COMMONWEALTH OF PENNSYLVANIA

J. D. ECKMAN, INC.	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION	:	
	:	
VS.	:	
	:	
VALLEY TOWNSHIP	:	DOCKET NO. 2971

FINDINGS OF FACT

1. The Plaintiff, J. D. Eckman, Inc. (hereinafter referred to as either "Eckman" or "the Claimant"), is a Pennsylvania Corporation with its principal place of business located at 141 Lower Valley Road, P.O. Box 160, at Apglen, Pennsylvania 19310-0160. (Complaint & Answer, Para. 1)

2. The Defendant is the Commonwealth of Pennsylvania, Department of Transportation (hereinafter referred to as either "PaDOT" or "the Commonwealth"), an administrative agency of the Commonwealth of Pennsylvania with its principal offices located in Harrisburg, Pennsylvania. (Complaint and Answer, Para. 2)

3. The Additional Defendant, Valley Township, is a political subdivision of Chester County Pennsylvania. (PaDOT's Complaint/Joinder of Additional Defendant and Answer thereto, Para. 3)

4. The project in this dispute consists of the design and construction of a replacement bridge carrying Valley Station Road over Brandywine Creek in Valley Township, Chester County, Pennsylvania (the "Project"). (Stipulation of Fact No. 3; N.T. 15)

5. On or about December 7, 1994, PaDOT and Valley Township entered into a Non-Federal Aid Bridge Project Agreement ("the Reimbursement Agreement") pertinent to the design of the project. (Stipulation of Fact No. 1)

6. On or about May 22, 1997, PaDOT and Valley Township entered into a Supplemental General Reimbursement Agreement for Non-Federal Aid Projects ("the Supplemental Reimbursement Agreement") for, *inter alia*, the design and construction of the project. (Stipulation of Fact No. 2)

7. The contract work to be performed on the project was to be reimbursed by PaDOT pursuant to the terms of the Reimbursement Agreement and Supplemental Reimbursement Agreement. (Stipulation of Fact Nos. 1 and 2; N.T. 16, 61)

8. Both the Reimbursement Agreement and the Supplemental Reimbursement Agreement named as parties the Commonwealth of Pennsylvania, acting through the Pennsylvania Department of Transportation and Township of Valley, a political subdivision of the County of Chester. The Claimant, J. D. Eckman, Inc., was not a party to either the Reimbursement Agreement or the Supplemental Reimbursement Agreement. Eckman, however, did have a contract with Valley Township. (Stipulation of Fact Nos. 1 and 2; Exh. E to the Stipulation of Fact; N.T. 16 & 17)

9. The Complaint alleges that PaDOT, through its representatives from their Engineering District, oversaw the work on Valley Station rehabilitation project. (Complaint, Para. 7)

10. The Complaint alleges that PaDOT, through its agents and representatives, participated in the review, approval and the funding of the payments for work performed by Eckman for the Valley Station project. (Complaint, Para. 8)

11. The Complaint also alleges that Valley informed Eckman, *inter alia,* that some issues delayed, or lack of payments, were at the direction of or caused by PaDOT. (Complaint, Para. 10)

12. The Complaint also alleges that despite its obligation to fund the contractual payments due to be paid to Eckman, PaDOT did not fully fund the alleged engineering professional costs associated with the project, but rather informed the Claimant that it would make one final payment to "close out" the project and thereafter refused to make any further payments to Valley or Eckman for Eckman's extra work, reimbursement for improperly deducted fees and all other costs eligible for reimbursement by PaDOT, but inaccessible to Valley. (Complaint, Para. 14)

13. The Complaint also alleges that PaDOT is obligated to reimburse Valley for all sums due and owing to Eckman under the contract. (Complaint, Para. 16)

14. The maximum amount PaDOT was obligated to pay Valley Township under the Reimbursement Agreement for the design, right-of-way acquisition and other incidentals for the replacement of the Valley Station Road Bridge over Brandywine Creek was Ninety-Eight Thousand Four Hundred Dollars ($98,400.00). Eckman does not dispute that PaDOT has paid Valley Township the amount of Ninety-Eight Thousand Three Hundred Ninety-Nine Dollars and Sixty-One Cents ($98,399.61). (Stipulation of Fact Nos. 1, 2 and 3; N.T. 63, 64, 201, 202)

