COMMONWEALTH OF PENNSYLVANIA

JAMES D. MORRISSEY, INC.	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF TRANSPORTATION	:	DOCKET NO. 2455

HISTORY OF THE CASE

Claim in the matter was originally filed on June 11, 1997 with an Amended Statement of Claim being filed on July 31, 1998. Defendant filed an Answer and New Matter on August 28, 1998, to which a Reply to New Matter was filed on October 2, 1998. After a long period of discovery, the matter was heard by a Board Appointed Panel of two on November 6, 2001. The Panel Report was received by the Board on March 28, 2002.

FINDINGS OF FACT

1. Plaintiff, James D. Morrissey, Inc., ("Plaintiff"), is a corporation organized under the laws of the Commonwealth of Pennsylvania with its principal place of business located at 9119 Frankford Avenue, Philadelphia, PA 19114. (Complaint ¶ 1, Answer ¶ 1)

2. Defendant, Commonwealth of Pennsylvania, Department of Transportation (the "Department" or "PennDOT), is an agency of the Commonwealth of Pennsylvania, having its principal office located at the Transportation and Safety Building, Harrisburg, Pennsylvania 17120, at the time the Complaint was filed. (Amended Complaint, ¶ 2, Answer ¶ 2)

3. Plaintiff has been a general or prime contractor for the Department of Transportation for a number of years. The company has done many projects for the Department of Transportation and has done a series of emergency projects over the years for the Department (N.T. 15-16)

4. The roadway in the Commonwealth of Pennsylvania known as Interstate Route 95 ("I-95"), also known as S.R. 0095, is a roadway owned and maintained by Defendant. (N.T. 19, 21, 203)

5. On or about March 13, 1996, a fire occurred on/under a portion of I-95 located off Castor

Avenue, in the Richman area, of Philadelphia County, Pennsylvania. The fire caused substantial damage to the roadway, necessitating immediate emergency repairs and subsequent permanent repairs. (Amended Complaint, ¶ 5; N.T. 19)

6. On Sunday, March 17, 1996, Plaintiff was contacted by representatives of Defendant to perform certain emergency repair work on the I-95 roadway. (N.T. 17-18; Exhibit C-1)

7. After the initial contact with Defendant, Mr. Morrissey said that his company was available to perform the work and he agreed to meet with Defendant's representatives on the project site on Sunday, March 17, 1996. A meeting did take place on that date. (N.T. 17-18)

8. The roadway was shut down at that time and the Defendant wanted to get the roadway open as soon as possible. (N.T. 19-20; 48-49)

9. Mr. Morrissey and Mr. Forster, representatives of Plaintiff, discussed the work with the Department representatives, principally Leo Leonetti and Tom Broska. They discussed the type of work Plaintiff was being requested to perform and the timing of the work. The work involved the construction of the cross-overs for roadway traffic. (N.T. 21) The Department confirmed with Mr. Morrissey that he had his asphalt plant open to provide the necessary asphalt for the work. (N.T. 21)

10. Defendant initially asked Plaintiff to start work on Monday, March 18, 1996. (N.T. 22; 48-49) The discussions concerning Morrissey's scope of work and the timing of the work were between the Plaintiff and Department of Transportation representatives. (N.T. 22-23; 49-50)

11. At the on-site meeting on March 17, 1996, the Department instructed the Plaintiff to perform and invoice its work on a "force account" basis in accordance with Department of Transportation Publication 408. (N.T. 46-47, 49) Force Account billing is a billing process that the Department of Transportation uses for time and material billing. It is outlined in Publication 408, Section 110. Force account billings are prepared using PennDOT forms. The force account formula takes all expenditures for labor, equipment and materials and mark-ups are applied to each category. The force accounts are then presented to PennDOT for review. (N.T. 46)

12. The Department of Transportation instructed the Plaintiff that, for administrative purposes, Plaintiff was to submit its force account billings for the emergency repair work "through" Cornell & Company, another contractor on the project. (N.T. 23; 49)

