

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA INDUSTRIES FOR THE : BEFORE THE BOARD OF CLAIMS
BLIND AND HANDICAPPED :
 :
VS. :
 :
COMMONWEALTH OF PENNSYLVANIA, :
STATE SYSTEM OF HIGHER EDUCATION, :
CHEYNEY UNIVERSITY OF :
PENNSYLVANIA : DOCKET NO. 2410

FINDINGS OF FACT

1. The Plaintiff, Pennsylvania Industries for the Blind and Handicapped (hereinafter "PIBH") is a non-profit corporation registered to do business in Pennsylvania with its address at 1007 North Front Street, Harrisburg, Pennsylvania. (Statement of Claim para. 1)

2. Elwyn Industries is a member of PIBH. Elwyn specializes in contracts to provide commercial janitorial services. It trains and employs handicapped individuals to perform these services. (N.T. 19)

3. Defendant is the Commonwealth of Pennsylvania, State System of Higher Education, Cheyney University of Pennsylvania (hereinafter "Cheyney"), a government agency, an instrumentality of the Commonwealth of Pennsylvania. Cheyney became a part of the State System of Higher Education on July 1, 1993. (24 P.S. §20-2001-a, et seq.)

4. Cheyney entered into a janitorial service Agreement with PIBH for July 1, 1995 through June 30, 1996 Agreement. Elwyn was the PIBH member agency which performed the work on this Agreement. (N.T. 67)

5. The 1995 Agreement contained provisions which would have allowed Cheyney to deduct from PIBH's fee for unsatisfactory work. Only a minimum amount was deducted by Cheyney. (N.T. 73; P-2)

6. By letter dated April 2, 1996, Cheyney advised PIBH that the 1995 Agreement would not be renewed, a new scope of work would be developed which would include "an increase in cleaning frequencies," and that it would be "in the best interest of all parties to rebid the service." (Plaintiff's Exhibit C-2)

7. Throughout May and June 1996, correspondence and communications were exchanged between Cheyney and PIBH regarding the enlarged scope and increased cost of the proposed 1996 Agreement. (Plaintiff's Exhibit C-2)

8. In spite of PIBH having accepted Cheyney's offer to perform the expanded scope of work at a price of Five Hundred Forty-Two Thousand Four Hundred Seventy-Eight Dollars (\$542,478.00) as documented in correspondence dated June 6, 1996, Cheyney to PIBH and June 14, 1996 PIBH to Cheyney, it was ultimately decided that the 1996 Agreement would continue the scope of work of the 1995 Agreement and the price for the 1996 Agreement would be increased by the consumer price index as was included in the 1995 Agreement. (Plaintiff's Exhibit C-2)

9. After negotiations by the parties and Cheyney receiving and rejecting all bids for a new Agreement, the parties entered into a Agreement for the period of July 1, 1996 to June 30, 1997. (N.T. 23)

10. Paragraph 8(A) of the 1996 Agreement is a termination clause as follows:

Termination of Agreement

(A) The University shall have the right to terminate this Agreement at any time upon thirty (30) calendar days written notice to the Contractor in the event the services are to be abandoned for any reason, indefinitely postponed, or because of the Contractor's inability to perform the work, in any of which cases the Contractor shall be compensated for work performed through the dates of termination in accordance with paragraph 4.

(N.T. 9; Statement of Claim Exhibit A)

11 Cheyney notified PIBH by letter dated September 20, 1996 they were terminating the 1996 Agreement effective October 31, 1996. The letter stated the reason for termination was inability to perform under paragraph 8(A) of the 1996 Agreement. (N.T. 152; Plaintiff's Exhibit 2)

12. From the inception of the 1996 Agreement on July 1, 1996 through October 31, 1996, Elwyn provided janitorial services to Cheyney. (N.T. 85)

13. During the period from July 1, 1996 to September 30, 1996, Cheyney employed additional janitorial contractors. A total of One Hundred Twenty-Six Thousand Four Hundred Thirty-Three Dollars and Ninety-Four Cents (\$126,433.94) was paid to three outside contractors. (N.T. 175-176, 178-180; Defendant's Exhibit 12 (A-C))