15. The maximum amount PaDOT was obligated to pay Valley Township under the Supplemental Reimbursement Agreement for the construction of the replacement of the Valley Station Road Bridge over Brandywine Creek was Four Hundred Eighty-Eight Thousand Dollars ($488,000.00)

and PaDOT has paid that amount to Valley Township. (Stipulation of Fact Nos. 1, 2 and 3; N.T. 63, 64, 201, 202)

16. PaDOT has dispersed to Valley all sums due it under both the agreement of December 7, 1994 and the agreement of May 22, 1997, i.e. Reimbursement Agreement and Supplemental Reimbursement Agreement. (Stipulations of Fact Nos. 1, 2 and 3; N.T. 63, 64, 201, 202; Valley Exh. 45)

17. PaDOT did not approve any extra work for Eckman or indicate a willingness to participate in funding of extra work or delay or disruption costs that Eckman allegedly experienced during the project. (Record)

18. PaDOT performed no inspection services during the course of the construction of the replacement bridge over Brandywine Creek. (Record)

19. Eckman's claim stems from the fact that in conducting Class 3 Excavation for Abutment 2, Eckman experienced unforeseen site conditions including rock at elevations above those shown in the borings, an old concrete footing within limits of the excavation and a significant quantity of buried organic material including timbers and debris at the bottom of the footer elevation, none of which was disclosed in the contract documents. (N.T. 46-48; P-22)

20. Eckman's claim is also based on the fact that there was some confusion regarding Conrail's 1995 Specifications, which were included in the contract documents and Conrail's Specific Requirement of Consolidated Rails Corporate for Work on its Right of Way (CE-6 REV 2-97/"Conrail's 1997 Specifications") which superseded Conrail's 1995 Specifications. (Stipulation of Fact 6, N.T. 28-29, 210)

21. The project scope of work included, *inter alia*, the preparation of shop drawings for and construction of certain temporary shoring in the vicinity of the Conrail facility near the project site. (Stipulation of Fact No. 4; N.T. 15)

22. Eckman subcontracted with Terratech, Inc. ("Terratech") for the performance of the shoring work, including the preparation of the shop drawings and physical construction of the shoring. (Stipulation of Fact No. 12; N.T. 25-26, 138, 140)

23. Conrail rejected Eckman's shoring submittal principally because it was not prepared in accordance with the 1997 Conrail Specifications and Eckman was twice forced to submit, through Terratech, revised shoring submittals to Conrail. (Stipulation of Fact Nos. 14, 16, 19; N.T. 31; P-5)

24. Eckman maintains that it incurred Twenty-Seven Thousand Eight Hundred Seventy-Four Dollars ($27,874.00) in additional costs because it was required to comply with Conrail's 1997 Specifications, including additional labor, equipment and subcontract costs. (N.T. 29-43; P-20)

25. Eckman also claims it is entitled to engineering fees assessed by Valley Township against Eckman in the amount of Sixteen Thousand Four Hundred Thirty Dollars and Fifty-One Cents ($16,430.51) and attorneys' fees in the amount of Fourteen Thousand Thirty Dollars and Forty Cents ($14,030.40). (N.T. 276; Add. Def. Exh.-42; Complaint, parag. 21; Eckman's Proposed Findings of Fact No. 104)

26. Eckman also claims that as a result of late payments throughout the project it is entitled to Five Thousand Twelve Dollars and Sixty-Seven Cents ($5,012.67) in interest. (P-39; Eckman's Proposed Findings of Fact No. 99)

27. In Eckman's Proposed Findings of Fact and Conclusions of Law, which were submitted to this Board on or about January 7, 2002, Eckman outlines its claims and then indicates the following Proposed Conclusions of Law at the following paragraphs:

> Paragraph 3. Valley Township materially misrepresented the scope of the shoring work by including superseded Conrail specifications in the contract documents.
>
> Paragraph 5. Valley Township's inclusion of the superseded Conrail specifications was a material breach of contract.
>
> Paragraph 6. Eckman is entitled to compensation in the amount of Twenty-Seven Thousand Eight Hundred Seventy-Four Dollars (27,874.00) for extra costs because it was required to comply with the requirements of Conrail's 1997 specifications.
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> Paragraph 11. Valley Township had actual or constructive knowledge of the subsurface conditions.
>
> Paragraph 12. Valley Township's failure to disclose these subsurface conditions constituted a positive misrepresentation.
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> Paragraph 15. Eckman is entitled to recovery of $12,511.78 as costs incurred as a result of encountering unforeseen site conditions.
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> Paragraph 16. Valley Township has no lawful basis for assessing any engineering fees against Eckman.
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> Paragraph 17. Valley Township acted in bad faith in assessing engineering fees against Eckman for 29 hours allegedly spent resolving the dispute with Eckman.