13. Toward the end of the on-site discussions on March 17, 1996, James D. Morrissey, Jr. talked to the Department's Resident Engineer, Tom Broska, about Plaintiff's cross-over work, and discussed with Mr. Broska where the "crossovers" would be constructed. Mr. Morrissey made suggestions as to where the crossovers could be better located than as originally planned by the Defendant. Mr. Broska agreed with Mr. Morrissey's suggestions, and the Plaintiff ultimately constructed the crossovers

in the areas where Mr. Morrissey suggested. (N.T. 26-27)

14. Cornell and Company did not submit a form 4339-R to the Department as required by Publication 408 for approval of Morrissey as a subcontractor on the emergency repair project. (N.T. 180-81)

15. After the on-site meeting on March 17, 1996, the Department contacted Plaintiff directly to obtain concrete median barriers for the emergency repair project. The Department needed barriers as quickly as possible to channel traffic across I-95. (N.T. 51)

16. Plaintiff obtained the concrete barriers for the emergency repair project at the Department's request and direction. (N.T. 51-53) No one from Cornell & Company was involved in any discussions concerning the concrete barriers. (N.T. 53) Plaintiff's price for the barrier rentals for the emergency repair project was $0.05 per lineal foot per day, which rate was determined in accordance with PennDOT Pub. 408, Section 110.03(d)3. (Exhibit C-6; N.T. 62-66)

17. Plaintiff performed its emergency repair work on March 18, 19, 20 and 21, 1996. (N.T. 46) Plaintiff did not enter into a subcontract agreement with Cornell & Company for the work it performed on the emergency repair project. (N.T. 32; 162, 179-183, 185)

18. Plaintiff's total "force account" billings for the emergency repair work were $138,623.41. (Exhibits C-5 and C-10)

19. Plaintiff's total charges for the barrier rentals for the emergency repair project were $853.80 (Exhibits C-7 and C-10)

20. Plaintiff has not been paid in full for its emergency repair work or for the barriers provided to the Department of Transportation for the emergency repair project. (N.T. 76-80)

21. In 1996, the Senior Assistant Construction Engineer for the Department of Transportation's Engineering District 6-0 was Joseph Meehan. Mr. Meehan was involved in both the emergency repair project and the permanent repair project on the I-95 roadway. For the emergency repair project, his involvement was processing certain paperwork for the project. For the permanent repair project, Mr. Meehan was involved in preparing the request for proposals on specifications to be issued by the Department of Transportation to selected bidders for the work. (Exhibit C-12, ¶¶ 1-4)

22. For the permanent repair project, the Department of Transportation needed to use both concrete roadway barriers and structure mounted barriers. These were the same type of concrete barriers the Department was using on the emergency repair project on the I-95 roadway. (Exhibit C-12, ¶ 5)

23. Before the commencement of work on the permanent repair project, Mr. Meehan

contacted William Greer at James D. Morrissey, Inc., concerning the Department's request to use

Plaintiff's roadway barriers and structure mounted barriers on the permanent repair project. These were the same barriers that were used on the emergency repair project (Exhibit C-12, ¶ 6)

24. Mr. Greer was an estimator for the Plaintiff and was involved in both the emergency repair project and the use of Plaintiff's barriers on the permanent repair project. (N.T. 122-125)

25. During the emergency repair project, Mr. Greer addressed a question which the Department raised concerning Plaintiff's work. The question concerned certain "unraveling" of asphalt materials installed on the roadway. The Defendant addressed the question directly with Mr. Greer and a mutual decision was reached between the Department and Plaintiff about how to address the unraveling. (N.T. 123-14)

26. After the Plaintiff completed its work on the emergency repair project, Mr. Meehan of the Department of Transportation contacted Mr. Greer directly. Mr. Meehan wanted to utilize Plaintiff's barriers on the permanent repair project. (N.T. 125) Mr. Meehan and Mr. Greer had a series of telephone conversations concerning the Department's request to use Plaintiff's barriers on the permanent repair project (N.T. 125-126)

