COMMONWEALTH OF PENNSYLVANIA

FERGUSON ELECTRIC CO., INC.	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF GENERAL SERVICES	:	DOCKET NO. 3934

REVISED OPINION AND ORDER

FINDINGS OF FACT

1. Plaintiff, Ferguson Electric Co., Inc., is a Connecticut corporation with its primary office in Plainville, Connecticut engaged in electrical and mechanical contracting. (N.T. 139).

2. Defendant, the Commonwealth of Pennsylvania, Department of General Services, and Ferguson Electric entered into a contract dated January 14, 1994 ("Contract") for the performance of electrical work in the construction of a state correctional institution in Houtzdale, Pennsylvania. (Contract No. DGS 579-2-44 - copy filed April 6, 2009 to supplement the record); N.T. 141).

3. During the course of the Houtzdale SCI construction project, Ferguson submitted a number of claims to DGS for costs of additional work above and beyond work specified in the Contract. (Complaint ¶ 5; N.T. 142, 144).

4. Under the heading "Professionals and Other Interpretations" the Contract provided that disputes raised by the contractor should initially be referred to DGS's Construction District Manager and Director of Construction and that they would then issue their determination in writing on these disputes within a reasonable time. (Contract § 63.81(A)).

5. In a letter dated December 21, 1995, Ferguson notified Mr. David McCarty, DGS's Director of Construction for the Houtzdale SCI project, that unresolved change orders and other claims remained on the project. The letter included a list of disputed work items together with the amounts in dispute that were discussed later at various construction conferences (including the December 5, 1996 construction conference). However, there was no evidence that the DGS Construction District Manager or the Director of Construction made a determination or definitely refused payment of any of these disputed items until after the matters proceeded to negotiation at construction conferences, and there was no evidence whatsoever presented to the Board that the DGS Construction Manager or the Director of Construction ever made a determination or definitely refused payment on the claims currently before the Board, nor evidence of any such definitive refusal of the claims currently before the Board from any DGS

official until the Joseph Resta letter of August 1, 2007. (N.T. 143-45, 153, 219-21; Exs. 14, 37; F.O.F. 50-54; Board Finding).

6. Under the heading "Claims Disputes Between the Contractor and the Department" the Contract provided for a procedure for the resolution of contractors' claims which procedure culminated in filing the claim with the Board under the Board of Claims Act. (Contract § 63.82, 63.83).

7. The Department referred to this procedure as the "three-tiered" system and it was followed at the time the present Contract was entered into until 1998 when the Procurement Code went into effect. (N.T. 206-07; Ex. 7).

8. The first tier of the dispute resolution process was to negotiate claims at a construction conference. (Contract § 63.82(A); N.T. 206, 272).

9. Claims not previously resolved by negotiation at the construction conference could be heard at an informal pre-claim hearing by a committee chaired by DGS's Deputy Secretary for Public Works or his representative. This was the second tier. (Contract § 63.82(B); N.T. 41, 42, 206, 210-11).

10. At the second tier, claims were decided by the Department's Deputy Secretary for Public Works or his designee based on information provided by the claimant. (N.T. 206, 209).

11. As the third tier, the Contract provided that, when an adverse decision was rendered as a result of the pre-claim hearing, claims could be filed at the Board of Claims pursuant to the Act of May 20, 1937, P.L. 728, No. 193. (Contract § 63.83(A); N.T. 206, 210-13).

12. The Contract also specifically required that claims must be filed with the Board of Claims within six months of the date the claimant received the decision from the pre-claim hearing. In the event no decision was received, the Contract provided that the claimant must file with the Board within six months after the fortieth day following the pre-claim hearing. (Contract § 63.83(B); N.T. 211-13).

13. Some of Ferguson's claims were resolved as a result of construction conferences held in 1996 pursuant to the Contract. (N.T. 57-58, 217-18).

14. A release dated March 22, 1999 was entered into by the parties as a result of the resolution of some of Ferguson's claims. This release specifically excluded the claims at issue in this matter presently before the Board. (N.T. 60, 163-65; Ex. 3).

15. A construction conference was held pursuant to the "three-tiered" procedure provided in the Contract on December 5, 1996 to consider the claims presently raised by Ferguson against DGS. (N.T. 273, 275-76; Ex. 1).

16. At this construction conference, the parties disputed the differences between the amounts paid by DGS for several items of change order work, based DGS estimates, and the amount sought by Ferguson based on its alleged actual costs. (Ex. 1; Board Finding).

17. The DGS arbitrator, Diane Hallett, suspended the proceedings at the December 5, 1996 construction conference to allow Ferguson to gather and submit additional information substantiating its costs for this claim. (N.T. 152-53, 219-21, 276; Ex. 1 at p. 16).

18. At the time Ferguson's construction conference of December 5, 1996 was suspended, no decision had been reached by DGS with respect to Ferguson's claim. (Ex. 1 at pp. 15-16; N.T. 220-21, 276).

19. By September 12, 1997, Ferguson had not provided any additional information on the claim here at issue. Diane Hallett wrote to Ferguson on that date asking if it still intended to submit the additional information promised at the December 5, 1996 construction conference. (N.T. 225-26, 276-77; Ex. 2).

20. Ferguson did not respond to Diane Hallett's September 12, 1997 letter. (N.T. 226).

21. DGS did not initiate further communication regarding Ferguson's claim and did not again request the additional information promised by Ferguson at the construction conference. (N.T. 156, 244, 277).

22. DGS adopted a strategy of leaving it up to Ferguson to advance its own claim and, consequently, DGS did not take steps to move the claim forward. DGS's Chief Counsel at the time Ferguson's claim was initiated, Herman Cardoni, decided with respect to Ferguson's claim to "let it slide" recognizing that it was in Ferguson's interest, and not the Department's, to pursue litigation against the Department. (N.T. 226-27, 332-33).

23. There is no evidence of activity in regard to the portion of Ferguson's claim here at issue from September 1997 until May 2002. (Exs. 4, 5; Board Finding).

24. Under cover of a letter dated May 20, 2002, Ferguson sought to file a claim with the Board captioned "Department of General Services Board of Claims" asserting a demand for payment arising from the claim at issue here. This claim was mailed in apparent error to the Department of General Services. (N.T. 168-69; Ex. 5; Board Finding).

25. By letter dated May 24, 2002, the Department returned Ferguson's claim noting that it was improperly filed with the Department instead of the Board. The letter went on to provide the Board's address to allow for proper filing. (Ex. 6).

26. By letter dated June 4, 2002, Ferguson's legal counsel addressed the Department's representative, Jose Morales, Esquire, purporting to confirm the substance of a discussion between the parties' lawyers. The letter represented that Ferguson's claim remained open and in the initial stage of the dispute resolution process provided in the Contract. The letter went on to represent that the Department offered the option of either continuing with the "three-

tiered" process or, considering that Department no longer used that system, presenting Ferguson's claim directly to the Board of Claims. (N.T. 169-72; Ex. 7).

27. The June 4, 2002 letter further stated Ferguson's legal counsel's initial inclination to continue with the "three-tiered" process at least to the extent of completing the construction conference. (Ex. 7).

28. By letter dated June 17, 2002, directed to Diane Hallett, DGS's Chief of Public Works Arbitration Division, Ferguson's legal counsel requested that the construction conference be rescheduled. (N.T. 173; Ex. 8).

29. DGS did not respond in writing to Ferguson's June 2002 letters and did not reschedule the construction conference or otherwise proceed to hear or decide Ferguson's claim. (N.T. 172, 173, 307).

30. By letter dated July 30, 2002, Ferguson's legal counsel confirmed a conversation with DGS's Ms. Hallett representing that it was DGS's position that Ferguson pursue its claim under the new claim procedures defined in Section 1712 of the Procurement Code in effect at that time. (N.T. 278-79; Ex. 9).

31. In this letter of July 30, 2002, Ferguson's counsel stated that his recommendation to Ferguson would be to proceed under the new claim procedure outlined in Section 1712 of the Procurement Code. The letter also stated that once Ferguson agreed to this procedure, legal counsel would explain and identify all Ferguson's claims and provide all supporting documentation. (N.T. 278-79; Ex. 9).

32. By letter of August 7, 2002, Ferguson's legal counsel confirmed Ferguson's agreement to proceed with its claim under the new claim procedure outlined in the Procurement Code Section 1712. The letter also renewed Ferguson's promise to provide details of the claim and all relevant supporting documentation. (N.T. 289; Ex. 35).

33. Ferguson did not provide the relevant supporting documentation promised in the letters of July 30 and August 7, 2002. (N.T. 278-282, 289; Board Finding).

34. By letter dated May 29, 2003, Ferguson's legal counsel provided DGS with a summary of Ferguson's claim but noted that this information did not include the full measure of the damages that Ferguson was claiming. The letter stated that Ferguson was still finalizing its damages and expected to submit the additional final claim analysis shortly. Finally, the letter reaffirmed Ferguson's understanding that it was proceeding according to the new claim procedures outlined in Section 1712 of the Procurement Code. (N.T. 173-74, 320-21, 327; Ex. 10).

35. In its letter dated July 11, 2003, Ferguson's legal counsel submitted further information regarding Ferguson's claim but, once again, noted that this submission did not include support for the full measure of damages claimed by Ferguson. According to the letter, these damages were still being finalized and information for this portion of the claim would be

provided shortly. Again, the letter reiterated Ferguson's understanding that the claim would proceed pursuant to the new claim procedures outlined in Section 1712 of the Procurement Code. (N.T. 175-76, 280-81; Ex. 11).

36. Ferguson did not provide the information promised in its letters in 2002 and 2003. (N.T. 111, 169, 172-73, 175-76, 182, 198, 282, 289, 308, 333; Exs. 9, 10, 11, 35).

37. DGS did not respond in writing to Ferguson's letters of 2002 and 2003. (N.T. 172-73, 175-76, 307, 309, 327, 329, 312-13).

38. On October 1, 2003, Ferguson submitted a request for documents relating to the present claim under the Right to Know Act, 65 P.S. § 66.2. (N.T. 176-77; Ex. 12).

39. Section 1712 of the Procurement Code was repealed on December 3, 2002 and Section 1712.1 (titled Contract Controversies) was enacted providing for a new procedure pertaining to contract claims at DGS and the Board of Claims. (December 3, 2002, P.L. 1147, No. 142 §§ 11.2, 12, 22; 62 Pa.C.S. § 1712.1).

