

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

RSJ ENTERPRISES, INC. t/a Schrader Architectural Products,	:	NO. 14 – 02,364
Plaintiff	:	
	:	
vs.	:	CIVIL ACTION - LAW
	:	
	:	
BOGNET, INC. and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,	:	
Defendants	:	Non-jury Trial

**OPINION AND VERDICT**

Before the Court is Plaintiff’s request for a judgment for sums allegedly owed for materials provided to Defendant for use in a construction project, as well as its request for interest and attorney’s fees. A trial was held on October 30, 2015. Counsel requested and were granted the opportunity to file post-trial briefs, which the court received on November 13, 2015. The matter is now ripe for decision and the court enters the following:

**FINDINGS OF FACT**

1. Plaintiff (“Schrader”) supplies architectural products and, as is relevant here, is the exclusive supplier in the subject area of products made by Construction Specialties.
2. Defendant (“Bognet”) is a construction contractor and a registered bidder with the Commonwealth of Pennsylvania. As a registered bidder, Bognet receives from the Commonwealth invitations to bid on Commonwealth

construction projects, as well as plans and specifications for those projects, and any addenda to those plans.

3. The Commonwealth, General Services Administration (“GSA”), sought bids for renovations to Clark Summit State Hospital sometime prior to April 26, 2012. Bids were to be submitted on or before May 8, 2012 at 2:00 p.m. The project required the use of Construction Specialties materials in four areas: the lobby, Corridor 1, Corridor 2 and the dayroom.

4. On April 26, 2012, Schrader prepared and, sometime thereafter submitted to 6 to 8 contractors (including Bognet, which requested the quotes by telephone sometime after April 26), two quotes related to the project, for two groups of Construction Specialties materials: wall covering and trim (Plaintiff’s Exhibit 6) and railings and railing accessories (Plaintiff’s Exhibit 7). The quotes were prepared by Schrader’s estimator, James Warren.

5. The quotes each listed various components by name and description, provided a “quantity” and designated a unit of measurement. For example, the quote for wall covering and trim lists “Acrovyn 4000 Wall Covering, .060” thick sheet. Primer and adhesive supplied. Sheet size 4’ x 10’ Standard color req’d for order mark: WC1”. The “quantity” box is marked “37” and the “Unit of Measurement” box is marked “EA”. The quotes did not provide unit prices, but only a lump sum price for all of the materials listed therein.

6. In preparing the quotes, Warren estimated the quantities of materials needed to complete the job by looking at a drawing of the project he obtained from the facilities manager at the hospital.<sup>1</sup> He also requested and obtained from the facilities manager an actual measurement of a hallway, and estimated the

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<sup>1</sup> This estimate of materials needed based on a drawing was called by both parties a “take-off”.

materials based on calculating a scale which correlated that measurement with the drawing. As it turns out, the measurement was incorrect and thus the estimation made by Warren was incorrect.

7. On May 2, 2012, the Commonwealth issued an Addendum to the original drawing which, among other things, “corrected scale notation of existing floor plan” from 3/16” = 1’ to 1/8” = 1’. This addendum was mailed to Bognet because it was a registered bidder and, as such, had received the original drawing. Bognet did not send the addendum to Schrader because it had not sent Schrader the original drawing. Schrader was not aware of the change in scale at any time prior to the bid deadline. This change in scale would not have affected Warren’s estimate, however, as the estimate was based on an actual measurement, and not the stated scale.

8. The quotes were prepared by Warren in the same fashion he had used to prepare quotes for Construction Specialties materials in the past. Bognet had used quotes from Schrader for other jobs prior to the state hospital job.

9. The quotes state: “This quotation is based on furnishing the types, quantities, and sizes listed herein. If quantities or types deviate from those listed, price is subject to increase or decrease proportionately.”

10. At some point prior to bidding, Bognet’s estimator, Dan Shellhamer, prepared a bid and in doing so, made notes of various details. Plaintiff’s Exhibit 5 is a collection of some of those notes<sup>2</sup> and on page 2 of that Exhibit, the bids which were actually submitted to the Commonwealth are set forth. On pages 7 and 8, estimates of the amount of wall covering and trim are set forth. These

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<sup>2</sup> Shellhamer testified that he made notes in other places and not just on paper.

estimates contain unit prices<sup>3</sup> and were based on Shellhamer's own take-off from the project plans sent by the Commonwealth to Bognet. The quantities are different than the quantities contained in Warren's quote for wall coverings and trim, and are based on greater linear footage. Estimates for the railings and railing accessories do not appear in the Exhibit.

11. Sometime prior to May 8, 2012, Shellhamer requested from Warren his take-off with respect to the quotes. Warren's take-off for the railings and railing accessories was faxed to Shellhamer at 12:03 p.m. on May 8, 2012. Plaintiff's Exhibit 4 is a copy of that fax which shows hand-written calculations of the cost of materials for that portion of the job made by Shellhamer, which calculations are based on the measurements estimated by Warren as shown on the document. The linear footage for each area is significantly less than that used by Shellhamer in estimating the wall covering and trim as shown on Plaintiff's Exhibit 5.

