

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BINKS MANUFACTURING COMPANY,  
Plaintiff,

v.

THE BEDWELL COMPANY, and  
SAFECO INSURANCE COMPANY OF  
AMERICA,  
Defendants.

Civil Action  
No. 96-2554

OPINION

**Gawthrop, J.**

**July 29, 1997**

The plaintiff, the Binks Manufacturing Company ("Binks"), has brought breach of contract and quantum meruit claims against the Bedwell Company ("Bedwell") and a surety bond claim against Bedwell's surety, Safeco Insurance Company of America ("Safeco"), arising from the subcontract between Binks and Bedwell for work on the C.I. Berridge Shop Renovation Project for the Southeastern Pennsylvania Transportation Authority ("SEPTA"). Bedwell has brought counterclaims sounding in contract and tort. I have already granted summary judgment in favor of Binks on two claims uncontested as to liability. Upon the following reasoning, I find that Binks has proved its claim for additional engineering costs, but that it has not proved any of its other claims. Further, I find that Bedwell has proved its claim that Binks owes it a credit because of the redesign, two of

its claims that Binks's conduct caused Bedwell to modify work it had already done, and its claim that Binks tortiously interfered with Bedwell's existing contractual relations with SEPTA. I find, however, that Bedwell has not proved its other claims.

### **I. Findings of Fact**

Binks, an Illinois corporation, has its principal place of business in Franklin Park, Illinois. Bedwell, a Pennsylvania corporation, has its principal place of business in West Chester, Pennsylvania. Safeco, a State of Washington corporation, has its principal place of business in Seattle, Washington. The amount in controversy exceeds \$50,000.

Bedwell entered into a contract with SEPTA to act as the general contractor on the C.I. Berridge Shop Renovations and Modifications to HVAC Systems project, also known as SEPTA Project 453.

The project included the construction of two paint spray booths capable of handling SEPTA's buses. The contract specified Sunkiss equipment or its equivalent.

Bedwell received bids from multiple contractors for the construction and installation of two paint spray booth systems. Binks submitted a bid of \$2,675,910, but Spray Booth Systems, Inc., submitted a far lower bid. Bedwell attempted to accept Spray Booth Systems' lower bid. Spray Booth Systems, however, could not secure Sunkiss equipment from Binks because Binks would not sell its equipment for installation by others. Spray Booth

Systems tried to substitute other equipment, but SEPTA rejected the proposed substitute equipment.

Thereafter, Bedwell subcontracted with Binks to provide and install two paint spray booth systems in a new building to be constructed as part of SEPTA Project 453.

The subcontract, dated December 13, 1993, provided for compensation to Binks of \$2,475,910. The parties arrived at this figure after negotiations in which Bedwell refused to pay Binks's full bid price. This price related to the paint spray booths as originally designed.

Beginning in September of 1993, Binks informed SEPTA that it had proposals for a redesigned exhaust system that it thought superior to the exhaust system contained within the original plan. Binks proposed the redesign after it had determined that the vane axial fan construction contained within the original plan would prove too costly.

In December of 1993, Binks submitted plans to SEPTA for a redesigned exhaust system. SEPTA authorized this redesign on January 12, 1994. On January 17, 1994, Bedwell instructed Binks to proceed with the redesign.

Under the original design, large fans would have sucked the exhaust air down into below-grade pits and then forced the air up through high exhaust stacks.

Under the redesign, however, the exhausted air travels directly up through shorter stacks. The redesigned exhaust system benefits not only from a more direct air flow and shorter,

less expensive exhaust stacks, but also from fewer exhaust duct elbows, smaller fans, and lower horsepower fan motors.

Additionally, SEPTA can service this essentially above-grade system more easily than it could have serviced the below-grade elements of the original design.

Both parties acknowledge that the redesign significantly modified the original scope of work and the subcontract between them. They contest, however, the effect the redesign had on cost.

Despite the simplified design, Binks estimated that the redesign would cost more to construct than the original, more complicated design. Binks submitted three additional charge claims to Bedwell. Bedwell then passed these claims along to SEPTA. On February 4, 1994, Binks made a backcharge claim of \$12,000 for additional engineering services ("BC-1"). On May 20, 1994, it made a backcharge claim of \$31,643 for structural work on the four air exhaust stacks ("BC-2"). Finally, on July 19, 1994, it claimed \$179,059 for upgrades to the exhaust stacks and exhaust elbows ("BC-3").

Bedwell, on the other hand, estimated that the redesign would cost less for Binks to construct than the original design would have cost. Bedwell has withheld \$158,568.27 that it would have owed Binks had Binks satisfactorily performed work according to the original design. Bedwell claims that it deserves a \$218,370.21 credit from Binks with respect to the original subcontract price because of the redesign. In other words, it

asserts that Binks owes it an additional \$59,801.94 because of the redesign. This figure does not include other claims between the parties.

During the Summer of 1994, Bedwell and SEPTA disputed several significant issues, including the amount Bedwell should credit SEPTA for the simplified exhaust system.

On June 6, 1994, Robert Stiltner, the SEPTA project engineer, requested that Bedwell submit detailed cost breakdowns for the redesign. Pursuant to this request, Randy White, Bedwell's project manager, wrote James O'Toole of Binks to obtain such breakdowns. Binks did not provide the breakdowns.

By June 23, 1994, the disputes between Bedwell and SEPTA had reached an impasse. SEPTA informed Bedwell that it would terminate Bedwell in ten days if it did not correct what SEPTA regarded as breaches of the prime contract.

As part of its effort to placate SEPTA and avoid termination, Bedwell offered SEPTA a credit of \$150,000 for the redesign. SEPTA refused this offer and stated in its letter of June 30, 1994, that it would accept nothing less than a \$175,000 credit. On July 5, Bedwell acceded to the \$175,000 credit.

On July 12, 1994, Ron Kawa of Binks wrote Thomas Bedwell, president of Bedwell, to express Binks's concerns about the project. He noted that "SEPTA's rejection of the Binks' claim for extra money for these design changes[] concerns us as to the scope of their specification." Binks continued to press for approval of its additional cost claims.

On July 22, 1994, Mark Bedwell of Bedwell wrote Mr. Kawa about the additional cost claims. Mr. Bedwell informed him that "SEPTA stated from the outset of the negotiations that they would not approve any additional costs for Binks" and "that Bedwell would not approve any additional monies to Binks for this work." Bedwell agreed to present Binks's most recent claim, BC-3, to SEPTA on the understanding that "Binks currently is not due any additional monies from Bedwell for the redesign changes" and that "Binks shall be entitled to such additional compensation only when, if and to the extent Bedwell recovers an extra for such work from SEPTA (exclusive of C.O.P. [change order proposal #12])[the \$175,000 credit to SEPTA]."

On August 15, 1994, Bedwell submitted BC-1 through BC-3 to SEPTA for approval. Mr. Mark Bedwell wrote that "[b]ased upon SEPTA's representations that Binks was not entitled to any additional monies for the COP #12 work, Bedwell had previously agreed to accept a \$175,000 credit."

On August 17, 1994, SEPTA issued Change Order No. 2 and sent it to Bedwell for its approval. The letter attached to the order stated that the \$175,000 credit included a charge to SEPTA for \$12,600 (\$12,000 plus a five percent general contractor's markup) for Binks's additional engineering fees claim.

On August 25, 1994, Joseph Marchese of SEPTA wrote Mr. Mark Bedwell about SEPTA's position regarding Binks's additional cost claims. He stated that SEPTA had agreed to \$12,600 for

additional engineering fees and \$63,792.53 for steel supports on the exhaust stacks.

Bedwell thought Binks's claims constituted no part of the \$175,000 credit contained within the order. On September 14, 1994, Bedwell informed SEPTA by letter that it would not accept Change Order No. 2 as described in SEPTA's August 17 and 25 letters. It returned the order unsigned.

SEPTA proceeded with Change Order No. 2 unilaterally. Binks and Bedwell have never agreed on any price for the BC-1, BC-2, or BC-3 claims.

Binks has presented evidence of its actual costs for BC-1, the additional engineering fees claim. Binks spent \$34,670.50 for engineering services provided by Gannett Fleming, Inc. Michael Lee of Gannett Fleming wrote that "[t]hese services were provided relative to the structural changes associated with the simplification of the paint booth ventilation system as proposed to SEPTA through Bedwell in December of 1993."

Binks has not presented evidence of its actual costs for the BC-2 and BC-3 claims. Binks could have calculated its actual costs for the manufacture of equipment pursuant to the redesign using time cards kept by workers in its facilities. It has destroyed these cards, however. Binks has instead presented only internally-generated cost estimates to substantiate its BC-2 and BC-3 claims.