40. Ferguson's letters dated May 29, 2003 and July 11, 2003 reiterating its understanding of the parties' agreement to follow the procedures at Section 1712 were written after Section 1712 was repealed and Section 1712.1 became effective. (N.T. 322-23; F.O.F. 34-35, 39).

41. DGS did not respond to Ferguson's written representations detailing the terms of the parties' agreement to use the new claims procedure. (N.T. 174-75, 307-08, 327-29).

42. Ferguson's letters in 2002 and 2003 provide the only evidence of the agreement to pursue the present claim according to the Procurement Code rather than the "three-tiered" process provided in the Contract. (F.O.F. 26, 31, 32, 34, 35; Board Finding).

43. DGS does not dispute that the parties agreed to abandon the old "three-tiered" procedure and to use "the new claim procedure as outlined in the Commonwealth Procurement Code, 62 Pa.C.S. § 1712" to resolve the outstanding dispute with Ferguson. (DGS Brief in Support at 5).

44. Ferguson and DGS agreed to follow the procedure of Section 1712 of the Procurement Code (1998) instead of the provisions for the "three-tiered" dispute resolution in the Contract. (F.O.F. 30-32, 34, 35, 42-43; Board Finding).

45. At the time they agreed to use "the new claim procedure as outlined in the Commonwealth Procurement Code, 62 Pa.C.S. § 1712" Ferguson and DGS also agreed that Ferguson would supply the "details," "supporting documentation" and additional information to support its claim "shortly" meaning within a reasonable period of time following its agreement with DGS. This obligation on Ferguson's part to provide the additional information to support its claim was also a material term of this agreement. (F.O.F. 30-32, 34-35, 42-44; Ex. 9, 10, 11, 35; Board Finding).

46. There was no activity in this case from October 2003 until April 2007, and Ferguson provided none of the additional claim information as promised. (Ex. 12, 13; Board Finding).

47. Ferguson failed to provide documentation supporting its claim "shortly" or within a reasonable period of time following its agreement with DGS when it did not provide this promised information over the four ensuing years that elapsed before it contacted DGS again in April 2007. This was a material failure. (F.O.F. 33, 36, 42-46; Board Finding).

48. In a letter dated April 23, 2007, directed to Diane Hallett of DGS, Ferguson's legal counsel requested a construction claims conference to be scheduled at the Department's earliest convenience to address all of Ferguson's unresolved claims associated with the Houtzdale SCI project. (N.T. 281; Ex. 13).

49. The April 23, 2007 letter represented that documentation supporting Ferguson's "entitlement to additional funds or the other change orders which were not resolved" by the 1999 settlement had finally been prepared. (N.T. 180-82, 281-82; Ex. 13).

50. Joseph Resta, DGS's Deputy Secretary for Public Works, responded to Ferguson's April 23, 2007 letter by letter dated August 1, 2007 sent through certified mail. Mr. Resta's letter stated that the Department deemed Ferguson to have breached its duty to submit the information in a timely manner thereby prejudicing the Department's ability to conduct a meaningful review of any claim. As an example of prejudice to the Department, Mr. Resta represented that the construction inspection manager on the Houtzdale SCI project had passed away. (N.T. 282, 303, 321; Ex. 14).

51. Mr. Resta's August 1, 2007 letter asserted that Ferguson had failed to provide the documentation of costs, despite assurances issued over the past 10 years, and concluded, "Ferguson's failure to submit the information constitutes a waiver of their rights to pursue the claim." (Ex. 14).

52. In a letter dated August 15, 2007, Ferguson's legal counsel acknowledged receipt of Mr. Resta's August 1, 2007 letter and disputed its conclusion, asserting that it was "inappropriate for the Department to blindly reject Ferguson's claims." The letter went on to renew its request for a construction claims conference and assert the position that Ferguson was entitled to its "day in court." (N.T. 303-04, 316, 321; Ex. 36).

53. DGS did not respond to Ferguson's August 15, 2007 letter. Additionally, there is no evidence of any further communication from DGS to Ferguson regarding the claim here at issue between the August 1, 2007 Resta letter and Ferguson's claim filing here at the Board on March 12, 2008. (N.T. 316; F.O.F. 50-52, 64; Board Finding).

54. Mr. Resta's August 1, 2007 letter constituted the first affirmative, unequivocal notification to Ferguson that it would not be paid by DGS on the claims here at issue. (Contract § 63.82(A), (B); N.T. 209-10, 303, 324; Ex. 14; F.O.F. 8-23, 26, 30-32, 41, 43-44, 50-52; Board Finding).

55. After more than 10 years following the construction conference of December 1996 and well after the completion of all work on the Houtzdale SCI project, Ferguson was capable of calculating the amount due under the claim and preparing a concise and specific written statement detailing its injury by the time of Mr. Resta's August 1, 2007 letter. This capability is further confirmed by the representations of Ferguson's own legal counsel in his letter of April 23, 2007. (Ex. 13; F.O.F. 2-3, 12-17, 24, 28, 31-32, 38, 45, 48, 49; Board Finding).

56. Ferguson's present claim against the Department accrued upon receipt of the August 1, 2007 letter from Joseph Resta notifying it that its claim was denied. (Ex. 14; F.O.F. 54-55; Board Finding).

57. Ferguson's formal claim to the DGS contracting officer contesting this initial denial on August 1, 2007 was filed on August 15, 2007 with the letter from Ferguson's legal counsel disputing Mr. Resta's rejection of Ferguson's claim. (Ex. 36; F.O.F. 50, 52; Board Finding).

58. The Department's conduct of reminding Ferguson to submit the promised information on only one occasion, in September 1997, and failing to prod Ferguson to pursue its claim in the ensuing years because it was not in DGS's interest to do so, does not rise to the level of a "fraud or concealment" or even an "unintentional deception" as we find no misrepresentation in these actions. (Ex. 2; F.O.F. 19-23, 36, 37, 44-47; Board Finding).

59. Ferguson and the parties here were not in continuous contact; instead long periods elapsed in which there was no activity on the claims here at issue (e.g. from September 1997 to May 2002 and October 2003 to April 2007). DGS did not at any time provide false assurances that additional payments on the claims here at issue would be made to Ferguson. DGS actively sought Ferguson's missing information in September 1997, but Ferguson did not respond or provide additional information for over ten years thereafter through no fault of DGS. (Ex. 1, 2; F.O.F. 19, 20, 23, 33, 36, 46, 47; Board Finding).

60. We do not find Ms. Hallett's statement at the end of the December 5, 1996 construction conference to the effect that DGS would reconvene the construction conference after Ferguson provided the additional information to support its cost claims to be a material misrepresentation despite DGS's subsequent failure to do so upon Ferguson's requests in June 2002 and again in April 2007. We so hold because we find that Ms. Hallett's representation at the end of the December 5, 1996 construction conference was conditioned upon Ferguson supplying such additional information within a reasonable amount of time following the December 5, 1996 suspension of the construction conference, and that Ferguson did not supply (nor tender) this information to DGS within a reasonable amount of time following the December 5, 1996 suspension of the construction conference. Additionally, any possible misunderstanding that DGS might still reconvene a construction conference for this claim after Ferguson's long delay in providing said information was clearly put to rest by Mr. Resta's August 1, 2007 denial letter, and there was no further communication from DGS that could be even remotely construed to cause Ferguson to delay or relax its vigilance in pursuing its remedies after August 1, 2007. (F.O.F. 15-18, 19-20, 23, 28-29, 48-57, 62; Board Finding).

61. We do not find the June 4, 2002 letter of Ferguson's counsel reporting an alleged offer by Mr. Morales of DGS to allow Ferguson to continue its claim under the "three-tiered" process (i.e. to reconvene the construction conference) to be credible in light of DGS failure to do so after Ferguson's June 17, 2002 request; the change in claims procedure dating back to 1998; and the subsequent agreement by both parties to abandon the "three-tiered" procedure. Thus we find no DGS representation in its actions of 2002 which would reasonably lead Ferguson to believe that DGS might reconvene its construction conference after still further delay in producing its claim support material. In any case, any possible misunderstanding that DGS might yet reconvene a construction conference for this claim was clearly put to rest by Mr. Resta's August 1, 2007 denial letter, and there was no further communication from DGS that could be even remotely construed to cause Ferguson to delay or relax its vigilance in pursuing its remedies after August 1, 2007. (F.O.F. 26-32, 34-35, 42-45, 48-53, 62; Board Finding).

62. After Mr. Resta's letter of August 1, 2007 affirmatively and unequivocally refused Ferguson's claim, DGS did not engage in any further communication with Ferguson nor any behavior that constituted misrepresentation, unintentional deception, fraud or concealment. (Ex. 14; F.O.F. 50-54; Board Finding).

63. Because the Department reminded Ferguson to provide its supporting documentation in Ms. Hallet's September 12, 1997 letter; because it did not misstate or conceal the status of Ferguson's claim at any time following the December 5, 1996 suspension of the claims conference; and because there was no communication to Ferguson from DGS following the Resta letter of August 1, 2007, the Board finds that Department neither misrepresented the status of Ferguson's claim nor gave any misleading assurance that would cause Ferguson to delay in pursuit of its claim or relax its vigilance in asserting its rights, particularly following Mr. Resta's August 1, 2007 denial letter. (Ex. 2; F.O.F. 15-23, 25, 29, 30-32, 37, 41-44, 50-51, 53, 58-62; Board Finding).

64. On March 12, 2008, Ferguson filed its complaint with the Board of Claims, 210 days from Ferguson's August 15, 2007 letter disputing DGS's decision on the present claim. (Board of Claims Docket No. 3934; Ex. 36; Board Finding).

65. On April 11, 2008, DGS responded with its preliminary objections. The Department's objections in the nature of a demurrer and to the sufficiency of counts II and III of the complaint were overruled and a hearing was held in November and December 2008, to determine facts pertaining to the Department's objection to the Board's in personam jurisdiction. (Board of Claims Docket No. 3934).

