasonably foreseeable by the parties at the time they made the contract and (3) can be proved with reasonable certainty. Adams v. Speckman, 122 A.2d 685, 687 (Pa. 1956) (cited cases omitted and emphasis added); James Corp. v. N. Allegheny Sch. Dist., 938 A.2d at 497.

23. Damages need not be determined with mathematical certainty, but only with reasonable certainty; and the evidence of damages may consist of probabilities and inferences. Sufficient facts must be introduced to allow a court to arrive at an intelligent estimate without conjecture. Spang & Co. v. U.S. Steel Corp., 545 A.2d 861, 866-867 (Pa. 1988); A.G. Cullen Constr. Inc., 898 A.2d at 1174; J.W.S. Delavau, Inc. v. Eastern America Transp. & Warehousing, 810 A.2d at 685-686.

24. However, damages are not recoverable if they are too speculative, vague or contingent to be ascertained with reasonable certainty. Spang, 545 A.2d at 866 (citing Restatement (Second) of Contracts, § 352); See also Scobell, Inc. v. Schade, 688 A.2d 715, 719-721 (Pa. Super. 1997).

25. A claim for damages must be supported by a reasonable basis for calculation; mere guess or speculation is not enough. John F. Harkins Co. v. School District of Philadelphia, 460 A.2d 260, 265 (Pa. Super. Ct. 1983).

26. One who suffers a loss due to breach of contract has a duty to make reasonable effort to mitigate damages. Delliponti v. Deangelis, 681 A.2d 1261,1265 (Pa. 1996); Bafile v. Borough of Muncy, 527 Pa. 25, 588 A.2d 462, 464 (1991).

27. Because Plaintiffs have failed to establish that Defendants' initial estimate of 13,600 tons of coal use for SCI-CH during the 2012-2013 Contract Period, although later proven to be false, was either an "actual misrepresentation" (i.e. known to be false at the time) or the result of either "gross mistake or arbitrary action" on the part of Defendants, we conclude that Plaintiffs' claim of constructive fraud fails with regard to this alleged misrepresentation. Acchione and Canuso at 768; Pittsburgh Building at 984-985; C.O.L. 17-18.

28. Because Plaintiffs have failed to establish that Mr. Landis's email to Mr. Nester of October 22, 2012, was false or misleading, we conclude that Plaintiffs' claim of constructive fraud fails with regard to this alleged misrepresentation. Acchione and Canuso at 768; Pittsburgh Building at 984-985; C.O.L. 17-18.

29. Because we have found that Hazleton Shaft's production cost for the 9,500 tons of Barley-sized coal it allegedly produced, stockpiled and held in its inventory for SCI-CH was $105 per ton; because Hazleton Shaft ultimately sold approximately 40 tons of this Barley-sized coal at $150 per ton between January and March 2014, and approximately 9,460 tons at $115 per ton between May and November of 2014; and because Hazleton Shaft has therefore failed to establish that it suffered financial harm due to reliance on Mr. Landis's November 26, 2012 revised coal requirements estimate of 9,500 tons, Hazleton Shaft's claim for constructive fraud on account of Mr. Landis's November 26, 2012 email to Kobin fails. Acchione and Canuso at 768; Pittsburgh Building at 984-985; Exs. P-6, P-7; C.O.L. 17-19.

30. Because we have found no evidence that Kobin has paid anything to Hazleton Shaft for any coal that was not delivered to SCI-CH and paid for by Defendants (including the 9,500 tons of Barley-sized coal Hazleton Shaft allegedly produced, stockpiled and held in its inventory for, but never delivered to, SCI-CH); and because Hazleton Shaft ultimately sold approximately

40 tons of Barley-sized coal at $150 per ton between January and March 2014, and approximately 9,460 tons at $115 per ton between May and November of 2014, all to parties other than Kobin; and because Kobin has therefore failed to establish that it suffered financial harm due to reliance on Mr. Landis's November 26, 2012 revised coal requirements estimate of 9,500 tons, Kobin's claim for constructive fraud on account of Mr. Landis's November 26, 2012 email to Kobin fails. Acchione and Canuso at 768; Pittsburgh Building at 984-985; Exs. P-6, P-7; C.O.L. 17-19.

31. Because the Contract is a requirements contract under which the Defendants agreed to purchase only, and Kobin agreed to provide only, the coal that was required by SCI-CH; and because this is what actually occurred; and because the Contract documents clearly provide that the quantities listed are estimates only, the Board concludes that an implied duty of good faith and fair dealing may not be utilized to impose a duty on the part of Defendants to pay for any estimated quantities not actually required, as it would defeat the parties' express rights and obligations under the Contract. Agrecycle at 867; C.O.L. 21.

32. Because we have found that the Plaintiffs have not established that the Defendants failed to act in good faith in determining the actual coal requirements of SCI-CH, or in providing the coal usage estimates proffered to Kobin, the Board concludes that the Defendants did not violate the good faith requirement of Section 2306 of the Pennsylvania Uniform Commercial Code. 13 Pa.C.S. § 2306(a); C.O.L. 7-16.

33. Because we have found that Plaintiffs have not established that the Defendants failed to act in good faith in determining the coal requirements of SCI-CH, or in providing the coal usage estimates proffered to Kobin, the Board concludes that the Defendants did not violate the good faith requirement of Section 1304 of the Pennsylvania Uniform Commercial Code. 13 Pa.C.S. § 1304; C.O.L. 7-16.

34. Because Hazleton Shaft has failed to establish that it could not sell the Barley-sized coal that it may have produced and stockpiled for shipment to SCI-CH at prices higher than its overall production and stockpiling cost, and because Kobin did not establish that it bought any Barley-sized coal for resale to Defendants for SCI-CH which was not purchased by Defendants; and because the Board is unable to find that the Plaintiffs have suffered financial harm due to their reliance on any of the alleged misrepresentations as to the estimated coal quantities identified in their claims based on constructive fraud, the Board concludes that the Plaintiffs' claims based on constructive fraud fails. Acchione and Canuso at 768; Pittsburgh Bldg. at 984-985; C.O.L. 17-19, 27-30.

35. Because we have found that Kobin was advised, as of January 22, 2013 (and Hazleton Shaft shortly thereafter) that SCI-CH would not require any more deliveries of coal under the Contract; and because neither Kobin or Hazleton Shaft took action to mitigate their alleged damages by selling any coal that Hazleton Shaft had stockpiled for potential delivery to SCI-CH until after the market price for coal had fallen in April, May and June of 2013; and because the Board finds that the Plaintiffs have not established any alleged breach of contract damages with reasonable certainty, the Board would be unable to award damages even if it had found a breach of contract. Delliponti v. Deangelis, at 1265; 23, 26.

OPINION

On January 6, 2014, Kobin Coal Corporation ("Kobin") and Hazleton Shaft Corporation ("Hazleton Shaft") filed a Statement of Claim ("Complaint") with the Board against the Department of General Services ("DGS") and the Department of Corrections ("DOC") relating to a requirements contract between Kobin and DGS under which Kobin agreed to supply anthracite coal "as required" to several Commonwealth facilities from July 1, 2012 to June 30, 2013 (also referred to herein as the "Contract Period"). The Complaint centers on that portion of the Contract whereby Kobin agreed to provide up to 13,600 tons of "Barley" coal as originally estimated to be required by the State Correctional Institute-Camp Hill ("SCI-CH"). The amount of coal actually ordered and delivered to SCI-CH totaled 1,477 tons for the Contract Period. This claim results from the discrepancy. The Defendants filed an answer and new matter on February 6, 2014, denying all claims.

