

COMMONWEALTH OF PENNSYLVANIA

U.S. VENTURE, INC. : BEFORE THE BOARD OF CLAIMS
: VS. :
: COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF COMMUNITY AND :
ECONOMIC DEVELOPMENT; :
COMMONWEALTH FINANCING :
AGENCY; AND SCOTT D. :
DUNKELBURGHER, EXECUTIVE DIRECTOR: :
OF THE COMMONWEALTH FINANCING :
AGENCY : DOCKET NO. 4180

FINDINGS OF FACT

1. Plaintiff is U.S. Venture, Inc. (“Venture”), a Wisconsin corporation which maintains its principal place of business in Appleton, Wisconsin. (Exs. P-1, P-2)
2. Defendants, Department of Community and Economic Development and Commonwealth Financing Authority (“Defendants”), are agencies of the Commonwealth of Pennsylvania, which maintains its principal place of business in Harrisburg, Pennsylvania. Defendant Scott D. Dunkelburgher (sic) (hereafter “Dunkelburger”) was, at all times relevant hereto, Director of the Commonwealth Financing Authority. (Ex. P-5, hereinafter referred to as the “Emerson Depo.”, n.t. p. 22)
3. The Defendants operated “The Alternative and Clean Energy Program” (Program) through which grants were provided for the development and construction of alternative energy projects in the Commonwealth. (Exs. P-1, P-2, Emerson Depo., n.t. pp. 11, 15)
4. In 2014, Venture was awarded two grants to aid in construction of two compressed natural gas (CNG) fueling stations, one in Bethel Township and one in Falls Township. (Exs. P-1, P-2)
5. On October 24, 2014, the Defendants sent correspondence to Venture confirming the award of two grants; a grant of \$643,389 for the Bethel project and a grant of \$547,047 for the Falls project. (Exs. P-1, P-2)
6. The October 24, 2014 correspondence from the Defendants lists ten conditions for the grants, including, inter alia, that the Grant Applicant must: comply with the Alternative/Clean Energy Program Guidelines; be responsible for seeking competitive bids for all work; submit any substantial change to an approved Project for consent of the Commonwealth Financing Authority;

maintain full and accurate records for the project and make them available for inspection by the Commonwealth Financing Authority if requested. (Exs. P-1, P-2)

7. The October 24, 2014 correspondence from the Defendants provides that the Commonwealth Financing Authority “reserves the right to approve or reject contracts between the Applicant and consultants or contractors for work that will be paid for with Grant funds.” (Exs. P-1, P-2)

8. Written agreements related to the grants were ultimately fully executed by the parties in March 2015. (Exs. P-1, P-2)

9. Once the grant agreements were fully executed, the Defendants sent copies to Venture. (Emerson Depo., n.t. p. 23)

10. The Defendants did not monitor whether or not Venture decided to proceed with the projects after the grant documents were executed. If Venture did proceed with the projects, Defendants expected Venture would submit claims for reimbursement only when the projects were completed. (Emerson Depo., n.t. p. 23)

11. There is no evidence that the Defendants and Venture had any communication after the grant documents were executed until the time that Venture completed the projects and sought payment from the Defendants for the projects. (Emerson Depo., n.t. pp. 39-41; Board Finding)

12. Although the grant documents include general requirements, such as nondiscrimination policies and a requirement for competitive bidding on the actual construction, there are no construction guidelines, plans, construction specifications, or provisions for Defendants to monitor or participate in the construction of the projects in the grant agreements. (Exs. P-1, P-2)

13. The grant documents do not require the grant awards to be made in stages, with separate bids submitted for design and elements of construction, as is generally the case for construction procurements under the Procurement Code. (Exs. P-1, P-2; Board Finding)

14. The grant documents do not include provisions requiring or allowing the Defendants to supervise the construction of the CNG fueling stations, nor do the grant documents give the Defendants control or direction over the actual construction of these fueling stations. (Exs. P-1, P-2)

15. There is no evidence that the Defendants drafted, reviewed or approved the bidding documents, plans, policies, procedures or specifications for the actual construction of the CNG fueling station projects. (Emerson Depo., n.t. pp. 39-41; Board Finding)

16. There is no evidence that the Defendants supervised the construction or participated in any way regarding the actual construction of the two CNG fueling stations, nor is there any evidence that Defendants’ employees were physically present at the construction site at any time before, during or after the construction. (Emerson Depo., n.t. pp. 39-41; Board Finding)

17. There is no evidence that the Defendants drafted or participated in drafting the terms for the construction contracts or provided guidelines for the terms of the contracts entered into by Venture dealing with the actual design or construction standards of the two CNG fueling stations here at issue. (Emerson Depo., n.t. pp. 39-41; Board Finding)

18. There is no evidence that any of Defendants' employees were present to supervise or even review the progress of the work during construction of the two CNG fueling stations here at issue. (Hearing Transcript and Exhibits; Emerson Depo., n.t. pp. 39-41; Board Finding)

19. Other than providing some funding, the Defendants played no role in the actual construction of the CNG fueling stations. (F.O.F. 10-18; Board Finding)

20. The grant awards were made at 40% of total project cost level, which was available for projects that would be "publicly accessible". (Emerson Depo., n.t. pp. 26-33)

21. Both the Bethel Township and Falls Township projects, when completed, would be publicly accessible, meaning that members of the public driving CNG vehicles could purchase fuel at the stations. (Emerson Depo., n.t. pp. 37-39)

22. The projects were both constructed on privately-owned property. (Emerson Depo., n.t. p. 7; Ex. 3 to Statement of Claim (Venture's Grant Application Project Narrative))

23. The equipment for dispensing CNG fuel at the fueling stations is not owned (in whole or in part) by the Defendants and no proceeds from the CNG fuel sales operation flow to the Defendants. In addition, there is no evidence of any ownership or interest of the Defendants in either the facility or in the property on which the CNG fueling station facilities are located. (N.T. 45-47; Emerson Depo.)