66. The provisions of the Procurement Code, as amended in 2002, including Section 1712.1, were in effect at the time Ferguson's claim accrued upon receipt of Mr. Resta's August 1, 2007 denial letter; at the time Ferguson filed its claim with the DGS contracting officer on or about August 15, 2007; and at the time Ferguson filed its claim with Board of Claims. (F.O.F. 39, 50-57, 64; Board Finding).

67. Herman Cardoni, former Chief Counsel to the DGS Public Works Unit from 1995 to 2000, testified on behalf of claimant Ferguson. From the latter part of 2001 through the time

of hearing in this case, Mr. Cardoni has been employed by Ferguson's current legal counsel, Cohen, Seglias, Pallas, Greenhall & Furman, P.C. DGS did not object to Mr. Cardoni testifying in this matter. (N.T. 203-05, 238-39; Board Finding).

CONCLUSIONS OF LAW

1. The Board of Claims has exclusive jurisdiction over claims for breach of contract asserted against the Commonwealth. For claims filed with the Board prior to June 28, 2003 this jurisdiction derives from the Board of Claims Act, May 20, 1937, P.L. 728, No. 193 (as amended). 72 P.S § 4651-4. For claims filed with the Board on or after June 28, 2003, the Board's jurisdiction derives from Act 142, December 3, 2002, P.L. 1147, No. 142 §§ 21.2, 22. 62 Pa.C.S. § 1724 (2002); Pa. Bull., Vol. 33, No. 26, June 28, 2003 pp. 3053-83; DGS v. Limbach Co., 862 A.2d 713, 718-720 (Pa. Cmwlth. 2004), aff'd per curiam, 895 A.2d 527 (Pa. 2006).

2. In the present case, the Board has subject matter jurisdiction, meaning it is competent to act on the general class or type of case presented, i.e. Ferguson's claim for breach of contract against the Commonwealth. By its preliminary objections, the Department of General Services disputes whether the Board has personal jurisdiction, that is the power to act over the parties in this case, due to the Department's allegations that the present claim was not timely filed. Id.; In re Melograne, 812 A.2d 1164, 1166-67 (Pa. 2002); Dep't of Pub. Welfare v. UEC, Inc., 397 A.2d 779, 785 (Pa. 1979).

3. Whereas subject matter jurisdiction cannot be supplied by any action or agreement of the parties, objections based on personal jurisdiction can be waived or estopped. In re Melograne, 812 A.2d at 1166-67; Dep't of Pub. Welfare v. UEC, Inc., 397 A.2d at 785.

4. From the date the parties entered into the Contract at issue in the present case, January 14, 1994, until Ferguson filed its claim with the Board of Claims on March 12, 2008, three different sets of time limitations/claim filing procedures have been in effect: (A) Section 4651-6 of the Board of Claims Act of 1937 and the "three-tiered" claim procedure set forth in the Contract and DGS regulations; (B) Section 4651-6 of the Board of Claims Act and § 1712 of the Procurement Code of 1998; and (C) §§ 1712.1 and 1724 of the Procurement Code (as amended in 2002) when the other two statutory provisions were repealed. Board of Claims Act of 1937, P.L. 728, No. 193 found at 72 P.S. § 4651-1 through 10 (repealed) and 4 Pa. Code §§ 63.81-63.83 (repealed) and Contract §§ 63.81-63.83; § 1712 of the Procurement Code of 1998, Act of May 15, 1998, P.L. 358, No. 57, § 1 found at 62 Pa.C.S. § 1712 (repealed); Procurement Code §§ 1712.1 and 1724, Act of December 3, 2002, P.L. 1147, No. 142 found at 62 Pa.C.S. § 1712.1 and 1724.

5. The Board of Claims Act of 1937 provided, inter alia, that: "The board shall have no power and exercise no jurisdiction over a claim asserted against the Commonwealth unless the claim shall have been filed within six months after it accrued." 72 P.S. § 4651-6 (Board of Claims Act of 1937, P.L. 728, No. 193).

6. The Board of Claims Act remained in effect until it was repealed on June 28, 2003, by Act 142 of 2002. Act of December 3, 2002, P.L. 1147, No. 142 §§ 21(a)(2), 21.2, 22; Pa. B., Vol. 33, No. 26, June 28, 2003 pp. 3053-83.

7. Prior to the 1998 Procurement Code, the procedure and time limits for filing a claim with DGS were controlled by the "three-tiered" claim procedure set forth in DGS's contracts and/or in DGS's regulations in effect at that time. F.O.F. 6-12; 4 Pa. Code §§ 63.82, 63.83 (1975); Contract §§ 63.82, 63.83.

8. In 1998, the Commonwealth Procurement Code was enacted and provided that, prior to filing under the Board of Claims Act, a claim must first be filed with the agency's contracting officer within six months of the date it accrued. Following a decision by the contracting officer/purchasing agency head, the contractor then had 30 days to file its claim with the Board. Act of May 15, 1998, P.L. 358, No. 57, § 1; 62 Pa.C.S. § 1712 (repealed).

9. In addition, § 1712 of the 1998 Procurement Code provided that, in the event the contracting officer did not issue a decision within 120 days after a written request, the contractor could proceed as if adverse decision had been issued. This, in effect, allowed the contractor 150 days from the date it submitted its claim to DGS to file its claim with the Board if DGS did not issue a decision. 62 Pa.C.S. § 1712 (repealed).

10. § 1712 of the 1998 Procurement Code was repealed by Act 142 of 2002 and replaced by § 1712.1 as of December 3, 2002. Act of December 3, 2002, P.L. 1147, No. 142, §§ 11.2, 12, 22.

11. Like its predecessor, § 1712.1 of the Procurement Code (as amended in 2002) requires that claims be filed with the contracting officer within six months of the date they accrue. However, from December 3, 2002 onward, the contractor may file a statement of claim with the Board within 15 days of the mailing date of a final determination by the contracting officer or within 135 days of filing a claim with the agency if no decision is rendered, whichever comes first. 62 Pa.C.S. § 1712.1(b),(e).

12. The current Procurement Code (2002) provides that (with exceptions not applicable here for contracts involving real estate or written agreements to arbitrate before the Board) the Board shall have no jurisdiction over contractors' claims which are not first filed in accordance with § 1712.1. 62 Pa.C.S. § 1724(a)(1).

13. A claim accrues when: 1) a claimant is first able to litigate his or her claim, i.e., when the claimant is able to prepare a detailed statement of its claim, and 2) the claimant is affirmatively notified that it will not be paid by the Commonwealth. Darien Capital Mgmt., Inc. v. Pub. Sch. Employes' Ret. Sys., 700 A.2d 395, 397-99 (Pa. 1997).

14. Ferguson's present dispute with the Department was initiated under the "three-tiered" procedure and was at the initial negotiation stage when the construction conference convened on December 5, 1996 and when the construction conference was thereafter suspended on that same date. F.O.F. 8, 15-18; Contract § 63.82(A); 4 Pa. Code § 63.82(A) (repealed).

15. The "three-tiered" procedure provided for in the Contract and regulations indicated that matters not resolved by negotiation at a construction conference would be heard by DGS at a pre-claim hearing and that claims remaining from an adverse decision by DGS at the pre-claim hearing could be filed at the Board within six months of the decision from the pre-claim hearing. F.O.F. 9-12; Contract § 63.82 and 63.83; 4 Pa. Code §§ 63.82 and 63.83 (repealed).

16. The Contract and regulatory provisions indicating that claims were to be filed with the Board within six months of the pre-claim hearing decision reflects the jurisdictional provisions of 72 P.S. §§ 4651-4 and 4651-6 (Board of Claims Act) that state the claim must be filed with the Board within six months of the date it accrued. Contract § 63.83(B); 4 Pa. Code § 63.83(B) (repealed).

17. The dispute resolution provisions specified in the Contract and DGS regulations, by commencing the six month period in which to file with the Board from the pre-claim decision date, implicitly recognize that it is not until this point in the dispute process that the contractor's claim "accrues" under the Darien criteria (i.e. it is not until the pre-claim hearing decision when the contractor receives the initial affirmative and unequivocal notice that the claimant will not be paid on its claims). Contract §§ 63.82 and 63.83; 4 Pa. Code §§ 63.82 and 63.83; 72 P.S. §§ 4651-4 and 4651-6; Darien, 700 A.2d at 397-99.

18. When the construction conference of December 1996 was suspended pending Ferguson's submission of supporting documentation, no decision had been reached by DGS on Ferguson's claims here at issue, and the claim had not reached a stage where Ferguson could proceed to a pre-claim hearing under the contract provisions. Contract §§ 63.82 and 63.83; Pa. Code §§ 63.82 and 63.83.

19. While the construction conference remained suspended, DGS had neither notified Ferguson that it would not be paid nor finally decided Ferguson's contract claim; therefore, the second prong of Darien was not satisfied. F.O.F. 18, 54; Darien, 700 A.2d at 397-99.

20. Because the construction conference of December 5, 1996 was suspended without a final decision by DGS and Ferguson's claim had not been affirmatively or unequivocally denied by DGS, Ferguson's claim had not accrued under the two prong standard of Darien. Moreover, the six month limitation period in which to file with the Board pursuant to both the Board of Claims Act and the Contract had not commenced. Contract § 63.83(B); F.O.F. 18; Darien, 700 A.2d at 397-99.

21. Compliance with the first prong of the Darien standard (that a claimant be able to litigate its claim) was established by the evidence presented in the present case and confirmed by Ferguson's April 23, 2007 letter seeking a construction conference and asserting readiness to proceed and produce the missing claim cost support information. Ex. 13; Darien, 700 A.2d at 397-99.

22. Mr. Resta's letter of August 1, 2007 constituted an affirmative and unequivocal denial of Ferguson's claim, satisfying the second prong of the Darien standard, in that it charged

Ferguson with breaching its duty to submit information in a timely manner resulting in prejudice to the Department including the death of a material witness; concluded that Ferguson had waived its rights to pursue its claim as a result of the past ten years of unfulfilled promises to submit documentation supporting its claim; and clearly communicated to Ferguson that its claim would not be paid. Ex. 14; Darien, 700 A.2d at 397-99.

23. Because the facts of the case confirm that Ferguson was able to litigate its case by no later than April 23, 2007, Ferguson's claim accrued on or about August 1, 2007 when it first received the affirmative and unequivocal denial of its claim expressed in Joseph Resta's letter of that same date. F.O.F. 49-56; Ex. 13, 14; Darien, 700 A.2d at 397-99.

