

COMMONWEALTH OF PENNSYLVANIA

THE SHEWARD PARTNERSHIP, LLC : BEFORE THE BOARD OF CLAIMS
: :
VS. : :
: :
COMMONWEALTH OF PENNSYLVANIA, : :
DEPARTMENT OF GENERAL SERVICES : DOCKET NO. 4104

FINDINGS OF FACT

1. The Sheward Partnership, LLC (“TSP” or “Plaintiff”) is a limited liability company, incorporated under the laws of the Commonwealth of Pennsylvania, with a principal place of business located at 2300 Chestnut Street, Philadelphia, PA 19103. (Compl. ¶ 1)

2. TSP provides architectural and other professional design services to governmental, institutional and commercial clients. (Compl. ¶ 2)

3. On or about September 27, 2007, TSP and the Pennsylvania Department of General Services (“DGS”) executed an Agreement for Professional Services (“Contract”) relating to the design and construction of a new county maintenance garage in Middlesex Township, Cumberland County (“Project”). (Compl. ¶ 8, Ex. B)

4. On September 19, 2014, TSP filed the instant Statement of Claim (“Complaint”) against Defendant DGS to recover damages of \$522,277.74, allegedly incurred during its performance of its Contract to provide architectural and other professional design services to DGS. (B.O.C. Docket No. 4104)

5. On October 17, 2014, DGS filed three Preliminary Objections to the Complaint and a Brief in Support. The three preliminary objections were: 1) the Board lacks jurisdiction as to all counts of the Complaint pursuant to 62 Pa.C.S. § 1724(a)(1) in that TSP’s Complaint was filed beyond the time for filing set forth at 62 Pa.C.S. §1712.1(d) and (e); 2) the Board lacks jurisdiction over all of TSP’s claims because it failed to file its administrative claim within six months of the claim’s accrual pursuant to 62 Pa.C.S. §1712.1(b); and 3) the Board cannot award attorneys’ fees, interest or penalty interest under the Prompt Pay provisions of the Procurement Code as claimed in Count VI of TSP’s Complaint because the Contract was not for “construction” but for architectural services, and that Count is therefore excluded from the Prompt Pay provisions. (B.O.C. Docket No. 4104)

6. TSP filed a Response in Opposition to the Preliminary Objections and Memorandum of Law on November 13, 2014, and DGS filed a Reply to TSP’s Response and Memorandum in Opposition on November 21, 2014. (B.O.C. Docket No. 4104)

7. On January 26, 2015, the Board issued an order scheduling “an evidentiary hearing to determine all factual issues pertinent to the Board’s jurisdiction” over TSP’s claim. (B.O.C. Docket No. 4104, January 26, 2015 Order)

8. On March 9, 2015, the Board held an evidentiary hearing at which both parties were provided opportunity to present such evidence as they wished. (B.O.C. Docket No. 4104, January 26, 2015 Order; N.T. 1-96)

9. On May 5, 2014, TSP, through its attorneys, O’Connor Kimball LLP, sent an administrative claim letter to DGS seeking payment of incurred and outstanding claimed costs and fees in the amount of \$510,814.36. (N.T. 13-15; Ex. D-1)

10. TSP’s administrative claim letter was received by DGS the following day, on May 6, 2014. (N.T. 15-17)

11. DGS’s contracting officer did not issue a determination on TSP’s administrative claim within 120 days of its receipt of the administrative claim. (Preliminary Objections ¶ 22)

12. TSP filed its Complaint with the Board on Friday, September 19, 2014. This was 136 days after DGS received TSP’s administrative claim letter on May 6, 2014. (Findings of Fact 4, 9, 10; Board Finding)

13. No evidence of any time extensions for filing the Complaint at this Board was presented by either party. (N.T. 1-96; Board Finding)

CONCLUSIONS OF LAW

1. The Procurement Code at 62 Pa.C.S. § 1724(a)(1) and (c) provides, inter alia, that:

(a) **Exclusive jurisdiction.**—The board shall have exclusive jurisdiction to arbitrate claims arising from all of the following:

(1) A contract entered into by a Commonwealth agency in accordance with [the Procurement Code] and filed with the board in accordance with section 1712.1 (relating to contract controversies).