24. The two projects were completed in early 2017. (Statement of Claim, ¶ 24)

25. The grant documents do not have provisions that provide for the Defendants to participate in the management or maintenance of the completed CNG fueling stations. (Exs. P-1, P-2)

26. After completing the two projects, Venture submitted paperwork seeking reimbursement. (Emerson Depo., n.t. p. 41)

27. On July 31, 2017, the Defendants sent correspondence to Venture denying payment. (Emerson Depo. at Exhibit E, July 31, 2017 letter from Commonwealth to Venture)

28. In its July 31, 2017, correspondence, the Defendants listed two reasons for denying payment. The first reason stated is that Venture "did not incur construction costs, instead electing to lease the CNG equipment/station" ... resulting in "no eligible costs for the ACE grant to reimburse" because "[t]he application stated that the grant funds would be used to purchase equipment and pay construction costs, not to make lease payments." The second reason stated is that the material provided by Venture "does not indicate that a competitive bid process was utilized

for the selection” of the contractor who installed the CNG fueling station equipment. (Emerson Depo. at Exhibit E, July 31, 2017 letter from Defendants to Venture)

29. The Defendants assert a lack of Board jurisdiction over this matter because the Board’s jurisdiction is strictly limited to Procurement Code contracts and the grants here at issue are expressly excluded from coverage under the Procurement Code. (Preliminary Objections, pp. 8, 10-15)

30. Section 102(f) of the Procurement Code (relating to the application thereof) states:

(f) Application to grants.—This part does not apply to grants. For the purpose of this part, a grant is the furnishing of assistance by the Commonwealth or any person, whether financial or otherwise, to any person to support a program. The term does not include an award whose primary purpose is to procure construction for the grantor. Any contract resulting from such an award is not a grant but a procurement contract.

62 Pa.C.S. § 102(f)

31. Section 103 of the Procurement Code (relating to definitions) defines “Construction” as follows:

The process of building, altering, repairing, improving or demolishing any public structure or building or other public improvements of any kind to any public real property. The term does not include the routine operation or maintenance of existing structures, buildings or real property.

62 Pa.C.S. § 103

32. Specifically, the Defendants argue that the agreements here at issue are for grants (as that term is used in Section 102(f)) since the primary purpose of these agreements was not to procure “construction” for the grantor because, inter alia, the term “construction” (as used in Section 102(f) and defined in Section 103) only encompasses work on a “public structure [on] public real property”, and the CNG fueling stations are not on public real property. According to Defendants, “public real property” and “public structure” means owned or controlled by a public (i.e. governmental) entity, which is clearly not the case here. (Defendant’s Brief in Support of Preliminary Objections to Statement of Claims, p. 3)

33. The Defendants also argue that sovereign immunity is not waived because the General Assembly did not specifically waive immunity under the Procurement Code for the award of grants. (Defendant’s Brief in Support of Preliminary Objections to Statement of Claims, p. 4-5)

34. Venture argues, contrary to the Defendants’ position, that the agreements here are actually procurement contracts because these agreements fit the exception to the exclusion from

the Procurement Code stated in section 102(f). That is to say, Venture asserts that the primary purpose of these agreements was to procure construction of a “public structure” built on “public real property” “for the grantor” as set forth in Sections 102(f) and 103 of the Procurement Code, 62 Pa.C.S. §§ 102(f) and 103. (Plaintiff’s Brief in Opposition to Defendants’ Preliminary Objections to Plaintiff’s Statement of Claim)

35. Specifically, Venture argues that use of the term “public” in Section 103 of the Procurement Code (62 Pa.C.S. § 103) simply means “publicly accessible” rather than “publicly owned” (or, at least for the sake of expanding Board jurisdiction over this claim, should be so interpreted). Venture therefore maintains that, because the CNG fueling stations on these two projects are open to, and accessible by, the public for the purchase of CNG fuel for vehicles, these fueling stations are “public structures” built on “public real property”, and, accordingly, the agreements here were to procure “construction” for the Commonwealth and are subject to the Procurement Code and Board jurisdiction. (Supplemental Brief in Opposition to Defendants’ Preliminary Objections to Plaintiff’s Statement of Claim, p. 3-8)

36. Because the question before the Board involves its subject matter jurisdiction, the Board indicated to the parties at hearing that they should also address the meaning/import of the phrase “for the grantor” in Section 102(f) as it pertains to the interpretation of that provision. (N.T. 8-9)

37. With respect to the foregoing issue noted by the Board, Venture argues that, in the sense the CNG fueling stations were open to the public to purchase CNG fuel and were constructed as part of the Alternative and Clean Energy grant program in furtherance of the Commonwealth’s goal to promote alternative energy sources for the general good and benefit of the Commonwealth, the CNG fueling stations were constructed “for the grantor” as that term is used in section 102(f) of the Procurement Code, 62 Pa.C.S. § 102(f). (Plaintiff’s Brief in Opposition to Defendants’ Preliminary Objections to Plaintiff’s Statement of Claim, p. 5)

CONCLUSIONS OF LAW

1. 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(c)(2); Ferguson Elec. Co., Inc. v. Department of Gen. Servs., 3 A.3d 681, 688 (Pa. Cmwlth. 2010).