24. Because Ferguson's claim accrued upon receipt of Mr. Resta's letter of August 1, 2007 (affirmatively and unequivocally denying Ferguson's claim) Ferguson then had six months from that date to file its claim with the appropriate DGS contracting officer under either § 1712 of the 1998 Procurement Code or § 1712.1 of the Procurement Code (2002). F.O.F. 49-56; C.O.L. 23; 62 Pa.C.S. § 1712 (repealed); 62 Pa.C.S. § 1712.1; Darien, 700 A.2d at 397-99.

25. The Statutory Construction Act of 1972 provides that "in ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: . . . (4) that when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed on such language." 1 Pa.C.S. § 1922.

26. The Pennsylvania Supreme Court set the standard for determining when a claim accrues under the Board of Claims Act when it decided Darien in 1997. Darien, 700 A.2d at 397-99.

27. In the Procurement Code of 1998 and in the amendments thereto in 2002, the Pennsylvania General Assembly used substantially identical language as was used in the Board of Claims Act in reenacting the six month statue of limitations to run from the date the claim accrued. 72 P.S. §§ 4651-4 and 4651-6 (repealed); 62 Pa.C.S. § 1712 (repealed); 62 Pa.C.S. § 1712.1.

28. Since the later enacted Procurement Code provisions used substantially the same "accrual" language to commence the six month limitation period as did the Board of Claims Act, which language had been construed by the Supreme Court, the presumption is that the General Assembly intended the subsequent statutes to be interpreted in the same way. 1 Pa.C.S. § 1922; In re Estate of Lock, 244 A.2d 677, 682 (Pa. 1968); Perize v. Phila. Zoning Bd. of Adjustment, 143 A.2d 360, 363 (Pa. 1958).

29. The standard established by the Supreme Court in Darien continues to apply to a determination of when a claim "accrues" under the Procurement Code, and we find no merit or bases for DGS's argument that the Darien criteria should not be used here to determine when Ferguson's claim accrued in this case. C.O.L. 13, 25-28; Darien, 700 A.2d at 397-99.

30. The letter of August 15, 2007 from Ferguson's legal counsel to Mr. Resta disputing the Department's initial rejection of Ferguson's claim constitutes Ferguson's formal claim to the DGS “contracting officer” contesting this initial denial and fulfilling the requirements of § 1712(a) of the 1998 Procurement Code and/or § 1712.1(a) of the Procurement Code (2002). Ex. 14, 36; 62 Pa.C.S. § 1712(a) (repealed); 62 Pa.C.S. §1712.1(a).

31. If Ferguson's August 15, 2007 letter response to Mr. Resta did not constitute a claim to the DGS contracting officer, Ferguson's claim filing at the Board would not have been preceeded by a filing at DGS (as required by § 1712(a) of the 1998 Procurement Code and/or § 1712.1(a)(b) of the 2002 Procurement Code). This claim would therefore be subject to dismissal for failure to exhaust an administrative remedy in compliance with statute were we not to construe Ferguson’s August 15, 2007 letter as a claim to the DGS contracting officer. 62 Pa.C.S. § 1712 (repealed); 62 Pa.C.S. § 1712.1; Brog v. Commonwealth, Dep't of Public Welfare, 401 A.2d 613, 615 (Pa. Cmwlth. 1979).

32. Because DGS did not respond to Ferguson's letter of August 15, 2007, which letter raised Ferguson's claim with the DGS contracting officer, and there was, therefore, no decision by the contracting officer on Ferguson’s claim, Ferguson had 150 days under § 1712(e)(f) or 135 days under § 1712.1(e), from the date it brought its claim to the DGS contracting officer in which to file this claim with the Board. 62 Pa.C.S. § 1712(e)(f)(repealed); 62 Pa.C.S. § 1712.1(e)(2002).

33. Because Ferguson's March 12, 2008 claim was filed at the Board approximately 210 days after its claim was filed with the DGS contracting officer, and is therefore well beyond the 150 days provided for by 62 Pa.C.S. § 1712 (repealed) and the 135 day period prescribed by 62 Pa.C.S. § 1712.1, Ferguson has failed to comply with either of these statutory provisions. 62 Pa.C.S. § 1712 (repealed); 62 Pa.C.S. § 1712.1; C.O.L. 30-32.

34. Because Ferguson's claim accrued on or about August 1, 2007; its claim to the DGS contracting officer was filed on or about August 15, 2007; its claim to the Board was filed March 12, 2008; and the provisions in the Procurement Code, as amended in 2002, were in effect for all these events, we hold that § 1712.1 of the Procurement Code (2002) provides the appropriate claim procedure and statute of limitations to apply to this claim. 62 Pa.C.S. § 1712.1; 1 Pa.C.S. § 1975; McDonald v. Redevelopment Authority of Allegheny County, 952 A.2d 713, 716-17 (Pa. Cmwlth. 2008); C.O.L. 10, 23, 30, 33, 35-38, 44-47.

35. Pennsylvania courts have held "where a statute is related to a party's substantive right, courts must apply the law that was in effect at the time the cause of action arose; however statutes relating to procedural matters, such as statutes of limitation, are applicable to cases filed after the effective date of the statute." McDonald v. Redevelopment Authority of Allegheny County, 952 A.2d 713, 716-17 (Pa. Cmwlth. 2008) (citing Bell v. Koppers Company, Inc. 392 A.2d 1380 (1978)).

36. The enabling act for the 1998 Procurement Code provided that: "this act shall apply to contracts solicited or entered into on or after the effective date of this act unless the

parties agree to its application to a contract solicited or entered into prior to the effective date of this act." Act of May 15, 1998, P.L. 358, No. 57 § 7.

37. In contrast, Act 142 of 2002, which repealed § 1712 of the Procurement Code and the Board of Claims Act and enacted §§ 1712.1 and 1724, contained the following transition language: "any claim filed and not finally resolved under the Act of May 20, 1937 (P.L. 728, No. 193) referred to as the Board of Claims Act, prior to the effective date of this act shall be disposed of in accordance with the Board of Claims Act." Act of December 3, 2002 P.L. 1147, No. 142 § 21.2.

38. Pursuant to § 21.2 of the enabling act of the Procurement Code amendments in 2002, as well as the principles of statutory construction and case law, we conclude that § 1712.1 is applicable to all claims filed after its effective date regardless of the date the Contract here at issue was entered. C.O.L. 34-37.

39. Because Ferguson has failed to timely file its claim relating to the SCI Houtzdale project at the Board within 135 days of submitting its claim to the DGS contracting officer on or about August 15, 2007, Ferguson has failed to comply with the requirements of § 1712.1 of the Procurement Code. 62 Pa.C.S. § 1712.1 (2002).

40. Because the present claim was not timely filed in compliance with 62 Pa.C.S. § 1712.1, the Board has no in personam jurisdiction over DGS with regard to this claim pursuant to § 1724 (a)(1) and (c) of the Procurement Code (2002); 62 Pa.C.S § 1724 (a)(1) and (c); Dep't of Transportation v. Dyberry Sand and Gravel, Inc., 542 A.2d 650, 652 (Pa. Cmwlth. 1988).

41. § 1712(c)(d) of the Procurement Code (1998) provided that, after a contractor's claim had been filed with the contracting officer, the contracting officer/purchasing head would issue a decision in writing that: (1) stated the reasons for the action taken; (2) informed the contractor of its right to administrative and judicial review as provided in the Procurement Code; and (3) was delivered to the contractor by registered mail. 62 Pa.C.S. § 1712(a)(c) and (d) (repealed).

42. The decision described in § 1712(c) and (d) refers to the decision rendered by the contracting officer/agency head after that officer has considered a claim filed with him/her under § 1712(a). The language in § 1712(c) and (d) does not refer to the initial affirmative denial of a contractor's request for payment that causes the claim to accrue pursuant to the Darien standard and triggers the filing with DGS's contracting officer in the first place. 62 Pa.C.S. § 1712 (repealed); Darien, 700 A.2d at 397-99.

43. The Board finds no merit to Ferguson's argument that the August 1, 2007 Resta letter was somehow insufficient or ineffective to act as the first clear and affirmative denial of Ferguson's claim by DGS because the August 1, 2007 Resta letter had not also: (1) stated the reasons for the action taken; (2) informed the contractor of its right to administrative and judicial review as provided in the Procurement Code; and (3) been delivered to the contractor by registered mail. For one thing, we have held that 62 Pa.C.S. § 1712 does not apply to this claim. However, even if 62 Pa.C.S. § 1712 were applicable, the requirements of § 1712(c) and (d)

simply do not, and did not, apply at any time to the initial, affirmative notice to a contractor that it would not be paid by DGS in order for the claim to accrue under the Darien criteria. 62 Pa.C.S. § 1712(c) and (d) (repealed); Darien, 700 A.2d at 397-99; C.O.L. 34, 41-42.

44. Ferguson's letters of July 30 and August 7, 2002 confirmed an oral agreement between the parties to proceed according to the new claim procedures of § 1712 of the Procurement Code of 1998. Ferguson reconfirmed this agreement by its letters of 2003. Because DGS neither responded to these letters nor denied this agreement, we conclude that the parties agreed to follow the new claim procedures of the 1998 Procurement Code as outlined in § 1712. Yarnall v. Almy, 703 A.2d 535, 538 (Pa. Super 1997); Jenkins v. County of Schuylkill, 658 A.2d 380 (Pa. Super 1995).

45. Because Ferguson's letters of 2002 and 2003 establishing this agreement to proceed according to § 1712 also included assurances that details of its claim, supporting documentation and additional information would be provided "shortly," we conclude that the parties' agreement to utilize § 1712 procedures also included a promise by Ferguson to provide this additional information within a reasonable amount of time following this agreement with DGS. Ex. 9, 10, 11, 35; F.O.F. 30-32, 34-35, 42-45.

46. Ferguson breached the obligation it assumed in this agreement to provide documentation supporting its claim within a reasonable amount of time following this agreement with DGS to utilize § 1712 by failing to provide this promised information over the four ensuing years before it contacted DGS in 2007. This was a material breach by Ferguson. F.O.F. 45-47; C.O.L. 45; Board Finding.