Binks presented unpersuasive estimates of the costs it had incurred and of the costs it would have incurred under the original design.

Binks had its field installation subcontractor, I.D. Griffith, bid on installation costs using Sketches A and B, which depicted the redesign, rather than the original plan's documents. Binks consequently could not estimate any field installation cost savings related to the redesign, despite the redesign's simplified construction.

Binks's witness James O'Toole gave trial testimony that at times contradicted his deposition testimony. For example, in his deposition, Mr. O'Toole stated that he had received the estimates from Binks's industrial division. At trial, however, he stated that he had estimated the costs personally. Further, in his deposition, he stated that the May 20, 1994, letter relating to BC-2 contained errors about the number of fans, but he did not acknowledge any errors at trial.

Binks's BC-2 and BC-3 claims both include additional costs estimates for the same exhaust duct elbows. The estimates, however, differed in cost.

Binks's BC-2 claim does not include credits for certain deleted work, such as stack work and duct work. It contains inflated prices for vane axial exhaust fans and support structures for the stacks. It includes a price for acoustic cones that it never installed.

Binks has repeatedly changed its estimate of the value of its BC-3 claim. In its letter of July 19, 1994, it claimed \$114,557 in additional costs for exhaust elbow ducts and stacks because of the redesign. In its Pretrial Memorandum of January 9, 1997, it valued the claim at \$41,657. On January 27, 1997, it increased this estimate to \$92,913.63. At trial, Mr. O'Toole reasserted the \$114,557 value claimed in the July 19 letter. Later, Binks's witness Richard Brend performed an extremely perfunctory estimate while on the stand and calculated \$60,436 in additional costs. In its Proposed Findings of Fact, Binks changed the value once again, arriving at a figure of \$86,936, and stated that it had claimed \$102,296 in July of 1994. Additionally, it has on occasion failed to differentiate the value of this claim from the values of the BC-1 and BC-2 claims.

Mr. Brend ignored certain contract documents in making his estimate. For example, the original design required free-standing stacks. Mr. Brend's estimate of the cost of the original design, however, included stacks constructed of lighter material and supported by guy wires. Physical calculations performed by Mr. Thomas Bedwell established that stacks constructed of the light-gauge material Binks claimed would have buckled under their own weight. Binks would have had to have used the more substantial material in constructing the original design's stacks that it used in the redesign's stacks. In other words, Binks literally claimed that shorter stacks cost it more

to build than otherwise virtually identical taller stacks would have.

Mr. Brend's estimate of the redesign's cost included inflated transportation charges.

Binks did not establish that the four elbows it actually used had cost more to build and install than the eighteen elbows it would have had to have used in the original design.

Binks's deduction credit included centrifugal fan motors that did not meet specifications. The motors credited Bedwell would have generated only one-half the horsepower required.

Mr. Brend's estimate did not include deductions for turning vanes that the original design would have required.

Because of delays caused by the redesign, Bedwell instructed Binks not to proceed with equipment installation as originally planned. Binks consequently had to store this equipment following manufacture but prior to installation. Because of SEPTA's restrictions on on-site storage, Binks had to store one of the paint spray booths ("BC-4") and other sundry equipment ("BC-5") off site.

Binks originally claimed as part of BC-5 that I.D. Griffith had brought a \$50,000 inefficiency claim against it. I.D. Griffith had never made such a claim.

Bedwell attempted in December of 1995 to audit Binks's records to confirm the additional cost claims. Binks refused to

cooperate with the audit in the absence of a confidentiality agreement. The subcontract contains no mention of a confidentiality agreement as a condition precedent to an audit. Bedwell refused to agree to the additional condition. Bedwell, through its accountant, Albert Pritchard, C.P.A., and Mr. Pritchard's assistant, eventually visited Binks's Franklin Park offices to conduct this audit. Mr. Pritchard could speak with no one other than Mr. O'Toole. Binks substantiated only its BC-1 claim and stated, in a written form, that it could not provide more documentation of its claims because of "intense activity in Binks' accounting departments because of annual inventory and fiscal year end as of November 30." This note represented that Binks would send more information "as soon as reasonable" if Bedwell so requested. Mr. Pritchard requested more information, but never received it.

Prior to trial, Bedwell admitted liability to Binks for additional costs related to the air make-up unit support structure ("BC-6") and the installation of tempered glass in place of wire safety glass ("BC-11"). Consequently, I granted summary judgment to Binks on these two claims.

Bedwell admitted liability of \$5,199.18 with respect to BC-6 and \$8,387.82 with respect to BC-11, the amounts claimed in Binks's Motion for Partial Summary Judgment. Binks has failed to prove greater costs related to these claims.

Binks has not proved that SEPTA had approved a markup for any extra-cost claims.

The subcontract requires Binks to submit a schedule of values to Bedwell breaking down its costs. Binks submitted this schedule. The schedule does not identify overhead and profit as individual factors. Instead, it apportions overhead and profit among other cost factors.

Unlike Binks, Bedwell provided documentation to substantiate its cost estimates. Bedwell relied heavily on Binks's schedule of values, submitted to Bedwell as part of the subcontract, and Binks's unit costs. Bedwell also included a quote from Chicago Blower Corporation and a purchase order to Process Resources, Inc.

The redesign included multiple deletions from Binks's original scope of work. I find the following total costs related to these deletions:

- a. Centrifugal fans at a cost of \$53,287.
- b. PB-1 (paint booth one) and PB-2 (paint booth two) exhaust duct plenums at a cost of \$16,825.30.
- c. PB-1 and PB-2 intake and exhaust ducts at a cost of \$48,327.88.
- d. Turning vanes at a cost of \$6,258.
- e. Reinforced stack bases at a cost of \$11,580.
- f. Fresh air supply recirculation duct system to the paint curing system at a cost of \$76,014.
- g. Recirculating and exhaust fans at a cost of \$58,539.44.

h. Exhaust ties into the stacks and related duct work at a cost of \$27,840.

i. Air make-up duct at a cost of \$7,224.

j. Stack sleeves at a cost of \$2,500.

k. PB-1 and PB-2 stacks at a cost of \$117,000.

The redesign also involved work not included in Binks's original scope of work. I find the following total costs related to these additions:

a. PB-1 and PB-2 stacks at a cost of \$71,370.

b. Mounting rings at a cost of \$4333.28.

c. Stack support structures at a cost of \$47,889.20.

d. Axial exhaust fans at a cost of \$40,011.80.

e. Dampers/actuators at a cost of \$16,070.80.

f. Exhaust elbows at a cost of \$29,584.88.

The deletions total \$425,395.62 and the additions total \$209,259.96. Therefore, the redesign resulted in cost savings to Binks of \$216,135.66.

Bedwell's calculations neither subtracted nor added overhead and profit as individual factors.

Bedwell performed work for SEPTA under its contract with SEPTA. Change Order No. 2 rendered some of this work superfluous, and forced Bedwell to modify other elements of work it had already performed.

Binks contacted SEPTA directly about payment disputes it had with Bedwell. On July 7, 1994, Mr. Kawa wrote Mr.

Stiltner asking for a meeting with SEPTA to discuss "payments for [their] material delivered to the job site."

On July 11, 1994, Joseph Marchese of SEPTA replied to Mr. Kawa's letter. Mr. Marchese related that "[w]hile SEPTA understands your concerns, The Authority has no contractual arrangement with Binks."

On July 13, 1994, Mr. White wrote Mr. Kawa about Binks's July 7 letter. The letter stated that "Binks' referenced letter to SEPTA was inappropriate, irregular and an unacceptable subcontract practice." In a July 28, 1994 letter, Mr. Mark Bedwell again objected to Binks's direct communications with SEPTA.

On October 14, 1994, Philip Croessmann of Kasimer & Ittig, counsel for Binks, wrote Mr. Marchese, stating that "[a]n agreement by SEPTA to issue joint checks would go along way to assuring Binks that they would be paid what is owed them on this project in a timely manner."

On November 17, 1994, Mr. Kawa wrote Mr. Stiltner about an invoice Bedwell had not paid Binks despite a recent payment by SEPTA to Bedwell. He asked that "this payment to Bedwell be postponed pending a resolution of this issue."

Binks also raised payment issues with SEPTA at meetings among SEPTA, Binks, and Bedwell. Binks threatened to stop work if Bedwell did not agree to its demands.

Mr. Stiltner of SEPTA stated in his deposition that the dispute between Binks and Bedwell had caused SEPTA to withhold payment from Bedwell.

Because of Binks's communications with it, SEPTA withheld \$253,280 from Bedwell from November of 1995 until January of 1997.