* * *

(c) **Limitations.**—The board shall have no power and exercise no jurisdiction over a claim asserted under subsection (a)(1) unless it is filed with the board in accordance with section 1712.1. . . .

62 Pa.C.S. § 1724(a)(1) and (c).

2. Section 1712.1 of the Procurement Code states as follows:

§ 1712.1. Contract controversies

(a) **Right to claim.** - A contractor may file a claim with the contracting officer in writing for controversies arising from a contract entered into by the Commonwealth.

(b) **Filing of a claim.** - A claim shall be filed with the contracting officer within six months of the date the claim accrues. If a contractor fails to file a claim or files an untimely claim, the contractor is deemed to have waived its right to assert a claim in any forum. Untimely filed claims shall be disregarded by the contracting officer.

(c) **Contents of claim.** - A claim shall state all grounds upon which the contractor asserts a controversy exists.

(d) **Determination.** - The contracting officer shall review and issue a final determination in writing regarding the claim within 120 days of the receipt of the claim unless extended by consent of the contracting officer and the contractor. If the contracting officer fails to issue a final determination within the 120 days unless extended by consent of the parties, the claim shall be deemed denied. The determination of the contracting officer shall be the final order of the purchasing agency.

(e) Statement of claim. - Within 15 days of the mailing date of a final determination denying a claim or within 135 days of filing a claim if no extension is agreed to by the parties, whichever occurs first, the contractor may file a statement of claim with the board.

(f) Applicability. - The provisions of 2 Pa.C.S. (relating to administrative law and procedure) shall not apply to this section.

62 Pa.C.S. § 1712.1(a)-(f).

3. Section 1712.1(b) requires, as a prerequisite to filing a claim with the Board, that a contractor initially file an administrative claim with the agency's contracting officer "within six months of the date the claim accrues ('administrative claim')." Id.

4. Section 1712.1(d) provides that the agency's contracting officer is to review the administrative claim and issue a written determination within 120 days. If the claim is denied by the agency, the claimant then has fifteen days to file his or her complaint with the Board. 62 Pa.C.S. § 1712.1(d) and (e).

5. If the contracting officer takes no action, the claim is deemed denied and the claimant has 135 days from the date of the filing of his or her administrative claim to file his or her complaint with the Board of Claims. Id.

6. Compliance by the contractor/claimant with each step of Section 1712.1 is necessary in order for the Board to assert jurisdiction over the claim. 62 Pa.C.S. § 1724(a)(1), (c); Buchart Horn, Inc. v. Department of Transportation, 1 A.3d 960, 965 (Pa. Cmwlth. 2010)

7. Pa. R.C.P. 126 provides for the liberal construction of the Pennsylvania Rules of Civil Procedure as follows:

The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

Pa. R.C.P. 126.

8. Pennsylvania Courts will not apply Pa. R.C.P. 126 to override statutory jurisdictional requirements such as time limits for perfecting appeals from administrative agencies or boards. S. Chester County Concerned Citizens Org. v. Zoning Bd., 937 A.2d 1141 (Pa.Cmwlth. 2007); Rostosky v. Commonwealth, Department of Environmental Resources, 364 A.2d 716 (Pa.Cmwlth. 1976).

9. Whether a statute is mandatory or directory must be determined by considering legislative intent gleaned from review of the entire statute and from considering the nature and

object of the statute and the consequences of the construction of it one way or the other. If the thing directed to be done is the essence of the thing required, the statute is mandatory. West Penn Power Co. v. Pennsylvania Public Utility Commission, 521 A.2d 75, 78 (Pa. Cmwlth. 1985); citing Pennsylvania Railroad Company v. Board of Revision of Taxes, 93 A.2d 679, 681-682 (Pa. 1953).

10. Because Section 1724(c) provides expressly that the Board shall have no power and exercise no jurisdiction over claims which are not filed in accordance with the Section 1712.1 filing time frames, those time frames are “the essence of the thing required” and thus mandatory. Id.; Buchart Horn, Inc. v. Commonwealth of Pennsylvania, Department of Transportation, B.O.C. Docket No. 3948 (Opinion and Order issued April 28, 2009).