12. Bognet submitted a timely bid to the Commonwealth on May 8, 2012. Bognet was awarded the project.

13. In connection with the contract between the Commonwealth and Bognet, Bognet posted a contract bond, issued by Defendant Fidelity and Deposit Company of Maryland.

14. On August 6, 2012, Bognet submitted a purchase order to Schrader for the materials listed on the two quotes previously provided. Those quotes are attached to the purchase order and the order states "per attached quote".

15. The ordered materials (with a change to the quantity/type of wainscot trim made by Bognet prior to shipping) were shipped by Construction Specialties (at

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<sup>3</sup> It is not clear where these unit prices were obtained.

Schrader's direction) to the job site, these shipments were invoiced to Bognet and these invoices were paid by Bognet.

16. Bognet paid Schrader a total of \$15,738.88.

17. In November 2012, Bognet's employees discovered they did not have sufficient materials to complete the job and alerted Warren to the shortage. Warren placed orders with Construction Specialties for all additional materials requested by Bognet for completion of the job and those materials were shipped to the job site. Schrader paid Construction Specialties for these materials. No purchase orders were requested by Schrader and no invoices for these additional materials were sent by Schrader until after all materials had been shipped.

18. Bognet has not paid the invoices for additional materials and it is these charges, adjusted by several unrelated credits, which Schrader seeks to recover in this suit.

19. Any unneeded materials were returned to Construction Specialties (an error in color, and shipments to correct that error resulted in some of the overage) and Schrader gave Bognet credit for the charges for those materials, which now appears as a deduction from what Schrader is currently seeking.

20. Schrader made a claim with Fidelity and Deposit Company of Maryland but that claim was denied.

## **DISCUSSION**

Schrader believes the matter is simple: they shipped materials pursuant to quotes which provided that "[i]f quantities or types deviate from those listed, price is subject to increase or decrease proportionately" and since the quantities were increased, the price should be increased. After all, Schrader posits, Bognet

removed items from one of the quotes and Schrader reduced the bill accordingly. Therefore, when they added items, Schrader should be able to increase the bill. Bognet contends, on the other hand, that the court must look at all the circumstances and that such show that the parties were operating in accordance with an accepted practice whereby a supplier estimates the materials needed, provides a quote for the cost of those materials, and that quote is relied on by contractors in making a bid on the job.

Bognet is correct in its assertion that the quotes cannot be read in isolation, but that all the circumstances of the transaction, including past practices between the parties, must be considered. Ludwig Honold Manufacturing Company v. Fletcher, 405 F.2d (3<sup>rd</sup> Cir. 1969). The court also agrees with Bognet that the circumstances in this case show that the deviation language is not controlling.

First, the quotes themselves do not contain unit prices. If the contractor receiving the quote is not to rely on the quantities stated therein, how is that contractor to estimate the cost for what will be needed? Second, why should the quote contain quantities in the first place if they have no meaning; instead, why is the quote not simply a list of materials with unit prices? After all, no one provided Schrader with the quantities needed (or indeed with a list of types of materials needed), they were estimated by Warren in the usual course of his business, using methods he had come to rely on. These circumstances suggest, and the court finds, that Schrader followed a common practice in the industry of preparing quotes and submitting them to bidders with the understanding of all parties that the quotes contained the quantities of materials needed for any particular project, and that the contractors would use the quoted sums in their bids on those projects, expecting that their cost for materials would be as quoted.

There was nothing presented at trial to suggest that the process was any different in this case.

Moreover, the deviation language placed on the quotes, relied on so heavily by Schrader, is not necessarily inconsistent with this practice. The court can still give effect to the deviation language and maintain what it finds to be a reasonable interpretation, as it is required to do, Unit Vending Corporation v. Lacas, 190 A.2d 298 (Pa. 1963), by considering that any change *by the Commonwealth* after the bid was accepted could require additional material, and in that instance the supplier would be justified in charging additional money for the additional materials in accordance with the deviation language. Of course, that was not the case here: the amount of materials needed did not change, there was simply a mistake in the estimation of what was needed in the first place.

Schrader argues that even if the quantities contained in the quotes are to be considered as representations which can be relied upon, liability for the mistake should still be placed on Bognet as Bognet knew of the change in scale but never provided the addendum to Schrader. This argument is without merit for two reasons. First, Shellhamer testified that the addendum would have been sent to only those suppliers who had received the original plans from Bognet, and that since Schrader had not requested plans from Bognet, they were not sent the addendum. This position is reasonable. Bognet is entitled to believe that the suppliers will make appropriate arrangements to obtain plans and any addenda, whether that arrangement is to get them from the contractor, of which there were at least five others, or from the Commonwealth directly. Second, Warren himself testified that he did not rely on the stated scale. Although he testified that had he

known of the change in scale he would have changed his quotes,<sup>4</sup> such testimony is directly contrary to his testimony that he used the measurement from the facilities director to make his own scale. Thus, it is assumed he would have applied the same incorrect measurement to any revised drawing, and still would have made an incorrect calculation. Bognet was therefore entitled to rely on the quotes in spite of the addendum.

