

COMMONWEALTH OF PENNSYLVANIA

THE BEDWELL COMPANY : BEFORE THE BOARD OF CLAIMS
: :
VS. : :
: :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF GENERAL SERVICES : DOCKET NO. 1706

FINDINGS OF FACT

1. Plaintiff, The Bedwell Company, is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. Plaintiff maintained a principal place of business at 1380 Wilmington Pike, West Chester, PA 19381. (Complaint and Answer, ¶ 1)
2. The Defendant is the Commonwealth of Pennsylvania, Department of General Services, an executive department of the Commonwealth of Pennsylvania, having its principal offices located at the North Office Building, Harrisburg, PA 17120. The Department of General Services (“DGS”) was created and derives its general and specific powers from the provisions of the Administrative Code of 1929, as amended, 71 P.S. §631 et seq. (Complaint and Answer, ¶ 2)
3. Plaintiff is a general contractor, engaging in construction projects, inter alia, in the Commonwealth of Pennsylvania. (Complaint and Answer, ¶ 3)
4. In September of 1990, Plaintiff received a copy of the “Notice to Contractors” issued September 12, 1990, identified as “Construction Contracts for Paper Warehouse, Pier 78, South Annex, Philadelphia Port Corporation, Philadelphia, Pennsylvania”. The Project number was D.G.S. 280-1, with numerous subsections. The contract in question was identified as “Contract No. D.G.S. 280-1.1 For General Construction (hereinafter “the .1 Contract”) (Complaint and Answer, ¶ 4)
5. On November 8, 1990, Plaintiff submitted its bid to DGS. (Complaint and Answer, ¶ 5)
The bid was based upon specifications issued by DGS for the .1 Contract, including certain special requirements regarding MBE/WBE participation. (Complaint and Answer, ¶ 6)
6. Defendant determined, after its administrative bid review process, that Plaintiff’s bid was non-responsive to the MBE/WBE participation requirements, and Defendant rejected Plaintiff’s bid. (N.T. 88-90)
7. On January 4, 1991, Plaintiff filed a Petition for Review and Application for Preliminary Injunction with the Commonwealth Court of Pennsylvania, seeking inter alia, to enjoin DGS

from implementing the terms of Contract No. D.G.S. 280-1.1 except to the lowest bidder. Defendant opposed Plaintiff's Application. (Complaint and Answer, ¶ 10; N.T. 16)

8. On February 20 and March 7, 1991, the Commonwealth Court issued an Order granting Plaintiff's Application for Preliminary Injunction, and identifying Plaintiff as the lowest responsible bidder. (Complaint and Answer ¶¶ 12, 14; N.T. 16-18)
9. Defendant appealed Plaintiff's preliminary injunction to the Supreme Court, and the Supreme Court affirmed the Order of the Commonwealth Court, Per Curiam. (Complaint and Answer ¶¶ 16, 17)
10. DGS did not award the .1 Contract to Plaintiff after the Supreme Court's decision to affirm the Commonwealth Court. (N.T. 140)
11. Plaintiff requested the Commonwealth Court for a permanent injunction. After full hearing on Plaintiff's Application for Permanent Injunction, the Commonwealth Court (per Lederer, J.) entered its Adjudication and Decree Nisi on August 3, 1992, granting a permanent injunction to Plaintiff. (Complaint and Answer, ¶ 18)
12. The Adjudication stated that "Bedwell had made a commitment of over 23% of its bid with a business that is certifiable as both an MBE and WBE . . . Under the documentation provided to Plaintiff by Defendant in its bid package, as well as under Defendant's own regulations . . ., Defendant must presume that Plaintiff has not discriminated in connection with Bedwell's selection of subcontractors. . . .[The] Court must conclude that Plaintiff was a responsive, therefore a qualified, bidder." (Exhibit P-1, pages 20-21)
13. Plaintiff is the lowest responsible qualified bidder. (Complaint and Answer ¶ 18; Opinion of Commonwealth Court)
14. Defendant abused its discretion in failing to award this Contract to Plaintiff and in proposing to award this contract to Guidi, the apparent third lowest bidder, whose bid was \$250,344 higher than the bid submitted by Plaintiff. (Opinion of Commonwealth Court)
15. Defendant mailed a letter dated September 17, 1992 to Plaintiff. This letter contained an offer of settlement and did not constitute a letter of award. (N.T. 93)
16. The offer of settlement was refused by Plaintiff by letter dated September 25, 1992, written by counsel for Plaintiff. (Exhibit P-6)
17. The September 17, 1992 letter did not create a contractual relationship as of September 17, 1992, between Plaintiff and Defendant. (N.T. 93)