47. Ferguson cannot enforce the agreement to proceed under the procedures provided for under § 1712 because it has failed to perform all of its own material obligations under the agreement. Nikole, Inc. v. Klinger, 603 A.2d 587, 593 (Pa. Super 1992); Trumbull Corp. v. Boss Construction, Inc., 801 A.2d 1289, 1292 (Pa. Cmwlth. 2002); Edmondson v. Zetusky, 674 A.2d 760 (Pa. Cmwlth. 1996); C.O.L. 44-46.

48. DGS would be estopped from invoking its limitation of action defense if, through fraud or concealment, it induced Ferguson to relax its vigilance or deviate from its right of inquiry in filing the claim here at issue. Dep't of Pub. Welfare v. UEC, Inc., 397 A.2d 779, 784 (Pa. 1979).

49. "[T]he 'fraud or concealment' necessary to establish a case for application of estoppel principles to prevent a defendant from asserting a statute of limitations does not mean fraud or concealment in 'the strictest sense encompassing an intent to deceive, but rather fraud in the broadest sense which includes an unintentional deception . . . (citations omitted). It is not the intention of the party estopped but the natural effect on the other party which gives vitality to an estoppel.'" Dep't of Pub. Welfare v. UEC, Inc., 397 A.2d at 784 quoting Nesbitt v. Erie Coach Co., 204 A.2d 473, 476-77 (Pa. 1964).

50. The Department's conduct of reminding Ferguson to submit the promised information on only one occasion, in September 1997, and failing to prod Ferguson to pursue its

claim in the ensuing years because it was not in DGS's interest to do so, does not rise the level of a "fraud or concealment" or even an "unintentional deception" as defined in the UEC case. Id.

51. The court in UEC also described limitations on when estoppel was applicable: "if through fraud or concealment the Defendant causes the Plaintiff to relax its vigilance or deviate from this right of inquiry, the Defendant is estopped from envoking the bars limitation of actions. . . . It is also established that mere negotiations toward amicable settlement afford no basis for an estoppel, nor do mistakes, misunderstanding or lack of knowledge in themselves toll the running of the statue. . . ." Id.; Nesbitt v. Erie Coach Co., 204 A.2d 473, 476-77 (Pa. 1964); Walters v. Ditzler, 227 A.2d 833, 835 (1967).

52. After Mr. Resta's letter of August 1, 2007 affirmatively and unequivocally refused Ferguson's claim, DGS did not engage in any further communication with Ferguson nor any behavior that constituted unintentional deception, fraud or concealment supporting Ferguson's claim of estoppel in this case. Dep't of Pub. Welfare v. UEC, 397 A.2d at 784; Dyberry Sand and Gravel, 542 A.2d at 652.

53. Because in contrast to UEC: the parties here were not in continuous contact but long periods elapsed in which there was no activity on the claims here at issue (e.g. from September 1997 to May 2002 and October 2003 to April 2007); DGS actively sought the missing information in September 1997, but Ferguson did not respond or provide additional information for over ten years thereafter through no fault of DGS; DGS did not provide false assurances that additional payments on the claim would be made; and DGS did not misrepresent matters to Ferguson that would reasonably cause Ferguson to delay or relax its vigilance in pursuing this claim for the extensive period it did (particularly after Mr. Resta's August 1, 2007 letter); we find that Ferguson has failed to establish a basis upon which to estop DGS from asserting the statute of limitations defense in 62 Pa.C.S. §§ 1712.1 and 1724. F.O.F. 55-63; Dep't of Pub. Welfare v. UEC, 397 A.2d at 784; Dyberry Sand and Gravel, 542 A.2d at 652; C.O.L. 48-52.

54. DGS is not estopped from asserting the statute of limitation contained in 62 Pa.C.S. § 1712.1(b). F.O.F. 55-63; C.O.L. 48-53.

OPINION

This matter is before the Board to resolve preliminary objections filed by the Department of General Services (DGS or the Department) in response to the claim of the plaintiff, Ferguson Electric Co., Inc., (Ferguson). On June 27, 2008, this Board issued an opinion and order overruling the Department's preliminary objections in the nature of a demurrer and to the sufficiency of the complaint. We further ordered that a hearing be held to determine the facts pertaining to the Department's objection to the in personam jurisdiction of the Board. The hearing concluded on December 10, 2008, and the parties have filed their proposed findings of fact, conclusions of law and briefs. After careful consideration, the Board concludes that the Department's preliminary objections must be sustained and the case dismissed.

Background

Ferguson's claim arises out of a contract between the parties dated January 14, 1994 for the performance of electrical work in the construction of a State Correctional Institution in Houtzdale, Pennsylvania. (Contract No. DGS 579-2.44, hereinafter the "Contract").[1] The claim was filed with this Board against the Department on March 12, 2008, more than 14 years later. As alleged in its complaint, Ferguson submitted a number of claims to DGS during the course of the Houtzdale SCI construction project seeking payment for costs of additional work above and beyond that set forth in the contract. (Complaint, ¶ 5; N.T 142, 144). The parties originally attempted to resolve some of these claims by conducting construction conferences in 1996 pursuant to the "three-tiered" procedure provided for in the Contract.[2] (N.T. 146, 150; Ex. 1, 15). This "three-tiered" procedure for review of a contract dispute was described by Herman

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[1] A copy of the contract was filed with the Board on April 6, 2009 to supplement the record.

[2] The contract procedures for dispute resolution were provided for in the 1993 General Conditions of Contract, Standard Form of Agreement between the Department and Contractor at §§ 63.81-63.84 at pp. 27-30 and reflect the DGS regulations in effect prior to the Procurement Code of 1998. 4 Pa. Code §§ 63.81-63.84 (repealed).

Cardoni, Ferguson's witness and former DGS Chief Counsel for the DGS Public Works Unit at the time these claims were initiated, as follows: 1. a construction conference; 2. a pre-claim hearing; and 3. a claim filed with this Board pursuant to the Board of Claims Act of 1937. (N.T. 203-206). At one of these construction conferences, held on December 5, 1996, the DGS arbitrator, Diane Hallett, suspended the proceedings to allow Ferguson to gather and submit additional information substantiating its claims. (N.T. 152-153; Ex. 1 at 16). Ms. Hallett also indicated that the December 5, 1996 construction conference would be reconvened when that additional information was received and reviewed by DGS. (N.T. 150-151, 153, 276; Ex. 1 at 2, 15-16). Nine months later, on September 12, 1997, Ms. Hallett wrote to Ferguson asking if it still intended to submit the additional information. (Ex. 2). Ferguson did not respond to this request, and DGS did not initiate further communication regarding the status of these claims or the additional information.[3] (N.T. 156, 277). The Department's strategy at the time was to "let it slide," considering that it was in Ferguson's interest to pursue its own claim and not in DGS's interest to encourage contractor's lawsuits. (N.T. 226-227).

Nearly five years later, in 2002, several letters originating from Ferguson's counsel evidence Ferguson's attempt to renew its outstanding claims. These letters from Ferguson's counsel also indicate that a discussion ensued at that time as to whether to proceed with the claim under the old "three-tiered" procedure or to utilize the "new claims procedure" that the Department had been following since the advent of the Procurement Code in 1998.[4] (N.T. 174, 278-279; Ex. 7, 9, 35). By letters dated July 7, 2002 and August 7, 2002 it appears that Ferguson agreed with DGS "to proceed with its claim under the new claim procedure as outlined in the

[3] Some of Ferguson's other claims on the Houtzdale SCI project were resolved as a result of other construction conferences and/or pre-claim hearing, and a release for these other claims was entered into on March 22, 1999. The release specifically excluded the claims still at issue here from the December 5, 1996 construction conference. (P. Ex. 3).

[4] Commonwealth Procurement Code Act of May 15, 1998, P.L. 358, No. 57; 62 Pa.C.S. § 101 et seq.

Commonwealth Procurement Code, 62 Pa.C.S. section 1712" rather than the "three-tiered" procedure that predated the Code. 62 Pa.C.S. § 1712. (N.T. 320-322; Ex. 9, 35). Also in these letters, which were the only evidence offered of this "agreement," Ferguson's legal counsel repeatedly confirmed that Ferguson would shortly provide DGS with the "details," "supporting documentation" and additional information that would substantiate Ferguson's claim. (N.T. 279-281; Ex. 9, 10, 11, 35). DGS did not respond in writing to these letters, and we have no direct testimony regarding these exchanges from any of those participating in same. However, Ferguson, once again, did not provide the promised information. (N.T. 111, 169, 172-173, 175-176, 282, 289, 308, 333). § 1712 of the 1998 Procurement Code was subsequently repealed on December 3, 2002 and replaced by § 1712.1 (entitled "Contract controversies") which again changed the procedure for bringing contract claims at both DGS and the Board. 62 Pa.C.S. § 1712.1 (2002).[5]

After passage of another four plus years, in a letter dated April 23, 2007, new legal counsel for Ferguson requested that a construction claims conference be scheduled at the Department's earliest convenience. (N.T. 281; Ex. 13). By this letter, Ferguson's counsel again represented that documentation "in support of its entitlement to additional funds for the other change orders which were not resolved" by the 1999 settlement had finally been prepared and would be supplied in order to resolve all of Ferguson's outstanding claims associated with the Houztdale SCI project. (Ex. 13).

In a letter dated August 1, 2007, Joseph Resta, DGS's Deputy Secretary for Public Works, responded to Ferguson's 2007 attempt to renew its claim, stating that Ferguson had breached its duty by failing to submit the information promised in support of its claim, thereby

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[5] 62 Pa.C.S. § 1712, repealed by Act of December 3, 2002, P.L.1147, No. 142, § 11.2.

prejudicing the Department.[6] (N.T. 282, 303, 321; Ex. 14). Mr. Resta's letter went on to deny Ferguson's request to schedule a conference and stated, inter alia, that "Ferguson's failure to submit the information constitutes a waiver of their right to pursue the claim." Id. On August 15, 2007, Ferguson's counsel responded, disputing this decision and stating that it was "inappropriate for the Department to blindly reject Ferguson's claims." (N.T. 303-304, 321; Ex. 36). Finally, on March 12, 2008, Ferguson filed its complaint with the Board of Claims, and DGS responded with its preliminary objections.