2. Once the issue of the Board's jurisdiction has been properly raised, the burden of proving jurisdiction is on the party asserting it. Deyarmin v. Consolidated Rail Corp., 931 A.2d 1, 14 (Pa. Super. 2007).

3. The issue of subject matter jurisdiction cannot be waived by the parties and can be raised at any time by the parties or by the Board sua sponte. City of Pittsburgh v. Silver, 50 A.3d 296, fn. 9 (Pa. Cmwlth. 2012); In re Angeles Roca First Judicial District Philadelphia County, 173 A.3d 1176, 1197 (Pa. 2017).

4. In order for the Board to exercise jurisdiction and hear a claim against a defendant under Section 1724(a)(1), such claim must sound in contract and be made against a Commonwealth agency. See, Department of General Services v. Limbach Co., 862 A.2d 713, 719 (Pa. Cmwlth. 2004), affirmed per curiam, 895 A.2d 527 (Pa. 2006); see also, Precision Marketing, Inc. v. Commonwealth, Republican Caucus of the Senate, 78 A.3d 667, 669 fn. 2 (Pa. Cmwlth. 2013). Accordingly, the Board has no subject matter jurisdiction over the claim made against the person of Scott D. Dunkelburger.

5. Section 102(f) of the Procurement Code (relating to the application thereof) states:

(f) Application to grants.—This part does not apply to grants. For the purpose of this part, a grant is the furnishing of assistance by the Commonwealth or any person, whether financial or otherwise, to any person to support a program. The term does not include an award whose primary purpose is to procure construction for the grantor. Any contract resulting from such an award is not a grant but a procurement contract.

62 Pa.C.S. § 102(f).

6. Section 103 of the Procurement Code (relating to definitions) defines “Construction” as follows:

The process of building, altering, repairing, improving or demolishing any public structure or building or other public improvements of any kind to any public real property. The term does not include the routine operation or maintenance of existing structures, buildings or real property.

62 Pa.C.S. § 103.

7. The Procurement Code (including Chapter 17, Subchapter C, Sections 1721-1726 respecting the Board of Claims) does not apply to grants, as stated in Section 102(f) of the Procurement Code. However, pursuant to the exception to this exclusion, also set forth in Section 102(f), a claim arising from a written agreement entered into by a Commonwealth agency for the primary purpose of procuring construction (i.e. building, altering, repairing, improving or demolishing any public structure or building or other public improvements of any kind to any real property) for the grantor is not considered a grant, but is rather a procurement contract subject to the Procurement Code and the Board's subject matter jurisdiction. 62 Pa.C.S. §§ 102(f), 103, and 1724.

8. In order to establish that the written grant agreements at issue in this matter should be considered procurement contracts under section 102(f) of the Procurement Code and subject to the Board's jurisdiction, Venture must establish that the primary purpose of these grant agreements was to "procure construction for the grantor," that is, that these written grant agreements had the primary propose of procuring the building of a public structure, or improvement to public real property, for the Commonwealth Financing Authority, the Department of Community and Economic Development or, in the broadest sense, the Commonwealth of Pennsylvania. 62 Pa.C.S. §§ 102(f), 103, and 1724.

9. Stated another way, in order for the Board to exercise jurisdiction over Venture's claim, Venture must demonstrate that the grant documents for construction of the CNG fueling stations were actually contracts for the building of 1) public structures or 2) public improvements on public real property, and that this construction was "for the grantor" (i.e. the Commonwealth Financing Authority, the Department of Community and Economic Development and/or the Commonwealth of Pennsylvania) and are, therefore, procurement contracts rather than grants. 62 Pa.C.S. §§ 102(f), 103, and 1724.

10. The term "public," "public structure," "public building," "public improvement," "pubic real property" and "grantor" are not explicitly defined in the Procurement Code. Moreover, none of the parties have identified any Pennsylvania case law interpreting these terms in the specific context of the Procurement Code. 62 Pa. C.S. § 101 et. seq.

11. Pennsylvania case law allows for use of standard dictionary definitions to interpret general terms utilized in Pennsylvania statutes where such terms are not otherwise defined therein. See, e.g. David Griffiths v. Workers' Comp. Appeal Bd., 943 A.2d 242, 255 (Pa. 2008).

12. Black's Law Dictionary defines "public" as follows: "1. Relating or belonging to an entire community, state or nation. 2. Open or available for all to use, share or enjoy. . . ." Black's Law Dictionary, Eighth Edition, 2004.

13. Black's Law Dictionary defines "public building" as "[a] building that is accessible to the public; esp., one owned by the government." Black's Law Dictionary, Eighth Edition, 2004.

