

COMMONWEALTH OF PENNSYLVANIA

ROSS BUEHLER FALK & COMPANY, LLP : BEFORE THE BOARD OF CLAIMS
VS. :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF STATE : DOCKET NO. 3392

FINDINGS OF FACT

1. Plaintiff, Ross Buehler Falk & Company, LLP (hereafter *ARoss Buehler@*), are Certified Public Accountants with principal offices located at 1500 Lititz Pike, Lancaster, Pennsylvania 17601. (Joint Stipulation of Facts, No. 1)

2. Defendant, Commonwealth of Pennsylvania, Department of State (hereafter *ADepartment@*), is an agency of the Commonwealth of Pennsylvania located at 302 North Office Building, Harrisburg, Pennsylvania 17120. (Joint Stipulation of Facts, No. 2)

3. On January 11, 1999, Plaintiff and Defendant entered into Service Purchase Contract No. 1981810003 (hereafter *AContract@*) in the amount of \$46,845.00 (1,735 hours at \$27 per hour) for professional services to audit campaign finance statements and reports submitted by selected candidates for public office for the Bureau of Commissions, Elections, and Legislation. (Joint Stipulation of Facts, No. 3)

4. The Contract stated that Plaintiff was not to exceed 1,735 hours of work at the rate of \$27.00 per hour for a total contract amount of \$46,845.00. (Joint Stipulation of Facts, No. 4)

5. Ross Buehler completed the work required under the Contract prior to its expiration on June 30, 2000. (Joint Stipulation of Facts, No. 5)

6. The Contract for services clearly stated the following terms: *Acontract not to exceed 1735 hrs.@, A\$27.00 per hour@, ATOTAL \$46,845.00".* (Complaint, Exhibit A)

7. The Contract clearly states that Attachment D, Specific Terms to Contract, are included in the Contract, and &28 thereof states: *AThe Contract, including all referenced documents, constitutes the entire agreement between the parties. No agent, representative, employee or officer of either the Commonwealth or the Contractor has authority to make, or has made, any statement, agreement or representation, oral or written, in connection with the Contract, which is (sic) any way can be deemed to modify, add to or detract from, or otherwise change or alter its terms and conditions. No negotiations between the parties, nor any custom or usage, shall be permitted to modify or contradict any of the terms and conditions of the Contract. No modifications, alterations, changes, or waiver to the Contract or any of its terms shall be valid or binding unless accomplished by a written amendment signed by both parties. All*

such amendments will be made using the appropriate Commonwealth form.@ (Complaint, Exhibit A)

8. On July 31, 2000, Ross Buehler filed a written notice of claim with the Commonwealth pursuant to Contract Section 20 - Contract Controversies. (Joint Stipulation of Facts, No. 6)

9. The claim was for the amount of \$5,076.00 and for 188 hours in excess of the hours stated in the Contract. (Joint Stipulation of Facts, No. 7)

10. The claim indicated that Ross Buehler exceeded the amount of hours stated in the Contract due to specific, unanticipated circumstances not known to Ross Buehler upon signing the Contract. (Joint Stipulation of Facts, No. 8)

11. On April 4, 2001, the Department sent a letter to Ross Buehler stating that following the Pennsylvania Office of the Budget's disapproval of the settlement agreement, the Department could not pay Ross Buehler for the hours it incurred in excess of the Contract amount because the Contract contained a Not to exceed@ clause. (Joint Stipulation of Facts, No. 9)

12. The above April 4, 2001 letter also stated, ARoss Buehler did not notify the Department that it had exceeded the Contract amount until after the Contract expired, leaving the Department with no way to evaluate the need for the extra hours. Accordingly, the Department will not pay for the additional hours. . . .@ (Complaint, Exhibit C)

13. On May 4, 2001, Plaintiff filed a Statement of Claim in the Board of Claims against the Defendant, seeking payment in the amount of \$5,076.00 for additional work performed by the Plaintiff for the Defendant. (Joint Stipulation of Facts, No. 10)

14. On June 15, 2001, Plaintiff and Defendant entered into a fully executed Settlement and Release Agreement, which stated that Plaintiff would be paid in the amount of \$5,076.00 in full settlement of all claims under the Contract. (Joint Stipulation of Facts, No. 11)

15. On September 26, 2001, Defendant informed Plaintiff that the claim was denied by the Budget Department. (Joint Stipulation of Facts, No. 12)