> Paragraph 21. Valley Township acted in bad faith by wrongfully overcharging Eckman for engineering fees.
>
> Paragraph 22. Eckman is a third-party beneficiary entitled to enforce the reimbursement agreements between PaDOT and Valley Township.
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> Paragraph 23. Valley Township failed to carry out its responsibilities and obligations under the reimbursement agreement by refusing to pay its municipal share to Eckman, and by failing to pay for additional work performed on the project by Eckman.
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> Paragraph 24. Plaintiff, Eckman, is entitled to recover $61,829.00 from Valley Township under the reimbursement agreement.
>
> Paragraph 26. Plaintiff Eckman, is entitled to recover costs, penalties and attorneys' fees and expenses from Valley Township in accordance with the Award and Execution of Public Contracts Act.

(citations omitted)

28. Eckman, in its Proposed Findings of Fact and Conclusions of Law, does not make any claim whatsoever against the Commonwealth of Pennsylvania, Department of Transportation. (Record)

29. The contract between Valley Township and Eckman contains the following provision:
> "All claims, disputes and other matters in question arising out of, or relating to this Contract or the breach thereof shall be decided by mutual agreement to arbitration in accordance with the Construction Arbitration Rules of American Arbitration Association then obtaining. This agreement so to arbitrate shall be specifically enforceable under the prevailing arbitration law. . . ."

(Valley Township Exh. 1; Answer of Valley Township to PaDOT's Joinder of Additional Defendant, page E-13 of amended contract)

CONCLUSIONS OF LAW

1. It is abundantly apparent from the evidence elicited at trial and the Claimant's own Proposed Findings of Fact and Conclusions of Law that Eckman's claim is solely against Valley Township.

2. It is equally apparent that Eckman does not have any viable claims against PaDOT.

3. The contract between Valley Township and Eckman required Eckman to arbitrate its claims against Valley Township through the American Arbitration Association.

4. PaDOT has not withheld any funds or refused to participate in the funding of extra work, nor have they caused alleged delayed payments, disruption of costs or improper deduction of fees.

5. The Board of Claims lacks subject matter jurisdiction over Eckman's claim and will transfer the claim to the American Arbitration Association.

OPINION

This matter was initiated by the Plaintiff, J. D. Eckman, Inc., (hereinafter referred to as "Eckman" or "the Claimant") on or about October 4, 1999 by the filing of a Claim in the amount of Fifty Thousand plus Dollars ($50,000.00+). On November 10, 1999, the Commonwealth of Pennsylvania, Department of Transportation (hereinafter referred to as either "PaDOT" or "the Commonwealth") filed an Answer with New Matter. On December 2, 1999 Eckman filed a Reply to New Matter and on January 5, 2000, a Complaint/Joinder of Additional Defendant was filed by the attorney for the Commonwealth. On January 27, 2000, an Answer of Additional Defendant, New Matter and Counterclaim was filed by the attorney for the Additional Defendant, Valley Township. On March 2, 2000, PaDOT replied to the New Matter of Valley Township and on March 6, 2000 a Reply was filed by the Plaintiff to the New Matter, Answer and Counterclaim which had been filed by Valley Township. Subsequently, the parties participated in discovery and on October 29, 2001 and October 30, 2001 the Board held hearings concerning Eckman's Claim. Claimant's Proposed Findings of Fact, Conclusions of Law and Memorandum of Law in Support of its Claim was received by this Board on January 7, 2002, and both PaDOT and Valley Township filed

their respective Proposed Findings of Fact, Conclusions of Law and Supporting Memorandums on February 6, 2002.