14. Black's Law Dictionary defines "public improvement" as "[a]n improvement made to property owned by the state or any other political entity, such as a municipality." Black's Law Dictionary, Eighth Edition, 2004.

15. Black's Law Dictionary defines "public place" as "[a]ny location that the local, state, or national government maintains for the use of the public, such as a highway, park or public building." Black's Law Dictionary, Eighth Edition, 2004.

16. Black's Law Dictionary defines "public land" as "[l]ands or land interests held by the government, without regard to how the government acquired ownership; unappropriated land belonging to the federal or state government." Black's Law Dictionary, Eighth Edition, 2004.

17. Webster's dictionary defines "public property" as "something owned by the city, town, or state." Merriam-Webster Online Dictionary.

18. Black's Law Dictionary defines "public property" as "[s]tate- or community-owned property not restricted to any one individual's use or possession." Black's Law Dictionary, Eighth Edition, 2004.

19. In contrast, Black's Law Dictionary defines "private property" as "[p]roperty protected from public appropriation over which the owner has exclusive and absolute rights." Black's Law Dictionary, Seventh Edition, 1999.

20. The ultimate principle of statutory interpretation is to effectuate the intent of the General Assembly. 1 Pa.C.S. § 1921(b).

21. Because the foregoing dictionary definitions of "public", "public property", "public structure", etc. always appear to include something owned by a governmental entity, but sometimes reference something "open to" or "accessible by" the general public, we do not find reference to these definitions to be conclusive as to the intent of the General Assembly regarding the proper interpretation of the term "public", "public structure" or "public improvement . . . to public real property" as these terms are used in the definition of "construction" in Section 103 of the Procurement Code. 62 Pa.C.S. § 103; Conclusions of Law ("C.O.L.") Para. 10-19.

22. More significant to this Board as an aid to interpreting the terms "public", "public structure" or "public improvement . . . to public real property" as they are used in Section 103 is the body of Pennsylvania case law dealing with these or similar terms over the years. See e.g. Stilp v. Com., 905 A.2d 918, 945-46 (Pa. 2006); Romano v. Nationwide Mutual Fire Ins. Co., 646 A.2d 1228, 1233 (Pa. Super. 1994).

23. Venture cites three Pennsylvania cases for support of its proposition that "public" in the definition of "construction" in Section 103 should be read as "publicly accessible." In two of these cases, Carney v. Penn Oil Co., 140 A. 133 (Pa. 1928) and Commonwealth v. Miles, 681 A.2d 1295 (Pa. 1996) the term "public" was used but with no discussion or analysis of the meaning of the term and in a context which was largely tangential to the primary holding of the case. In the third, Limley v. Zoning Hearing Bd. of Port Vue Borough, 625 A.2d 54 (Pa. 1993) the Court held that use of a facility as a public restaurant was sufficiently similar to prior use as a private club to be considered a continuation of a prior nonconforming use for purposes of the applicable zoning ordinance.

24. In contrast, Defendant has cited, and/or the Board has found, a number of Pennsylvania cases where the term “public”, “public structure”, “public building”, “public improvement . . . to public real property” or similar term has been specifically analyzed or discussed, with the majority of these cases holding such terms to mean owned or controlled by a public (i.e. governmental) entity. See, e.g. Tragesser v. Cooper, 169 A. 376, 378 (Pa. 1933); In re Public Parking Authority of Pittsburgh, 76 A.2d 620, 624 (Pa. 1950); Mechanical Contractors Ass’n of Northwest Pennsylvania v. Senior Citizen Health Care Council of Erie County, 674 A.2d 752, 754 (Pa. Cmwlth. 1996); Bay Harbor Marina Limited Partnership v. Erie County Bd. Of Assessment Appeals, 177 A.3d 406 (Pa. Cmwlth. 2018); Cellco Partnership, d/b/a Verizon Wireless v. North Annville Township Zoning Hearing Board, 2006 WL 6031709 (Ct. Com. Pleas, Lebanon County, 2006), aff’d, 939 A.2d 430 (Cmwlth. Ct. 2007); Carpenters Combined Funds, Inc. v. Liberty Mutual Insurance Co., 2015 WL 13021326 (Pa. Com. Pl. Civil Div., Allegheny County, 2015). See also Philips Brothers Electrical Contractors, Inc. v. Pennsylvania Turnpike Commission, 960 A.2d 941, 943-945 (Pa. Cmwlth. 2008).

25. Most persuasive of the cases noted above are those which discuss the term “public building” and find that this term means one owned or controlled by an agency or political subdivision of the Commonwealth for the purpose of the Separations Act,¹ a statute whose subject (i.e. expenditure of public funds on construction projects of the Commonwealth and/or its political subdivisions or agencies), although not exactly contiguous with the Procurement Code is, nonetheless, sufficiently close in our view to provide persuasive indication as to the most appropriate interpretation of “public”, “public structure” or “public improvement . . . to public real property” as used in Section 103 of the Procurement Code.² See In re Public Parking Authority of Pittsburgh, 76 A.2d at 624; Mechanical Contractors Ass’n, 674 A.2d at 754; see also Tragesser, 169 A. 378 (interpreting the state statute providing a third class borough with authority for expending funds on construction projects in pari materia with the Separations Act).