Background

On April 26, 2012, DGS issued an Invitation for Bids ("RFQ") soliciting bids to supply the anthracite and/or bituminous coal requirements for various Commonwealth facilities for the period of July 1, 2012 to June 30, 2013. The RFQ for anthracite coal included a spreadsheet listing, inter alia, the size of the coal required for each Commonwealth facility and the estimated annual usage for each facility. The RFQ instructed bidders to fill in missing information on the provided spreadsheet, primarily the suppliers' name, vendor number, and bid price per ton for each facility for which a bid was to be submitted. On or about May 16, 2012, Kobin submitted its bid to supply the anthracite coal needs for 17 of the Commonwealth facilities included in the RFQ, including SCI-CH. On July 11, 2012, DGS awarded to Kobin Contract No. 4600014928 ("Contract"), to be

a supplier of anthracite coal on an "as required" basis for several Commonwealth facilities, including SCI-CH.

The original quantity of "Barley" coal (size 3/16"-3/32") estimated to be required by SCI-CH for the Contract Period was 13,600 tons at a Contract price of $183 per ton. In addition to the annual estimated coal usage for each facility, DGS also provided a spreadsheet breaking down the annual estimated usage for each facility by month, beginning with July 2012 and running through June 2013. (Ex. P-5) The Contract documents established a general framework whereby the Commonwealth could issue purchase orders as the procurement mechanism under the Contract to satisfy SCI-CH's requirements, as well as those of other institutions. The supplier/contractor, Kobin, was contractually bound to provide the required quantity as identified within any particular purchase order.

Pursuant to the foregoing procedure, Kobin made monthly deliveries to SCI-CH in July, August and September 2012, totaling 1,477 tons. This amount was shy of original estimates by only 123 tons. However, on October 22, 2012, George Landis, a Commodity Specialist with DGS, informed Kobin's Vice President, Daniel Nester, that both coal boilers at SCI-CH were "down for extensive repairs" and that no additional coal deliveries would be requested through December 2012. On November 26, 2012, Mr. Landis again provided Kobin with an "update." This time, he advised Kobin that SCI-CH would not be taking any more coal until at least February 2013 due to coal boiler maintenance issues, adding, "we are reducing the annual estimate at SCI Camp Hill by 4,100 tons to 9,500 tons." Finally, on January 22, 2013, at a meeting called by State Senator David Argall to discuss SCI-CH's coal usage (or lack thereof), Kobin learned from the DGS/DOC representatives at that meeting that SCI-CH would not be using any more coal for the remainder of the Contract Period.

Plaintiffs Kobin and Hazleton Shaft (which claims to be a third-party beneficiary of the Contract)[2], aver that, contrary to DGS's communications, a decision to cease burning coal at SCI-CH had already been made very early in the Contract Period (i.e. in August of 2012). Alternatively, Kobin and Hazleton Shaft claim that Defendants DGS and DOC failed to provide timely and accurate information with respect to the condition of the boilers at SCI-CH. More specifically, they allege that DGS and DOC knew early on in the Contract Period that no anthracite coal (other than the initial small shipments in July, August and September 2012) would be shipped to SCI-CH pursuant to the Contract, yet continued to provide Kobin and Hazleton Shaft with incorrect and misleading "updates" to SCI-CH estimated coal needs. (Plaintiffs' Post Hearing Brief at pp. 10-15)

The Plaintiffs contend that these misrepresentations as to the initial and continued need for coal and quantities thereof at SCI-CH constitute "constructive fraud" as well as bad faith on the part of DGS and DOC in their performance of the Contract, thereby breaching same. Plaintiffs further aver that this caused them to suffer damages in the form of lost profits on unconsummated sales. Specifically the Plaintiffs assert that because the Defendants never reduced the annual estimate at SCI-CH below the 9,500 tons indicated in the revised estimate sheet issued on November 26, 2012, this caused them to hold these amounts until the coal market prices dropped precipitously in May-June 2013. Kobin and Hazleton Shaft calculate their damages at $890,800 at Count I (Constructive Fraud) and $622,250 at Count III (Breach of Contract), reflecting their

[2] Kobin, signatory to the Contract, was, at all times relevant hereto, a coal broker not a producer. Kobin, in essence, purchased coal from suppliers like Hazleton Shaft, and resold it to the Commonwealth. Accordingly, DGS required Kobin to submit commitment letters from actual coal producers with Kobin's bid to supply the Commonwealth's coal needs for the relevant period. Hazleton Shaft had done so for the bid which became Kobin's Contract, and hence, had supplied a commitment letter addressed to itself to produce up to 20,000 tons of Barley coal for three facilities: Shippensburg University, SCI-Graterford, and SCI-CH. Hazleton Shaft did not allocate a specific amount (of the 20,000 tons) to SCI-CH. (Exs. P-2, P-3).

anticipated profit based on the Contract price for the maximum Contract amount of 13,600 tons and, alternatively, for the 9,500 tons pursuant to Mr. Landis's last estimate.

Hazleton Shaft, which was the actual coal producer, claims that it originally produced and stockpiled in excess of 13,000 tons of Barley coal to ship to SCI-CH pursuant to its commitment letter, Kobin's purchase order, and the Contract. It also claims that it continued to hold up to 9,500 tons as a result of Defendants' last revised coal requirements estimate in November of 2012. The Plaintiffs further assert that Hazleton Shaft could have avoided the cost of producing and stockpiling anthracite coal pursuant to the Contract, the commitment letter and its purchase order from Kobin absent these alleged misrepresentations. So too, they allege, had the Defendants provided them with timely and accurate information, Kobin and Hazleton Shaft could have at least sold product to other customers when they had an opportunity to do so, but could not because of their obligations under the Contract and the related commitment letter, respectively.

On January 6, 2014, Plaintiffs filed the Complaint with the Board. Discovery ensued, and a full hearing on the merits was held before the Board on October 3 and 4, 2017, at which both Plaintiffs and Defendants were represented by counsel and presented testimony and documentary evidence. Plaintiffs filed Proposed Findings of Fact, Conclusions of Law, and a Brief on November 20, 2017. The Defendants filed Proposed Findings of Fact, Conclusions of Law, and a Brief on December 20, 2017. The Plaintiffs filed a reply brief on January 16, 2018.[3] The matter is now ripe for final disposition.

[3] On January 19, 2018, the Defendants filed a motion to strike the Plaintiffs' reply brief as untimely filed. The Board denied the motion to strike in an order issued February 5, 2018.