11. A paper sent by mail to an administrative agency shall not be deemed filed until received by the agency. See General Rules of Administrative Practice and Procedure, 1 Pa. Code § 31.11; Skyvue Terrace, Inc. v. Commonwealth, Department of Public Welfare, 482 A.2d 58, 59-60 (Pa. Cmwlth. 1984).

12. Materials sent to the Board shall not be deemed filed until received by the Board. BOC R.P. 102; Pa. R.C.P. 205.1; see also Greater Erie Indus. Dev. Corp. v. Presque Isle Downs, Inc., 88 A.3d 222, 226 (Pa. Super. 2012).

13. Because we have found that the Board has no power and may exercise no jurisdiction over a claim asserted under Section 1724(a)(1) unless it is filed with the Board in accordance with Section 1712.1; Section 1712.1(d) and (e) require that Complaints must be filed with the Board within 135 days of the receipt of an administrative claim by the subject agency; TSP did not file its Complaint until 136 days after DGS received TSP’s administrative claim on May 6, 2014; and because the Pennsylvania Rules of Civil Procedure may not be applied to override statutory jurisdictional requirements such as Sections 1712.1 and 1724(a)(1) and (c), we conclude that the Board lacks jurisdiction over TSP’s Complaint filed here on September 19, 2014, and sustains DGS’s first preliminary objection. 62 Pa.C.S. §§ 1712.1, 1724(a)(1) and (c); Buchart Horn, Inc. v. Department of Transportation, 1 A.3d 960, 965 (Pa. Cmwlth. 2010); S. Chester County Concerned Citizens Org. v. Zoning Bd., 937 A.2d 1141 (Pa. Cmwlth. 2007); Rostosky v. Commonwealth, Department of Environmental Resources, 364 A.2d 716 (Pa. Cmwlth. 1976); Ex. D-1; Conclusions of Law 1-12.

OPINION

On September 19, 2014, Plaintiff, The Sheward Partnership LLP ("TSP") filed the instant Statement of Claim ("Complaint") against Defendant, Commonwealth of Pennsylvania, Department of General Services ("DGS") to recover damages of \$522,277.74, allegedly incurred during its performance of a contract to provide architectural and other professional design services to DGS.¹ On October 17, 2014, DGS filed Preliminary Objections to the Complaint and a Brief in Support. TSP filed a Response in Opposition to the Preliminary Objections and Memorandum of Law on November 13, 2014, and DGS filed a Reply to TSP's Response and Memorandum in Opposition on November 21, 2014.

DGS makes three separate preliminary objections to TSP's claims. They are: 1) the Board lacks jurisdiction as to all counts of the Complaint pursuant to 62 Pa.C.S. § 1724(a)(1) in that TSP's Complaint at the Board was filed beyond the time for filing set forth at 62 Pa.C.S. §1712.1(d) and (e); 2) the Board lacks jurisdiction over all of TSP's claims because TSP failed to file its administrative claim within six months of the claim's accrual pursuant to 62 Pa.C.S. §1712.1(b); and 3) the Board cannot award attorneys' fees, interest or penalty interest under the Prompt Pay provisions of the Procurement Code as claimed in Count VI of TSP's Complaint because the Contract was not for "construction" but for architectural services, so Count VI must be dismissed.

In its Response to DGS's preliminary objections, TSP argues: 1) that it filed its Complaint on the 135th day in compliance with 62 Pa.C.S. § 1712.1(e) or, alternatively, that the

¹ TSP had previously filed a Statement of Claim against DGS on December 26, 2013, at Docket No. 4096. In an Opinion and Order issued March 26, 2014, the Board sustained DGS's preliminary objection to Board jurisdiction finding that TSP had filed that Statement of Claim with the Board prematurely because it had failed to first file an administrative claim with DGS. The Board dismissed that case at Docket No. 4096 without prejudice. TSP subsequently withdrew its initial claim and the case was discontinued and closed by order of April 21, 2014. TSP consequently filed the instant claim at Docket No. 4104 on September 19, 2014, after having filed an administrative claim with DGS. This Opinion deals only with the instant Complaint filed here on September 19, 2014.

one-day delay in filing may be excused pursuant to Pa. R.C.P. 126 and/or supporting caselaw; 2) that its claim did not accrue until July 3, 2013, less than six months before it submitted its administrative claim to DGS on November 11, 2013; and 3) TSP provided services as a design professional and thus its claim involves “construction” under the Prompt Pay provisions of the Procurement Code and is allowed. Accordingly, TSP asserts that the Board retains jurisdiction over the instant claim.