16. On November 16, 2001, Defendant filed an Answer to the Statement of Claim with New Matter, denying that Plaintiff was entitled to recover damages and demanding judgment in favor of the Defendant. (Joint Stipulation of Facts, No. 13)

17. The parties agree that any future hearings shall be canceled, and that the parties shall submit argument of this case in the form of briefs and proposed findings of fact and conclusions of law, and any other documents required by the Board in accordance with the Order of the Board. (Joint Stipulation of Facts, No. 19)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the parties and over the subject matter asserted in

this Claim pursuant to 72 P.S. ' 4651-1, *et seq.*

2. Plaintiff and Defendant entered into Service Purchase Contract No. 1981810003 for professional auditing services.

3. The Plaintiff timely filed a written Claim requesting an adjustment in payment for additional hours of work completed in excess of the maximum specified.

4. This request was made pursuant to Section 20 - Contract Controversies, which provides in part that the Contractor must, within six months after the cause of action accrues, file a written notice of controversy or claim with the Contracting Officer.

5. The assertion by the Department stated in its final determination dated April 4, 2001, that Plaintiff's Claim ought to have been filed before the end of the Contract, is an additional term that does not comport with the language in Section 20.

6. However, the ability or right to file a claim does not in itself guarantee that the Plaintiff will prevail. The Plaintiff must establish its case by meeting its burden of proof, in this case, by a preponderance of the evidence.

7. The parties did not stipulate that the Plaintiff exceeded the number of hours stated in the contract or that it did so because of specific unanticipated circumstances not known to it upon the signing of the Contract. The parties only stipulated that the claim indicated this.

8. Strictly speaking, the Plaintiff, relying upon the stipulated facts, has not met its burden of proof to establish that it did, in fact, work the additional hours. More importantly, the stipulated facts provide no support for Plaintiff's allegation that the circumstances of which it complained could not have been anticipated.

9. Absent fraud, accident, or mistake, parole or extrinsic evidence of a prior or contemporaneous oral agreement is not admissible to alter, vary, modify, or contradict terms of a contract, which has been reduced to an integrated written instrument.

10. It is a fundamental rule that in construing a contract the clear contractual terms capable of one reasonable interpretation must be given that effect.

11. The Contract clearly states an upper limit for time and fees, which maximum has been paid to Plaintiff.

12. The Plaintiff is not entitled to additional compensation under the Contract.

13. Assuming arguendo that the Plaintiff's claim may be construed as one for quantum meruit or unjust enrichment, the Plaintiff still has the burden of proof to establish not only that it worked the additional hours and that the Defendant accepted and retained the benefit of that work, but also to establish that it did such additional work with a reasonable expectation of reimbursement.

14. Relying on the stipulated facts, and comparing same to the clear statement of maximum hours and fee, the Plaintiff fails to establish a reasonable expectation of compensation for the additional work alleged.

OPINION

On May 4, 2001, Plaintiff, Ross Buehler Falk & Company, LLP (ARoss Buehler@), filed, *Pro Se*, a Claim against the Defendant, Commonwealth of Pennsylvania, Department of State (ADepartment@), for Five Thousand Seventy-Six Dollars (\$5,076.00). Ross Buehler alleged that it should be paid for work performed in excess of the maximum specified in the Contract between the two parties. On November 16, 2001, attorney for Defendant filed an Answer with New Matter; and Plaintiff filed a letter-type reply to the New Matter on December 19, 2001.

On February 7, 2002, Plaintiff filed a Motion for Judgment on the Pleadings, as well as a ABrief as part of the Motion.@ On February 12, 2002, Defendant responded and stated, ABY way of further answer, the Department's Answer and New Matter adequately sets forth the Department's position without the need for further evidence herein or the need for a supporting brief.@ This Board issued its Opinion and Order on March 18, 2002, denying Plaintiff's Motion for Judgment on the Pleadings.

On October 2, 2002, Plaintiff and Defendant filed Joint Stipulation of Facts, to be

considered in determining the case; and they agreed to submit their respective cases on briefs without further hearings. The Board issued an Opinion and Order accepting the Joint Stipulation as part of the record on November 18, 2002. It further ordered Ross Buehler to file its Brief within thirty (30) days from the exit date of the Order and the Department to file its Reply Brief within thirty (30) days of the receipt of Plaintiff's Brief.