Primary Issues

The Complaint in this matter consisted of five counts: Count I (Constructive Fraud); Count II (Negligent Misrepresentation); Count III (Breach of Contract); Count IV (Promissory Estoppel); and Count V (Penalties and Attorneys Fees under 62 Pa.C.S. § 3935). At the beginning of the hearing, the Board granted the Defendants' motions to strike Counts II, IV and V, leaving Counts I (Constructive Fraud) and III (Breach of Contract) for further consideration.[4] In Count I (Constructive Fraud), the Plaintiffs allege that the Defendants misrepresented the amount of coal SCI-CH expected to require and the condition of the SCI-CH boilers in the Bid/Contract documents and in Mr. Landis's October and November email updates. The Plaintiffs seek $890,800, which apparently constitutes a profit margin of $65.50 per ton for the total originally estimated quantity of 13,600.[5] In Count III (Breach of Contract), the Plaintiffs allege that the Defendants breached the Contract by breaching the implied duty of good faith and fair dealing inherent in the Contract by failing, in a timely fashion, to inform the Plaintiffs that SCI-CH's coal boilers could not burn coal without extensive repairs requiring large capital expenditures, and by providing misleading estimates of SCI-CH's coal needs. In particular, the Plaintiffs cite Mr. Landis's November 26, 2012 email in which he informed Kobin that SCI-CH would not be taking coal deliveries until at least February 2013 due to "boiler maintenance issues," and revised the coal usage estimate from 13,600 tons to 9,500 tons when, in fact, no more coal would be taken.

[4] The Board has no jurisdiction over the tort claim of Negligent Misrepresentation; Chapter 39 of Title 62 Pa.C.S. is not applicable to a contract for the sale of goods; and Plaintiffs' attorney acknowledged at hearing that the claim for promissory estoppel was based on settlement discussions, substantive evidence of which would be largely inadmissible at hearing. (N.T. 1:8-11).

[5] Complaint at ¶¶ 34-36.

Plaintiffs seek $622,250, which constitutes a profit of $65.50 per ton for the revised estimate of 9,500 tons.[6]

The Defendants also made an initial motion in limine at the start of the hearing to "prevent the Plaintiffs from proceeding under a theory of fraud in the inducement" and, presumably, from introducing evidence in support of this theory of liability on the basis that such fraud had not been pled with the requisite specifity. (N.T. 1:8-13). The Board deferred its ruling on this motion, having no testimony (or proffer of same) to which it could apply said objection at the time and because of a concern that evidence to support an assertion of constructive fraud (which had been specifically pled) would be substantially similar to evidence introduced to support a claim of fraud in the inducement. We believe subsequent testimony and evidence submitted at hearing bears out this concern. While there will be no finding of "fraud in the inducement" as such was not pled, it is the Board's view that the evidence accepted at hearing relevant to the issue of "constructive fraud" has been appropriately introduced. Defendant's outstanding motion in limine is overruled.

The Defendants deny all claims. With respect to Count I, the Defendants argue initially that "constructive fraud" is applicable only to construction contracts and not to the Contract at issue in this case, a requirements contract that did not guarantee that any specific amount of coal would be ordered or purchased. They also assert that the Plaintiffs have failed to satisfy any of the five enumerated elements of "constructive fraud" under Pennsylvania case law. (Respondents' Post Hearing Brief at pp. 3-6)

As to Count III, the Defendants argue that, even if the implied duty of good faith advanced by the Plaintiffs exists in Pennsylvania, it is also inapplicable to the Contract in this case as such

[6] Complaint at ¶¶ 48-50.

an implied duty may not be used to change an express contract right (emphasizing the "requirements" nature of the contract). With respect to the statutory duties of good faith imposed by the Pennsylvania UCC, Defendants argue that these only serve to preclude unreasonably large quantity demands and, in any event, cannot create an independent cause of action outside of existing contract terms. (Id. at pp. 12-13)

The Defendants also assert in New Matter that the Contract at issue is between DGS and Kobin only and that neither DGS nor DOC have a contract with Hazleton Shaft. Accordingly, the Defendants argue that the Board lacks jurisdiction over any claim by Hazleton Shaft. The Defendants also assert the defenses of failure of consideration and sovereign immunity as related to claims by Hazleton Shaft.[7]

Before engaging in a discussion of the merits of Plaintiffs' remaining Counts I and III, we believe it beneficial to first clarify two areas of potential misunderstanding. These two areas of potential confusion stem, in our view, from the manner in which Plaintiffs have presented their case and/or by the way Defendants have chosen to interpret same.

The first point of clarification originates from Defendants' suggestion that Plaintiffs are asserting that the Contract, in and of itself, committed Defendants to purchase (or somehow guaranteed that Defendants would purchase) for SCI-CH, the original estimate of 13,600 ton or the last revised estimate of 9,500 ton. Although Plaintiffs' damage calculations may suggest this, a point we will discuss later in this opinion, the Board sees no assertion on the part of Plaintiffs that the Contract here is anything but a "requirements contract" as that term is commonly

[7] The Defendants do not appear to have addressed directly Hazleton Shaft's assertion that it is a third-party beneficiary under the Contract. For instance, the Defendants state that DGS "is not objecting to having [Hazleton Shaft] be a party to these proceedings for convenience in presenting any claims" without waiving any "objections that [Hazleton Shaft] is an improper party since there is no privity of contract" between Hazleton Shaft and the Defendants. New Matter at ¶ 2. Defendants also made no serious effort at briefing this issue. See Respondents' Post-Hearing Brief.

understood. In any event, the Board wishes to be clear that we read the Contract here at issue as a "requirements contract" with no guarantee that the estimated quantities would be purchased.

1. Requirements Contract.

Requirements contracts in Pennsylvania are governed, inter alia, by Section 2306(a) of the Uniform Commercial Code, 13 Pa.C.S. § 2306(a), which provides as follows:

> § 2306. Output, requirements and exclusive dealings
>
> (a) Quantity measured by…requirements.—A term which measures the quantity by…the requirements of the buyer means such actual…requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior…requirements may be tendered or demanded.

13 Pa.C.S. § 2306(a). Both the RFQ and the Contract documents provide under the heading "CONTRACT SPECIFICATIONS" that the Contract/RFQ "will cover the requirements of the Commonwealth of Pennsylvania for Anthracite and Bituminous Coal." (Exs. P-1, P-3). The RFQ for anthracite coal included for each Commonwealth facility a spreadsheet listing, inter alia, the size of the coal required for each facility and the "Estimated Annual Usage" (in tons) for each facility. (Ex. P-3). DGS also provided a spreadsheet breaking down the annual estimated usage for each facility, including SCI-CH, by month, beginning with July 2012. (Ex. P-5). These estimated quantities are addressed in Part V, "Contract Terms and Conditions," as follows:

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

Ex. P-1, Part V.11 CONTRACT-007.02. The Board finds that it is clear from the terms of the Contract that the Commonwealth agreed to purchase only the quantities of coal actually required by each facility, including SCI-CH.

The second point of clarification the Board wishes to make is occasioned by Plaintiffs' description of their Count I as "Constructive Fraud." Specifically, the Board does not consider constructive fraud to be an independent cause of action outside of, or different from, a cause of action for breach of contract. Rather, we consider constructive fraud to be a specific legal theory or principle (developed by case law) supporting or identifying a particular type of breach of contract. Acchione and Canuso, Inc. v. Dep't of Trans., 461 A.2d 765, 767 (Pa. 1983); Dep't of Gen. Servs v. Pittsburgh Bldg. Co., 920 A.2d 973, 977 (Pa. Cmwlth. 2007). As a result, we consider Count I of Plaintiffs' Complaint to be one for breach of contract based on the theory of constructive fraud just as we consider Plaintiffs' Count III to be one for breach of contract based on the theory of Defendants' failure to meet its duty of good faith. Accordingly, we will proceed to analyze both remaining counts in accordance with the specific elements and prescribed remedies for each alleged breach.

