

COMMONWEALTH OF PENNSYLVANIA

SHIPLEY BROS. CONSTRUCTION, INC. : BEFORE THE BOARD OF CLAIMS
 :
VS. :
 :
COMMONWEALTH OF PENNSYLVANIA, :
STATE SYSTEM OF HIGHER EDUCATION, :
CALIFORNIA UNIVERSITY : DOCKET NO. 4145

OPINION

On May 31, 2016, Plaintiff Shipley Bros. Construction, Inc. (“Shipley”) filed a Statement of Claim (“Complaint”) against Defendant California University of Pennsylvania of the State System of Higher Education (“California University”) alleging breach of contract. On July 5, 2016, California University filed preliminary objections, and on August 4, 2016, Shipley filed a response opposing the preliminary objections. The matter is now ready for decision.

Factual and Procedural Background

On or about February 8, 2013, Shipley and California University entered into a written construction contract, Contract No. CAL-199.3 (the “Contract”) under which Shipley was the plumbing prime contractor for the renovation of the Natali Student Center Renovation and Additions (the “Project”). Cmpl. ¶ 4; Ex. 1. Under the Contract, California University agreed to pay Shipley \$1,0075,000.00 subject to adjustment by change order. *Id.* Shipley avers there were numerous issues on the Project that occasioned delays. Cmpl. ¶¶ 8-16. As a result of these delays, Shipley contends it is owed \$188,786.43. Cmpl. ¶ 17.

Shipley alleges that on or about January 19, 2016,¹ it sent a Change Order Request in accordance with the terms of the Contract, requesting additional compensation from California University. Cmpl. ¶ 18. According to Shipley, “the University has neglected, failed and refused to issue a written determination relating to the Change Order Request” and has “neglected, failed and refused to pay Shipley” the amount claimed. Cmpl. ¶¶ 19, 20. Shipley states that it filed this action within 135 days of submitting its Change Order Request in order to preserve its right to seek compensation for the delays it experienced. Cmpl. ¶ 21.

California University filed preliminary objections to the Complaint based on Pa. R.C.P. 1028 (a)(1) and (a)(7), and argues that the Board has no jurisdiction over Shipley’s claims because Shipley has failed to exhaust its administrative remedies as required by 62 Pa. C.S. § 1712.1. POs ¶¶ 8-11. California University asks the Board to dismiss the Complaint for lack of subject matter jurisdiction.

Legal Standard

Under Pennsylvania Rule of Civil Procedure 1028, preliminary objections may be filed on several grounds including 1028(a)(1) for lack of subject matter jurisdiction and 1028(a)(7) for failure to exercise or exhaust a statutory remedy. The defendant has the burden of supporting its objection to the court's jurisdiction with facts and legal argument. See Schmitt v. Seaspray-Sharkline, Inc., 531 A.2d 801, 803 (Pa. Super. 1987). Once the jurisdictional issue is properly raised, the burden of proving jurisdiction is upon the party asserting it (namely plaintiff). Deyarmin v. CONRAIL, 931 A.2d 1 (Pa. Super. 2007). When a preliminary objection raises the jurisdictional issue, "the trial court's function is to determine whether the law will bar recovery due to a lack of

¹ In Paragraph 18 of the Complaint, Shipley states that it sent a Change Order Request on “January 19, 2015”. We assume this “2015” is a typographical error and should read “2016” since the Change Order Request referred to is attached to the pleading as Exhibit 2 and is clearly dated “January 19, 2016.”

subject matter jurisdiction." Arbor Res., L.L.C. v. Nockamixon Twp., 973 A.2d 1036, 1042 (Pa. Cmwlth. 2009). Challenges to Board jurisdiction may be addressed during the preliminary objection phase by application of the law and by taking evidence to resolve any material issues of fact relevant to the challenge. Pa. R.C.P. 1028(b)(2); see also Ferguson Elec. Co. v. Dep't of Gen. Servs., 3 A.3d 681, 688 (Pa. Cmwlth. 2010).

We have looked at the facts presented by the parties in the verified pleadings and exhibits on file. In this case, we consider them sufficient to determine the objections to jurisdiction and find that no fact hearing is necessary.

Argument

In its preliminary objections based on Pa. R.C.P. 1028 (a)(1) and (a)(7), California University argues that the Board has no jurisdiction over Shipley's claims because Shipley has failed to exhaust its administrative remedies as required by 62 Pa. C.S. § 1712.1. P.O. ¶¶ 8-11. California University asks the Board to dismiss the Complaint for want of subject matter jurisdiction.

Shipley opposes the preliminary objections. It asserts that by submitting its Change Order Request, to which no response has been forthcoming, it has done all it could to comply with the statutory requirements of Section 1712.1 and the dispute resolution provisions in ¶ 4.3.103 of the Contract. Resp. Br. p. 4; Cmpl., Ex. 1, Rider B. Specifically, Shipley argues it met its contract obligations by submitting a Change Order Request to the University's project manager, Management Engineering Corporation ("MEC"), as required by the contract and directed by the University, and that MEC was then obligated to promptly review the Request and issue a determination, but did not do so.² Resp. Br. p. 4-5. Shipley further notes that, despite the fact that

² The ¶ 4.3.101 of the Contract provides:

earlier Change Order Requests had been promptly addressed, MEC never issued any determination of the Change Order Request at issue. Cmpl. ¶ 19, Resp. to POs ¶ 10. Shipley waited four months for a reply, then sent a letter to California University asking if it intended to issue a determination. However, it still has received no response from MEC or California University. Resp. to POs ¶ 10. Because California University did not respond at all to Shipley's claim, Shipley says it has been denied the opportunity to commence the administrative review process and was placed in the position of having to file with the Board "out of an abundance of caution" in order to insure its claim was not time barred. Resp. Br. p. 5. Shipley asks the Board to overrule the preliminary objections because California University's failure to act has, in essence, denied Shipley an administrative review and prevented compliance with Section 1712.1. Alternatively, it asks the Board to stay the present action until such time as Shipley's claim is formally denied.