The Dispute

The issue raised by the Department's preliminary objections to the Board's jurisdiction is whether Ferguson's claim has been timely filed. The Department asserts that the Board lacks in personam jurisdiction over this claim because it was not timely filed with the contracting officer at DGS or, alternatively, with the Board. Ferguson denies that its filing with the Board is late and instead argues that its claim has never actually accrued. Although we do not agree completely with either party's arguments, we do agree that ascertaining if and when Ferguson's claim "accrued" is essential to resolution of this matter.

Discussion

To begin with, we acknowledge that during the time the parties have been disputing Ferguson's claim, three different sets of time limitations/claim filing procedures have been in effect: (A) Section 4651-6 of the Board of Claims Act of 1937[7] and the "three-tiered" claim procedure set forth in the Contract and DGS regulations; (B) Section 4651-6 of the Board of Claims Act and § 1712 of the Procurement Code of 1998; and (C) §§ 1712.1 and 1724 of the

[6] Among other things, Mr. Resta represented that a key witness for DGS had passed away in the intervening years. P. Ex. 14.

[7] Board of Claims Act, Act of May 20, 1937, P.L. 728, No. 193, repealed by Act of December 3, 2002, P.L. 1147, No. 142 § 21(a)(2). The Board of Claims Act provisions were found at 72 P.S. § 4651-1 to 10.

Procurement Code (as amended in 2002) when the other two statutory provisions were repealed. 62 Pa.C.S. §§ 1712.1 and 1724. Prior to 1998, the procedure and time limits for initiating a claim with the Department were controlled by the aforementioned "three-tiered" approach in the DGS contract and regulations. Under this "three-tiered" procedure, any dispute such as the one here at issue between Ferguson and DGS was "subject to negotiation at a Construction Conference" as a first step. Contract, § 63.82(A). If the matter was not resolved at the construction conference, the contractor could demand a pre-claim hearing before a committee chaired by DGS's Deputy Secretary of Public Works or his designee. Contract, § 63.82(B). Once a decision was rendered as a result of the pre-claim hearing, the contract provided that the matter could be referred to the Board pursuant to the provisions and procedures of the Board of Claims Act of 1937. Contract, § 63.83(A). The Board of Claims Act of 1937 provided that a claim must be filed with the Board within six months after the date it accrued or the Board would have no jurisdiction. 72 P.S. § 4651-6 (repealed).

In 1998, the Commonwealth Procurement Code was enacted and provided that, prior to filing under the Board of Claims Act, the claim had to be filed with the agency's contracting officer within six months of the date it accrued. Following a decision by the contracting officer, the contractor then had 30 days to file its claim with the Board. If no decision was issued by the contracting officer, the section provides, in effect, 150 days from submission of the contractor's claim to the contracting officer to file the claim with the Board. 62 Pa.C.S. § 1712 (repealed).

In 2002, § 1712 and the Board of Claims Act of 1937 were repealed by Act 142 of 2002 and replaced by 62 Pa.C.S. §§ 1712.1 and 1721-1724. Act of December 3, 2002, P.L.1147, No. 142, §§ 11.2, 12, 21(a)(2), 21.2, 22; Pa.B., Vol. 33, No. 26, June 28, 2003 pp. 3053-83. Currently, the Procurement Code (as amended in 2002) retains the six month requirement from

accrual of the claim to file with a contracting officer of the agency, but now provides that, following agency review of a claim and issuance of a final determination, the contractor has only 15 days to file its claim with the Board. If no decision is issued by the contracting officer, the contractor has, in effect, 135 days from submission of its claim to the contracting officer to file a claim with the Board. 62 Pa.C.S. § 1712.1. The Procurement Code further provides (with exceptions not relevant to this case) that the Board shall have no jurisdiction over claims not first filed in accordance with § 1712.1. 62 Pa.C.S. § 1724(a) and (c).

Accrual of Claim

As noted above, DGS initially contends that Ferguson's claim must be dismissed as untimely because it failed to file this claim, in writing, with the DGS contracting officer within six months after the claim accrued, as required both by § 1712 of the Procurement Code (now repealed) and § 1712.1, which is currently effective. In support of this contention, the Department maintains that Ferguson's present claim accrued on August 7, 2002, when Ferguson's counsel agreed with DGS to proceed with the claim pursuant to the new claims procedures under the Procurement Code then outlined at § 1712. DGS, therefore, calculates that Ferguson had six months from that date, i.e. until February 6, 2003, to file with the DGS contracting officer as required by § 1712(a).[8] Ferguson, however, did not provide DGS with any subsequent filing or "with details concerning Ferguson's claim, as well as all relevant supporting documentation" as promised in its August 7, 2002 letter and/or as part of this exchange between counsel creating this agreement. Therefore, DGS reasons, the "claim" was not filed with the

[8] § 1712(a) states, in pertinent part, "Prior to filing a claim under this section with the Board of Claims under the exclusive jurisdiction provided in the act of May 20, 1937 referred to as the Board of Claims Act, the claim must first be filed in writing with the contracting officer within six months after it accrues and not thereafter." (citation omitted).

DGS contracting officer and the statute of limitations set forth in § 1712 (and/or § 1712.1) now bars Ferguson from bringing its claim to the Board.

In response, Ferguson argues that, contrary to DGS's assertions, its claim has never really accrued pursuant either to the Board of Claims Act or under either section of the Procurement Code (the repealed § 1712 or the current § 1712.1). Ferguson first cites to Darien Capital Mgmt., Inc. v. Pub. Sch. Employees' Ret. Sys., 700 A.2d 395, 397 (Pa. 1997) for the legal standard to define when a claim accrues against the Commonwealth: "A claim accrues when 1) a claimant is first able to litigate his or her claim, e.g., when the amount due under the claim is known and the claimant is capable of preparing a concise and specific written statement detailing the injury, and 2) the claimant is affirmatively notified that he or she will not be paid by the Commonwealth." Id. Ferguson then asserts that, although it originally raised its claim properly with DGS according to the "three-tiered" procedure then in effect, as set forth in the Contract, its claim was never affirmatively denied as required by the second prong of the Darien standard. That is to say, the construction conference that had been convened to negotiate Ferguson's claims was simply suspended without any resolution. With no affirmative denial from the construction conference, pre-claim hearing or otherwise, Ferguson maintains that this claim has never properly "accrued" and, therefore, no statute of limitations has run. It then reasons that, since Joseph Resta's letter of August 1, 2007 denied Ferguson's request to continue the construction claims conference, Ferguson's only option was to file a claim with the Board and seek to reconvene the conference.

The Department counters by arguing, among other things, that the second prong of the Darien standard does not apply to this case, and that determining when this claim accrued requires abandoning the two-prong standard established in Darien by the Pennsylvania Supreme

Court. DGS's position is that the Darien standard only applied to the Board of Claims Act and, therefore, ceased to be relevant after November 15, 1998, the effective date of the new Procurement Code and §1712. Act of May 15, 1998, P.L. 358, No. 57, §§ 1 and 8. According to DGS, determination of the date a claim accrues for purposes of filing with the contracting officer under either § 1712 (Procurement Code, 1998) or § 1712.1 (Procurement Code, 2002) now only requires a finding of when the claimant is first able to litigate its matter because final denial of a claim under the Procurement Code does not occur until the contracting officer makes his decision, and this would result in a dilemma requiring the contracting officer to rule before the claim is submitted.

After considering the parties' arguments, together with the three potential statutes of limitations and their accompanying procedural requirements, and the facts of this case, we conclude that Ferguson's claim has, in fact, accrued. However, we do not agree with DGS's argument that we must abandon Darien or with its assertion that this "accrual" occurred in 2002 when DGS and Ferguson agreed to utilize the "new claims procedure" under the Procurement Code to resolve the dispute. We instead conclude that this claim "accrued" pursuant to the normal Darien criteria when Ferguson received the Resta letter of August 1, 2007, which we find, in fact, constituted the first clear, definitive and affirmative denial of Ferguson's pending claim.

To begin with, we do not agree with the Department that we must ignore Darien either as a factual matter or as a legal matter. It has been the Board's experience, since inception of the Procurement Code, that a contractor typically experiences at some point in discussion, a definitive refusal or notice that it will not be paid for some item or service from a DGS representative with authority to do so (commencing the six month period) and then files a formal

claim for resolution of this refusal with the "contracting officer" (typically the Deputy Secretary for Public Works) without creating any "dilemma" a DGS argues in its brief. Secondly, all three statutes (Section 4651-6 of the Board of Claims Act; § 1712 of the 1998 Procurement Code; and § 1712.1 of the Procurement Code (as amended in 2002)) state that the six month limitations period for contract claims begins to run from the time the claim "accrues."[9] The Pennsylvania Supreme Court set the standard for determining when a claim "accrues" under The Board of Claims Act when it decided Darien in 1997. Thereafter, in the Procurement Code of 1998 and in the amendments thereto in 2002, the Pennsylvania General Assembly used substantially identical language as in the Board of Claims Act in reenacting the six month statute of limitations to run from the date the claim "accrues."

The Statutory Construction Act of 1972, 1 Pa.C.S. § 1922 provides, in relevant part, that: "In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: . . . (4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language." Since the later enacted Procurement Code provisions use substantially the same language to commence their six month limitation period as did the Board of Claims Act, which language had been construed by the Pennsylvania Supreme Court, the presumption is that the General Assembly intended the subsequent statutes to be interpreted in the same way. In re Estate of Lock, 244 A.2d 677, 682 (Pa. 1968); Parisi v. Philadelphia Zoning Bd. of Adjustment, 143 A.2d 360, 363 (Pa. 1958).

[9] The Board of Claims Act § 4651-6: "the claim shall have been filed within six months after it accrued."
The 1998 Procurement Code § 1712: "the claim must first be filed in writing with the contracting officer within six months after it accrues and not thereafter."
The Procurement Code § 1712.1 (as amended): "A claim shall be filed with the contracting officer within six months of the date it accrues."

DGS has provided us with nothing to overcome this presumption. Therefore, we conclude that the standard established by the Supreme Court in Darien continues to apply to a determination of when a claim "accrues" under the Procurement Code.