Facts Relevant to Counts I (Constructive Fraud) and III (Duty of Good Faith)

The Plaintiffs' arguments in Count I (that the Defendants committed constructive fraud) and in Count III (that Defendants breached their implied duty of good faith) are based, inter alia, on the Plaintiffs' assertions: that 1) the Defendants' estimated coal requirements for SCI-CH for the period July 1, 2012 to June 30, 2013 (13,600 tons at first, later revised to 9,500 tons) were false and/or misleading; 2) that the Defendants knew that the coal boilers at SCI-CH were not capable of using those estimated quantities of coal in that period; and 3) that these usage estimates were therefore given in bad faith or by reason of gross mistake or arbitrary action. Before addressing

the legal arguments underlying the specific claims in Counts I and III, we will summarize the salient facts, as they appear to the Board, from the evidence presented at hearing.

At all times relevant to the Contract, SCI-CH had two coal-fired boilers, Boiler #2 and Boiler #3, both dating back to the 1930s. Boiler #3 had not functioned and had not been operational since March 28, 2012. However, it appears from the evidence provided, that Coal Boiler #2 was operable and operating during the time from April to mid-July of 2012 when DGS issued its RFQ and entered into its coal "requirements" contracts for the period July 1, 2012 to June 30, 2013 (i.e. the Contract Period). In fact, it was not until July 31, 2012 when Boiler #2 was shut down due to problems with the coal conveyance system. Through the Summer of 2012, the condition of Boiler #2 was being investigated. During this time, SCI-CH ordered and accepted a total of 1,477 tons (only 123 tons short of its stated estimates for July, August and September). Accordingly, at the time Defendants issued their RFQ (with the initial coal usage estimates for SCI-CH and others) and entered into the Contract here at issue, it appears that Defendants knew that Boiler #3 was not, and would not be, operable for the 2012-2013 Contract Period. However, the status of Boiler #2 was uncertain and no evidence was provided to show that the effect of these boiler issues on SCI-CH's estimated coal usage of 13,600 tons for the Contract Period could have been quantified at that time.

In June and July 2012, DOC received estimates to repair/rebuild/refurbish or replace the two SCI-CH coal boilers at costs ranging from $536,000 to repair tubing in Boiler #2, to $1,400,000 to "rebuild/refurbish" Boiler #3. Sometime in or around September 2012, SCI-CH determined that it would have an independent inspection and evaluation of Boiler #2 performed. This inspection was done on September 26-28, 2012, by an outside contractor, Trojan Boiler Service, to determine the full nature of the problems with Boiler #2, what repairs were needed, and

whether the boiler could still be operated. The inspection report revealed, inter alia, that Boiler #2 and stoker were "in operational condition" and that the stoker was "able to be operated via the drive motor." (Ex. P-28). The report also indicated, however, that the boiler was experiencing a number of problems attributable to wear that required attention and for which repairs were possible at an estimated cost of $500,000. Without any repairs, the Trojan inspector concluded, the boiler could be run as is, though it was not known for how much longer.

With Boiler #2 now shut down, DOC's Chief Engineer, Mr. Klinikowski, exchanged emails on September 28, 2012 and October 1, 2012 with Mr. Gouse, the facility maintenance manager at DOC. Among other things, this exchange stated that Boiler #2 may be made operational to get through the winter by replacing some wear parts. but all wear parts on the stoker will need to be replaced in the off-season. In that same exchange, Mr. Klinikowski estimated that, without these repairs, coal use at SCI-CH "will drop by 80% to 1800 tons." (N.T. 2: 130-131; Ex. P-26). Mr. Klinikowski also testified credibly at trial, however, that DOC had not, as of September 28, 2012, given up on the possibility of continuing to burn coal at SCI-CH. This email exchange supports his contention. (N.T. 2: 131; Ex. P-26).

On October 22, 2012, DGS's Mr. Landis advised Kobin that because the two coal boilers at SCI-CH were not operating at that time, no coal deliveries would be requested through December 2012. On November 26, 2012, Mr. Landis advised Kobin that coal deliveries would not resume until at least February 2013, and reduced the estimated coal requirement at SCI-CH under the Contract to 9,500 tons.

Although Mr. Landis never clearly explained how he arrived at his revised coal usage estimate of 9,500 tons, it is apparent from the spreadsheet he included with this November 26, 2012 email that it was based on the original monthly usage estimates - with the estimated deliveries

for October, November and December subtracted. Had Kobin chosen to perform even a cursory examination of the calculations in this email, it would have ascertained that Mr. Landis had made a significant mathematical error in arriving at his 9,500 ton estimate. Specifically, he failed to deduct from this number the estimated January 2013 delivery of 1,800 tons, even though he had already communicated that deliveries would not resume until February at the earliest. Accordingly, we believe Mr. Landis's November 26, 2012 email to Kobin, read as a whole, should have been understood to reduce his annual estimate to 7,700 tons at most.

As time went on, however, the repairs to Boiler #2 envisioned by Mr. Klinikowski were not performed and alternate heat sourcing was being investigated (primarily that of an additional oil-fired boiler). While it does appear that such an investigation began as early as June of 2012, and that sometime in October 2012 DOC engineers believed it likely that oil would be used to supplement the heating at SCI-CH, the earliest documentary evidence brought to our attention indicating that a decision had been made by DOC to add an additional oil-fired boiler "through the winter season, until the Coal Boiler #2 can be repaired and made operational" occurs on or about November 13, 2012. (Ex. P-29).

On or about January 14, 2013, Mr. Klinikowski raised the possibility to Mr. Gouse in an email that no more coal shipments would be made to SCI-CH that heating season.[8] However, he did not communicate these thoughts to DGS's Mr. Landis.

[8] The January 14, 2013 email Mr. Klinikowski sent to Mr. Gouse, appears to be responding to Mr. Landis's December 24, 2012 request for information from facilities about anticipated changes to their estimated coal usage for the 2012-2013 season. Mr. Klinikowski asked if it was "reasonable" for DGS to estimate coal usage below 1,450 tons at SCI-CH "for the next heating season." (Ex. P-14). Mr. Klinikowski gave conflicting testimony as to whether he meant usage for the 2012-2013 contract year (N.T. 2: 29-30) or the following year (N.T. 2: 161-162). Because, among other things, this estimate was in response to Mr. Landis's query regarding the 2012-2013 season, and because this amount was roughly the equivalent of the actual deliveries to SCI-CH from July to September 2012, we believe this estimate was for the 2012-2013 heating season. (Exs. P-5, P-14; Board Finding).

Up to this point in time, virtually all relevant communications between the Defendants and the Plaintiffs occurred exclusively between Mr. Landis of DGS and Mr. Nester of Kobin.[9] However, on January 22, 2013, at a meeting called by Senator Argall to discuss SCI-CH's lack of coal usage, attended by, among others, DOC Deputy Secretary Tim Ringler, Kobin's Mr. Nester was informed directly that SCI-CH would not be taking any more coal deliveries for the term of the Contract. Mr. Roskos of Hazleton Shaft was not at this meeting, but was informed of this advice from DOC by Mr. Nester sometime shortly thereafter.

After Kobin learned at this January 2013 meeting that no more coal deliveries to SCI-CH would be ordered, it was in April or May 2012, when Mr. Landis again communicated with Kobin confirming what Kobin already knew, i.e. that no more coal would be shipped to SCI-CH under the 2012-2013 Contract. (N.T. 1: 173-174). From the evidence presented, it does not appear that anyone from DGS or DOC ever communicated directly with Mr. Roskos of Hazleton Shaft, who apparently received whatever information he did receive on a second-hand basis from Mr. Nester of Kobin. We view this communication arrangement as entirely appropriate as it was Kobin and DGS who were the primary contracting parties.