26. Also of highly persuasive value, in our view, is the U.S. Supreme Court’s pronouncement that a privately-owned commercial establishment does not lose its private character merely because the public is generally invited to use it for designated purposes. Lloyd Corporation, Ltd. v. Tanner, 92 S.Ct. 2219, 2229 (1972).

27. A privately-owned CNG fueling station located on privately-owned property is not a “public structure” or a “public improvement . . . to any public real property” as these terms are used in the definition of “construction” in Section 103 of the Procurement Code even though the public is invited onto the property for the limited purpose of purchasing CNG fuel. 62 Pa.C.S. §103; C.O.L. 10-26.

28. Since we have found that the grant agreements here do not procure “construction” as that term is defined in the Procurement Code because the CNG fueling stations are not public structures or public improvements to public real property as used in the Section 103 definitions, we conclude that these grant agreements at issue do not have the primary purpose of procuring

¹ 71 P.S. §1618.

² Both the Procurement Code and the Separations Act address the expenditure of public funds on construction projects. The overlapping nature of the Procurement Code and the Separations Act is indicated explicitly in Section 322 of the Procurement Code. 62 Pa.C.S. §322

construction for the grantor as set forth in Section 102(f) and are, therefore, grants, not procurement contracts. 62 Pa. C.S. §§102(f) and 103; C.O.L. 5-27.

29. The grant agreements here at issue are grants, not procurement contracts as these terms are used in Section 102(f) and are, therefore, not subject to application of the Procurement Code or the Board's jurisdiction. 62 Pa.C.S. §102(f) and 1724; Telwell, Inc. v. Public School Employees' Retirement System, 88 A.3d 1079 (Pa. Cmwlth. 2014); C.O.L. 5-28.

30. Because we have found that the Defendants did not provide or dictate any plans or specifications for the actual construction of the CNG fueling stations here at issue; and because there was no direction, supervision or participation by Defendants over the actual construction of the CNG fueling stations, no ownership interest for Defendants in the proceeds from the CNG fueling stations, no control by Defendants over the operation of the stations, and no ownership or control by Defendants over property on which the two CNG fueling stations sit; and because we do not find that the general good of the Commonwealth is sufficient to satisfy the requirement that the construction be done "for the grantor" because such an interpretation would make the language "for the grantor" mere surplusage since all grants are awarded for the general good of the Commonwealth, we conclude that the primary purpose of the grant agreements here at issue was not to procure construction "for the grantor" as that term is used in Section 102(f) of the Procurement Code. 62 Pa.C.S. §102(f). See also 1 Pa.C.S. §1922(2); Holland v. Marcy, 883 A.2d 449, 456 (Pa. 2005). Distinguish Sordoni Construction Servs., Inc. v. Commonwealth, Dep't of Transp., B.O.C. Dkt. No. 3992, Opinion and Order of March 14, 2014 (Construction was found to be "for the grantor" where PennDOT mandated and supplied detailed construction plans and specifications and PennDOT agents on site regularly during actual construction directed work and oversaw compliance with these plans and specifications).

OPINION

Background and Procedural History

This matter comes before the Board of Claims (Board) on preliminary objections filed by Defendants, Commonwealth of Pennsylvania, Department of Community and Economic Development, Commonwealth Financing Authority (collectively, the Defendants) and Scott D. Dunkelburger, Executive Director of the Commonwealth Financing Authority to the Statement of Claim filed by Plaintiff, U.S. Venture, Inc. (Venture). The matter commenced before the Board on January 23, 2018, when Venture filed its Statement of Claim.

The Statement of Claim alleged, *inter alia*, that the Defendants operated “The Alternative and Clean Energy Program” (Program) through which it provided alternative energy-related grants, including grants for the development and construction of compressed natural gas (CNG) fueling stations. The claim further alleges that, on October 24, 2014, Venture was awarded two grants for the construction of CNG fueling stations, one in Bethel Township (with a grant amount of \$643,389) and one in Falls Township (with a grant amount of \$547,047). The projects were completed in early 2017. Thereafter, Venture requested reimbursement from the grant money for its expenses. On July 31, 2017, the Defendants corresponded with Venture and denied payment on both grants, asserting that Venture had violated the grant requirements by financing equipment purchases through lease agreements and by failing to abide by required competitive bidding procedures for the actual construction of the fueling stations. Venture seeks to have the Board award it the grant monies for the two projects.

On February 15, 2018, the Defendants filed preliminary objections and a brief in support of the objections to the claim, asserting first, that the Board does not have jurisdiction because section 102(f) of the Procurement Code, 62 Pa.C.S. § 102(f), expressly provides that it does not

apply to grants, and second, that the limited waiver of sovereign immunity for matters under the Procurement Code has not been met, leaving the Defendants immune. On March 19, 2018, Venture filed its response in opposition to the preliminary objections and brief in support, arguing that the award of grant money was for the primary purpose of procuring construction for the grantor, and was thus a procurement contract as defined in section 102(f).

On April 9, 2018, the Board issued an Opinion and Order, holding that the first preliminary objection was explicitly stated as one based on lack of subject matter jurisdiction and the second raised the defense of sovereign immunity, which is entirely contingent upon whether or not the Board has jurisdiction. Under the Rules of Civil Procedure, the Board concluded it was proper to hold an evidentiary hearing.

