

COMMONWEALTH OF PENNSYLVANIA

DEETER, RITCHEY, SIPPEL, P.C. : BEFORE THE BOARD OF CLAIMS
 :
VS. :
 :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF GENERAL SERVICES : DOCKET NO. 1784

FINDINGS OF FACT

1. A hearing on this matter was held before a Panel consisting of Louis R. Martin, Chairman and Conrad Kambic, Engineer Member on February 23, 1998.
2. Plaintiff is Deeter, Ritchey, Sippel, P.C. (hereinafter “DRS”) an architectural firm with its place of business at One Gateway Center, Pittsburgh, PA. (Paragraph 1, Complaint; Paragraph 1, Answer)
3. Respondent is the Commonwealth of Pennsylvania, Department of General Services (hereinafter “DGS”) an administrative department of the Commonwealth with its principal office at 515 North Office Building, Harrisburg, Pennsylvania. (Paragraph 2, Complaint; Paragraph 2, Answer)
4. DGS selected DRS to design renovations and additions to the Salk Hall and Dental Annex at the University of Pittsburgh (hereinafter “the Project”). (N.T. 7; Exhibit 15)
5. DRS retained Gensert Bretnall Assoc. for structural engineering, Meucci Engineering, Inc. for mechanical engineering and Peter F. Loftus for electrical engineering (hereinafter “the Consultants”). (N.T. 7; Exhibit 15)
6. Project completion was delayed beyond the original completion date and was finally completed in 1993. (N.T. 7)
7. DRS filed a statement of claim with the Board of Claims at Docket No. 1784 in February of 1994. The claim was for damages alleged to have incurred due to delays in completing the Project. (N.T. 12)

8. Consistent with its practice, DGS withheld 5% of DRS's fee totaling \$63,669.40. (N.T. 8; Exhibit 23)

9. Late in 1990 DGS agreed to release 2.5% of DRS's fee, an amount of \$31,834.70. However, DGS retained \$14,591.41 from this amount for error/omission assessment resulting in payment to DRS of \$17,243.29. (N.T. 8; Exhibit 23)

10. DGS filed an answer with a counterclaim against DRS at Docket No. 1784 for costs incurred in issuing \$122,982.32 in error/omission change orders on the Project. (N.T. 3, 8; Answer with Counterclaim)

11. DRS responded to the counterclaim by filing an answer and new matter to the counterclaim which denied any error/omissions by DRS and added that any recovery by DGS must be limited to \$14,591.41 which DGS previously withheld to account for error/omission change orders. (DRS's verified Answer and New Matter to the Counterclaim)

12. At the request of DRS, DGS agreed to reevaluate the \$14,591.41 assessment and made a reduction of the assessment in the amount of \$6,935.50. This reduced the amount retained by DGS for error/omission change orders to \$7,655.91. (N.T. 14; Exhibit 23)

13. DGS issued a check to DRS in February of 1996 for \$38,770.20 which represented the remaining 2.5% of DRS's fee (\$31,834.70) and \$6,935.50 reduction. (N.T. 13, 23)

14. DGS retained \$7,655.91 from DRS's fee as the assessment for the error/omission change order. (N.T. 38; Exhibit 23)

15. DGS and DRS executed a Settlement Agreement and Release dated November 25, 1996. (N.T. 19; Exhibit 15A)

16. The claim heard by this Panel of the Board of Claims involved only DRS's claim of entitlement to the \$7,655.91 withheld by DGS as an assessment for error/omission change orders. (N.T. 27)

17. In a letter dated March 21, 1997, from DGS's Assistant Counsel O'Reilly to Robert W. Doty, Esquire, counsel for DRS, attorney O'Reilly stated, "I will not however process an invoice for the \$7,655.91." This was stated in response to a request for payment of same. (Plaintiff's Exhibit 23)