18. Act No. 188 of 1992 enacted by the General Assembly, divested DGS of any further authority to construct the Paper Warehouse. (Complaint and Answer, ¶ 25)
19. There is no contractual relationship between the parties either upon an expressed, implied or quasi contractual basis. (entire record)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction to hear and determine Plaintiff's claim as it arises out of an alleged contract between Plaintiff and Defendant and the amount in controversy is in excess of \$300.00. 72 P.S. §4651-4.
2. Defendant never awarded a contract to Plaintiff.
3. The letter of September 17, 1992 from Defendant to Plaintiff did not create a contract and was an offer of settlement.
4. The offer of settlement was refused on September 25, 1992.
5. There is no expressed, implied or quasi contractual relationship between the parties.
6. Plaintiff is not entitled to recover damages against Defendant.

OPINION

The facts of this case are largely uncontroverted. However, the legal conclusions are in dispute.

Plaintiff is a general construction contractor engaged in public works construction projects within the Commonwealth of Pennsylvania. In September of 1990, Plaintiff received a publication from the Defendant entitled "Notice to Contractors", dated September 12, 1990, which invited bids for the "Construction Contracts for Paper Warehouse, Pier 78, South Annex, Philadelphia Port Corporation, Philadelphia, Pennsylvania". The project was Project No. D.G.S. 280-1 ("Project") with numerous contract subsections.

Plaintiff submitted its bid for the general construction portion of the Paper Warehouse Project to Defendant. Defendant's specifications contained special requirements identified as "Minority Business and Womens' Business Enterprise Affirmative Action" specifications. The special requirements established for bidders the minimum level of MBE and WBE participation for the general construction portion of this Project, to wit 18 percent for MBE participation and 5 percent for WBE participation.

After competitive bidding, and although Plaintiff was the low bidder, Defendant rejected Plaintiff's bid on the basis of non-responsiveness and cited failure to answer specific questions required in the special requirements as the basis for this action of non-responsiveness.

On January 4, 1991, Plaintiff filed a Petition for Review and Application for Preliminary Injunction with the Commonwealth Court seeking to enjoin Defendant from implementing the terms of the Contract except to the lowest bidder. On February 20 and March 7, 1991, the Commonwealth Court issued an Order granting Bedwell's Application for Preliminary Injunction and identifying Plaintiff as the lowest responsible bidder.

Defendant thereafter sought Appellate review from the Supreme Court of Pennsylvania from the Commonwealth Court's Preliminary Injunction. The Supreme Court affirmed, per curiam, on November 21, 1991.

Following the Supreme Court's affirmance of Plaintiff's Preliminary Injunction, Defendant never forwarded any contract documents to the Plaintiff. Plaintiff applied to the Commonwealth Court for a Permanent Injunction and the Commonwealth Court entered its Decree Nisi on August 3, 1992.

Among the Courts findings and conclusions was the following: 1) the Department, through its Office of Minority and Women's Business Enterprise ("OMWBE") erred by using an incorrect addition of DGS special requirements to evaluate Plaintiff's bid, instead of using the edition published with the instant Notice to Contractors for this Project. In its Opinion, the Court stated that Defendant failed to exercise "sound discretion according to the standards fixed for the protection of the public" and that Defendant acted arbitrarily and capriciously by awarding the Contract to another bidder rather than the lowest responsible qualified bidder, and concluded further that Plaintiff was in fact the lowest bidder.

On September 17, 1992, Defendant mailed a letter to Plaintiff. The September 17th letter must be examined in its totality. The letter is straight forward enough. Defendant, through its counsel, in this letter, specifically states, in the second paragraph, that they have been authorized to make an offer of settlement, and accordingly sets out five points which comprise in effect the settlement offer. In conclusion, the letter further states that Defendant looked forward to an early response to the offer to settle.