On April 12, 2018, the Board issued an Order scheduling the matter for hearing on August 27, 2018. On May 2, 2018, the Board issued an additional Order noting, *inter alia*, that Claimant would be allowed to present evidence and oral argument on the preliminary objections at the August 27, 2018 hearing, and denied Venture's outstanding motion for oral argument on the preliminary objections, which had been filed earlier. On August 24, 2018, Venture filed a Supplemental Brief in Opposition to Defendants' Preliminary Objections to Plaintiff's Statement of Claim, primarily addressing whether or not the CNG fueling stations are "public structures".

An evidentiary hearing convened on August 27, 2018, before the Board. Subsequently, each party filed its proposed findings of fact, conclusions of law and legal brief. On November 26, 2018, Venture filed a reply brief. The matter is ripe for disposition by the Board.

Discussion

To begin our discussion we turn first to the portion of the claim made against Scott D. Dunkelburger. It is well-settled case law that the issue of subject matter jurisdiction cannot be

waived and can be raised by the parties at any time, or by the Board sua sponte. City of Pittsburgh v. Silver, 50 A.3d 296, fn. 9 (Pa. Cmwlth. 2012); In re Angeles Roca First Judicial District Philadelphia County, 173 A.3d 1176, 1197 (Pa. 2017). In order for the Board to exercise jurisdiction and hear a claim against a defendant under Section 1724(a)(1), such claim must sound in contract and be made against a Commonwealth agency. See, Department of General Services v. Limbach Co., 862 A.2d 713, 719 (Pa. Cmwlth. 2004), *aff'd per curiam*, 895 A.2d 527 (Pa. 2006); see also, Precision Marketing, Inc. v. Commonwealth, Republican Caucus of the Senate, 78 A.3d 667, 669 fn. 2 (Pa. Cmwlth. 2013). Because Mr. Dunkelburger is not an agency, the Board concludes that it lacks subject matter jurisdiction over the claim made against the person of Mr. Dunkelburger and must dismiss same for this reason. Id.

Turning to the issues argued by the parties, we note that the Defendants raise two preliminary objections: first, the Defendants assert a lack of subject matter jurisdiction over the entire claim and second, the Defendants raise the defense of sovereign immunity. It is well established that the defense of sovereign immunity in the case of a contract action against an agency of the Commonwealth is contingent upon whether or not the Board has jurisdiction over the action. 62 Pa.C.S. §§ 1702 and 1724; see also, Scientific Games Int'l, Inc. v. Commonwealth of Pa., Dep't of Revenue, 66 A.3d 740, 756 (Pa. 2013).

Pennsylvania Rule of Civil Procedure 1028(a)(1) addresses preliminary objections filed on the grounds of lack of jurisdiction over a claim. 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, if necessary. Pa.R.C.P. 1028(c)(2); see also, Ferguson Elec. Co., Inc. v. Department of Gen. Servs., 3 A.3d 681, 688 (Pa. Cmwlth. 2010).

Once the jurisdictional issue is properly raised, as it has been here by the Defendants, the burden of proving jurisdiction is upon the party asserting it. Deyarmin v. Consolidated Rail Corp., 931 A.2d 1, 14 (Pa. Super. 2007). Thus, in light of Sections 102(f) and 103 of the Procurement Code, Venture bears the burden of establishing that the Board has subject matter jurisdiction over the claim by demonstrating that the grant agreements here at issue are actually procurement contracts whose primary purpose was to procure the building of a public structure, or public improvement on public real property, for the grantor. The Board must determine whether Venture has met this burden.

Positions of the Parties

In its preliminary objections, the Defendants point to section 102(f) of the Procurement Code, which provides that the Code (including Chapter 17, Subchapter C, Sections 1721-1726 containing the Board's enabling provisions) does not apply to grants. Although the Defendants do acknowledge that a grant may be considered a procurement contract under the Code if it is "an award whose primary purpose is to procure construction for the grantor", they argue that the primary purpose of the two grant agreements at issue in this matter was to award grants, not to procure construction for the Defendants, and thus do not fall under the exception to the Section 102(f) exclusion from the Procurement Code. In support of their argument, the Defendants note that "construction" is defined in the Procurement Code as "[t]he process of building, altering, repairing, improving or demolishing any public structure or building or other public improvements of any kind to any public real property." 62 Pa.C.S. § 103 (emphasis added). Accordingly, the Defendants reason that, because the CNG fueling stations here are built on privately-owned property and the Commonwealth has no ownership or control over these fueling stations, they are neither "public structures or buildings" or "public improvements. . . to any public real property"

and, therefore, do not involve “construction” as defined in Section 103. Further, because these projects do not involve the procurement of “construction” as that term is used in Section 102(f), the agreements here at issue remain grants excluded from coverage of the Procurement Code and outside the Board’s jurisdiction.

Defendants cite Telwell for the proposition, *inter alia*, that exclusion from coverage under the Procurement Code means exclusion from Board jurisdiction. They also cite Commonwealth, Department of Transportation v. Walsh/Granite JV, 149 A.3d 425, 430 (Pa. Cmwlth. 2016) to support their assertion that, as used in Section 103 and 102(f), the terms “public structure”, “public building”, “public improvement” and “public real property” must involve an element of ownership or control by the purchasing agency.