Count I - Constructive Fraud

Turning to the claim of constructive fraud raised in Count I, we note initially our agreement with Defendants that the legal concept of "constructive fraud" in Pennsylvania has so far been applied only to construction contracts and not to contracts for the procurement of commodities, as is the case here. See e.g. Acchione and Canuso at 768; Dep't of Gen. Servs v. Pittsburgh Bldg. at

[9] Kobin's Mr. Nester testified that in addition to regular communications with Mr. Landis, he occasionally spoke with the maintenance foreman and scale operator at SCI-CH. However, we have no testimony as to the substance of these communications. (N.T. 1: 51-53).

976. However, it is equally true that we have found no case (from Pennsylvania or otherwise) which states that the principle of "constructive fraud" can only be applied to construction contracts, as argued by the Defendants. Moreover, Defendants offer no persuasive reasoning, and we see no particular legal principle, that would so limit its application solely to construction contracts. Accordingly, we will proceed to compare the facts of this case to the specific elements of constructive fraud.

For the Plaintiffs to be successful in their claim based on the legal concept of "constructive fraud," they must produce evidence to establish the following elements:

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

Acchione and Canuso at 768; Pittsburgh Bldg. at 984-985.

With respect to the individual elements of "constructive fraud" set forth in Acchione and Pittsburgh Building, the Plaintiffs first argue that "DGS made positive representations of

specifications to [Kobin] three times with respect to the Contract."[10] Specifically, the Plaintiffs assert that DGS, when soliciting the bids and again when contracting with Kobin, "positively represented and specified the estimated tonnage requirements for Barley coal to be shipped to SCI Camp Hill under the Contract to be 13,600 [tons]."[11] The Plaintiffs assert further that DGS made a third positive representation as to the estimated tonnage in Mr. Landis's November 26, 2012 email, which included a revised tonnage estimate of 9,500 tons. Implicit in each of these representations, the Plaintiffs argue, was the fact that the coal boilers at SCI-CH were capable of burning the amounts of coal in these estimates.[12]

The amount of coal to be shipped is a material specification of the Contract, the Plaintiffs argue, satisfying the second element under Acchione and Pittsburgh Building as well. Moreover, they assert that DGS and DOC were the only parties that had the means to investigate the accuracy of the estimated coal requirements and/or the condition of the coal boilers, thereby satisfying the third element of constructive fraud.

With respect to the fourth element, the Plaintiffs assert that the above-cited representations ultimately "proved to be false and/or misleading by what amounts to a misrepresentation through either the gross mistake or arbitrary action on the part of" the Defendants. Here, the Plaintiffs point to the facts that the Defendants knew, when the Contract was bid, that coal Boiler #3 had not been in operation since March 2012, and that DOC had received bids to repair one or both of the coal boilers which exceeded the $300,000 limit for which Capital Project funding was required, meaning that the repairs could not have been completed during the Contract Period.[13] Finally, the

[10] Plaintiffs' Post Hearing Brief at p. 6.
[11] Id. at pp. 6-7.
[12] Id.
[13] Id. at pp. 7-8.

Plaintiffs claim that they were financially harmed due to their reliance on these misrepresentations. As a result they assert that they are due "lost profits that they should have earned under the Contract." [14] Alternatively, they claim that Hazleton Shaft suffered additional losses due to its producing and stockpiling Barley coal for SCI-CH, but again calculate this damage based on lost profits on the sale of the estimated requirements.[15]

The Defendants respond that the alleged representations cited by the Plaintiffs do not satisfy the first two elements of Acchione and Pittsburgh Building because quantities are simply not a material specification under the Contract. Looking to the third element of constructive fraud, the Defendants argue that Mr. Landis's regular communications with Kobin's Mr. Nester provided a means for the Plaintiffs to independently investigate the status of coal-burning at SCI-CH. Finally, the Defendants argue that neither DGS nor DOC made any misrepresentations which fit under the fourth element of Acchione and Pittsburgh Building because, under the Contract terms, the "estimated requirements" provided by DGS were estimates only and did not impose a duty upon DGS to purchase any coal beyond their actual requirements. Therefore, Defendants assert, the Plaintiffs could not rely upon these estimates.

The Board finds itself in agreement with some of the points made by Plaintiffs and some made by Defendants. Ultimately, however, we must conclude that Plaintiffs have failed to establish their claim of constructive fraud on the facts presented.

To begin with, we agree with the Defendants that the estimated coal requirements provided in the bidding and Contract documents, as well as the revised estimate provided by Mr. Landis in his November 26, 2012 email, do not represent a commitment on the part of DGS to purchase that

[14] Id. at pp. 8-9.
[15] Id.

amount of coal. However, we agree with the Plaintiffs that these requirements estimates contain both the explicit representation that Defendants expected to use the quantities stated and the implicit representation that the coal boilers at SCI-CH were capable of burning the amounts of coal stated in these estimates at the time they were made.

Although we consider the question of whether or not the foregoing "requirements estimates" satisfy elements one and two of constructive fraud to be a close one, we ultimately conclude that they do. For one thing, the fact that set quantities are not stated in the Contract terms or specifications does not mean, as Defendants seem to suggest, that the quantity of the product to be purchased is not a material term of the Contract. Although the quantity here is flexible, it is nonetheless defined or set, in the case here at issue, as the quantity of coal actually "required" by SCI-CH, as per Paragraph V.II-007.02 of the Contract. Not only is this quantity a specific term of the Contract, but it is further addressed and required to be determined in good faith as per the PA UCC Section 2603(a). 13 Pa.C.S. § 2603(a). We further believe that this treatment in the PA UCC, as well as countless cases and common sense, attest to the fact that the quantity of a product to be purchased is a material term of almost any contract for the sale of goods, and that this Contract is no exception.

Moreover, "representations" capable of supporting a claim for constructive fraud, per Acchione and Pittsburgh Building may go not only to the "specifications" of a contract, but also to the "conditions relative to the work." Accordingly, we consider "representations" relative to the quantity of SCI-CH's actual coal requirements and/or relative to conditions determinative of SCI-CH's actual coal requirements to be material (i.e. the conditions of the two coal-fired boilers at SCI-CH).

That is to say, while we are aware of Defendants' position that the requirements estimates are not statements of what the actual coal requirements are, we find that these estimates are statements "relative to" what the actual coal requirements are, and are, therefore actionable representations for the purpose of constructive fraud. This seems especially true when one considers that, under the terms of the Contract, Kobin might be held liable to DGS if it were to fail to supply SCI-CH's actual coal requirements during the Contract Period. See Ex. P-1; ¶ V.30-021.1(a)(4) and (b). Similarly, because these "requirements estimates" carry the implicit representation that SCI-CH's boilers were capable of using that quantity of coal at the time these estimates were made, we do find them to be material representations as to conditions relative to the actual coal requirements at SCI-CH, again satisfying elements one and two of constructive fraud.

As far as the third element of constructive fraud is concerned, we agree with the Plaintiffs that Kobin had no reasonable means of making an independent investigation as to the accuracy of these estimates or whether the boilers at SCI-CH were capable of burning such an amount of coal during the Contract Period. Based on the evidence the Board has seen, Defendants' suggestion that Plaintiffs could have made such an independent assessment by inquiring of Mr. Landis (or otherwise) is wholly unpersuasive.