27. In his position as Senior Assistant Construction Engineer for District 6-0 Mr. Meehan was authorized to contact Morrissey concerning the Department's use of Plaintiff's barriers on the permanent repair project (Exhibit C-12, ¶ 7)

28. Mr. Meehan did not discuss the Department's use of Plaintiff's barriers on the permanent repair project with any person from Cornell & Company. He only discussed it with Mr. Greer from Plaintiff. All agreements and understandings concerning the Department's use of Plaintiff's barriers were between Mr. Meehan and Mr. Greer. (Exhibit C-12, ¶ 12)

29. The Department of Transportation and Plaintiff reached certain agreements and understandings concerning the Department's use of Plaintiff's barriers on the permanent repair project. The Department of Transportation and Plaintiff agreed on the following:

a. The Department of Transportation would use Plaintiff's roadway barriers and structure mounted barriers on the permanent repair project.

b. Plaintiff would retain ownership of the barriers.

c. The rental rate for the Department's use of the barriers would be based on the formula of rental of items for maintenance and protection of traffic under Department of Transportation Publication 408.

d. The purchase price to be used in the formula under Pub. 408 would be $17 per lineal foot.

e. The contractor on the permanent repair project would be permitted to move and reset Plaintiff's barriers.

f. The contractor on the permanent repair project would deliver the barriers to a site mutually agreed upon by the Department of Transportation and Plaintiff within 15 miles of the I-95 project site and would unload the barriers at the site.

(Exhibit C-12, ¶ 14; N.T. 128-133)

30. Based on the agreements reached between the Department of Transportation and the Plaintiff concerning the barriers, the Department of Transportation used Plaintiff's roadway barriers and structure mounted barriers on the permanent repair project. The Department's permanent repair contractor moved and reset Plaintiff's barriers. After the permanent repair project was complete, the Department's permanent repair contractor delivered Plaintiff's barriers to an agreed upon location and unloaded the barriers at that location. (Exhibit C-12, ¶ 15; N.T. 134-135)

31. On or about April 9, 1996, Plaintiff submitted its invoice for its emergency repair work which was calculated on a force account basis as directed by the Defendant. (Exhibit C-2; N.T. 55-57; 205) Plaintiff submitted the invoice through Cornell & Company. (Exhibit C-2; N.T. 57)

32. On or about July 26, 1996, the Department submitted comments on Plaintiff's force account submission through Cornell & Company. (Exhibit C-4; N.T. 59-60; 205) On or about October 11, 1996, Plaintiff submitted a revised final summary of force account work in the amount of $138,623.41. (Exhibit C-5; N.T. 61; 205) Plaintiff's force account invoice was calculated as follows: material costs, including markup, $47,344.28; labor costs, including markup, $54,075.70; equipment costs, including markup, $30,915.79; subcontractor, $6,287.54; total $138,623.41. All bills were submitted through Cornell & Company. (Exhibit C-5; N.T. 205-206)

33. Plaintiff's force account billings for the Department's barrier rentals for the emergency repair project were $853.80. (Exhibits C-7 and C-10)

34. Plaintiff's total force account billings for the emergency repair work, including the Department's barrier rentals, were $139,477.21. (Exhibits C-10). Plaintiff has only received payment in the amount of $100,535.83 for its emergency repair work and barrier rentals, leaving an unpaid balance of $38,941.38. (Exhibit C-10, p.2)

35. Plaintiff provided roadway barriers and structure mounted barriers to the Department of

Transportation for the permanent repair project from on or about March 22, 1996 through July 18, 1996. (N.T. 68; Exhibit C-7)

36. Plaintiff's total force account billings for the barrier rentals for the permanent repair project were $36,818.40. (Exhibit C-7, C-10; N.T. 68-70)

37. Plaintiff has not been paid any amounts for its barrier rentals for the permanent repair project in the amount of $36,818.40. (Exhibit C-10; N.T. 71)

38. Plaintiff and Defendant agreed that Plaintiff was to submit its invoices for work performed to Cornell & Company. Cornell in turn would submit the invoices to PennDOT for payment, PennDOT would pay Cornell for Plaintiff's work, and Cornell would transmit the payment to Plaintiff. (N.T. 83, 95)