Venture, for its part, does not appear to contest the facts, presented at hearing, that these fueling stations were built on privately-owned real property or that neither the Commonwealth nor any other governmental subdivision has any ownership or control over these fueling stations. It does, however, argue strenuously that the terms “public”, “public structure” and/or “public real property” as used in Section 103 to define “construction” should be construed to mean “publically accessible” not just owned or controlled by a public (i.e. governmental) entity. Venture maintains that such a broader interpretation of these terms is appropriate to expand the Board’s jurisdiction and provide it a remedy where none would otherwise be available.

In support of its position, Venture notes that, when general terms are left undefined in a statute (as they are here), reference may be made to standard dictionary definitions to interpret such terms. It goes on to cite, *inter alia*, the definition for “public” in Black’s Law Dictionary, as follows: “of, relating to, or involving an entire community, state, or country,” and second, “open or available for all to use, share or enjoy.” Venture argues that, while the first definition may

imply ownership, the second definition clearly supports its position that “public” means accessible to the public, so a “public structure” and “public real property” means any structure or property that is publicly accessible. Contrary to Defendants’ assertions, reasons Venture, because these CNG fueling stations are publicly accessible, these projects fit the definition of “construction” in Section 103; fall under the exception to the exclusion from the Procurement Code set forth in Section 102(f); and are subject to the Board’s jurisdiction. Venture also cites to three cases it believes support its proposition that “public” means “publicly accessible”.

With respect to the second issue raised by the Board (i.e. the import of the phrase “for the grantor” as used in Section 102(f)), Defendants appear to suggest that the phrase “for the grantor” means that the construction referred to in 102(f) as a procurement contract must be performed for, and directly benefit, the agency that procured the construction. In addition, Defendants assert that construction is not “for the grantor” unless, at the completion of the construction, the grantor has either ownership or control over the completed project. (Defendants’ Brief Regarding the Statutory Interpretation of the Phrase “Construction for the Grantor” in 62 Pa.C.S. 102(f), at 4-5, citing to Walsh/Granite JV, *supra*.)

In its post-hearing briefing, Venture also addresses the question of whether the construction of the CNG fueling stations was “for the grantor.” First, Venture argues that because the CNG fueling stations advance the grant program’s goal of increasing the use of clean and alternative energy sources, their construction was “for the grantor.” Second, Venture asserts that the two grant agreements “included detailed conditions, policies, and procedures that must be met by U.S. Venture in the construction of the CNG fueling stations” and that “construction of the CNG fueling stations was performed pursuant to the plans, policies, procedures and specifications approved by

Commonwealth defendants” (Plaintiff’s post-hearing brief, pp. 7-8), further indicating these projects were constructed “for the grantor.”

Venture also asserts that the Board’s own precedent, established in Sordoni Construction Servs., Inc. v. Commonwealth, Dep’t of Transp., B.O.C. Dkt. No. 3992, supports its argument that the construction here was performed “for the grantor.” According to Venture, in Sordoni “the Board ... flatly rejected PennDOT’s argument that in order for the primary purpose of the construction to be for PennDOT ... it had to ‘benefit’ PennDOT,” choosing instead to focus on “PennDOT’s control and direction over the construction.” Plaintiff’s Brief Regarding Statutory Interpretation of the Phrase “Construction for the Grantor” in 62 Pa.C.S. § 102(f), at p. 5. Venture next asserts that Sordoni stands for the proposition that the construction at issue does not have to be on Commonwealth-owned property in order for the Defendants to benefit from the construction, because the property in Sordoni was owned by the city, rather than by the Commonwealth.

Finally, Venture asserts that the word “grantor” includes one who possesses an interest in the construction other than ownership. Venture reasons that since a “grant” is assistance which is furnished, that a “grantor” is simply one who furnishes assistance. Venture thus asserts that “grantor” cannot be limited to one with an ownership interest, but necessarily must include the Defendants because the Defendants furnished the grant. (Plaintiff’s post-hearing brief, p. 8-9)

Analysis

The Procurement Code defines construction as follows:

“Construction”—The process of building, altering, repairing, improving or demolishing any public structure or building or other public improvements of any kind to any public real property. The term does not include the routine operation or maintenance of existing structures, buildings or real property.

62 Pa.C.S. § 103.

As stated in Section 102(f) of the Procurement Code, the code does not apply to grants. However, pursuant to the exception to this exclusion, also set forth in Section 102(f), a claim arising from a written agreement entered into by a Commonwealth agency for the primary purpose of procuring construction for the grantor is not considered a grant, but is rather a procurement contract subject to all provisions of the Code and the Board's subject matter jurisdiction. Thus, the Board must determine whether the construction of the two CNG fueling stations meets the definition of "construction" in Section 103 of the Procurement Code and, if so, whether this construction was "for the grantor", as required by Section 102(f).

The Procurement Code does not define "public structure", "public building", "public improvements", or "public real property". Moreover, the parties have not cited, and the Board has not found, case law specifically discussing or interpreting these terms as they are used in the Procurement Code.