In the Board of Claims enabling statute the jurisdiction of this Board can be found at section 4 of the Board of Claims Act, 72 P.S. § 4651-4, and reads as follows:

> "The Board of Claims shall have exclusive jurisdiction to hear and determine all claims against the Commonwealth arising from contracts hereafter entered into with the Commonwealth, where the amount in controversy amounts to Three Hundred Dollars ($300.00) or more."

During the course of the trial, this Board became increasingly concerned regarding the jurisdictional issue. As the trial proceeded, it became more and more apparent that Eckman's Claim was not really against PaDOT, but rather was directed almost exclusively toward Valley Township. If the Board had any lingering doubts regarding the exclusivity of Eckman's Claim against Valley Township, that doubt was erased with the Claimant's own submission of Proposed Findings of Fact and Conclusions of Law. As indicated in the Board's Findings of Fact, paragraphs 3 through 26 of Eckman's Proposed Conclusions of Law set forth claims entirely directed towards the Additional Defendant, Valley Township. This Board's jurisdictional statement is clear: "[t]he Board of Claims shall have exclusive jurisdiction to hear and determine all claims against the Commonwealth . . . ."

Eckman cites Shovel Transfer & Storage, Inc. v. Simpson, 523 Pa. 235, 565 A.2d 1153 (1989) as standing for the proposition that this Board has jurisdiction to examine factual predicates to determine whether a valid contract claim exists. While we concur that the Pennsylvania Supreme Court explained this Board's jurisdiction in the Shovel decision, we disagree with Eckman's interpretation of that decision. The Shovel decision did not confer additional jurisdiction on this Board and there must first be a claim against

the Commonwealth for this Board's jurisdiction to attach.

Eckman's third-party beneficiary argument is similarly misplaced. Although Eckman, at paragraphs 7, 8, 10, 14, 15, 16, 17, 18, 19 and 21 sets forth purported claims against PaDOT, during the course of the trial it became abundantly clear that virtually none of those claims could be substantiated as against PaDOT. The stipulation of facts, entered into between the parties, standing alone, is probably sufficient to warrant the jurisdictional decision reached by this Board. However, a review of the Claimant's own Proposed Findings of Fact and Conclusions of Law left little doubt as to the nature of Eckman's Claim as against PaDOT. In short, it is nonexistent. For that reason, Eckman's third-party beneficiary argument must fail.

There is also no dispute that the contract between Valley Township and Eckman contains the following provision regarding mandatory arbitration:

> "All claims, disputes and other matters in question arising out of, or relating to this Contract or breach thereof shall be decided by mutual agreement to arbitration in accordance with the Construction Arbitration Rules of American Arbitration Association then obtaining. This agreement so to arbitrate shall be specifically enforceable under the prevailing arbitration law. . . ."

This language is mandatory and unequivocal. Furthermore, as a matter of public policy, Pennsylvania Courts favor settlement of disputes by arbitration. Goral v. Fox Ridge, Inc., 453 Pa. Super. 316, 683 A.2d 931 (1996); Elkins & Co. v. Suplee, 371 Pa. Super. 570, 538 A.2d 883 (1988), citing Waddell v. Shriber, 465 Pa. 20, 348 A.2d 96 (1975) Since no real controversy exists between Eckman and PaDOT, this Board has no choice but to transfer the matter to the American Arbitration Association, despite the obvious adverse effect on "judicial economy." We are quite cognizant of the fact that all parties have gone through the time

and expense associated with conducting a full hearing before this Board; however, we can not and will not create jurisdiction where none exists. The additional case law cited by Eckman in its "Reply Memorandum of Law" is distinguishable and does not change the simple fact that the Board lacks jurisdiction in this matter.

Accordingly, an appropriate order shall be entered.

ORDER

AND NOW, this 9th day of July, 2002, the Board of Claims hereby relinquishes and transfers this matter to the American Arbitration Association due to the fact that the Board of Claims lacks subject matter jurisdiction over Eckman's claim. The parties are directed to submit this matter to the American Arbitration Association as per paragraph 30 of the agreement between the Claimant and Valley Township as set forth in the Bid Documents.

Each party to bear its own costs.

BOARD OF CLAIMS

David C. Clipper
Chief Administrative Judge

Louis G. O'Brien
Engineer Member

John R. McCarty
Citizen Member