Responding to that Order, the Plaintiff filed a Brief which essentially restated its Claim on December 16, 2002; and counsel for Defendant filed a letter reiterating Paragraph 11 of the Joint Stipulation of Facts, that the parties had entered into a Settlement Agreement and that it concurs with Plaintiff's Brief and that it would not file a Reply Brief. It should be noted for clarification purposes only (not for consideration in this judgment) that on two earlier occasions the Department entered into Settlement Agreements with Ross Buehler, only to have them rejected by the Office of the Budget of the Commonwealth. The pleadings are abbreviated and somewhat unusual in this matter since the Plaintiff is not an attorney and has filed *Pro Se*, and the Department does not vigorously oppose the Claim. The Department has joined in the Stipulated Facts and concurs with Ross Buehler's final Brief.

In the Defendant's New Matter, it raises the issue that Ross Buehler's notice to the Department indicated that it had unilaterally exceeded the contractual limit for the number of hours and that Ross Buehler had not contracted for this excess work, making the payment expressly prohibited by Section 543(a) of the Procurement Code. This Section of the Procurement Code requires execution by all the necessary Commonwealth officials as provided by law before a contract shall be effective. 62 Pa. C.S.A. § 543(a). Citing this provision of the Procurement Code, the Department is viewing Ross Buehler's request

for payment as a separate contract rather than as a request for payment under the Contract which is the subject of this instant case.

This matter involves a Contract between Ross Buehler and the Department of State under which Ross Buehler was to provide professional auditing services to audit campaign finance statements and reports submitted by elected candidates for public office for the Bureau of Commissions, Elections, and Legislation. The Contract stated that the Plaintiff was not to exceed 1,735 hours of work at the rate of \$27.00 per hour. Ross Buehler completed the work in a timely fashion, and the Department paid the Plaintiff \$46,845.00 for that number of hours.

The first issue the Board considers is whether the Department breached the terms of the Contract by denying the consideration of Ross Buehler's Claim under Paragraph 20 of the Contract itself. Paragraph 20, entitled "Contract Controversies", provides that the Contractor, here the Plaintiff, may file a Notice of Controversy or Claim rising from the Contract itself with the Contracting Officer. For the second issue, the Board liberally construes the *Pro Se* Plaintiff's Complaint to include a claim for recovery in quantum meruit and unjust enrichment.

The need to address these issues any further is negated by the obvious and fatal lack of facts to support the Plaintiff's claims. To be successful in recovering under its contract arguments, Ross Buehler has the burden to establish by a preponderance of the evidence that it did perform the excess work for the number of hours it alleges and possibly that there were specific unanticipated circumstances not known to it upon the signing of the contract.

The Joint Stipulation of Facts does not establish either of the above facts. It only

acknowledges that Ross Buehler's claims address these issues as indicated below:

Joint Stipulation of Facts, No. 7:

The claim was for the amount of \$5,076.00 and for 188 hours in excess of the hours stated in the Contract.

Joint Stipulation of Facts, No. 8:

The claim indicated that Ross Buehler exceeded the amount of hours stated in the Contract due to specific, unanticipated circumstances not known to Ross Buehler upon signing the Contract.

Considering the facts stipulated, the Board finds that the Plaintiff has not met its burden of proof. The Plaintiff is not entitled to additional compensation under the contract.

Plaintiff has also failed to establish a claim for quantum meruit or unjust enrichment. As noted above, the stipulated facts fail to establish that excess work was performed. However, even if the Board could somehow find its way past the failure to stipulate the number of excess hours worked, we cannot find a reasonable expectation of payment for these excess hours in light of the clearly stated contractual limit on maximum hours and fee, absent some further explanation of the circumstance.

Finally, we find the Commonwealth's failure to honor the first settlement agreement between Ross Buehler and the Department of State, (referenced in Joint Stipulation of Facts, No. 9), and the fully executed Settlement and Release Agreement of June 15, 2001, (Joint Stipulation of Facts, No. 11), very troubling. However, we cannot find a claim for relief based on either of these settlement agreements anywhere within the Plaintiff's pleadings; and we are not at liberty to import a new cause of action into Plaintiff's claim, sua

sponte.

ORDER

AND NOW, this 29th day of October, 2003, it is hereby **ORDERED** and **DECREED** that judgment is entered in favor of the Defendant, Commonwealth of Pennsylvania, Department of State, and that the Claim of the Plaintiff, Ross Buehler Falk & Company, LLP is hereby **DISMISSED**.

Each party to pay its own costs and attorney-s fees.

BOARD OF CLAIMS

Jeffrey F. Smith
Chief Administrative Judge

Ronald L. Soder, P.E.
Engineer Member

Opinion Signed

John R. McCarty
Citizen Member