SEPTA's retaining payment became due on November 1, 1995. It released the payment on January 30, 1997, after Bedwell agreed to drop its third-party complaint against the authority. This delay cost Bedwell \$18,983 in interest.

Binks has net annual sales of \$243,000,000 and a net stockholder's worth of \$90,227,554.

## **II. Discussion**

### **A. Binks's Claims**

Binks claims generally that a redesigned spray-paint-booth exhaust system cost more to manufacture and erect than the original exhaust system would have cost. SEPTA approved the redesigned exhaust system after Binks and Bedwell had entered into a contract for two paint spray booths utilizing the original design. In particular, Binks makes five claims for backcharges, denominated BC-1 through BC-5, against Bedwell. Bedwell has already admitted liability for two other backcharge claims, BC-6 and BC-11, and I have granted Binks summary judgment on these claims. Additionally, Binks demands payment of the original subcontract's entire sum. Bedwell has not paid \$158,568.27 that

it would have owed under the original contract because it claims a credit for the redesign. Binks also makes a restitution claim against Bedwell and a surety bond claim against Safeco for amounts Bedwell may owe Binks. I examine these claims in order below.

**1. BC-1**

Binks first asserts that it should receive an additional \$12,000 for engineering work performed by its subcontractor, Gannett Fleming, because Bedwell agreed to pay it this amount. Bedwell replies that it never agreed to pay Binks \$12,000 for this engineering work. I conclude that Binks has not proved that Bedwell agreed to pay it an additional \$12,000 for engineering expenses.

I must first determine the applicable contractual provision. Article 4 of the subcontract provides that SEPTA may change the scope of work by issuing orders to Bedwell. It also states that Bedwell may order Binks to make additions, deletions, or other revisions to the work, with corresponding adjustments to the contract price and the time permitted for completion. Exhibit V of the subcontract, "Modification to Standard Form Agreement between Contractor and Subcontractor," includes a provision at Article K for "Change Orders, Additions and Deductions."<sup>1</sup> Article K provides that Binks represents that it

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1. Article K reads in full:

(continued...)

requires no change orders or extras to complete its scope of work

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1. (...continued)

CHANGE ORDERS, ADDITIONS AND DEDUCTIONS (SUPPLEMENT)

Subcontractor [Binks] acknowledges and agrees that, based on its review of the Contract Documents and its inspection of the site, its portion of the work, as set forth in this subcontract, will result in a complete Down-draft Spray Type Booth System including all related accessories, that no change orders or extras are required to produce that result, and the Contract Sum has been agreed upon on that basis. Subcontractor therefore further agrees that, in order to avoid disputes and protect Bedwell from improper claims for extras, it will not perform any work which it believes is outside the scope of this subcontract without the prior written order of Bedwell. If the Owner [SEPTA] determines that work which the Subcontractor contends is an extra is in fact part of that portion of the contract to which the Subcontractor's work applies, then the Subcontractor will promptly proceed with that work. If the Subcontractor thereafter asserts a claim for additional compensation for such work, he shall be entitled to such additional compensation only when, if and to the extent Bedwell recovers an extra for such work from the Owner. Bedwell shall reasonably cooperate with the Subcontractor in the prosecution of such a claim against the Owner, provided that all costs and expenses of any such proceeding shall be borne by the Subcontractor.

If the parties agree in advance upon a price for work which Bedwell and the Owner agree is extra work, that price shall be the sole and exclusive amount payable to Subcontractor for such work.

If the parties cannot agree upon a price for such work, and if Bedwell nonetheless gives Subcontractor a written order to proceed with such work, Subcontractor shall be entitled to its actual labor and material costs for performing such work, plus such mark ups as are approved by the Owner, which shall be the exclusive compensation payable for such work. Provided, however, that Subcontractor shall not be entitled to recover for labor costs unless it shall maintain and furnish to Bedwell, on a daily basis, records documenting the hours expended by the individuals and the task(s) performed by each. Subcontractor's failure to do so shall absolutely bar any claim for any hours not so documented. In addition, Bedwell shall have the right to audit Subcontractor's records to verify and document all elements of the Subcontractor's claim. Subcontractor's failure to provide access to records and cooperate with Bedwell in the audit shall absolutely bar any claim for any expenses not confirmed by Bedwell's own audit.

and that it shall "not perform any work which it believes is outside of the scope of this subcontract without the prior written order of Bedwell"(emphasis in original). Article K allows Binks to recover for claimed extras only to the extent that Bedwell recovers from SEPTA for them. Further, if the parties agree in advance on a price for work that "Bedwell and [SEPTA] agree is extra work, that price shall be the sole and exclusive amount payable to [Binks] for such work." If the parties cannot agree on a price, then Binks may recover its "actual labor and material costs for performing such work, plus such mark ups as are approved by [SEPTA]." Under the latter circumstances, Bedwell has a right to audit Binks's records. Binks's failure to document its costs at Bedwell's audit bars "any claim for any expenses not confirmed by Bedwell's own audit."

Article K makes no explicit reference to the pricing of change orders, as opposed to extras, such as the change order that modified the original design and gave rise to this dispute. Binks did not start performing the original scope of work, then find a condition that rendered performance considerably more burdensome than anticipated, and request additional compensation to complete the original design. Rather, it proposed a revised design that SEPTA eventually accepted that involved both deletions from, and additions to, the original scope of work.

Under Pennsylvania law, which governs this diversity case under Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), a

contractual ambiguity exists only if the court could reasonably understand language to have more than one meaning. See Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 614 (3d Cir. 1995)(quoting Samuel Rappaport Family Partnership v. Meridian Bank, 441 Pa.Super. 194, 657 A.2d 17, 21 (1995)).

One could reasonably read the pricing clauses of Article K to include change orders or not. That is, Article K deals with change orders, additions and deductions. The pricing clauses, however, refer to "extra work," not to change orders or additions. One could interpret "extra work" to mean an addition, where the subcontractor must spend additional money to complete the original design, but not a change order, where the owner changes the original scope of work. Therefore, an ambiguity exists. Nevertheless, Binks itself relies on Article K for its BC-1 and BC-2 claims to the extent the article provides that Binks may recover a negotiated price for extra work. Binks has never contended that BC-1 and BC-2 constitute costs needed to complete the original design because of unforeseen difficulties. Instead, it asserts these claims represent the cost difference between the redesign and the original design. It never argued, for example, that Bedwell could not audit its books under Article K because the article applies only to additions and not to change orders. Bedwell's conduct also suggests the parties intended the pricing clauses to apply to change orders. It relied on the clauses when it presented Binks's backcharge claims to SEPTA and attempted to audit Binks's costs. Therefore, I find that the

parties intended Article K's pricing provisions to apply to all work outside the original scope of work.

Binks's \$12,000 claim for BC-1 depends wholly on an alleged agreement between Bedwell and it to price additional engineering fees at that figure. Binks contends that Bedwell agreed to this price when it agreed to give SEPTA a total credit of \$175,000 for the redesign. See N.T of Feb. 11, 1994, at 98-100. In particular, Binks cites an August 17, 1994, letter from SEPTA to Bedwell in which SEPTA stated that the \$175,000 credit to SEPTA included a \$12,600 charge to SEPTA for Binks's additional engineering fees. See id. at 101; Pl. Exs. 7, 7A. The \$600 represents Bedwell's five-percent general contractor's markup.

Binks has not proved that Bedwell agreed to pay it an additional \$12,000 for engineering expenses. The plaintiff must prove a contract's existence by a preponderance of the evidence. See Viso v. Werner, 471 Pa. 42, 46, 369 A.2d 1185, 1187 (1977). Here, Binks needed to show that Bedwell and it had agreed on a price for the added work and that SEPTA approved it as extra work. Binks, however, presented no evidence of an agreement beyond SEPTA's understanding that the \$175,000 credit included offsets for Binks's backcharges. It put no written agreement into evidence. It presented no correspondence between Bedwell and it indicating an agreement. Nor did it present testimony that the parties had agreed orally to a \$12,000 price. Binks simply failed to prove its point.

Binks presented evidence that SEPTA thought that Bedwell had agreed to prices for the BC-1 and BC-2 claims. None of this evidence suggests that Bedwell actually agreed to prices for either claim. On July 5, 1994, Bedwell agreed to credit SEPTA \$175,000 for the redesign as part of a negotiated settlement to avoid threatened termination. See N.T. of Feb. 14 at 17-18. Bedwell clearly indicated to SEPTA that this credit included no allowance for Binks's backcharge claims. In his letter of August 15, 1997, to Robert Stiltner of SEPTA, Mark Bedwell agreed to present Binks's most recent claim, BC-3, to SEPTA on the understanding that "Binks currently is not due any additional monies from Bedwell for the redesign changes." Def. Ex. 58. "Binks shall be entitled to such additional compensation only when, if and to the extent Bedwell recovers an extra for such work from SEPTA (exclusive of C.O.P. [change order proposal] #12)[the \$175,000 credit to SEPTA]." Id.; N.T. of Feb. 14 at 23. Mr. Bedwell wrote that "Bedwell [had] advised Binks that Binks would not be paid any additional monies for Binks' claims BC#1 and BC#2 by Bedwell." Def. Ex. 58. Bedwell refused to sign Change Order No. 2 given SEPTA's apparent understanding of it, and SEPTA subsequently imposed the change unilaterally. See N.T. of Feb. 14 at 26. Binks has presented little more than evidence of a third party's subjective understanding of an agreement that the third party thought existed.