39. Plaintiff submitted all its invoices on the emergency project through Cornell & Company. (N.T. 92-95)

40. On July 12, 1996, Plaintiff was advised by Cornell that PennDOT had paid Cornell for the work Plaintiff performed on the emergency repair project, but that Cornell could not forward payment to Plaintiff because the money had been spent by Cornell. (N.T. 96-97)

41. PennDOT paid Cornell & Company for all of the work Plaintiff performed and materials Plaintiff provided on the emergency repair project as well as the permanent repair project. (N.T. 156-159)

42. Plaintiff has not been paid the sum of $75,759.79 for the work performed. (N.T. 156-159)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the parties and they are properly before the Board.

2. The Board of Claims has subject matter jurisdiction over the claims asserted.

3. Plaintiff entered into a contract with the Defendant to perform roadway construction work and to provide concrete roadway barriers for the emergency repair project on the I-95 roadway. The parties discussed and agreed on the essentials of the transaction, including the nature and scope of the work Plaintiff was to perform, the timing for performance of the work, and the pricing and basis for payment (PennDOT "force account" process). The parties also discussed and agreed on the essentials of Plaintiff's supplying concrete barriers for the emergency repair project, including the type of barriers to be supplied and used and the pricing for the Department's use of the barriers.

4. The agreement to submit invoices through Cornell & Company did not constitute Plaintiff a subcontractor of Cornell & Company since such agreement only related to billing.

5. Defendant's payment to Cornell & Company did not discharge its obligation to Plaintiff.

6. Plaintiff's total charges for its work and barriers on the emergency repair project were $139,447.21. Of this amount, Plaintiff only received payment of $100,535.83, leaving an unpaid balance of $38,941.38.

7. Plaintiff's charges for the Department's use of the barriers on the permanent repair project were $36,818.40. The Department has not paid Plaintiff any amounts for use of the barriers. The amount of $36,818.40 is due and owing.

8. Plaintiff's damages are as follows:

Emergency repair work/barrier rental	$38,941.38
Permanent repair barrier rental	$36,818.40

9. The Department of Transportation is liable to Plaintiff for damages in the amount of $75,759.78.

10. Plaintiff is entitled to interest on its damages at the rate of 6% per annum from June 11, 1997, the date on which it filed its complaint with the Board.

OPINION

This matter was called to hearing before the Eastern Panel, composed of Richard B. Swartz, Attorney Member, and James B. Wilson, Engineer Member. The Panel Report has been submitted and reviewed.

Plaintiff, James D. Morrissey, Inc. (hereinafter "Plaintiff") is a general contractor which performs various types of construction work, including highway work, and has been in business nearly 100 years. It has done business with PennDOT for 55 years, has done thousands of PennDOT projects, and has done a series of emergency projects for PennDOT over the years.

On March 13, 1996, a fire occurred under Interstate Route 95 in Philadelphia County. The fire

did substantial damage to a portion of I-95.

PennDOT determined that emergency repairs were necessary because of the disruption of traffic caused by the damage, and permanent repairs would be required as well. On Sunday, March 17, 1996, Plaintiff was contacted and asked to perform emergency work at the site.

On March 17, 1996, representatives of Plaintiff and PennDOT met with others at the site where the work was to be performed. Plaintiff agreed to perform emergency repair work for PennDOT and at a later date agreed to provide concrete barriers that would be rented and used during the permanent repair work. PennDOT entered into a written contract with two third parties, one of which is called Cornell & Company. It was agreed by Plaintiff and Defendant that Plaintiff would bill and be paid on a "force accounting" basis. It was also agreed that Plaintiff would submit its statements through Cornell & Company as a convenience to Defendant. Cornell & Company would then submit Plaintiff's bill to PennDOT. PennDOT would pay Plaintiff's bill under the Cornell & Company contract. There is no dispute that this was the agreement between Plaintiff and PennDOT.