On September 25, 1992, Plaintiff's counsel informed Defendant's counsel that they could not accept the conditions proposed in the letter of September 17, 1992. The letter further states that Plaintiff considered the offer to be contrary to law and unenforceable and further advised that Plaintiff looked forward to the receipt of the Contract documents. Such Contract documents were never forwarded. Thereafter, by Bill No. 1642 Section 20B, the General Assembly of the Commonwealth of Pennsylvania divested Defendant of any further authority with respect to the construction of the Paper Warehouse and transferred that responsibility to the Philadelphia Regional Port Authority directing the Port Authority to proceed immediately to competitive bid and construct

the Paper Warehouse as a new project. Further the legislature stated that participation in the bidding process authorized under Paragraph 3 of the Act shall be the sole remedy for any person previously involved in the bidding process before the Department of General Services and no suit or other proceeding shall be brought before any court or administrative body against the Commonwealth or any agency, officer or employee thereof as a result of any action taken or contract heretofore awarded with respect to the Paper Warehouse Project except to the extent that a remedy is available before the Board of Claims under the Act of May 20, 1937 P.L. 728 No. 193 (referred to as the “Board of Claims Act”). (Underlining added).

Accordingly, it is the function of the Board to determine if in fact a remedy to the Plaintiff is available. The Commonwealth Court has determined that the Plaintiff is the lowest responsible bidder. The General Assembly of Pennsylvania has declared an administrative code that the Department shall, as soon as practicable award the contract to the lowest qualified bidder. However, the General Assembly of the Commonwealth of Pennsylvania has subsequently transferred this Project from the Defendant to the Philadelphia Regional Port Authority granting parties who are wronged because of prior proceedings to vent their request for damages before the Board of Claims.

Accordingly, the jurisdiction of the Board of Claims in this matter must carefully be considered. From the Act quoted above and from court decisions, it is clear that the Board of Claims is empowered to entertain all contractual claims against the Commonwealth irrespective of the type of relief sought. Express Trucklines, Inc. vs. Pennsylvania Liquor Control Board, 503 Pa. 399, 407, 469 A.2d 1000 (1983) In Shovel Transfer and Storage, Inc. vs. Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board, 523 Pa. 235, 565 A.2d 1153 (1989), the Supreme Court stated

that the Board of Claims has the jurisdiction to determine whether a contract has been entered into for purposes of the Act. It is therefore clear that the Board has jurisdiction to hear this matter.

Having determined that the Board has jurisdiction, the next issue is whether or not a contract was properly formed. It is our conclusions that we find no basis for Plaintiff's contention that a contract did in fact exist. Plaintiff practically admits this fact when in the September 25, 1992 letter to Defendant's counsel, they in fact request that a contract be submitted. None of the formalities required for entering into contracts with the Commonwealth were met. No award was made, no contract was signed, no bonds were issued and no signature appears on any contract. Rightfully or wrongfully, it is apparent that the Department rejected Bedwell's bid and accordingly, there is no expressed contract between the parties. Shovel Transfer and Storage, Inc. vs. Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board, 523 Pa. 235, 565 A.2d 1153 (1989) Each element is essential to the formation of a binding contract and must be manifested by one party to another. It is further true that if the parties agree upon essential terms and intend them to be binding, a contract is formed even though they intend to adopt a formal document with additional terms at a later date. Johnson v. Johnson, 346 Pa. Superior Court 427, 499 A.2d 1074 (1985) Where, however, the parties contemplate that their agreement can not be considered complete before it is reduced to writing, no contract exists until the execution of the writing. Essner v. Shoemaker, 393 Pa. 422, 143 A.2d 364 (1958) In the case at hand, no contract can legally exist, as none of the formalities for the creation of contracts were followed. Further, the Commonwealth's Attorneys' Act requires the Office of Attorney General to approve all contracts. Administrative Code Supplement Act of 1980 P.L. 950 No. 164. No such contract was ever submitted to the Office of Attorney General for approval.

Since we have concluded that there is no expressed contract, it is further observed that the equity jurisdiction of the Board also extends to all cases instituted in a form of contract actions, namely quasi-contract claims and claims in quantum merit. Lowry v. Commonwealth, 365 Pa. 474, 76 A.2d 363 (1950) Harry D. Miller, III and a Potty on the Spot, Inc. vs. Department of Environmental Resources, 133 Pa. Cmwlth. Ct. 327, 578 A.2d 550 (1990)

However, an examination of these forms of actions are inappropriate to the existing situation.

It is true that a contract can be formed if the parties intend to adopt a formal document at a later date. Johnson v. Johnson, 346 Pa. Superior Ct., 427, 499 A.2d 1074 (1985) However, where the parties contemplate a written agreement, no contract exists until the execution of the writing. Essner v. Shoemaker, 393 Pa. 422, 143 A.2d 364 (1958) Here, such formality was expected and required.

Accordingly, we must conclude that no contract ever existed between the parties and Plaintiff is not entitled to any damages. We therefore find in favor of Defendant.