Binks next contends that it should recover \$4,670.50 as the difference between the amount it budgeted for engineering

expenses under the original design and amount it paid Gannett Fleming under the redesign. Bedwell asserts that the claim should fail because Binks's documentation does not distinguish between costs related to the redesign and costs related to unchanged aspects of the original design. I find that Binks spent an additional \$4,670.50 on engineering fees because of the redesign.

As I shall hold below in discussing BC-3, the subcontract permits Binks to recover costs incurred for work performed outside the original scope of work if it demonstrates its actual costs. Binks provided Bedwell's auditor, Albert Pritchard, with documentation of its engineering costs. See N.T. of Feb. 14 at 173. According to the evidence, Binks spent \$34,670.50 for engineering services provided by Gannett Fleming. Michael Lee of Gannett Fleming wrote that "[t]hese services were provided relative to the structural changes associated with the simplification of the paint booth ventilation system as proposed to SEPTA through Bedwell in December of 1993." Def. Ex. 22. Consequently, the evidence demonstrates that the additional \$4,670.50 in engineering fees related to the redesign. Further, the original \$30,000 estimate appears reasonable in light of the evidence. Therefore, Binks has proved it spent an additional \$4,670.50 for engineering costs attributable to the redesign.

## 2. BC-2

Binks claims that Bedwell agreed to pay it \$31,643 for structural work on the air exhaust stacks. I have already rejected the contention that Binks and Bedwell agreed to a price for work performed according to the redesign, and I need not revisit that issue here.

I find further that the subcontract bars this claim because Binks has not maintained its cost records. By its own admission, Binks has not maintained actual cost records to document its BC-2 claim. The evidence established that Binks's employees completed labor activity cards that would have permitted it to calculate these costs, but that it has destroyed these cards in the ordinary course of business. See N.T. of Feb. 12 at 144; Feb. 13 at 18, 82. As I shall hold below in discussing BC-3, the subcontract requires Binks to maintain actual costs records for all work performed outside the original scope of work. Therefore, because Binks did not maintain such records, the subcontract bars BC-2.

Even if the subcontract did not bar its BC-2 claim, Binks still could not recover because it did not demonstrate that it incurred additional costs because of the redesign. Pennsylvania law permits a plaintiff who cannot quantify damages exactly to prove damages using the "total cost" method. See John F. Harkins Co. v. School Dist. of Philadelphia, 313 Pa.Super. 425, 430, 460 A.2d 260, 263 (1983). Employing this method, the plaintiff proves damages by subtracting estimated costs from

actual costs. "[B]ecause the total cost method of measuring damages is imprecise it is fraught with danger and must be applied with caution." Id. The plaintiff must demonstrate that: "(1) the nature of the particular losses make[s] it impossible or highly impracticable to determine them with a reasonable degree of accuracy; (2) the plaintiff's bid or estimate was realistic; (3) its actual costs were reasonable; and (4) it was not responsible for the added expenses.'" Id., 313 Pa.Super. at 431, 460 A.2d at 263 (quoting Boyajian v. United States, 423 F.2d 1231, 1243 (Ct.Cl. 1970)).

Binks has not satisfied three of the four elements needed to prove damages using the total-cost method. To begin with, it has not shown that the nature of its losses makes it impossible or highly impracticable to determine costs with accuracy. Rather, the evidence indicated that Binks had destroyed the records that would have allowed it to show its actual costs with a high degree of accuracy. See N.T. of Feb. 12 at 144; Feb. 13 at 18, 82.

Further, Binks has not proved that it bid realistically on the original design. For example, Binks had its field installation subcontractor, I.D. Griffith, bid using documents denoted Sketches A and B, documents that depicted the redesign, not the original design. See N.T. of Feb. 14 at 5-7. Binks used I.D. Griffith's bid in its bid on the original design. Thus, Binks could not have accurately bid the original design.

Finally, Binks has not demonstrated the reasonableness of its actual costs. In fact, it has not shown its actual costs at all. See E.C. Ernst, Inc. v. Koppers Co., 626 F.2d 324 (3d Cir. 1980)(total cost method "permits subtraction of contract cost from actual cost"). "Under the total cost method, at a minimum the plaintiff must provide some reasonably accurate evidence of the various costs involved." Id. at 328. Binks, however, presented unpersuasive estimates of the costs it had incurred. James O'Toole of Binks, who testified at trial about Binks's estimates, contradicted his deposition testimony about the value of the claim. At trial, he valued it at \$31,643, while at his deposition he had put it "[s]omewhere about [\$5000]." N.T. of Feb. 12 at 6. He also contradicted his testimony about his source for the estimate. At trial, he stated that he had prepared the estimate personally. See id. at 33-34. In his deposition, however, he said he had gotten the figure from someone in Binks's industrial division. See id. Such inconsistencies, coupled with a lack of documentation, cast serious doubt on the reliability of Binks's estimates.

### **3. BC-3**

Binks claims that the redesigned air exhaust stacks and exhaust elbows cost it at least \$41,657 more to construct than they would have cost if constructed according to the original

design.<sup>2</sup> Bedwell replies that the ordinary language of Article K requires Binks, in the absence of an agreement, to maintain actual cost records as a condition precedent to any recovery, and that Binks has failed to do so. I hold that Article K bars this claim because Binks has not maintained cost records to support it.

"Under Pennsylvania law, 'it is firmly settled that the intent of the parties to a written contract is contained in the writing itself.'" Duquesne Light Co., 66 F.3d at 613 (quoting Meridian Bank, 657 A.2d at 21). "'A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends. . . .'" Id. at 614 (quoting Meridian Bank, 657 A.2d at 21-22). A court may not "rewrite [a] contract or give it a construction that conflicts with the plain, ordinary, and accepted meaning of the words used." Lindstrom v. Pennswood Village, 417 Pa.Super. 495, 502, 612 A.2d 1048, 1051 (1992)(citing Warren v. Greenfield, 407 Pa.Super. 600, 607, 595 A.2d 1308, 1312 (1991)).

Article K of the subcontract states that Binks may recover "its actual labor and material costs for performing" work outside the scope of the original contract, plus markups that SEPTA approves. "Actual" means "existing in act or fact; real."

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2. I purposely say "at least" because of the number of times before, during, and after trial that Binks has revised its estimate of this claim.

Random House College Dictionary, at 15 (revised ed. 1984). "Labor" means "productive activity, especially for the sake of economic gain; work; toil." Id. at 747. "Material" means "the substance or substances of which a thing is made or composed." Id. at 824. Therefore, the ordinary language of the subcontract dictates that Binks maintain records of its real costs for productive activity and substances for work performed outside the scope of the original contract. In other words, if the parties cannot agree on a price for work outside the scope of the original contract, then Binks may recover only on a cost-plus basis.<sup>3</sup> Binks admits that it never reached an agreement with Bedwell on a price for this claim. It also concedes that it has not kept its actual cost records. Therefore, Article K bars the claim.

Binks seeks to avoid the bar to this claim that the plain language of Article K contains. It contends that an ambiguity exists about the scope of the actual cost provision of Article K. It asserts that this latent ambiguity exists because the article refers to labor and material costs only, whereas the subcontract at other points refers to other cost factors such as service, equipment, and storage.

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3. Construction contracts often require parties to maintain records of changes. See, e.g., United States ex rel. Carpet Boutique, Inc. v. Aetna Ins. Co., 1986 WL 15026, at \*11 (E.D. Pa. Dec. 23, 1996) ("SGA . . . followed the industry practice to require backup documentation of the change").