With respect to whether or not the requirements estimate of 13,600 ton for SCI-CH in the bid and Contract documents cited by the Plaintiffs meets the fourth element of "constructive fraud," we find that the Plaintiffs have failed to establish that these estimates, while later proven to be inaccurate, were made as a result of "actual misrepresentation … or by what amounts to a misrepresentation through gross mistake or arbitrary action …." Stated another way, the evidence produced clearly established that the initial usage estimate of 13,600 tons of coal for SCI-CH

turned out to be false and wholly inaccurate, but failed, in our view, to establish that the estimate resulted from an actual misrepresentation (i.e. a representation known to be false at the time) or one made by reason of gross mistake or arbitrary action. To the contrary, while Plaintiffs did show that Boiler #3 was not, and likely would not be, operational from March 2012 onward, the evidence adduced at hearing indicated that Boiler #2, the remaining coal boiler, was operational at the time the Contract was bid and signed in the April to mid-July 2012 time frame. Moreover, while the status of Boiler #2 was arguably uncertain during this time period, no evidence was provided to show that the effect of these boiler issues on SCI-CH's estimated coal usage of 13,600 ton for the Contract Period could have been quantified at that time. Accordingly, the Plaintiffs have failed to carry their burden of proving the originally estimated requirement of 13,600 tons of coal for SCI-CH constituted an actual misrepresentation or what amounts to a misrepresentation through either gross mistake or arbitrary action by the Defendants at the time. Plaintiffs also failed to produce any persuasive evidence that Defendants had decided during the bidding, contracting or even in the early stages of the Contract Period, to forego the use of coal as a heat source for SCI-CH.[16]

Although not the primary focus of Plaintiffs' claims, they do, at one point or another, appear to assert that Mr. Landis's October 22, 2012 email to Kobin was false or misleading. In this email, which was an effort undertaken gratuitously by Mr. Landis to update Kobin on the coal use status of SCI-CH, Mr. Landis stated:

> Dan and Alex:
>
> Camp Hill has informed us that the boilers are down for extensive repairs (stokers, steam tubes, and coal handling system) and the facility will not be taking coal

[16] Even though DOC was investigating alternate heat sources for SCI-CH in the summer of 2012, the evidence suggests that they held out hope to utilize Boiler #2 in the Fall of 2012. (See F.O.F. 42-51). In fact, according to the documentary evidence produced at hearing, the earliest indication that a decision had been made to utilize an additional oil-fired boiler in place of coal Boiler #2 is Ms. Piontkowski's November 13, 2012 letter to DEP advising of same. (F.O.F. 57).

> through December, 2012 and they cannot provide a start-up date at this time. As soon as I receive additional [sic] I will forward it to you. The Commonwealth appreciates your patience in this matter. If you have any questions do not hesitate to contact me.

Given the status of the boilers at SCI-CH at this point in time (Boiler #3 down, Boiler #2 operable but needing some level of repair), as well as what appears to be indecision among DOC parties as to how best to proceed (e.g. operate Boiler #2, proceed with some repairs and operate Boiler #2, supplement or replace the coal boilers with additional oil or gas heat, etc.), we consider Mr. Landis' October 22, 2012 email to Kobin to be an accurate update of the then current situation at SCI-CH.

Notwithstanding the foregoing, we believe the requirements estimate made by Mr. Landis in his November 26, 2012 email to be a different story with respect to the fourth element of constructive fraud. To be clear, we find no misrepresentation or error in his statement that no coal deliveries to SCI-CH would be anticipated "until at least February, 2013 because of their coal boiler maintenance issues"[17] However, we do find that Mr. Landis's revised estimate of 9,500 tons for the Contract Period (and/or 7,700 tons if corrected for no delivery in January 2013) does constitute a positive misrepresentation resulting from arbitrary action on the part of Defendants.

To begin with, this November email, unlike that of the October 22, 2012 (which accurately reported the boiler problems and made no representation as to when/if these problems would be repaired) did make a positive statement to the effect that DOC (on or about November 26, 2012) still expected to use 9,500 tons of coal (or, if read more carefully, 7,700 tons of coal) for the Contract Period and, by reasonable implication, that the SCI-CH coal boilers were in a condition to utilize this amount of coal at the conclusion of boiler maintenance. Moreover, unlike the circumstances in which the original requirements estimate of 13,600 ton was made, this November

[17] Ex. P-13.

2012 representation was made at a time when SCI-CH's coal Boiler #3 had been deactivated; coal Boiler #2 clearly required repairs to be operational; DOC was exchanging internal memos stating, inter alia, that "with both coal boilers requiring repair, coal use will drop by 80% to 1,800 tons"; and DOC had made a decision that an additional oil-fired boiler was to be added to supplement SCI-CH's heating needs through the winter season, if/or until Coal Boiler #2 could be repaired and made operational. Moreover, these discussions were occurring with the then clear knowledge that the necessary capital expenditure required to repair either of these coal boilers would require action by the General Assembly and, even if that were to occur, the time it would take to plan, bid-out, and perform the needed repairs could not be done within the remaining Contract Period. Given DOC's assessment of Boiler #2's capabilities on or about November 26, 2012, as well as the lack of communication between DOC and Mr. Landis, we conclude that Mr. Landis's revised estimate of 9,500 tons amounts to a misrepresentation through gross mistake or arbitrary action by him as a representative of DGS and agent of DOC.

Notwithstanding the foregoing discussion, Plaintiffs have still failed to establish an entitlement to damages pursuant to the fifth element of constructive fraud with respect to any of the alleged misrepresentations, including the November 26, 2012 email. Specifically, Plaintiffs have failed to establish that they actually suffered financial harm due to their reliance on the misrepresentation in Mr. Landis's November 26, 2012 email or, for that matter, on any of the alleged misrepresentations.

At Count I of the Plaintiffs' Complaint, based on the legal theory of "constructive fraud," the Plaintiffs seek damages in the amount of $890,800. This calculation is apparently based on an anticipated profit under the Contract in the amount of $65.50 per ton, which is the Contract price per ton ($183) reduced by the overall production cost per ton ($105) and the shipping cost per ton

($12.50) for the original estimated quantity of 13,600.[18] In Count III, Plaintiffs applied this same calculation to the 9,500 tons in the November 2012 email, arriving at a damage claim of $622,250.[19]At the hearing, Hazleton Shaft's Mr. Roskos also calculated the Plaintiffs' damages based on 9,500 tons (the revised estimate given by DGS's Mr. Landis in his November 26, 2012 email) in a different manner. Specifically, Mr. Roskos testified, that the Plaintiffs were entitled to damages in the amount of the difference between the Contract price of coal ($183 per ton) less trucking costs ($12.50 per ton) for the 9,500 tons not ordered by DGS ($1,619,750), reduced by the amount that Hazleton Shaft was able to realize from the ultimate sale of these 9,500 tons in 2014 ($1,093,903), for a total loss on the coal held by Hazleton Shaft and later sold of $525,847.[20]

Neither of the amounts claimed in the Complaint, or by Mr. Roskos at hearing, represents the measure of damages contemplated under the fifth element of "constructive fraud" as set forth in Acchione and Pittsburgh Building. The former amounts calculated by Plaintiffs represent a claim for lost profits (i.e. the full benefit of the bargain) under the Contract while the latter calculation appears to demand the difference between gross sales pursuant to the Contract and subsequent sales (less only shipping and any mitigation accomplished by sale of the unused coal) in respect to the 9,500 ton calculation. However, the fifth element of "constructive fraud" as set forth in Acchione and Pittsburgh Building only contemplates compensating the contractor for his "financial harm due to his reliance on" the alleged misrepresentation. That is to say, the remedy for a breach of contract pursuant to constructive fraud is to receive reliance damages. Acchione at 768-769; Pittsburgh Building at 986. The financial harm suffered by the Plaintiffs in reliance upon Mr. Landis's November 26, 2012 revised estimate of SCI-CH's coal requirements is not, as

[18] Complaint at ¶¶ 34-36.
[19] Complaint at ¶¶ 48-50.
[20] Exs. 6, 7; N.T. 1: 188-189.