14. The agreed to total payment for services under the 1996 Agreement was Four Hundred Eighty-Nine Thousand Three Hundred Thirty-Five Dollars and Forty-Nine Cents (\$489,335.49) payable in monthly increments of Forty Thousand Seven Hundred Seventy-Seven Dollars and Ninety-Six Cents (\$40,777.96). (N.T. 11-13; Statement of Claim, para. 4 Exhibit (A))

15. To date, no payment has been made by Cheyney to PIBH under the 1996 Agreement. (N.T. 85)

16. Paragraph 4 of the 1996 Agreement provided a formula for deduction from the agreed to compensation for work performed unsatisfactorily. (Statement of Claim, Exhibit (A), pgs. 24-25)

17. Cheyney had utilized a similar formula in the 95-96 Agreement to deduct for unsatisfactory work performed on the Wade Wilson Administration Building in May and June of 1996. The deduction was One Hundred Ninety Dollars and Two Cents (\$190.02) as stated in a letter dated June 4, 1996 from the Contract Administrator, Antoni Williams to Susan P. Morret, Contract Administrator for PIBH. (Plaintiff's Exhibit P-2)

18. From late June 1996 through September 1996, Cheyney conducted a series of inspections of campus buildings and through reports notified PIBH of its dissatisfaction with PIBH's work. (N.T. 55-56; Plaintiff's Exhibit 1)

19. By memorandum dated September 6, 1996, Tom Walsh of Elwyn Industries advised Mr. Clay, Superintendent of Facilities of PIBH, that Mr. Walsh would advise PIBH to bill Cheyney over Ten Thousand Dollars (\$10,000.00) additional for work demanded by Cheyney which Mr. Walsh considered to be beyond the scope of work included in the 1996 Agreement. (Plaintiff's Exhibit 2)

20. During this period, July, August and September of 1996, Cheyney insisted that the level of service being provided by PIBH was not satisfactory. (N.T. 162, 164; Defendant's Exhibit 3)

21. The scope of work in both the 1995 and 1996 Agreement was a frequency of cleaning scope. That is, it itemized specific tasks by specific locations and indicated how frequently the tasks at these locations were to be performed. (N.T. 39, 160; 1996 Agreement Attachment A-C)

22. On August 24 & 25, 1996, Cheyney engaged the services of American Services Corporation to perform a one time "clean-up" of Fox Hall, Dudley Center, Markus Foster Center, Duckery and Tubman Halls at a total cost to Cheyney of Three Thousand Four Hundred Nineteen Dollars and Ninety Cents (\$3,419.90). (Defendant's Exhibit 12)

23. On August 25, 1996, Cheyney hired Lifestyle Environmental Products to perform detailed restoration of vinyl floors, restrooms, public areas, classrooms and offices in Marion Anderson Auditorium and Foster Student Center for which Lifestyle Environmental Products was paid Thirty-Eight Thousand Eight Hundred Sixteen Dollars and Ninety-Two Cents (\$38,816.92). (Defendant's Exhibit 12)

24. On September 7, 1996, Cheyney hired Lifestyle Environmental Products for restoration of the Foster Student Center Building including detailed restoration of vinyl tile, spanish floors, game room, spanish tile hardware, president's office, conference room among several other tasks. Lifestyle Environmental Products was paid Thirty Two Thousand Two Hundred Sixty-Five Dollars (32,265.00) for this work. (Defendant's Exhibit 25)

25. On September 16, 1996, Cheyney hired Lifestyle Environmental Products to restore and decontaminate floors, base boards, auditorium chair legs, seats, recoating of lecture stand and projector booth, sound room, all stairwells of the World Cultural Center for which Lifestyle Environmental Products was paid Thirty Three Thousand One Hundred Forty-Nine Dollars and Seventy Cents (\$33,149.70). (Defendant's Exhibit 12)

26. On September 28, 1996, Cheyney hired Lifestyle Environmental Products for detailed restoration, decontamination and resurfacing of all tile floors, clean and sanitize chairs, and move all unused computer equipment in boxes in Carne Center. Lifestyle Environmental Products was paid Eleven Thousand Two Hundred Seventy-Seven Dollars and Eighty-Eight Cents (\$11,277.88) for this work. (Defendant's Exhibit 12)