I reject this argument and find the article contains no latent ambiguity. Counsel for Binks at one point admitted that the article contains no patent ambiguity. See N.T. of Feb. 13 at 16. The clauses cited by Binks accomplish different purposes. They therefore do not conflict with, or contradict, one another. For example, Article 3.1.5 requires Binks to "pay for materials, equipment and labor used in connection with the performance of this Subcontract," and provide evidence to Bedwell that it has done so, but only for the purpose of verifying Binks's progress. Article K, on the other hand, concerns modifications to the subcontract. Binks has produced no evidence that the drafters of the proof of work progress clause intended it to apply to contractual modifications. See Duquesne Light Co., 66 F.3d at 616. A court should not read inapplicable provisions of a contract in such a way as to create an ambiguity where none otherwise exists. See Commonwealth Dep't of Transp. v. L.C. Anderson & Sons, Inc., 69 Pa.Cmwlth. 601, 603, 452 A.2d 105, 106 (1982)("we cannot adopt a strained interpretation of words merely to give effect to inapplicable provisions").

Additionally, to read equipment costs as outside the cost-plus provision of Article K would result in an absurdity because Binks, in the absence of an agreement, could simply state its own price for whatever equipment it furnishes. Binks would have had no incentive to negotiate a price for equipment if it had known it could simply hold out and claim whatever price it

wished for that equipment, even in the absence of any proof of costs.

Further, and related to the above, Binks's proposed reading of Article K would introduce an indefinite price term that the ordinary language avoids. The common law of Pennsylvania governs this construction contract. Prior to performance, Pennsylvania courts will not enforce agreements containing extremely indefinite price terms. See, e.g., Jennison v. Jennison, 346 Pa.Super. 47, 55, 499 A.2d 302, 306 (1985)(where parties to stock purchase agreement had agreed to agree on price but then did not agree on price, court could not enforce contract). The plain meaning of Article K, however, avoids such a problem by linking the price term to Binks's actual costs.

Binks further contends that Article K could not require the production of actual cost records; because the article deals with deletions, as well as change orders and additions, and it is impossible to provide actual costs of deletions, which of course are non-events, this argument amounts to little more than a truism. That a company cannot maintain actual cost records for work it does not perform, hardly leads to the conclusion that the parties could not have intended a cost-plus arrangement for work that in fact it does perform, outside the original scope of work.

Finally, Binks asserts that Mr. O'Toole's testimony that Article K applies only to field erection labor and materials, not all inputs, demonstrates that the parties never intended the article to require Binks to maintain cost records.

I do not find the argument persuasive. I note preliminarily that I may consider extrinsic evidence only to determine if a latent ambiguity exists. See Duquesne Light Co., 66 F.3d at 614; Raffles v. Wichelhaus, 2 H. & C. 906, 907-908, 159 Eng.Rep. 375, 376 (Ex. 1864)(parol evidence admissible only after extrinsic evidence revealed latent ambiguity). I may use extrinsic evidence only to "determin[e] "the parties' linguistic reference," such as whether "\$10,000" refers to Canadian or American dollars, or whether two ships "Peerless" exist. Duquesne Light Co., 66 F.3d at 614 (quoting Mellon Bank v. Aetna Business Credit, Inc., 619 F.2d 1001, 1011 n.12 (3d Cir. 1980)). In other words, a court may look at extrinsic evidence only to see if the parties thought that an apparently clear contractual term that refers to some object referred to different objects (e.g., different ships named "Peerless," or Canadian or American dollars). See id. (quoting Allegheny Int'l, Inc. v. Allegheny Ludlum Steel Corp., 40 F.3d 1416, 1424 (3d Cir. 1994))("a latent ambiguity arises from extraneous or collateral facts which make the meaning of a written agreement uncertain although the language thereof, on its face, appears clear and unambiguous"). If a latent ambiguity does not exist, then I may not use this evidence to engage in "an impermissible analysis of the parties' subjective intent." Id. Mr. O'Toole's testimony does not show that Binks thought a contractual term referred to one object, while Bedwell thought it referred to another. Instead, his testimony presents Binks's subjective understanding of

contractual terms' scope of application. Consequently, the testimony reveals no latent ambiguity. I may not use Mr. O'Toole's testimony to rewrite the contract. See id. at 614-15.

Additionally, Bedwell asserts that Article K requires Binks to submit records of its claim to Bedwell for auditing, if requested, or else lose any claim it may have against Bedwell. As I shall examine below with respect to BC-4 and BC-5, I agree. Because Binks did not provide records to Bedwell at the latter's audit, the audit clause bars the claim as well.

Even if the cost-plus and audit clauses did not bar the BC-3 claim, Binks still failed to prove damages under Pennsylvania law. It attempted to prove damages using the total-cost method that I described above. As above, however, Binks did not satisfy three of the four elements needed to prove damages using this method. First, it failed to demonstrate that the nature of its losses makes it impossible or highly impracticable to determine the losses accurately. The evidence showed that it destroyed work cards that would have permitted it to prove its actual costs quite accurately. See N.T. of Feb. 12 at 144; Feb. 13 at 18, 82.

Second, Binks has failed to demonstrate the reliability of its original bid. As noted above, I.D. Griffith bid on installation costs using documents that depicted the redesign, not the original design. See N.T. of Feb. 14 at 5-7. Thus, Binks could not have accurately bid on the original design.

Third, Binks has not proved the reasonableness of its actual costs. It admitted that the claim does not reflect actual costs and that it could not establish its actual costs. See N.T. of Feb. 11 at 194; Feb. 13 at 18. Further, its estimates of the claim changed repeatedly. At trial, Mr. O'Toole stood by the \$114,557 claimed in Binks's July 19, 1994, letter. See N.T. of Feb. 12 at 80-81; Pl. Ex. 10. On the other hand, Mr. Brend put the figure at \$60,436 (\$112,296 minus \$51,860). See N.T. of Feb. 13 at 24, 31. Additionally, Binks has at various times both before and after trial cited amounts that differ from Mr. O'Toole's and Mr. Brend's.

In addition, I did not find Mr. Brend's estimate persuasive. For example, Mr. Brend substantially underestimated the cost of the deleted stacks. Consequently, Bedwell should have received a considerably larger credit. The original design required free-standing stacks. See N.T. of Feb. 14 at 37-38. Mr. Brend's estimate of the cost of the original design, however, included stacks constructed of lighter material and supported by guy wires. See N.T. of Feb. 13 at 30, 54. Mr. Thomas Bedwell's calculations and Mr. Brend's admission established that stacks constructed of the light-gauge material Binks had used in its estimate would have buckled under their own weight. See N.T. of Feb. 13 at 54-55; Feb. 14 at 48. Further, Binks presented nothing to corroborate Mr. Brend's assertion that four duct elbows cost more to construct than eighteen similar elbows would have cost under the initial design. See N.T. of Feb. 14 at 59-63 (same

airflow through ducts under original design and redesign). The estimate for the redesign's cost included inflated transportation charges. See N.T. of Feb. 13 at 58-60. Binks credited Bedwell with blower motors that would have generated only one half of the output specified under the original design. See N.T. of Feb. 18 at 49. Finally, Mr. Brend's estimate did not credit Bedwell for the cost of turning vanes, devices that assist airflow in ninety-degree exhaust elbows, that it would have incurred under the original design. See N.T. of Feb. 13 at 53; Feb. 14 at 55-56.

#### **4. BC-4 and BC-5**

Binks claims certain additional costs related to storage, transportation, and supervision it allegedly incurred in its installation of PB-2 because of delays caused by Bedwell. Bedwell retorts that Binks provided for these costs in its original bid and that it failed to document these costs in the audit Bedwell conducted. I find that Binks's failure to document the BC-4 and BC-5 claims at Bedwell's audit bars claims.

Article K states that Bedwell has the right to audit Binks's records to verify its claims and that Binks's "failure to provide access to records and cooperate with Bedwell in the audit shall absolutely bar any claim for any expenses not confirmed by Bedwell's own audit." Thus, Binks must give Bedwell access to its cost records as a condition precedent to any recovery.

On December 7, 1994, Mr. Albert Pritchard, Jr., and his associate, Mr. Paul Young, visited Binks's Franklin Park

headquarters to verify Binks's additional cost claims. See N.T. of Feb. 14 at 169. Binks failed to provide the original estimate, the project budget, financial statements, the general ledger or general journals. See id. at 171. Binks's accounting department informed Bedwell's auditors by note that "[d]ue to intense activity at Binks accounting department because of annual inventory and fiscal year end as of November 30th, we will not be able to provide immediate assistance for any questions you may have. Please provide [a] written question list for any information you may request regarding the material you are working with and we will review and provide a followup response as soon as possible." Id. at 170; Def. Ex. 74. The auditors received no additional information until discovery, despite their requests. See id. at 175-76. Binks provided some subcontractor records to substantiate its BC-4 and BC-5 claims, but "nothing was broken down between [the] original contract and the extras." Id. at 177. Because Binks has not satisfied a condition precedent to recovery with respect to BC-4 and BC-5, the subcontract bars both claims.