Discussion

The issue presented is whether the Board has jurisdiction over the claims presented in Shipley's Complaint. The Board's jurisdiction is governed by the Procurement Code, 62 Pa. C.S. § 101 *et seq.*, particularly in 62 C.S. § 1724(a)(1) which provides;

- (a) **Exclusive jurisdiction.** – The board shall have exclusive jurisdiction to arbitrate claims arising from all the following:
 - (1) A contract entered into by a Commonwealth agency in accordance with this part and filed with the board in accordance with section 1712.1 (relating to contract controversies).

In the event of any dispute, claim, question or other matter (hereinafter called disputed item) the Contractor shall immediately refer the disputed item in writing to the System Project Manager for a Determination, which Determination shall be rendered in writing within a reasonable time. Contract, Rider B, ¶ 4.3.101 (Ex. 1 to Cmpl.).

Section 1712.1 sets forth not only the pre-litigation procedure for resolving disputes between contractor and a Commonwealth agency, but also the prerequisites for the assertion of the Board's jurisdiction over said disputes. 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 the 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 concen 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).

It is abundantly clear that Section 1724(a)(1) of the Procurement Code requires compliance with Section 1712.1 (and the filing of an administrative claim with the defending agency) before the Board may exert jurisdiction over a claim filed here against that agency. However, it is equally clear that Section 1712.1 contemplates that said agency will respond to a contractor's change order request or other demand for payment based on a contract (rather than remain silent) in order for

the requirements and procedures of Section 1712.1 to even come into play. To wit, in order for a claim to “accrue” and commence the initial six month period for a contractor to file a claim with the agency’s contracting officer under Section 1712.1(b), two things must occur according to the test set forth by the Pennsylvania Supreme Court:

[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 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 be paid by the Commonwealth.

Darien Capital Mgmt., Inc. v. Pub. Sch. Employes’ Ret. Sys., 700 A.2d 395, 397 (Pa. 1997)(emphasis in original).

The University’s denial of a claim must be unequivocal for a claim for a claim to accrue. Id. Both prongs must be satisfied for a claim to be considered to have accrued, and only then will the six month limitation period commence and the procedures outlined in Section 1712.1 come into effect.

Wayne Knorr, Inc. v. Dep’t. of Transp., 973 A.2d 1061, 1088 (Pa. Cmwlth. 2009); Ferguson Elec. Co. v. Dep’t of Gen. Servs., 3 A.3d 681, 686 (Pa. Cmwlth. 2010).

In this case, it appears the parties agree that on January 16, 2016, Shipley submitted a Change Order Request to California University for payment of \$188,786.43 claimed due. It further appears they agree that California University has never made any payment or response to that claim. Cmpl. ¶¶ 18-20; POs ¶¶ 5-7.

Because there has been no affirmative, unequivocal rejection of the Change Order Request, it does not appear from the pleadings that Shipley’s claim has accrued at this time. Without that “affirmative no” the claim has not accrued under Darien, and Shipley’s six month time period within which to file the administrative claim has not commenced to run, making its claim here before the Board premature.

In order to be within the Board's jurisdiction, Shipley must first file an administrative claim with the agency's contracting officer; and before Shipley can do that, Section 1712.1 contemplates it will receive a final, unequivocal "no" to its Change Order Request. It is obvious that California University knows this, yet has chosen to "game" the system set up by the Procurement Code by not paying Shipley and refusing to respond to its contractor, thereby preventing Shipley from pursuing its contractual and statutory remedies, and/or possibly tricking it into making a filing mistake which would put it outside the jurisdiction of the Board and deny it any remedy here.

The Board finds this conduct reprehensible and unworthy of a Commonwealth agency. Should California University refuse to respond promptly to the Change Order Request after the issuance of this Order, we would expect to see Shipley send California University a letter demanding a response to its Change Order Request and stating in that letter that if no response is received within a stated time period that Shipley will consider the Change Order Request to be finally and unequivocally rejected at the end of that stated period. Shipley could then proceed to file its administrative claim and follow the statutory periods stated in 62 Pa. C.S. § 1712.1. The Board would also expect a claim for attorneys' fees and penalties pursuant to Chapter 39 of the Procurement Code to be asserted should the claim ultimately proceed to this Board.

For the reasons stated herein, we sustain California University's preliminary objections and dismiss Shipley's claim because Shipley has not yet complied with Section 1712.1 by filing its administrative claim with the agency's contracting officer. Further, as explained above, it appears from the pleadings that Shipley's claim has not yet accrued and thus the six-month period for filing the administrative claim has not yet begun.

ORDER

AND NOW, this 22nd day of August, 2016, upon consideration of the preliminary objections filed by the Defendant and the opposition to the preliminary objections filed by the Plaintiff, it is **ORDERED** and **DECREED** that the current Complaint is **DISMISSED** for the reasons stated herein.

BOARD OF CLAIMS

ORDER SIGNED

Jeffrey F. Smith
Chief Administrative Judge