27. On September 20, 1996, Cheyney by letter notified PIBH that it was terminating the 1996 Agreement effective October 31, 1996. (N.T. 152; Plaintiff's Exhibit 2)

CONCLUSIONS OF LAW

1. The Board of Claims has exclusive jurisdiction to hear and determine all claims against the Commonwealth of Pennsylvania arising from contracts entered into with the Commonwealth. (72 P.S. §4651-4)

2. This claim is brought against Cheyney University, a University included in the Pennsylvania State System of Higher Education, a government agency, an instrumentality of the Commonwealth of Pennsylvania. (24 P.S. §20-2001-a, et seq.)

3. The Board has jurisdiction over the parties as well as subject matter jurisdiction asserted by the Plaintiff. (72 P.S. §4651-1, et seq.)

4. Cheyney and PIBH entered into a one (1) year agreement for janitorial services for the period of July 1, 1996 through June 30, 1997.

5. Paragraph 8 of the Agreement provided two different means by which Cheyney could terminate the Agreement between the parties: 8(A) allowed Cheyney to terminate for among other reasons “the contractors inability to perform the work,” provided 30-day notice was given to the Contractor. This paragraph also would then require Cheyney to compensate the Contractor for work performed through the date of termination. The alternate means to terminate per paragraph 8(B) occurs when “in the judgment of the University, such services are unsatisfactory or the Contractor has failed to abide with the performance requirements of the Contract.” In this situation, Cheyney was required to provide “formal notice of the Contractor’s deficiencies, the Contractor then had thirty days to correct the deficiencies for which it had been notified.” In the notice of termination to PIBH both paragraphs were cited. The evidence shows it was Cheyney’s intent to terminate the Agreement pursuant to paragraph 8(A).

6. Although Cheyney conducted many inspections from July 1, 1996 until termination of the Agreement and criticized PIBH’s work, both orally and through many written communications, at no time did Cheyney claim a deduction from PIBH’s contracted fee in accordance with the formula provided in paragraph four of the Agreement.

7. Deductions pursuant to paragraph four would also be “formal notice of the contractor’s deficiencies” as required by paragraph 8(B).

8. None of the correspondence or communications from Cheyney to PIBH was “formal notice of the contractor’s deficiencies” as required by paragraph 8(B) of the Agreement.

9. The opportunity for Cheyney to off-set the cost of “similar services” arises under paragraph 8(C) of the Contract only when the provisions of 8(B), that is, formal notice of deficiencies, etc. has occurred. Since the provisions of 8(B) were not adhered to, Cheyney can not off-set costs of third-party contractors.

10. The tasks performed by the additional contractors, were not proven to be “services similar to those terminated.”

11. Work pursuant to the Agreement was performed by PIBH from July 1, 1996 until termination on October 31, 1996. This work was criticized but no deduction were asserted by Cheyney as was its prerogative under the formula provided in paragraph four of the Agreement. PIBH is entitled to compensation for the four months work performed at the Agreement rate of Forty Thousand Seven Hundred Seventy-Seven Dollars and Ninety-Six Dollars (\$40,777.96) per month for a total of One Hundred Sixty-Three Thousand One Hundred Eleven Dollars and Eighty-Four Cents (\$163,111.84).

12. PIBH is entitled to interest at the legal rate of six percent (6%) per annum from the date of the filing of the Claim.

OPINION

This Claim is based upon a Agreement for janitorial services between Pennsylvania Industries for the Blind and Handicapped (hereinafter “PIBH”) and State System of Higher Education, Cheyney University (hereinafter “Cheyney”), a member university of the Commonwealth of Pennsylvania. Prior to July 1, 1995, janitorial services were provided by Cheyney staff. PIBH is a non-profit corporation which procures employment opportunities for blind and handicapped individuals in Pennsylvania. Pursuant to Section 2409.1 of the Administrative Code, Cheyney as part of the Commonwealth, is required to obtain goods and services from agencies who serve handicapped persons when such agencies often provide goods and services at a fair market price as determined by the Secretary of General Services of the Commonwealth. 71 P.S. §639.1 Pursuant to this Statute, Cheyney entered into a Agreement with PIBH for the period of July 1, 1995 through June 30, 1996. PIBH was to provide janitorial services to Cheyney on a frequency of cleaning basis. The actual services were to be provided by Elwyn Industries (hereinafter “Elwyn”). Elwyn is one of 100 member agencies which provide rehabilitative services for the handicapped through the PIBH umbrella.