Plaintiffs claim, their lost profits or the difference between their gross sales Contract price (less trucking cost) for the sale of 9,500 tons of Barley-sized coal to SCI-CH and the price they ultimately realized from the eventual sale of the coal. Rather, any financial harm suffered by Hazleton Shaft in reliance on Mr. Landis's November 26, 2012 revised estimated coal requirement would be the difference between Hazleton Shaft's cost to produce and stockpile the coal (which they claim to have done in reliance on the 9,500 estimate) and the price for which they eventually sold the 9,500 tons of coal. In the case of Kobin, its reliance damage would be the difference between what it paid for the coal it purchased and held in reliance of the 9,500 ton estimate versus what it resold this coal for. A similar calculation would needs be made for the original estimate of 13,600 ton for that portion of Plaintiffs' claim based on constructive fraud.

Mr. Roskos testified that Hazleton Shaft's overall production cost for the Barley-sized coal was $105 per ton,[21] and that Hazleton Shaft was able to ultimately sell approximately 40 tons for $150 per ton and 9,460 tons for $115 per ton.[22] He did not provide the Board with, or indicate that there were, shipping costs for the eventual sale of this coal. Thus, even assuming that Mr. Landis's asserted "misrepresentation" on November 26, 2012 caused Hazleton Shaft to produce and stockpile 9,500 tons (which cost it $105 per ton), Hazleton Shaft suffered no financial harm in reliance thereon because it was able to sell this coal at a profit: 40 tons at $150 per ton and 9,460 tons at $115 per ton. Further, Mr. Roskos did not provide the Board with evidence that the resale of any of the 13,600 tons of Barley coal originally estimated for SCI-CH was below Hazleton

[21] N.T. 1: 189, 202.
[22] N.T. 1: 188.

Shaft's overall production costs of $105.[23] With respect to Kobin, who appears to have purchased from Hazleton Shaft only what it actually resold to DGS/DOC, we similarly find no proof of reliance damages incurred.

Moreover, even if we were to consider "unconsummated" potential sales to other coal users as an appropriate measure of damages in this case (which we do not), it would only be for the brief period from November 26, 2012 until the January 22, 2013 meeting when this misrepresentation relative to the 9,500 tons was corrected and Kobin was told SCI-CH would not be taking anymore coal for the Contract Period. The Board has insufficient evidence from which to calculate what these supposed lost sales might be with any reasonable certainty. In addition, Plaintiffs' apparent failure to attempt to mitigate its damages by moving to sell their coal promptly after the January 22, 2013 advice adds an additional level of uncertainty to any such damage calculation.

For all the foregoing reasons, the Board concludes that the Plaintiffs' claims presented in the Complaint under the theory of "constructive fraud" ultimately fail.

Count III - Good Faith

A. In support of Count III, the Plaintiffs argue that the Defendants breached the Contract by breaching the implied duty of good faith and fair dealing inherent in the Contract by failing, in a timely fashion, to inform the Plaintiffs that SCI-CH's coal boilers could not burn coal without extensive repairs requiring large capital expenditures. The Plaintiffs cite Cable & Associates v. Commercial National Bank, 875 A.2d 361 (Pa. Super. 2005), and Angino & Rovner v. Santander Bank, 118 A.3d 457 (Pa. Super. 2015) as Pennsylvania case law support for this

[23] While the Plaintiffs base their claims on the presumption that Hazleton Shaft initially produced the original 13,600 tons estimated and/or 9,500 tons of Barley-sized coal stockpiled in order to meet Mr. Landis's November 26, 2012 revised estimate, Mr. Roskos never clearly testified that either such amount was ever actually produced in reliance on these estimates. N.T. 1: 201-210.

implied duty of good faith. The Defendants, in response, point out that, even if there is this implied duty of good faith in the performance of the Contract, this implied duty cannot be employed to change an express Contract term. That is to say, this implied duty of good faith cannot change the Defendants' express commitment to take only their coal requirements from Kobin into some type of commitment to take Defendants' estimated requirements. We agree with the Defendants.

In Agrecycle, Inc. v. City of Pittsburgh, 783 A.2d 863 (Pa. Cmwlth. 2001), Commonwealth Court noted that the implied duty of good faith is recognized in Pennsylvania only in limited situations:

> More specifically, the duty of good faith may not be implied where (1) a plaintiff has an independent cause of action to vindicate the same rights with respect to which the plaintiff invokes the duty of good faith; (2) such implied duty would result in defeating a party's express contractual rights specifically covered in the written contract by imposing obligations that the party contracted to avoid; or (3) there is no confidential or fiduciary relationship between the parties.

Id. at 867. The contract at issue in Agrecycle provided that the plaintiff would collect compostable materials from various city facilities, compost those materials, and sell the compostable materials to third parties for profit. The contract specifications included an annual estimate based on a prior year's output that between 20,000 and 30,000 tons of compostable materials would be produced, but also expressly disclaimed that any quantity of compostable materials was guaranteed or would be produced. The Contract provided that the city would pay Agrecycle certain fees based on the quantity of compostable materials delivered and Agrecycle would pay the city a percentage of its profits from the ultimate sale of the composted materials. Over the course of the contract term, the city produced substantially less than the annual estimate of compostable materials, an average of approximately 2,300 tons per year, and Agrecycle alleged that the city breached its implied duty of good faith and fair dealing. The Commonwealth Court declined to find that the city had an

implied duty based on the contract's estimates, holding that to do so would be "in total disregard of the unambiguous language" in the contract where the city expressed that it was not guaranteeing that the estimated quantity of compostable materials would actually be produced. Id. at 868.

We conclude that Agrecycle provides controlling authority in the instant case. As was the case with the city's estimated annual production in Agrecycle, the Defendants here provided an estimate of the quantity of coal which might be expected to satisfy the actual requirements of SCI-CH, but also expressly provided that no quantity was guaranteed and that the Contract was for the facility's actual coal requirements only. Accordingly, we find that the implied duty of good faith cannot be employed here to change a Contract term (i.e. the Defendants' commitment to take only their actual coal requirements from Kobin) into a commitment to take Defendants' estimated coal requirements.

B. Although the Plaintiffs do little more than note its existence in their briefing, they do also reference the "good faith" performance mandate in the Pennsylvania Uniform Commercial Code (the "PA UCC") as applicable to the case at hand. In response, the Defendants appear first to contest the basic applicability of this provision to the Contract here at issue. They also assert, in the alternative, that this duty of good faith, imposed by the PA UCC at Section 2306(a) (13 Pa.C.S. § 2306(a)) can only be applied to preclude unreasonably large demands made on a requirements contract. The Defendants also suggest that there has been no explicit waiver of sovereign immunity by the General Assembly concerning the applicability of the PA UCC to Commonwealth contracts.