Binks wishes to avoid the audit clause's bar to its BC-4 and BC-5 claims by contending that Bedwell's refusal to sign a confidentiality agreement excuses its failure to satisfy this condition precedent to recovery. The subcontract, however, does not permit Binks to condition the audit on Bedwell's acquiescence to a confidentiality agreement. The parties could have so conditioned the audit clause, but I may not rewrite the

subcontract to include a clause that the parties did not.

I note additionally that Binks formerly represented in connection with BC-4 and BC-5 that its installation subcontractor, I.D. Griffith, had brought a \$50,000 inefficiency claim against it. The evidence reveals that I.D. Griffith never raised such a claim, a fact that calls Binks's candor into question. See N.T. of Feb. 14 at 8.

Even if Binks had complied with the audit clause, it could not recover the full amount it claims because the subcontract bars portions of the claims. Article 2.1.2 requires the subcontractor to "provide suitable areas for storage of [Binks's] materials and equipment during the course of the Work."<sup>4</sup> Article C of Exhibit V, however, states that "Bedwell shall in no way be liable to [Binks] for lost profits, consequential damages, or extended overhead" because of delays,

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4. Article 2.1.2 states, under the heading "SERVICES PROVIDED BY THE CONTRACTOR:

The Contractor shall provide suitable areas for storage of the Subcontractor's materials and equipment during the course of the Work. Additional costs to the Subcontractor resulting from relocation of such facilities at the direction of the Contractor, except as previously agreed upon, shall be reimbursed by the Contractor, unless ordered by the Owner, in which event there shall be no additional costs reimbursed.

even delays caused "by the act, neglect or default of Bedwell." <sup>5</sup>  
Thus, Binks could not recover for additional supervisory costs.

**5. \$158,568.27 of the Original Contract's Sum**

As noted above, Binks claims the redesign cost it more than the original design would have, while Bedwell claims it cost less. Consequently, Bedwell has withheld \$158,568.27 that it would have owed Binks had the latter satisfactorily performed its original scope of work. By both parties' admissions, Change Order No. 2 substantially altered the original scope of work, both adding to and deleting from that scope. The parties disagree, however, about the financial impact of the change. I find that the subcontract bars Binks's claim for the \$158,568.27

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5. Article C reads in full:

**EXTENSION OF TIME**

Should the Subcontractor be delayed in the prosecution or completion of the Work by the act, neglect or default of Bedwell, or of any person employed by Bedwell upon the Work, or of any supplier, materialman or other Subcontractor of Bedwell, or by any damage caused by fire or other casualty or by combined action of the workmen or by any third party in no way caused by or resulting from default or collusion on the part of the Subcontractor, then the time herein fixed for the completion of the Work shall be extended for a period equivalent to the time lost by reason of any or all causes aforesaid, which extended period shall be determined and fixed by the Owner, but no such allowance shall be made unless a claim therefore is presented in writing to Bedwell within forty-eight hours of the commencement of such delay. Such extensions of time shall be the sole remedy for any such delay, and releases Subcontractor and discharges Bedwell of and from any claims which the Subcontractor may have on account of any of the aforesaid causes of delay. Bedwell shall in no way be liable to the Subcontractor for lost profits, consequential damages, or extended overhead.

because it has not complied with the cost-plus and audit clauses.

I have already held that the cost-plus clause of the subcontract applies to all work performed by Binks outside the original scope of work. The redesign work constitutes work performed outside the original scope of work. Binks had to maintain records of its costs of this work. By its own admission, and with few exceptions such as the invoice for engineering fees, Binks did not maintain its cost records. Therefore, Article K of the subcontract bars its claim.

Further, Binks failed to comply with the audit clause of the subcontract for all costs it now claims, save the additional engineering expenses. Consequently, the subcontract bars recovery.

Alternatively, Binks has not proved the damages it claims. To begin with, its proof generally consisted of widely varying estimates of its actual costs, backed by few solid records. Additionally, it never demonstrated the reliability of its original estimate, and Bedwell's evidence showed significant problems with that estimate's reliability. Finally, it did not establish that it had deducted sufficient sums from the original subcontract's price to account for the deletions to the original scope of work. For instance, Binks deducted too little for the exhaust stacks and fan motors. See N.T. of Feb.13 at 54-55; Feb. 14 at 48; Feb. 18 at 49. As I shall examine below, I find that the redesigned exhaust system cost Binks considerably less to construct than the original design would have.

## 6. Quantum Meruit

Binks also makes a restitution claim for the work it performed. It asserts that Bedwell would receive a windfall unless it pays damages to it. Because the subcontract governs the relationship between Binks and Bedwell, this claim, too, must fail.

"Quantum meruit is a quasi-contractual remedy in which a contract is implied-in-law under a theory of unjust enrichment; the contract is one that implied in law, and 'not an actual contract at all.'" Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 998 (3d Cir. 1987)(quoting Ragnar Benson, Inc. v. Bethel Mart Assocs., 308 Pa.Super. 405, 414, 454 A.2d 599, 603 (1982)). "Under Pennsylvania law, 'the quasi-contractual doctrine of unjust enrichment [is] inapplicable where the relationship between the parties is founded on a written agreement or express contract.'" Id. at 999 (quoting Benefit Trust Life Ins. Co. v. Union Nat'l Bank, 776 F.2d 1174 (3d Cir. 1985)). Here, the subcontract controls the relations between the parties. Therefore, the remedy of quantum meruit does not apply.

## 7. Surety Bond

Binks makes a claim against the surety bond which Bedwell posted with Safeco for the amount Bedwell allegedly owes it. Because Bedwell owes Binks no damages, I find for Safeco on this claim.

Binks argues that the bond constitutes a payment bond that "protects those who have supplied labor and materials to the prime contractor on a public works project." Downingtown Area Sch. Dist. v. International Fidelity Ins. Co., --- Pa.Cmwlth. ----, ----, 671 A.2d 782, 786 (1996). Bedwell counters that this bond constitutes a performance bond that "protect[s] the entity which awarded the contract by assuring faithful contract performance." Id. The bond provides that a claimant, "defined as one having a direct contract with the Principal [Bedwell] or with a Subcontractor of the Principal for labor, material, or both, used or reasonably required for use in the performance of the Contract," may sue on the bond for amounts owed it more than ninety days after the completion of the claimant's work. Pl. Ex. 25. I need not decide this issue, however. Safeco owes Binks nothing because Bedwell owes Binks nothing.

#### **8. BC-6 and BC-11**

In both its Pre-trial Memorandum and Motion for Partial Summary Judgment, Binks made a claim of \$5,199.18 ("BC-6") for additional costs generated by revisions to the air make-up unit support structure and \$8,387.82 ("BC-11") for costs associated with the replacement of wire safety glass with tempered glass. Bedwell admitted its liability and the damages claimed, and I therefore granted summary judgment to Binks on the claims. I did not include a damage figure in the order, however, because of the pending trial.

At trial Binks attempted to prove damages in excess of those admitted by Bedwell. Binks did not maintain actual cost records of these claims or provide the documentation for them at the audit. Therefore, the subcontract bars the claims to the extent that Bedwell has not waived the conditions precedent with respect to them. I assess damages in favor of Binks and against Bedwell of \$5,199.18 and \$8,387.82 on these claims.

#### **B. Bedwell's Counterclaims**

Bedwell makes four counterclaims against Binks, seeking: 1) credit for the redesign, 2) compensation for work rendered obsolete by the redesign, 3) compensation for certain backcharges, and 4) damages caused by Binks's alleged tortious interference with Bedwell's existing contractual relations. I consider these claims below.

##### **1. Credit for the Redesign**

Bedwell first claims that the redesign cost Binks substantially less to construct than the initial design would have cost and that it consequently should obtain a credit of \$218,370.21 from Binks. As discussed above, it has withheld \$158,568.27 that it would have owed Binks under the original contract, so this claim in fact amounts to a demand for \$59,801.94. Binks argues that the subcontract bars this claim because Bedwell did not make it in a timely fashion. I find that the subcontract permits this claim.

Binks's argument that the subcontract bars this claim relies on Article 2.3.2, which provides that Bedwell "agrees that no claim for payment for services rendered or materials and equipment furnished by [Bedwell] to [Binks] shall be valid without prior notice to [Binks]." Binks contends that the claim arose on January 12, 1994, when SEPTA informed Bedwell that it had adopted Binks's proposed redesign and that Bedwell did not make this claim until well after the date allowed by contract. Bedwell replies that this clause governs claims by it against Binks for services it rendered to Binks, not disputes about the amount Bedwell owes Binks under the subcontract. By its ordinary language, the clause applies to claims by Bedwell for services rendered or materials and equipment furnished by Bedwell to Binks. Consequently, the clause does not apply to a dispute about a credit Binks allegedly owes Bedwell for work Binks performed for Bedwell under the subcontract.