And there lies the real issue which decides this case: Bognet did *not* rely on Schrader's quotes. While Exhibit 4 shows Shellhamer calculating railings and railing accessories costs by using Warren's stated distances, Shellhamer clearly testified that he did his own take-off, made his own calculations based thereon, and prepared his bid based on those calculations before he received Schrader's quotes. Shellhamer may have noticed that the quotes were significantly lower than what he had calculated, and for that reason asked for Warren's take-offs, but the fact of the matter is that Shellhamer considered the difference to work in his favor and did not change his bid from that which he originally calculated. He may not have known that there was a mistake in Warren's figures, and perhaps could not account for the difference, but the simple fact that he did not rely on Schrader's quotes means that Bognet cannot plead detrimental reliance. Harm to Bognet, if any,<sup>5</sup> from having to pay for the additional materials was not caused by Schrader's mistake.

Therefore, the court will consider Plaintiff's request under its alternative theory of unjust enrichment. The elements of unjust enrichment are "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant,

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<sup>4</sup> One is left to wonder why he would have made this change if the quantities are not to be relied upon.

<sup>5</sup> As Shellhamer admitted when being questioned about the difference by the court, any difference would be profit as the bid already contained the higher cost. Further, the additional materials were invoiced at cost.



and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value." Northeast Fence & Ironworks, Inc. v. Murphy Quigley Company, Inc., 933 A.2d 664, 669 (Pa. Super. 2007), quoting Lackner v. Glosser, 892 A.2d 21, 34 (Pa. Super. 2006). It is clear that Schrader conferred a benefit on Bognet by supplying the additional materials to enable Bognet to complete its contract with the Commonwealth, and that Bognet appreciated that benefit. The question is: would it be inequitable for Bognet to retain that benefit without payment of value?

The court believes three factors support a finding in Schrader's favor. First, Bognet's bid actually allowed for a higher cost of Construction Specialties materials. Second, the court cannot help but believe that even if Shellhamer was not actually aware of the mistaken measurement, he had some inkling that something was wrong with the quotes before he placed his bid and should have inquired further. Finally, Schrader provided the materials at cost, and thus any recovery to Schrader will allow them to merely break even on the additional materials and they will not realize a profit thereon. Considering all the circumstances, the court believes the equities lie in Schrader's favor and therefore, the court will award Schrader the invoiced amount.

Schrader has also requested interest and attorney's fees, relying on the Procurement Code's provision for such in the event payment is not made and it is found that failure to make the payment was in bad faith. 62 Pa.C.S. Section 3935. "Bad faith" is defined by the Code as "arbitrary or vexatious". Id. Courts have interpreted those terms to mean "based on random or convenient selection or choice rather than on reason or nature" and "without sufficient ground in either

law or in fact and ... serv[ing] the sole purpose of causing annoyance”, respectively. See A.G. Cullen v. State System of Higher Education, 898 A.2d 1145, 1164-65 (Pa. Commw. 2006). Additionally, a “bad faith lawsuit” has been defined as “one filed ‘for purposes of fraud, dishonesty, or corruption’”. Id. Here, Bognet believed that it should not be responsible for Schrader’s mistake, and for that *reason*, refused to pay the additional invoices. While Bognet was ultimately mistaken about the issue, it did not refuse to pay for *no* reason or simply to annoy Schrader. In fact, Schrader’s delay in invoicing the additional materials may have contributed to Bognet’s taking that position. Therefore, the court cannot find that Bognet acted in bad faith in failing to pay for the additional materials, and Schrader is not entitled to these additional Procurement Code damages.

Accordingly, the Court draws the following:

### **CONCLUSIONS OF LAW**

1. Bognet was entitled to rely on the quotes provided by Schrader in submitting its bid to the Commonwealth.
2. Bognet did not rely on Schrader’s quotes, however, and therefore any harm was not caused by the inaccurate quotes.
3. Bognet would be unjustly enriched if it were not required to pay for the additional materials.
4. Schrader is not entitled to interest and attorney’s fees.

**VERDICT**

AND NOW, this            day of November 2015, for the foregoing reasons, the Court finds in favor of Plaintiff and against Defendants, jointly and severally,<sup>6</sup> in the amount of \$17,242.41.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Jonathan Butterfield, Esq.  
William Carlucci, Esq.  
Gary Weber, Esq.  
Hon. Dudley Anderson

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<sup>6</sup> Counsel stipulated that any verdict against Bognet should be entered against both defendants jointly and severally.