We find the last assertion by the Defendants to be wholly without merit. Section 1702(b) of the Procurement Code (61 Pa.C.S. § 1702(b)) expressly waives sovereign immunity for claims brought against Commonwealth agencies in accordance with Section 1712.1 relating to contract

controversies. Section 1712.1 authorizes claims "arising from a contract entered into by the Commonwealth" without regard to any statutory applications to the language of the contract. Moreover, we note the Pennsylvania Procurement Code, which encompasses the Board's enabling provisions, also expressly states that the PA UCC is applicable and supplementary to the Procurement Code. See 61 Pa.C.S. § 104.

We also disagree with the Defendants' suggestion that Section 2306(a) of the PA UCC only applies to prevent unreasonably large product demands. This section addresses requirements contracts as follows:

> (a) **Quantity measured by output or requirements.--**A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded. [quote § 2306 here].

13 Pa.C.S. § 2306(a).

While many of the cases do use this provision to curb unreasonably large demand for a product, the plain language of Section 2306 goes both ways. See also: Paramount Litho. Plate Serv. V. Hughes Printing Co., 2 Pa. D. & C. 3d 677 (C.P. Phila. 1977). However, we do read Section 2306 to require good faith in determination of the buyer's actual requirements, not in making gratuitous estimates. There is no evidence in this case that the Defendants' actual requirements for coal were not determined in good faith, and the gratuitous estimates provided by the Defendants did not act to change the Defendants' actual requirements for coal at SCI-CH.

Although there is also a general duty of good faith in the performance of a contract subject to the PA UCC found at Section 1304 (13 Pa.C.S. § 1304), we believe the specific provision relating to requirements contracts (Section 2306) controls over the general good faith requirement

at Section 1304 under the circumstances of this case. Moreover, we once again conclude that the duty of good faith cannot be applied to change the explicit terms of the Contract. See e.g. Hanaway v. Parkesburg Group, LP, 168 A.3d 146, 157 (Pa. 2017)(Breach of duty of good faith under the UCC does not create a separate cause of action). These terms specifically require only that DGS take, and Kobin provide, DGS's actual requirements for coal at SCI-CH, which the evidence indicates was, in fact, done.

Finally, we do not see the evidence as supporting a claim for lack of good faith on the part of DGS or DOC as a matter of fact. Although we believe Mr. Landis's estimate of 9,500 ton was made arbitrarily (without factual support) it is clear to us he was motivated by a good faith desire to keep Kobin apprised of the circumstances at SCI-CH as best he could.[24] Moreover, while DOC coal requirements estimates were incorrect, Plaintiffs have not provided the Board with sufficient evidence to establish their coal usage estimates were made in bad faith. Accordingly, we see no breach of the Contract for a failure of either an implied duty of good faith or of the statutory duty of good faith imposed on the Contract by the PA UCC.

2. Damages – Count III

Under Pennsylvania law, in order to recover damages on a breach of contract claim, the plaintiff must prove such damages with reasonable certainty. That is to say, damages need not be determined with mathematical certainty, but only with reasonable certainty; and the evidence of damages may consist of probabilities and inferences. However, sufficient facts must be introduced to allow a court to arrive at an intelligent estimate without conjecture. See e.g. Spang & Co. v. U.S. Steel Corp., 545 A.2d 861, 866-867 (Pa. 1988); A.G. Cullen Constr. Inc., 898 A.2d at 1174;

[24] Facts necessary to support a finding of constructive fraud are not necessarily sufficient to support a finding of bad faith. Lichtenstein v. Kidder, Peabody & Co., Inc., 777 F.Supp. 423, 428 (W.D. Pa. 1991).

J.W.S. Delavau, Inc. v. Eastern America Transp. & Warehousing, 810 A.2d at 685-686. Damages are not recoverable if they are too speculative, vague or contingent to be ascertained with reasonable certainty. Spang, 545 A.2d at 866 (citing Restatement (Second) of Contracts, § 352); See also Scobell, Inc. v. Schade, 688 A.2d 715, 719-721 (Pa. Super. 1997). It is also well established that one who suffers a loss due to breach of contract has a duty to make reasonable efforts to mitigate damages. Delliponti v. Deangelis, 681 A.2d 1261,1265 (Pa. 1996); Bafile v. Borough of Muncy, 527 Pa. 25, 588 A.2d 462, 464 (1991).

The Plaintiffs base their claim for damages at Count III on the revised estimated coal requirement of 9,500 tons for SCI-CH communicated to Kobin by DGS's George Landis on November 26, 2012. In their Complaint, Plaintiffs provide a "lost profits" calculation for this and arrive at $622,250. However, at hearing, Hazleton Shaft's George Roskos set forth the claim for both Plaintiffs with respect to the 9,500 ton estimate in the amount of $525,847 (excluding interest), which represents the difference between the Contract price ($183 per ton) less trucking costs ($12.50 per ton or $170.50 per ton net) for the 9,500 tons not ordered by DGS ($1,619,750) reduced by the amount that Mr. Roskos testified Hazleton Shaft was able to realize from the ultimate sale of 9,500 tons in 2014 ($1,093,903).[25]

However, even if we were to find a breach of the Contract here at issue, we encounter problems in trying to quantify Plaintiffs' damages on the evidence presented. For one thing, the mistaken representation on November 26, 2012 that SCI-CH still expected to use 9,500 ton for the Contract Period was corrected at the January 22, 2013 meeting, and we simply do not see adequate

[25] This latter calculation, which appears based on gross sales (reduced only by trucking costs) begs the question of why production costs are not also deducted to arrive at a lost profit number and then reduce this by the profit attributable to mitigation by subsequent resale. Plaintiffs have not persuaded the Board this discrepancy is justified.

evidence from which to ascertain what damages Plaintiffs' suffered during the time period this misrepresentation was in effect. Furthermore, based on the evidence provided, it would appear that the Plaintiffs had an opportunity to mitigate their claimed damages by attempting to sell any Barley coal that was stockpiled beginning in January 2013 rather than waiting until April, May or June of 2013 when the market, in their words, "collapsed" but failed to act on this opportunity. Because the Plaintiffs did not act to mitigate damages by attempting to sell any such stockpiled coal promptly after the January 22, 2013 meeting, we find this to be an additional unknown in any attempt to arrive at a damages amount owing to Plaintiffs without engaging in speculation or conjecture.

Having found insufficient factual bases for the Plaintiffs' claim on the theory of constructive fraud; no breach of the July 11, 2012 Contract for a failure of either an implied duty of good faith or of the statutory duty of good faith imposed on the Contract by the PA UCC; and insufficient evidence to calculate Plaintiffs' damages with reasonable certainty in any event, it is unnecessary to address the issue of whether or not Hazleton Shaft is an intended third-party beneficiary of the Contract. Accordingly, the following Order shall issue.

ORDER

AND NOW, this 2nd day of April, 2018, it is **ORDERED** and **DECREED** that judgment of **NO AWARD** is entered in favor of Defendants, Department of General Services and Department of Corrections, and against Plaintiffs, Kobin Coal Corporation and Hazleton Shaft Corporation.

BOARD OF CLAIMS

OPINION SIGNED

_____
Jeffrey F. Smith
Chief Administrative Judge

OPINION SIGNED

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