On January 26, 2015, the Board issued an order scheduling “an evidentiary hearing to determine all factual issues pertinent to the Board’s jurisdiction” over TSP’s claim. This hearing was held on March 9, 2015, and both parties were provided opportunity to present such evidence as they wished. The evidence presented at the hearing related to DGS’s first two preliminary objections.

Summary of the Parties’ Arguments

In support of its first preliminary objection, that TSP failed to file its claim with the Board within the 135 day time frame required by Section 1712.1(e), DGS presented evidence that DGS received TSP’s administrative claim letter (dated May 5, 2014) on May 6, 2014; that its contracting officer did not issue a final determination regarding TSP’s administrative claim; that TSP’s Complaint was not filed with the Board of Claims until September 19, 2014; and that this filing with the Board occurred 136 days after the receipt by DGS of TSP’s administrative claim or one day too late to comply with Section 1712.1 requirements.

In response to DGS’s first preliminary objection, TSP asserted initially that it filed its complaint with the Board within the 135 day time frame allowed under Section 1712.1(e). Alternatively, TSP cited Pa. R.C.P. 126 and McCreech v. City of Philadelphia, 888 A.2d 664 (Pa. 2005); argued that rules of procedure are to be liberally construed to ensure the just, speedy and

inexpensive determination of actions; and asserted that a one-day filing delay is only a “procedural misstep” and may be excused where, as it suggests is the case here, there is no prejudice to the opposing party. TSP also cites to the Commonwealth Court’s unpublished opinion in In re: Condemnation by Athens Twp., Pa. Commw. Unpub. Lexis 21 (Pa. Cmwlth. 2013), for its argument that the Board still has jurisdiction even if the instant Complaint was filed one day late. Finally, TSP raised for the first time in its posthearing brief the argument that the wording in Section 1712.1(e), that a contractor “may” file a claim with the Board within 135 days of the filing of an administrative claim, is directory rather than mandatory. Accordingly, TSP asserts that its failure to comply with the 135 day filing deadline does not require dismissal.

With respect to its second preliminary objection, DGS asserted that TSP did not file its administrative claim with DGS’s contracting officer within six months of the date the claim accrued as required under Section 1712.1(b). Citing Darien Capital Management, Inc. v. Pub. School Employees' Retirement Sys., 700 A.2d 395 (Pa. 1997),² DGS argued that, viewing the pleadings in the light most favorable to TSP, the latest date upon which TSP’s claim accrued was November 30, 2012. According to DGS, this was the date TSP submitted a request to DGS seeking compensation for additional design services on the finished Project. DGS also asserted that it had previously (before November 30, 2012) rejected TSP’s compensation request for additional design services. Thus, DGS argued, TSP was required to submit its administrative claim to DGS’s contracting officer within six months of November 30, 2012, or no later than May 30, 2013. According to DGS, because TSP did not submit its administrative claim for

² Darien provides that 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 and unequivocally notified that his or her claim will not be paid by the Commonwealth.

additional design services until November 11, 2013, the Board has no jurisdiction over this claim under Section 1712.1(b).

In response to DGS's second preliminary objection, TSP asserted that it did not know the full extent of its claim until July 3, 2013, the date DGS notified TSP of its "final determination" of an Errors and Omissions change order assessment following a review initiated by DGS, so its claim did not accrue until that date. Thus, TSP argued, its November 11, 2013 claim letter was timely filed within six months of the accrual of its claim, i.e. July 3, 2013.

We note, of course, that TSP's argument here, in support of its opposition to DGS's second preliminary objection (where it seems to argue in the alternative that TSP's November 11, 2013 letter to DGS constituted its administrative claim letter) contradicts its position taken as to the first preliminary objection that TSP's administrative claim was submitted to DGS on May 6, 2014 (and was within 135 days of the instant Complaint filed here on September 19, 2014). This argument is also contrary to the argument made by DGS in the first Sheward case at Docket No. 4096 (and the finding of the Board in our March 26, 2014 Opinion and Order) that the November 11, 2013 letter was not properly considered an administrative claim respecting the same issues now raised in the current Complaint. See also Docket No. 4096, DGS's Brief in Response to TSP's Brief in Opposition to Preliminary Objections, at pp. 2-3.