Binks further contends that under Bruce Construction Corp. v. United States, 324 F.2d 516 (Cl. Ct. 1963), Bedwell may not present its own estimates to refute the costs Binks claims. This argument fails because the common law of Pennsylvania governs this dispute, not federal common law. Bruce Construction Corp. involved the application of federal common law, not Pennsylvania law. See id. at 518.

This contention also lacks merit because Bruce Construction Corp. does not stand for the proposition for which Binks has cited it. There, the court held that a presumption of

reasonableness attaches to actual costs paid for materials. See id. at 520. Here, Binks has not shown its actual costs.<sup>6</sup> The Bruce Construction Corp. court never addressed the issue of whether a defendant may present cost estimates to refute a plaintiff's estimates and to support its counterclaim. Therefore, Bruce Construction Corp. does not prohibit an examination of Bedwell's cost estimates. To hold otherwise would result in the absurdity that a plaintiff could make claims backed only by its own estimates, destroy its actual cost records prior to litigation, and force the defendant to capitulate without any opportunity to refute the plaintiff's claims.

I find that Bedwell has proved that the redesigned exhaust system cost less to construct than the original design would have cost. As Binks had before it, Bedwell put a witness on the stand to testify about the difference in cost between the original design and the simplified redesign. See Testimony of Mark Bedwell, N.T. of Feb. 18 at 28 et seq. Bedwell, however, provided documentation to substantiate its cost estimates. See Def. Ex. 76. Much of this documentation consists of Bedwell's cost estimates. See id. The documentation also includes Binks's

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6. Binks contends that it would have charged these equipment prices on the open market, so Bedwell must accept its prices the way it would have to accept a third-party subcontractors' pass-through equipment costs. In other words, its contention rests on the argument, above rejected, that Article K applies only to field erection, not equipment. The subcontract does not distinguish between field erection and equipment. Perhaps the result would differ had Binks obtained its equipment from a third party and maintained records of its payments to that third party, but I do not face that situation.

schedule of value, a paper that itemizes costs under the original design, and Binks's unit costs. See id. Bedwell's estimate uses Binks's schedule of value and unit costs whenever possible. The estimate neither subtracts nor adds overhead and profit as individual factors because Binks's schedule of value included them as part of the various components' costs. I find that the deletions total \$425,395.62 and the additions total \$209,259.96. Therefore, the redesign resulted in cost savings to Binks of \$216,135.66. Subtracting from these savings the \$158,568.27 Bedwell has withheld from Binks, I find that Binks owes Bedwell a credit of \$57,567.39 because of the redesign.

**2. Work Performed by Bedwell for which SEPTA Has Not Compensated It**

Bedwell maintains that Binks's failure to comply with its contractual obligation to submit shop drawings in compliance with the original design caused Bedwell to perform work for SEPTA that the redesign rendered obsolete. It claims this breach damaged it because SEPTA has refused to compensate it for the obsolete work. Bedwell claims in particular that it spent \$5,482.83 on excavations for the PB-1 pit, \$3,300 for moving a drain pipe, \$1,202 for engineering services from McGlade Engineering, and \$1,129 to purchase an aluminum hatchway. It also claims \$3,000 for a time-impact analysis it completed for SEPTA because of delays related to the redesign. Bedwell asserts

that Binks should compensate it for this analysis because the redesign Binks wished SEPTA to adopt necessitated the analysis.

Binks replies that Bedwell has waived these claims because it did not make the claims within the time allotted by Article 2.3.2 of the subcontract. I have already disposed of the argument that Article 2.3.2 bars these claims. That article pertains to claims by Bedwell against Binks for work that the former has done for the latter. In this case, Bedwell performed the disputed work for SEPTA, not Binks.

Binks then contends that SEPTA implemented the redesign, and that Bedwell should assert any claim it may have for uncompensated, obsolete work it performed for SEPTA against SEPTA, not Binks. I find that SEPTA's conduct caused these losses.

Bedwell performed this work for SEPTA, not for Binks. Binks undeniably urged SEPTA to adopt the redesign, but the decision to implement the redesign ultimately lay with SEPTA, not Binks. Bedwell argues that Binks's failure to submit shop drawings in conformity with the original design caused it to perform this obsolete work, but the subcontract states at Article 4.1 that SEPTA "may make changes in the Work by issuing Modifications to the Prime Contract." As noted above, SEPTA directed a change in the work on January 12, 1995. See Pl. Ex. 2. The redesign substantially altered the subcontract, including Binks's responsibilities under it. After SEPTA authorized the

redesign, Binks had to submit shop drawings in conformity with the redesign, not the original design.

Bedwell's obsolete-work claims fail because it has not proved that Binks's actions caused its losses. Bedwell performed certain work under the prime contract for SEPTA according to the initial design. The redesign rendered this work obsolete. SEPTA altered the prime contract when it adopted the redesign, not Binks. SEPTA assumed financial responsibility for the redesign. Pl. Ex. 2 ("Should there be an adjustment (plus or minus) to the dollar value and time of your contract, we will issue a change order in accordance with the contract documents"). Bedwell informed SEPTA that it would hold the authority responsible for additional costs. Pl. Ex. 38. ("The Bedwell Company is entitled to additional time and compensation for the impact of these changes and the unforeseen conditions we have encountered to date). SEPTA in fact agreed to compensate Bedwell for moving the drain pipe. See Pl. Ex. 36. Additionally, under the prime contract, SEPTA required Bedwell to conduct a time-impact analysis, because it had decided to proceed with the redesign. SEPTA's conduct, not Binks's, led to Bedwell's losses.

### **3. Backcharges**

Bedwell also makes three backcharge claims against Binks, consisting of \$9725.46 for modifying the PB-1 pit openings, \$946.63 for dowel work on the PB-2 base slab, and \$808.50 for modifying filter frames in the pit areas. Binks

contests liability in all three cases, contending that the subcontract bars the first claim and that Bedwell's failure to follow shop drawings defeats the second and third claims.

I have already held that Article 2.3.2 applies to work Bedwell performs directly for Binks, not work it performs for SEPTA under the prime contract. Binks has made no other defense to this claim. On the other hand, Bedwell has demonstrated that Binks had submitted shop drawings to it that showed a distance of three feet between the exhaust openings, but revised the distance to eleven feet after Bedwell had constructed the openings according to the earlier drawings. See N.T. of Feb. 14 at 76; Feb. 18 at 83-87. I therefore award Bedwell \$9,725.46 for modifying the PB-1 pit openings.

Bedwell has presented evidence that it had to drill and grout dowels in the PB-2 base slab because Binks had not fabricated the exhaust elbows in accordance with shop drawings. See N.T. of Feb. 18 at 88-89. Binks's counsel argued that drawing SR-01 placed the responsibility for coordinating structural steel work on Bedwell and that Bedwell had committed a coordination error. Binks presented no evidence, however, that Bedwell had erred. Thus, I award Bedwell \$946.63 for modifications to the PB-2 base slab.

Bedwell also has presented evidence that it had to cut and reweld filter frames in the pit areas because Binks had made improper measurements for them. See N.T. of Feb. 18 at 89-90. Evidence Binks presented, however, demonstrates that Bedwell had

improperly constructed the filter frame openings. In an October 17, 1994, letter from SEPTA to Bedwell, SEPTA wrote that Bedwell had "not construct[ed] the width of the paint booth pit walls in accordance with the contract documents" and inquired about how Bedwell could modify the pits in order to permit equipment installation. Pl. Ex. 35. The weight of the evidence indicates that the error lay with Bedwell.

#### **4. Tortious Interference with Existing Contractual Relations**

Finally, Bedwell claims that Binks's improper direct contacts with SEPTA caused SEPTA to withhold a retaining payment of \$253,280 from November of 1995 until January of 1997, resulting in a loss of \$18,983 in interest and \$6,800 for the cost of its audit. It also seeks punitive damages of \$77,349, or three times the amount of actual damages it claims.

Binks first responds that the subcontract permitted it to contact SEPTA directly about payment disputes. Additionally, it argues that Bedwell did not prove that any of its contacts with SEPTA caused SEPTA to withhold the \$253,280 retaining payment.<sup>7</sup>

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7. Binks also contends that Bedwell may not maintain a tort claim because the tort claim does not constitute the "gist" of Bedwell's counterclaim. The cases cited by Binks, however, hold that a plaintiff may not convert a contract claim into a tort claim merely by alleging the defendant breached the contract willfully. See Weston v. Halliburton Nus Environmental Corp., 839 F. Supp. 1151, 1156 (E.D. Pa. 1993)(citing Wood & Locker, (continued...))