Plaintiff performed its emergency roadway repair work on March 18 through March 21, 1996. Plaintiff's revised final force account billing for the emergency work was $138,623.41. The final force account billing for the barrier rentals during the emergency work was $853.80, for a total force account billing for the emergency work of $139,477.21. Plaintiff's final force accounting bill for the barrier rentals for the permanent repair project was $36,818.40. The parties do not contest these numbers and agree that Plaintiff performed work or rented equipment of this value under the agreement between the parties. Plaintiff submitted these billings to Cornell & Company, which then submitted the charges as part of its bill to PennDOT.

PennDOT paid Cornell & Company for all the work performed and materials and equipment

provided by Plaintiff and paid Cornell & Company all of the monies encumbered for the I-95 emergency repair project. (PennDOT's PFFs 64, 67). Unfortunately, Plaintiff has only received $100,535.83 for its emergency repair work and barrier rentals and received nothing for its permanent repair rentals. Thus, Plaintiff has unpaid balances of $38,941.38 for the emergency repair work and related barrier rentals and $36,818.40 for its barrier rentals for the permanent repair project.

Defendant claims it is relieved of further payment as payment to Cornell & Company constituted a discharge of its obligation since Plaintiff was a subcontractor of Cornell & Company. In deciding such issue, a subcontracting agreement must be found to exist between Plaintiff and Cornell & Company. Under Pennsylvania Law, a contract is found where the essential elements of the contract exist. Johnston the Florist, Inc. v. TEDCO Const. Corp., 657 A.2d 511, 516 (Pa. Super. 1995). Contracts are enforceable when parties reach mutual agreement, exchange consideration, and have set forth the terms of their bargain with sufficient clarity. First Home Savings Bank, FSB v. Nernberg, 648 A.2d 9 (Pa. Super. 1994), reargument denied, appeal denied, 657 A.2d 491 (Pa. 1995). An agreement is valid, enforceable and binding if the parties have manifested an intent to be bound by the terms, the terms are sufficiently definite, and there was consideration. Johnston the Florist, Inc. v. TEDCO Const. Corp., 657 A.2d 511 (Pa. Super. 1995). To be enforceable, a contract must represent a meeting of the parties' minds on essential elements of their agreement. Courier Times, Inc. v. United Feature Syndicate, Inc., 445 A.2d 1288 (Pa. Super. 1982).

There is no evidence of any agreement or meeting of the minds between Plaintiff and Cornell & Company other than that Cornell Company was to act as a conduit for payment. The Board concludes that all discussions concerning the nature and scope of the work, the timing of the work and the pricing

were between Plaintiff and PennDOT only. There were no such discussions with Cornell & Company.

Since the payment arrangements were only for the convenience of PennDOT, Plaintiff cannot rely on any further relationship between Plaintiff and Cornell & Company. None in fact existed.

Accordingly, we find for Plaintiff in the amount of $75,759.78. Finally, the Department is liable for accrued interest on the amounts owed. Plaintiff is entitled to interest on its claims calculated at the statutory rate of six percent (6%) per annum, since June 11, 1997, the date of filing. See Dubrook, Inc. v. Commonwealth of Pennsylvania, Dep't of Transp, Pa. Bd. of Claims Dkt. No. 1011 (June 16, 1992), slip op. at 50, citing Commonwealth of Pennsylvania, State Public School Bldg. Auth. v. Noble C. Quandel Co., Pa. Bd. of Claims Dkt. No. 1192, affirmed 2404 C.D. 1989, 585 A.2d 1136 (Pa. Commw. 1991).

ORDER

AND NOW, this 26th day of April, 2002, it is hereby **ORDERED** and **DECREED** that Judgment be entered for Plaintiff and against Defendant in the sum of Seventy-Five Thousand Seven Hundred Fifty-Nine Dollars and Seventy-Eight Cents ($75,759.78), plus statutory interest at the rate of six percent (6%) per annum from June 11, 1997.

Each party shall bear its own costs and attorneys' fees.

BOARD OF CLAIMS

David C. Clipper
Chief Administrative Judge

Louis G. O'Brien
Engineer Member

John R. McCarty
Citizen Member