In the Spring of 1996 Cheyney concluded that it would require additional services in excess of those provided in its then current Agreement with PIBH. Cheyney prepared an expanded scope of work and invited a price proposal from PIBH for this expanded scope of work. After negotiations, it was determined that the cost for expanded services were more than Cheyney wished to pay. The Agreement for the period of July 1, 1996 through June 30, 1997 (hereinafter 1996 Agreement) was entered into by the parties utilizing the previous contracts scope of work with the cost of services being adjusted upward by the cost of living index.

From the inception of the 1996 Agreement, Cheyney expressed its dissatisfaction with the services being provided by PIBH. On September 20, 1996, Cheyney notified PIBH that services would be terminated on October 31, 1996. PIBH, to date, has received no compensation under the 1996 Agreement. In August, September and October of 1996, Cheyney engaged third-party firms to provide various services for which it expended a total of One Hundred Twenty Six Thousand Four Hundred Thirty-Three Dollars and Ninety-Four Cents (\$126,433.94).

PIBH initiated this claim by filing a Claim with the Board of Claims on February 6, 1997 claiming payment under the Agreement for the period of July 1, 1996 through October 31, 1996 in the amount of One Hundred Sixty-Three Thousand One Hundred Eleven Dollars and Eighty-Four Cents (\$163,111.84). A hearing was held before the Middle District Panel of the Board of Claims on December 3, 1997. Richard B. Swartz, Esquire was Attorney Member and Chairman and Howard G. Minckler was the Engineer Member. The Panel Report has been submitted and viewed.

A review of the 1996 Agreement clearly reveals expressed language controlling various issues in this controversy. The primary evidence in determining the intent of the parties to an agreement is the express language of the contract. PBS Cole, Inc. v. Hard Hat Mining, Inc., 429 Pa Superior Court 372, 632 A.2nd 903, 905 (1993). Accordingly, Paragraph Y4 pages 24 and 25 provides for the compensation to PIBH as well as a formula for deductions from payment for work performed unsatisfactorily. Paragraph Y8 page 26 addresses termination of the Agreement for various reasons; (8A) inability to perform; (8B) for unsatisfactory service or if the contractor has failed to abide by the agreement and has not complied within the period to cure. Paragraph 8C

allows the University to seek services of a third-party to perform the work of the terminated contractor and hold the terminated contractor liable for excess costs for such work.

Cheyney's termination letter of September 20, 1996 stated "you are hereby notified, as provided in Sections A & B, Termination of Agreement, this Agreement will terminate at the close of business on Tuesday, October 31, 1996." This wording generated confusion. If the Agreement was terminated under 8A that would give rise to a set of rights between the parties which would be substantially different from the rights provided had the contract been terminated in accordance with Section 8B. Evidence at the hearing including the testimony of Ms. Williams (N.T. 152-158) indicated that it was Cheyney's intent to terminate the Agreement through paragraph 8A. Consistent with the provisions of 8A, PIBH as the contractor "shall be compensated for work performed through the date of termination in accordance with paragraph 4."

It is contended by Cheyney that PIBH did not substantially perform during the four (4) months of the 1996 Agreement. The language of paragraph 8A refers to paragraph 4. Paragraph 4 clearly provides a means by which Cheyney could have documented the deficient performance it now alleges and deduct appropriate amounts from the fee to PIBH. Although Cheyney utilized this means of documentation and deduction one time in the 1995 Agreement, it failed to utilize the contractual tools available to it in the 1996 Agreement. Throughout the four (4) month duration of the 1996 Agreement, Cheyney criticized orally and through correspondence, both the quality and quantity of PIBH's services. But in none of the correspondence was paragraph 4 and the remedial deductions available to Cheyney referenced or utilized. Without notice of its fee being in jeopardy, it was only reasonable for PIBH to conclude that Cheyney's criticisms were minor and curable.