A person commits the tort of intentional interference with contractual relations if, without the privilege to do so, he "'induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another,'" and this conduct causes the plaintiff harm. Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 130, 393 A.2d 1175, 1182 (1978)(quoting Birl v. Philadelphia Elec. Co., 402 Pa. 297, 300-301, 167 A.2d 472, 474 (1961)(adopting § 766 of the Restatement of Torts)). See also Windsor Securities, Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 660 (3d Cir. 1993)("Adler, Barish makes clear that the Pennsylvania Supreme Court (1) recognizes the inducement variety of contract interference torts and (2) will apply Restatement (Second) of Torts § 766 in analyzing inducement torts"). "The inducement may be any conduct conveying to the third person the actor's desire to influence him not to deal with the other." Restatement (Second) of Torts § 766 cmt. k (1979). A request or exertion of moral pressure may constitute an inducement. See id. Whether an alleged tortfeasor enjoys a "privilege" to interfere with contractual relations depends on the propriety of his conduct. See Adler, Barish, 482 Pa. at 433 n.17, 393 A.2d at 1184 n.17. To determine the propriety of an alleged tortfeasor's

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7. (...continued)  
Inc. v. Doran and Assocs., 708 F.Supp. 684 (W.D. Pa. 1989)). Here, Bedwell alleges that Binks interfered with its existing contractual relations with a third party, not that Binks willfully breached the subcontract.

conduct, the court must examine factors such as the nature of his conduct, his motive, the interests with which he has interfered, the interest he has sought to advance, the proximity of his conduct to the interference, and "'[t]he relations between the parties.'" Id. at 433, 1184 (quoting Restatement (Second) of Torts § 767 (Tent. Draft No. 23, 1977)). Further, "indifference to the rights" of a party under a contract may "support a finding of liability for punitive damages." Advanced Med., Inc. v. Arden Med. Sys., Inc., 955 F.2d 188, 202 (3d Cir. 1992).

The evidence presented indicates that Binks repeatedly contacted SEPTA directly about payment disputes it had with Bedwell, despite Bedwell's objections and a warning from Joseph Marchese of SEPTA that Binks and SEPTA had no contractual relationship with one another. See N.T. of Feb. 14 at 142; Def. Ex. 70 (July 11, 1994, Letter from Joseph Marchese to Ron Kawa)("As a subcontractor to Bedwell, Binks must address its concerns to Bedwell in accordance with the subcontract agreement between the two firms"). Binks first petitioned SEPTA to issue Bedwell and it joint checks. See N.T. of Feb. 14 at 152-153; Def. Ex. 70 (Oct. 14, 1994, Letter from Philip R. Croessmann to Joseph Marchese)("An agreement by SEPTA to issue joint checks would go a long way to assuring Binks that they would be paid what is owed them on this project in a timely manner"). Later it requested SEPTA to withhold payment from Bedwell pending resolution of its disputes with Bedwell. See N.T. of Feb. 14 at 153-154; Def. Ex. 70 (Nov. 17, 1994, Letter from Ron Kawa to

Robert Stiltner)("For the benefit of the project, we request that this payment to Bedwell be postponed pending a resolution of this issue"). In other words, Binks contacted Bedwell's contractual partner to induce it to put economic pressure on Bedwell to succumb to its demands. Further, Mr. Stiltner of SEPTA stated in his deposition that this dispute between Binks and Bedwell had caused SEPTA to withhold from Bedwell the retaining payment.

The subcontract provides no justification for this action because nothing in it permits Binks to contact SEPTA about payment disputes it may have with Bedwell. Article 2.2.3 of the subcontract provides that Binks may contact SEPTA directly to determine "the percentages of completion and the amount certified on account of Work done by [it]." That is, the subcontract allows Binks to contact SEPTA to discover the extent to which SEPTA has certified as completed the work for which Binks has responsibility. The subcontract necessitates this limited contact because it provides, at Article 10.6, that Binks's applications for payment must "indicate the percentage of completion of each portion of [its] Work." The subcontract does not, however, authorize Binks to make direct applications to SEPTA for payment or otherwise contact SEPTA about payment disputes. Rather, the subcontract, at Article 10.3, directs Bedwell to include Binks's payment applications with its own payment applications to SEPTA. The subcontract therefore provides that Binks must work through Bedwell, not around it.

I find Binks's conduct improper because it interfered with Bedwell's existing contractual relations in order to gain the upper hand in its dispute about the cost of the redesign. Binks contacted SEPTA not only to guarantee payment to it, but also to induce SEPTA not to pay Bedwell, in order to coerce Bedwell economically.

I find that Binks's improper interference with Bedwell's existing contractual relations with SEPTA caused SEPTA to withhold a \$253,280 retaining payment from Bedwell from November 1, 1995, until January 30, 1997. See N.T. of Feb. 18 at 109. This deprived Bedwell of the time value of that money, or \$18,983. See id. I also find that Binks demonstrated a wanton disregard for, and indifference to, Bedwell's contractual rights by attempting to coerce Bedwell economically in order to gain the advantage in this dispute. It was economic bullying that can be fairly described as outrageous. Such conduct justifies the imposition of punitive damages. Considering the harm Bedwell suffered, Binks's conduct, and Binks's wealth, I shall impose exemplary damages of \$56,949, or three times the damages Bedwell actually incurred because of Binks's conduct. See BMW of N. Am., Inc. v. Gore, --- U.S. ----, ----, 116 S.Ct. 1589, 1602 (1996) (punitive damages award of more than 500 times the amount of actual harm grossly excessive and violative of due process); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991) (punitive damages award of more than four times the award of actual damages not violative of due process); Kirkbride v. Lisbon

Contractors, Inc., 521 Pa. 97, 102, 555 A.2d 800, 803 (1989)(in imposing punitive damages, finder of fact must consider character of act, nature and extent of harm, and wealth of defendant). I find, however, that Bedwell did not conduct the audit because of Binks's interference with Bedwell's existing contractual relations, so I do not award Bedwell the costs of the audit.

### III. Conclusions of Law

1. This court has subject-matter jurisdiction over this case under 28 U.S.C. § 1332 because complete diversity of citizenship exists between Binks, on the one hand, and Bedwell and Safeco, on the other, and the amount in controversy exceeds \$50,000, the jurisdictional threshold at the time Binks filed this lawsuit.

2. This court has personal jurisdiction over the three parties.

3. The subcontract provides for venue in the Eastern District of Pennsylvania, and the parties performed under the subcontract and surety agreement within this district.

4. Pennsylvania law governs this case under Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), and Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

5. The subcontract between Binks and Bedwell, dated December 13, 1993, governs the relations between them.

6. Bedwell owes Binks an additional \$4,670.50 for engineering fees incurred because of the redesign.

7. Binks has not proved its BC-2, BC-3, BC-4, BC-5 claims.

8. Binks has not proved that Bedwell owes it \$158,568.27, the amount that Bedwell would have owed Binks, assuming Binks had satisfactorily completed the original contract.

9. Binks is not entitled to restitution from Bedwell.

10. Binks has not proved its surety bond claim.

11. Bedwell owes Binks \$5,199.18 for BC-6 and \$8,387.82 for BC-11, two claims on which Binks has been granted summary judgment.

12. Bedwell has proved that Binks owes it a credit of \$57,567.39 because of the redesign. This figure equals the cost savings to Binks minus the amount Bedwell has withheld from it.

13. Binks does not owe Bedwell for sums for which SEPTA would not compensate it.

14. Bedwell has proved two of its backcharge claims, worth \$9725.46 and \$946.63, but has not proved its third backcharge claim.

15. Binks intentionally interfered with Bedwell's existing contractual relations with SEPTA.

16. This intentional interference caused SEPTA to withhold from Bedwell a large payment from November 1, 1995, until January 30, 1997.

17. Because of the intentional interference, Bedwell lost \$18,983 in interest.

18. Binks intentionally interfered with Bedwell's existing contractual relations, with indifference to Bedwell's contractual rights.

19. Bedwell is entitled to punitive damages in the amount of \$56,949.

20. In sum, Binks owes Bedwell damages of \$125,913.98.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BINKS MANUFACTURING COMPANY,  
Plaintiff,

v.

THE BEDWELL COMPANY, and  
SAFECO INSURANCE COMPANY OF  
AMERICA,  
Defendants.

Civil Action

No. 96-2554

ORDER

AND NOW, this        day of July, 1997, JUDGMENT is  
entered in favor of the defendants and against the plaintiff.  
Binks Manufacturing Company shall pay the Bedwell Company damages  
of \$125,913.98.

BY THE COURT:

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Robert S. Gawthrop, III,        J.