Although the Board accepted evidence on both preliminary objections to jurisdiction made by DGS, we find DGS's first preliminary objection to be dispositive as to our lack of jurisdiction. Accordingly, we find it unnecessary to address the remaining preliminary objections.

Lack of jurisdiction for failure to file claim in accordance with 62 Pa.C.S. § 1712.1

Pursuant to Section 1724(a)(1) of the Procurement Code, the Board has “exclusive jurisdiction to arbitrate claims arising from . . . a contract entered into by a Commonwealth agency in accordance with this part and filed with the board in accordance with section 1712.1.” 62 Pa.C.S. § 1724(a)(1); Hanover Insurance Company v. State Workers’ Insurance Fund, 35 A.3d 849, 852-856 (Pa. Cmwlth. 2012). Section 1724(c) states expressly that the Board “shall have no power and exercise no jurisdiction over a claim asserted under subsection (a)(1) unless it is filed with the board in accordance with section 1712.1.” 62 Pa.C.S. § 1724(c). Thus, Section 1712.1 sets forth not only the pre-litigation procedure for resolving disputes between a contractor and a Commonwealth agency, but also the prerequisites for the assertion of the Board’s jurisdiction over said disputes. Id. It states:

§ 1712.1. Contract controversies

(a) Right to claim. - A contractor may file a claim with the contracting officer in writing for controversies arising from a contract entered into by the Commonwealth.

(b) Filing of a claim. - A claim shall be filed with the contracting officer within six months of the date the claim accrues. If a contractor fails to file a claim or files an untimely claim, the contractor is deemed to have waived its right to assert a claim in any forum. Untimely filed claims shall be disregarded by the contracting officer.

(c) Contents of claim. - A claim shall state all grounds upon which the contractor asserts a controversy exists.

(d) Determination. - The contracting officer shall review and issue a final determination in writing regarding the claim within 120 days of the receipt of the claim unless extended by consent of the contracting officer and the contractor. If the contracting officer fails to issue a final determination within the 120 days unless extended by consent of the parties, the claim shall be deemed denied. The determination of the contracting officer shall be the final order of the purchasing agency.

(e) Statement of claim. - Within 15 days of the mailing date of a final determination denying a claim or within 135 days of filing a claim if no extension is agreed to by the parties, whichever occurs first, the contractor may file a statement of claim with the board.

(f) Applicability. - The provisions of 2 Pa.C.S. (relating to administrative law and procedure) shall not apply to this section.

62 Pa.C.S. § 1712.1(a)-(f).

Section 1712.1(b) requires, as a prerequisite to filing a claim with the Board, that a contractor initially file an administrative claim with the agency's contracting officer "within six months of the date the claim accrues." *Id.* Section 1712.1(d) provides that the agency's contracting officer is to review the administrative claim and issue a written determination within 120 days. If the claim is denied by the agency, the claimant then has fifteen days to file a complaint with the Board. 62 Pa.C.S. § 1712.1(d) and (e). If the contracting officer takes no action, the claim is deemed denied and the claimant has 135 days from the date of the filing of the administrative claim to file with the Board of Claims. *Id.* Compliance by the contractor/claimant with each step is necessary in order for the Board to assert jurisdiction over the claim. 62 Pa.C.S. § 1724(a)(1) and (c). Buchart Horn, Inc. v. Department of Transportation, 1 A.3d 960, 965 (Pa. Cmwlth. 2010)

The evidence presented at hearing established the following sequence of events. On May 5, 2014, through its attorneys O'Connor Kimball LLP, TSP sent an administrative claim letter to DGS seeking payment of incurred and outstanding claimed costs and fees in the amount of \$510,814.36. TSP's administrative claim letter was received by DGS the following day, on May 6, 2014. DGS's contracting officer did not issue a determination on TSP's administrative claim within 120 days of its receipt of the administrative claim, and no extensions of filing times were agreed to. The claim was therefore deemed denied in accordance with 62 Pa.C.S. §

1712.1(d). TSP filed the instant Complaint with the Board on Friday, September 19, 2014, 136 days after DGS received TSP's administrative claim letter on May 6, 2014.