In support of our factual finding that Mr. Resta's August 1, 2007 letter was the first definitive and affirmative notice to Ferguson that it would not be paid by DGS, we note both the Contract dispute provisions and the testimony of Ferguson's own witness and former DGS counsel, Mr. Cardoni, describing the import of same. According to Mr. Cardoni and the Contract, disputes like Ferguson's were "subject to negotiation at a Construction Conference" as a first step. Contract, § 63.82(A) (emphasis added). If the matter was not resolved at the construction conference, the contractor could demand a pre-claim hearing by a committee chaired by DGS's Deputy Secretary of Public Works or his designee. Contract, § 63.82(B). Once a decision was rendered as a result of the pre-claim hearing, the contract provided that the matter could be referred to the Board pursuant to the provisions and procedures of the Board of Claims Act of 1937. Contract, § 63.83(A). Section 63.83(B) went on to provide that claims addressed to the Board must be filed within six months after the decision resulting from the pre-claim hearing. This last section of the Contract clearly reflected the jurisdictional provision of Section 4651-4 of the Board of Claims Act and the implicit conclusion that a denial from the pre-claim hearing process was to be considered the initial affirmative notice that the claimant would not be paid as required by the Darien criteria to "accrue" the claim and initiate the six month limitations period. Contract, §§ 63.82-63.83.[10]

[10] The Board acknowledges that Contract § 63.81 suggests that there should have been some initial communication of the dispute to the Construction District Manager and Ferguson has confirmed that this occurred through introduction of Exhibit 37. However, the overall scheme of the dispute resolution procedure outlined in Contract §§ 63.81-84 and all the testimony presented at the hearing (including Mr. Cardoni's) indicates that neither party considered this initial communication to trigger a definitive response by DGS or to "accrue" the claim for purposes of commencing the six month limitations period. Moreover, no evidence was provided to establish that there was

At the time Ferguson's construction conference of December 1996 was suspended pending Ferguson's submission of supporting documentation, no decision had been reached by DGS with respect to the present claim. The claim, therefore, had not reached a stage where Ferguson could proceed to the pre-claim hearing under the "three-tiered" procedure established by the Contract or DGS regulations[11] nor had the claim accrued for the purpose of commencing the six month period in which to file with the Board under the standard provided for in Darien.

Because DGS neither notified Ferguson that it would not be paid nor finally decided its contract claim, the second prong of Darien was not satisfied while the construction conference remained suspended. However, with the issuance of Mr. Resta's letter of August 1, 2007, DGS made it perfectly clear that Ferguson's long-standing claim was denied and would not be paid. This advice constituted the first clear and affirmative denial of the pending dispute and triggered accrual of Ferguson's right to file a formal claim with the appropriate authority within six months.[12]

We further note that the evidence establishes that Ferguson's only filings subsequent to its receipt of the August 1, 2007 Resta denial letter were: (A) Mr. Cohen's August 15, 2007 response letter to Mr. Resta contesting the summary denial of Ferguson's claim and (B) the March 12, 2008 claim filing at the Board. Viewed favorably to Ferguson, we find Mr. Cohen's

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any response to this early communication other than to commence negotiation via the construction conferences. (N.T. 143-45, 153, 219-21; Ex. 37)

[11] DGS regulations at the time correspond to the same section numbers as in the Contract, i.e. Contract §§ 63.81-63.84 mimics 4 Pa. Code §§ 63.81-63.84 (repealed).

[12] In our view, Mr. Resta's letter of August 1, 2007 constituted an affirmative and unequivocal denial of Ferguson's claim satisfying the second prong of the Darien standard. The letter clearly stated DGS's refusal to consider, any further, Ferguson's claim for payment asserting, inter alia, that Ferguson's failure to provide information promised for over 10 years, together with prejudice to the Department by reason of the delay and death of a witness, constituted waiver of its claim. Ex. 14. At the time, even Ferguson's counsel recognized this letter as a rejection of Ferguson's claim when he stated as much in his responsive letter of August 15, 2007. Ex. 36. Additionally, there can be no dispute that the first prong of Darien (that a claimant be able to litigate its claim) was established, inter alia, by Ferguson's April 23, 2007 letter seeking a "construction conference" and asserting readiness to proceed. Ex. 13. Therefore, the Darien standard was met when Ferguson received notification that its claim was refused in the August 1, 2007 Resta letter, and its claim accrued on that date.

letter of August 15, 2007 sufficient to fulfill the requirements of § 1712(a) and/or § 1712.1(a) and (b) as the requisite claim to the DGS "contracting officer" prior to Ferguson's claim filing here at the Board.[13] However, even with this benefit, Ferguson is still faced with the fact that its March 12, 2008 claim filing here at the Board is well beyond 150 days from Mr. Cohen's August 15, 2007 protest to DGS of the August 1, 2007 denial as prescribed by § 1712(e) and (f) (and even further beyond the 135 days prescribed by § 1712.1(e)).

Additionally, because we find that: Ferguson's claim here at issue accrued as of August 1, 2007; its formal claim to the DGS "contracting officer" was filed on or about August 15, 2007; its claim to the Board was filed on March 12, 2008; and the provisions of the Procurement Code (as amended in 2002) were then in effect for all these events, we hold that 62 Pa.C.S. § 1712.1 prescribes the appropriate claim procedures and time limits to be applied to this claim. 1 Pa.C.S. § 1975; see also, McDonald v. Redevelopment Authority of Allegheny County, 952 A.2d 713, 716-17 (Pa. Cmwlth. 2008) (citing Bell v. Koppers Company, Inc., 392 A.2d 1380 (1978)) ("Where a statute is related to a party's substantive right, courts must apply the law that was in effect at the time the cause of action arose; however, statutes relating to procedural matters, such as statutes of limitation, are applicable to cases filed after the effective date of the statute.").[14]

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[13] Were we not to view Mr. Cohen's August 15, 2007 letter response to Mr. Resta as a claim to the DGS "contracting officer," Ferguson's claim filing here at the Board after accrual of the claim on August 1, 2007 would not have been preceded by a filing at DGS and the claim at the Board would be subject to dismissal for failure to exhaust administrative remedy in compliance with § 1712(a) and/or § 1712.1(a) and (b). Brog v. Com., Dept. of Public Welfare, 401 A.2d 613, 615 (Pa. Cmwlth. 1979).

[14] The enabling act for the 1998 Procurement Code provided that: "This act shall apply to contracts solicited or entered into on or after the effective date of this act unless the parties agree to its application to a contract solicited or entered into prior to the effective date of this act." (Act of May 15, 1998, P.L. 358, No. 57, § 7). In contrast, Act 142 of 2002 which repealed § 1712 and the Board of Claims Act and substituted §§ 1712.1 and 1724 contained the following transition language: "Any claim filed and not finally resolved under the act of May 20, 1937 (P.L. 728, No. 193), referred to as the Board of Claims Act, prior to the effective date of this act shall be disposed of in accordance with the Board of Claims Act." (Act of December 3, 2002, P.L. 1147, No. 142 § 21.2). Thus we conclude pursuant to Section 21.2 of its enabling act, as well as the principles of statutory construction and case law

Thus, as a result of the evidence presented, and despite viewing same most favorably to Ferguson, we must conclude that Ferguson has failed to timely file its claim relating to SCI Houtzdale here at the Board in compliance with the applicable statutory procedure at 62 Pa.C.S. § 1712.1. The Board, therefore, must further conclude that we have no in personam jurisdiction over DGS on the claim here at issue pursuant to 62 Pa.C.S. § 1724(a)(1) and (c).

Miscellaneous Arguments

For the sake of completeness, we will also address some additional arguments set forth by Ferguson which we find ultimately unpersuasive. Among these is the argument that § 1712 not § 1712.1 applies to Ferguson's claim (because of the alleged agreement reached as a result of the 2002 letters from Ferguson's counsel to DGS) and Ferguson's corollary assertion that the August 1, 2007 Resta letter could not effectively deny its claim and trigger the running of the six month limitations period under the Darien standard because the Resta letter failed to conform to the statutory requirements for a decision under § 1712. § 1712, now repealed, stated as follows:

> § 1712. Authority to resolve contract and breach of contract controversies
>
> (a) Applicability.-This section applies to controversies between a Commonwealth agency and a contractor which arise under or by virtue of a contract between them, including controversies based upon breach of contract, mistake, misrepresentation or other cause for contract modification or rescission. Prior to filing a claim under this section with the Board of Claims under the exclusive jurisdiction provided in the act of May 20, 1937 (P.L. 728, No. 193), referred to as the Board of Claims Act, the claim must first be filed in writing with the contracting officer within six months after it accrues and not thereafter.
>
> (b) Authority.-The contracting officer is authorized to settle and resolve a controversy described in subsection (a).
>
> (c) Decision.-If the controversy is not resolved by mutual agreement, the head of the purchasing agency shall promptly issue a decision in writing. The decision shall:

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cited above in the text, that § 1712.1 is applicable to all claims filed after its effective date regardless of the date the affected contract was entered.

(1) State the reasons for the action taken.
(2) Inform the contractor of its right to administrative and judicial review as provided in this chapter.

(d) Notice of decision.-A copy of the decision under subsection (c) shall be delivered by registered mail to the contractor.

(e) Finality of decision.-The decision under subsection (c) shall be final and conclusive unless the contractor files a claim with the Board of Claims within 30 days of receipt of the decision.

(f) Failure to render timely decision.-If the contracting officer does not issue the written decision required under subsection (c) within 120 days after written request for a final decision or within a longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received. 1998, May 15, P.L. 358, No. 57, § 1, effective in 180 days.

62 Pa.C.S. § 1712 (repealed).

Despite the expression of finality in Mr. Resta's August 1, 2007 refusal to hear its claim, Ferguson contends that the letter cannot constitute a final decision under § 1712 because it does not inform Ferguson of its right to administrative and judicial review and it was not sent by registered mail as required by the statute's provisions at 62 Pa.C.S. § 1712 (c)(2) and (d) (repealed).