18. In its answer and new matter to counterclaim, DRS stated, "To the extent it is determined that DRS is liable for costs incurred as a result of change orders issued by the Department, the amount of such liability must be limited to \$14,591.41 which was previously withheld by the Department from payment of DRS' invoices to allegedly account for any potential costs resulting from error and/or omission change orders." (Paragraph 35 to DRS Answer and New Matter to Counterclaim)

19. The current claim of DRS for the unpaid fee has been administered under Docket No. 1784. (Plaintiff's Pre-Trial Statement; DRS letter of October 18, 1997 to the Board)

20. Settlement Agreement executed November 25, 1996, included mutual release language in paragraphs 4 and 5. Paragraph 4 included the following language:

"...DRS hereby releases and forever discharges DGS, it [sic] successors and assigns, from any and all actions, causes of action, claims, suits, debts, sums of money, accounts, reckonings, covenants, controversies, agreements, promises, variances, damages, liability, demands, obligations, losses, costs and expenses of every kind, name and nature, which DRS now has against DGS with respect to those claims raised before the Board of Claims at Docket No. 1784; provided, however, that this release shall not discharge any claims, causes of actions, or demands which may arise after the date of this Settlement Agreement and Release as a result of defects, acts, omissions or negligence on the part of DGS or its agents or representatives."

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over a claim presented herein since it is a claim against the Commonwealth arising from a contract entered into by the Commonwealth.
72 P.S. §4651-1 through 10

2. Plaintiff's claim for the uncollected fee arose and is part of the dispute docketed at No. 1784.

3. Pending final resolution of the matter, the statute of limitations with respect to the uncollected fee has been tolled by pendency of this case.

4. On May 4, 1994, DRS in a pleading (Answer and New Matter to Counterclaim) indicated that DGS's Counterclaim for costs resulting from error/omission change orders was limited to \$14,591.41. The \$7,655.91 which was the subject of the hearing before the Panel clearly was included in the DGS Counterclaim acknowledged by DRS in this pleading.

5. On November 25, 1996, DRS and DGS executed a Settlement Agreement and Release between the parties which in mutual release language respectively released the parties for any and all claims previously raised before the Board of Claims at Docket No. 1784. The amount in dispute at the hearing before the Panel was a claim previously raised before the Board of Claims at Docket No. 1784.

6. Prior to executing the Settlement Agreement of November, 1996, DGS paid DRS \$6,935.50 in February of 1996 withholding the balance of \$7,655.91, the amount of the claim before the Panel.

7. The language of the Settlement Agreement is very clear and very complete affecting a settlement and release of all matters at Docket No. 1784 in existence prior to the execution of the agreement in November of 1996.

8. The impending assertion of DRS's claim under Docket No. 1784 tolled the Statute of Limitations, but since the Settlement Agreement and Release disposed of the question, there is no statute of limitations question.

9. In executing the agreement, DRS released DGS from any claim DRS may have had to the \$7,655.91 DGS was then withholding from DRS's fees.

OPINION

Paragraph 4 of the Settlement Agreement and Release is quite clear in that DGS is released from any claim DRS raised prior to the Settlement Agreement. DRS in its Answer and New Matter to Counterclaim acknowledged that DGS's Counterclaim was limited to \$14,591.41 which included the \$7,655.91 which was the subject of dispute at the hearing before the Panel. This Answer and New Matter was filed long before the Settlement Agreement and Release was executed by DRS. Pursuant to the Settlement Agreement, DRS received \$675,000.00 as full and complete settlement of all claims pending at the time of execution of the Agreement. There is no language within the Agreement making an exception for the \$7,655.91 withheld from DRS as regular fee as a cost of error/omission change order.

In view of the unambiguous language of the Settlement Agreement and Release and the establishment prior thereto of the DRS claim for withheld fees, the matter is clearly and completely resolved by the Settlement Agreement. It is unnecessary to reach the evidentiary parol evidence questions or Statute of Limitations questions raised at the hearing and in the parties' Briefs.