At the evidentiary hearing held March 9, 2015, TSP offered no evidence to contradict the above timeline. Rather, as noted above, TSP argued that Pa. R.C.P. 126 directs that procedural rules should be "liberally construed to ensure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable" and cited McCreesh v. City of Philadelphia, 888 A.2d 664 (Pa. 2005), for the proposition that a one-day filing delay is a "procedural misstep" which may be excused where, as is the case here it argues, there is no prejudice to the opposing party. In McCreesh, the Supreme Court, relying in part on Pa. R.C.P. 126, held that a party's inadvertent failure to comply with time limits for serving a civil complaint under the Pennsylvania Rules of Civil procedure may be excused where a defendant has actual knowledge of a pending complaint and has not been prejudiced by the plaintiff's late filing. Id., 888 A.2d at 674.

While Pa. R.C.P. 126, by its express language, directs that the Pennsylvania Rules of Civil Procedure are to be "liberally construed," it may not be applied to waive statutory jurisdictional requirements. See e.g. S. Chester County Concerned Citizens Org. v. Zoning Bd., 937 A.2d 1141 (Pa.Cmwlt. 2007); Rostosky v. Commonwealth, Department of Environmental Resources, 364 A.2d 716 (Pa.Cmwlt. 1976). In S. Chester County, the Commonwealth Court affirmed the dismissal of a zoning board appeal which was filed two days beyond the statutory appeal period. In Rostosky, the Court affirmed a decision by the Environmental Hearing Board which held that it had no jurisdiction to hear an appeal of a determination by the department which was filed beyond the time permitted by the Environmental Hearing Board's enabling statute, holding "Where a statute has fixed the time within which an appeal may be taken, we

cannot extend such time as a matter of indulgence. . . . The untimeliness of the filing deprives the Board of jurisdiction [citations omitted].” Id. 364 A.2d at 763. In both cases, the Court rejected arguments by the appellants that Pa. R.C.P. 126 permitted the extension of statutory jurisdictional filing time periods. S. Chester County, 937 A.2d at 1145-1146; Rostosky, 364 A.2d at 764.

We also find TSP’s reliance on the Commonwealth Court’s unpublished opinion in In re: Condemnation by Athens Twp., Pa. Commw. Unpub. Lexis 21 (Pa. Cmwlth. 2013), for its argument that the Board still has jurisdiction even if the instant Complaint was filed one day late to be unavailing. In Athens Twp. the issue addressed was whether or not the Township’s failure to comply with the statutory requirement that it provide the plaintiffs/condemnees with a plot plan for the entire property subjected to taking made the condemnation improper. The Court there found that this failure was not material given the small portion of land taken and the clear description of the portion taken so this failure to adhere strictly to the statutory requirement did not prejudice the condemnees and there dismissal of the eminent domain proceeding was not required. We find this case dealing with technical requirements for eminent domain to be inapposite the instant action and the enforceability of statutory time limits for the filing of claims before the Board.

Finally, we turn to the issue of whether the filing periods set forth in Section 1712.1(e) are mandatory or directory. Whether a statute is mandatory or directory must be determined by considering legislative intent gleaned from review of the entire statute and from considering the nature and object of the statute and the consequences of the construction of it one way or the other. If the thing directed to be done is the essence of the thing required, the statute is mandatory. West Penn Power Co. v. Pennsylvania Public Utility Commission, 521 A.2d 75, 78

(Pa. Cmwlth. 1985); citing Pennsylvania Railroad Company v. Board of Revision of Taxes, 93 A.2d 679, 681-682 (Pa. 1953).