Cheyney's attempt to off-set fees paid to third-party contractors for various restoration and cleaning tasks must fail. This remedy would only be available to Cheyney had the Agreement been terminated under paragraph 8B. The evidence presented at the hearing is consistent with Ms. Williams' testimony that the Agreement was terminated per paragraph 8A. In none of the communication between Cheyney and PIBH did language appear that could be considered "formal notice of the contractors deficiencies." None of these communications referred to paragraph 8C and none made reference to the thirty (30) day curative period which 8C would have allowed PIBH. The right to off-set emanates from the language in paragraph 8C and only occurs when termination is in accordance with 8B as follows:

In the event the University terminates this Agreement in whole or in part as provided in paragraph 8B above, the University may procure, upon such terms and in such manner as it may deem appropriate, services similar to those terminated, and the contractor shall be liable to the University for any excess costs for such similar services, provided that the contractor shall continue the performance of this Agreement to the extent not terminated under the provisions of the paragraph.

Even if the Agreement had been terminated through the provisions of paragraph 8B, Cheyney would only have been allowed to off-set the costs of third-party contractors for "services similar to those terminated." It was not clear that the services provided by the third-party contractors, Life Style Environmental, Superior Industrial and American Services Corporation, were similar in tasks and more importantly in scheduled time to accomplish the task. The scope of work in the 1996 Agreement is quite specific as to how often specific tasks shall be performed and at what time of the day these tasks may or may not be performed. A definite fee was negotiated between the parties based on this scope. Departure from, or additions to this scope would clearly require that

modifications of the fee to be made. The language of the Agreement clearly indicates the parties contemplated such departures could occur and a corresponding modification or addition to the fee. Paragraph 4 of the Agreement provided “on those occasions when the University requires custodial services to support special events such as homecoming, open house, May weekend, etc., the University will ask the Contractor to provide the agreed upon services. The services provided will be billable at the average hourly rate for the Agreement. Such services shall be invoiced apart from the monthly billing rate.” The tasks performed by the third-party contractors were “special events,” undertakings or were tasks that were included in the 1996 scope of work but were performed by the third-party contractor on an accelerated or concentrated schedule when compared with the scope and schedule of the 1996 Agreement. As such, this work was not “similar services” as required by paragraph 8C as a condition precedent to allowing an offset.

Cheyney entered into a very specific Agreement with respect to quantity and quality of services. Cheyney did reserve the right in paragraph 8A to make a judgment with respect to its satisfaction with the work and if unsatisfied, terminate the Agreement. Paragraph 8A in relevant part is as follows:

“The Agreement ‘may be terminated when in the judgment of the University, such services are unsatisfactory.’”

However, additional language in the same paragraph requires Cheyney to compensate PIBH for the work performed up to termination. Cheyney may not have been satisfied with the services PIBH provided under the 1996 Agreement. Cheyney never the less failed to prove where those services materially differed from the scope to which Cheyney agreed. Cheyney also failed to

utilize remedial measures included in the Agreement which could have remedied its dissatisfaction.

Therefore, the Board will issue the following Order:

ORDER

AND NOW, this day of June, 1999, upon due consideration of the pleadings, the record, and other submissions of the parties, the Defendant, Commonwealth of Pennsylvania, State System of Higher Education, Cheyney University, is indebted to Plaintiff, Pennsylvania Industries for the Blind and Handicapped, in the sum of One Hundred Sixty Three Thousand One Hundred Eleven Dollars and Eighty-Four Cents (\$163,111.84) with interest at the legal rate of six percent (6%) per annum from the date of the filing of the Claim.

Upon receipt of payment of said award, Plaintiff shall forthwith file with the Board a Praecipe that the case be marked settled and ended with prejudice.

Each party to bear its own costs other than above noted.

BOARD OF CLAIMS

David C. Clipper
Chief Administrative Judge

Louis G. O'Brien, P.E.
Engineer Member

Opinion Signed
June 15, 1999

James W. Harris
Citizen Member

Opinion Signed