Assuming, for the sake of argument, that § 1712 rather than § 1712.1 did apply to Ferguson's claim, the remaining flaw in this argument is that it confuses the standards to be applied to two different "denials." Specifically, the Darien standard applies for determining when a claim "accrues" for purposes of commencing the six month period in which to make the initial filing to the DGS contracting officer per § 1712(a). The requirements that §§ 1712(c)(2) and (d) impose are instead to be applied to notification of the formal decision rendered by the contracting officer/purchasing agency head commencing the 30 day period to file with the Board. Put another way, all that is required to satisfy the second prong of Darien and commence the

running of the six month limitations period (to file with the contracting officer) is a clear and affirmative notice the contractor will not be paid. § 1712(c)(2) and (d) do not apply to the initial refusal (which commences the six month period) but only to the contracting officer's formal decision thereafter (which commences the 30 day period in which to file a claim with the Board under § 1712(e)). Thus, as explained above, whether one applies § 1712 or § 1712.1 to the facts of this case, Ferguson's claim accrued upon its receipt of Mr. Resta's August 1, 2007 letter. Therefore, the claim to this Board, filed on March 12, 2008, was filed well in excess of the 150 or 135 days allowed to file a claim with the Board in the absence of a response to Mr. Cohen's formal claim to the DGS contracting officer made on or about August 15, 2007.[15]

Although, ultimately, it does not alter the end result in this mater whether one applies the procedure and time limitation periods of § 1712 or § 1712.1 to the facts of the case, we believe it appropriate nonetheless to explain our conclusion that § 1712.1 not § 1712 is the correct procedural provision to utilize given the evidence presented. To begin this portion of the discussion, we would first acknowledge that, although DGS did not respond in writing to the 2002 "agreement" letters from Ferguson's counsel, DGS does not dispute that the parties agreed to abandon the old "three-tiered" procedure and to utilize "the new claim procedure as outlined in the Commonwealth Procurement Code, 62 Pa.C.S. § 1712" to resolve their outstanding dispute. DGS Brief in Support p. 5. DGS does, however, emphasize reference to the "new claim procedure as outlined in the Commonwealth Procurement Code" portion of the language in the "agreement" while Ferguson focuses more on the specific reference to § 1712. Accordingly, DGS asserts that § 1712.1 is the correct procedural provision to apply to the claim by reason of both the "agreement" and rules of statutory interpretation, while Ferguson argues that § 1712

[15] In fact, the claim here at the Board was filed more than six months past the August 15, 2007 letter, thus making even a claim filed under a six month time limitation, as in the Board of Claims Act of 1937, late.

must apply by agreement of the parties. DGS Brief in Support, pp. 5, 11; Ferguson's Brief in Opposition, pp. 14-18.

On this initial point regarding the specificity of the "agreement," we note that, in addition to the July 30 and August 7 letters exhibiting the agreement (and expressly referencing § 1712) Ferguson followed-up with letters of May 29, <u>2003</u> and July 11, <u>2003</u> again referencing specifically to § 1712 as the "agreement." (Exs. 10-11). Given that Act 142 of 2002 (substituting § 1712.1 for § 1712) was passed on December 3, 2002, and DGS made no apparent response or correction to Ferguson's reference to § 1712 in the 2003 letters, we tend to concur with Ferguson that a fundamental element of the agreement was to utilize the § 1712 procedure (not "the § 1712 procedure and/or any new claims procedure that it might subsequently be changed to"). That said, we also do not find DGS agreeing, by acquiescence to these letters, to an open-ended, forever-type commitment to using § 1712 regardless of how long Ferguson delays in providing its claim support information. In fact, we find throughout these letters a second fundamental and material element in this "agreement," namely that Ferguson would supply the "details," "supporting documentation" and additional information to support this claim "shortly" or, at very least, within a reasonable time after the agreement was made. (Exs. 9, 10, 35). We further find that Ferguson clearly breached this material obligation under the "agreement" by failing to provide this promised information for yet another four plus years before again contacting DGS. Thus, we find Ferguson's attempt to enforce this "agreement" now against DGS in order to substitute § 1712 for § 1712.1 (the latter being the appropriate procedural provision given the timing of events as we have found them) to be wholly ineffectual and without merit.

Estoppel

Ferguson has also argued that DGS should be estopped from invoking any limitation of action defense because "through fraud or concealment" it induced Ferguson "to relax his vigilance or deviate from his right of inquiry." Dept. of Pub. Welfare v. UEC, Inc., 397 A.2d 779, 784 (Pa. 1979). Ferguson maintains that the Department should be estopped, as was the Department of Public Welfare in UEC, as a result of allegedly analogous facts between the two cases, in that: the parties remained in continuous contact from the date the claim was filed in 1996 until the present; the Department acknowledges that some amount of money is owed and it only remains to determine how much;[16] and the Department engaged in conduct that amounted to "fraud or concealment" as that term is used by Pennsylvania courts in resolving limitation of action cases.[17]

The conduct by the Department that Ferguson points to as "lulling" it into delaying production of the information supporting its case is described in the testimony of Mr. Cardoni. (N.T. 204). Mr. Cardoni, who was with the Department's Public Works Unit as legal counsel from 1995 until 2001, but now works for Ferguson's legal counsel,[18] testified that, following Diane Hallet's September 1997 reminder to Ferguson to submit the promised information, DGS did nothing to prod Ferguson to pursue its claim. (N.T. 226). Mr. Cardoni himself decided to "let it slide" because he viewed the matter as Ferguson's claim and that it was Ferguson, not DGS, that had an interest in pursuing it. (N.T. 226-227, 229).

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[16] N.T. 219-220.

[17] "[T]he 'fraud or concealment' necessary to establish a case for application of estoppel principles to prevent a defendant from asserting a statute of limitations does not mean fraud or concealment in 'the strictest sense encompassing an intent to deceive, but rather fraud in the broadest sense which includes an unintentional deception . . . (citations omitted). It is not the intention of the party estopped but the natural effect upon the other party which gives vitality to an estoppel.'" Dept. of Pub. Welfare v. UEC, Inc., 397 A.2d 779, 784 (Pa. 1979) quoting Nesbitt v. Erie Coach Co., 204 A.2d 473, 476-77 (Pa. 1964).

[18] N.T. 203-05, 238-39.

Contrary to Ferguson's assertions, the Board does not find that the Department engaged in any "fraud or concealment," even under the relaxed standard of an "unintentional deception." As unappealing as the tactic may be for an agency of state government to hold silent for all these years in the hope that a contractor will forget about a pending claim (regardless of the merits), DGS did make an early attempt to move the matter along when Ms. Hallett sought Ferguson's information by letter dated September 12, 1997. It was, after all, Ferguson which then failed to respond, allowed the claim to languish for over 10 years and, throughout that time, failed to produce the additional claim information despite its own repeated promises to do so. More to the point, we do not find the facts here analogous to UEC to any significant degree. Unlike UEC, the parties here were not in continuous contact or negotiation. Instead, long periods elapsed in which there was no activity in regard to the portion of Ferguson's case here at issue, including the period from September 1997 to May 2002 and from October 2003 until April 2007. Additionally, we find no persuasive evidence of any misrepresentation on the part of DGS giving Ferguson cause to delay or relax its vigilance as was the case in UEC where "[h]igh Commonwealth officials . . . repeatedly gave UEC their assurances that the Commonwealth would compensate them [UEC] under the Contract." Id. at 784.[19] In any event, Mr. Resta's letter of August 1, 2007 made it abundantly clear that DGS would not consider Ferguson's claim any further, and Ferguson has offered no evidence whatsoever of any basis to assert an estoppel

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[19] A full cite to the estoppel principles applied in UEC includes the following:

> There are certain well settled legal principles applicable to the case at bar. "[I]f through fraud or concealment the defendant causes the plaintiff to relax his vigilance or deviate from this right of inquiry, the defendant is estopped from invoking the bar of limitation of action. (citations omitted) The burden of proving the existence of such fraud or concealment is upon the asserting party by evidence that is clear, precise and convincing. (citations omitted) It is also well established that mere negotiations toward an amicable settlement afford no basis for an estoppel, nor do mistakes, misunderstandings or lack of knowledge in themselves toll the running of the statute . . . (citations omitted)."

Nesbitt v. Erie Coach Co., 416 Pa. 89, 92-93, 204 A.2d 473, 475 (1964); Walters v. Ditzler, 424 Pa. 445, 449-450, 227 A.2d 833, 835 (1967); UEC, 397 A.2d at 784.

claim as it relates to Ferguson's delay in filing a claim after the Resta letter of August 1, 2007. See e.g., Dept. of Transp. v. Dyberry Sand & Gravel, Inc., 542 A.2d 650, 652 (Pa. Cmwlth. 1988).

In summary, the Board finds that Ferguson's claim against DGS accrued pursuant to the Darien standard when the Resta letter of August 1, 2007 was received; that Mr. Cohen's letter of August 15, 2007 acted as a formal claim to the DGS "contracting officer" following the August 1, 2007 denial (satisfying the § 1712(a) and/or § 1712.1(b) requirement that Ferguson file with the contracting officer within six months of the date of accrual); but that Ferguson failed thereafter to timely file its claim with the Board before the expiration of the 135 days required by § 1712.1 (or the 150 days required by § 1712) in the absence of a response by the contracting officer. We further find that DGS is not estopped from asserting the statute of limitation as the result of any fraud or concealment on its part and find no merit to the various additional arguments raised by Ferguson as noted above.

Accordingly, the Board concludes that it lacks in personam jurisdiction of Ferguson's claim under § 1724 of the Procurement Code (62 Pa.C.S. § 1724(a) and (c)) since the claim was not timely filed in compliance with § 1712.1, the procedural statute in effect at the time the claim was filed (or under § 1712 the procedural section allegedly agreed to by the parties). We therefore enter the following Order granting the Department's preliminary objection to the in personam jurisdiction of the Board.

REVISED ORDER

AND NOW, this 23rd day of September, 2009, upon consideration of Ferguson Electric Co., Inc.'s request for reconsideration and reconsideration of the preliminary objections of the Commonwealth of Pennsylvania, Department of General Services; Ferguson Electric Co., Inc.'s response thereto; and the testimony and evidence presented at the hearing in this matter, it is **ORDERED** and **DECREED** that the Department's preliminary objection to the Board's in personam jurisdiction over the Department is hereby **SUSTAINED**. The claim is **DISMISSED**.

BOARD OF CLAIMS

____
Jeffrey F. Smith
Chief Administrative Judge

OPINION SIGNED

____
Harry G. Gamble, P.E.
Engineer Member

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Andrew Sislo
Citizen Member