We previously addressed the issue of whether the Section 1712.1(e) time frames are mandatory or directory in Buchart Horn, Inc. v. Commonwealth of Pennsylvania, Department of Transportation, B.O.C. Docket No. 3948 (Opinion and Order issued April 28, 2009). There we held that “the permissive nature of the word ‘may’ in § 1712.1(e) is directed at the claimant’s decision of whether or not to file a claim at the Board” and not to the timing parameters contained in Section 1712.1(e). In that case, we stated:

Comparing the original language of Section 1712 to the new language contained in Section 1712.1 of the 2002 Amendments, it becomes apparent to us that the General Assembly was attempting to modify the language of the provision to make it clearer that the time frames are mandatory while recognizing that a contractor, dissatisfied with its administrative appeal, must still be allowed to make a choice of whether or not to appeal to the Board in the event the purchasing agency failed to issue a written decision in a timely manner. Specifically, we note that the new Section 1712.1, among other things, provides that, if a written decision is not issued by the purchasing agency within 120 days, then the claim shall be deemed denied. It also runs the time frame for filing with the Board from 15 days of the mailing date of a final determination (if made in writing) or 135 days from the original filing of the claim with the agency if no determination is issued. Unlike the original Section 1712, which left it unclear as to whether or not the agency might still issue a decision after the 120 days if the contractor did not appeal to the Board, this 2002 modification to the language of 1712 put to rest, in our view, any doubt that an agency’s failure to act on a claim within the prescribed 120 days constitutes anything but a denial at that point in time. Once this is clarified, there is no logical justification not to commence the running of the period in which the contractor must appeal this denial of its claim to the Board. We believe this comparison of the two provisions indicates that the General Assembly was trying to eliminate with the 2002 Amendments the initial ambiguity of when a claim is to be considered denied by the Commonwealth agency (and when a party must file with the Board) in the absence of a written decision by the purchasing agency by the changes embodied in Section 1712.1.

Id. at pp. 8-9.

The Board also looked to Section 1724(c), governing Board jurisdiction, which was also added to the Procurement Code in the 2002 Amendments:

Most importantly, however, we note that the 2002 Amendments also added Section 1724(c) which, in our view, eliminates any lingering ambiguity present in Section 1712.1 as to the filing time frames being mandatory. Section 1724(c) states explicitly that “the Board shall have no power and exercise no jurisdiction over a claim asserted under subsection (a)(1) unless it is filed with the Board in accordance with Section 1712.1.” Thus we believe the combination of the 2002 Amendments to the Procurement Code contained in Section 1712.1 and Section 1724(c) establishes that the permissive nature of the word “may” in Section 1712.1(e) pertains only to a decision by the contractor of whether or not to appeal further to the Board and makes compliance with the timing requirements otherwise set forth in Section 1712.1 mandatory, not optional.

Id. at p. 9.

Because of the foregoing history and the perceived purpose of Sections 1712.1 and 1724 (which we view as intending to move claims along to a clear and final resolution), and because Section 1724(c) provides expressly that the Board shall have no power and exercise no jurisdiction over claims which are not filed in accordance with the Section 1712.1, we view compliance with the filing time frames in these provisions to be “the essence of the thing required” and thus mandatory. West Penn Power Co., 528 A.2d at 78; Pennsylvania Railroad Company v. Board of Revision of Taxes, 93 A.2d at 681-682. Were we to view the time frame in 1712(e) otherwise, any claimant could leave its claim dormant for years after its administrative claim yet reinstitute proceedings at the Board any time in the distant future. We do not see this as reasonable or intended by the General Assembly.

As discussed above, the requirement that a claimant comply with the provisions of Section 1712.1 of the Procurement Code (including the requirement that a statement of claim be filed with the Board within 135 days of the filing of an administrative claim with the agency

where no decision has been rendered by said agency) is a prerequisite to the Board's jurisdiction to hear the case. Because TSP filed its Complaint with the Board 136 days after its administrative claim was received by DGS, the Board lacks jurisdiction in accordance with 62 Pa.C.S. § 1724(a)(1) and (c). See also Buchart, 1 A.3d at 965. Accordingly, we sustain DGS's first preliminary objection.

ORDER

AND NOW, this 11th day of June, 2015, upon consideration of the verified pleadings, the preliminary objections, supporting briefs filed by parties, and the evidence provided by the parties at hearing, **IT IS ORDERED** that DGS's first preliminary objection based on lack of Board jurisdiction is **SUSTAINED**. The Complaint is **DISMISSED** in its entirety with prejudice.

BOARD OF CLAIMS

ORDER SIGNED

Jeffrey F. Smith
Chief Administrative Judge

Harry G. Gamble, P.E.
Engineer Member

Andrew Sislo
Citizen Member