With no statutory definitions for these terms in the Procurement Code, the Board may look, inter alia, to common dictionary definitions for these terms (as urged by Venture).³ Black's Law Dictionary defines "public" as "[r]elating or belonging to an entire community, state or nation" and "[o]pen or available for all to use, share or enjoy." The first of the two definitions of "public" in Black's Law Dictionary emphasize ownership by a government entity, while the second seems to emphasize accessibility. Neither Black's Law Dictionary nor general dictionaries consulted by the Board define "public structure." "Public improvement" is defined as "[a]n improvement made to property owned by the state or any other political entity, such as a municipality." "Public building" is defined as "[a] building that is accessible to the public; esp., one owned by the

³ It is well-settled law that a reviewing authority may look to dictionary definitions to aid in determining the plain meaning of undefined terms used in statutes. See, e.g. David Griffiths v. Workers' Comp. Appeal Bd., 943 A.2d 242, 255 (Pa. 2008).

government.” Webster’s dictionary defines “public property” as “something owned by the city, town, or state.” Merriam-Webster Online Dictionary. Black’s Law Dictionary (2004) defines “public property” as “Any property that is not owned by a private individual or a company. It belongs to the public at large and not to any one person. It covers premises and facilities that are owned by the government or a community.”⁴

What is apparent from these definitions is that “public”, when used as an adjective, almost always includes that which is owned by a government entity and sometimes includes that which is publicly accessible. Thus, the Board does not find reference to these various dictionary definitions to be conclusive as to the intent of the General Assembly regarding their proper interpretation in the context of the Procurement Code.⁵

The Board also finds the three cases cited by Venture for the proposition that “public” means “publicly accessible” to be considerably less than persuasive. In two of these cases, Carney v. Penn Oil Co., 140 A. 133 (Pa. 1928) and Commonwealth v. Miles, 681 A.2d 1295 (Pa. 1996) the term “public” was used but with no discussion or analysis of the meaning of the term and in a context which was largely tangential to the primary holding of the case. In the third, Limley v. Zoning Hearing Bd. of Port Vue Borough, 625 A.2d 54 (Pa. 1993) the Court held that use of a facility as a public restaurant was sufficiently similar to prior use as a private club to be considered

⁴ The Board notes that additional related definitions in Black’s Law Dictionary, such as those for “public place” and “public land” support the Defendants’ position that the Procurement Code terms indicate that the structures at issue must be owned or operated by the government. “Public place” is defined as a location “that the local, state or national government maintains for the use of the public, such as a highway, park or public building.” And, “public land” is defined as “[l]and or land interests held by the government.”

⁵ The ultimate principle of statutory interpretation is to effectuate the intent of the General Assembly. 1 Pa.C.S. §1921(b).

a continuation of a prior nonconforming use for purposes of the applicable zoning ordinance. The Board finds Venture's remaining arguments equally unpersuasive.⁶

In contrast, Defendant has cited, and/or the Board has found, a number of Pennsylvania cases where the term "public", "public structure", "public building", "public improvement . . . to public real property" or similar term has been specifically analyzed or discussed, with the majority of these cases holding such terms to mean owned or controlled by a public (i.e. governmental) entity. See, e.g. Tragesser v. Cooper, 169 A. 376, 378 (Pa. 1933); In re Public Parking Authority of Pittsburgh, 76 A.2d 620, 624 (Pa. 1950); Mechanical Contractors Ass'n of Northwest Pennsylvania v. Senior Citizen Health Care Council of Erie County, 674 A.2d 752, 754 (Pa. Cmwlth. 1996); Bay Harbor Marina Limited Partnership v. Erie County Bd. Of Assessment Appeals, 177 A.3d 406 (Pa. Cmwlth. 2018); Cellco Partnership, d/b/a Verizon Wireless v. North Annville Township Zoning Hearing Board, 2006 WL 6031709 (Ct. Com. Pleas, Lebanon County, 2006), aff'd, 939 A.2d 430 (Cmwlth. Ct. 2007); Carpenters Combined Funds, Inc. v. Liberty Mutual Insurance Co., 2015 WL 13021326 (Pa. Com. Pl. Civil Div., Allegheny County, 2015). See also Philips Brothers Electrical Contractors, Inc. v. Pennsylvania Turnpike Commission, 960 A.2d 941, 943-945 (Pa. Cmwlth. 2008).

Most persuasive of the cases noted above are those which discuss the term "public building" in the context of the Separations Act,⁷ and find that this term means owned or controlled by an agency or political subdivision of the Commonwealth. The Separations Act is a statute

⁶ Among other assertions, Venture argues that Sordoni Construction Servs., Inc. v. Commonwealth, Dep't of Transp., B.O.C. Dkt. No. 3992, Opinion and Order of March 14, 2014, pp. 76-79, supports its position that publicly accessible private property is included in "public real property" under Section 103. We do not agree. The property at issue in Sordoni was owned by a municipality (through a municipal authority) and was thus clearly not private property as is the case with the CNG fueling stations. Venture also argues that, had the General Assembly intended "public" to mean something owned by the public instead of simply "publicly accessible", it would have modified "building", "structure", etc. with words like "state-owned." However, using the same logic, it appears to us that, had the General Assembly intended "public" to mean "publicly accessible" it would have used the words "publicly accessible".

⁷ 71 P.S. §1618.

whose subject (i.e. expenditure of public funds on construction projects of the Commonwealth and/or its political subdivisions or agencies), although not exactly contiguous with the Procurement Code is, nonetheless, sufficiently close in our view to provide persuasive indication as to the most appropriate interpretation of “public”, “public structure” or “public improvement . . . to public real property” as used in Section 103 of the Procurement Code.⁸ See In re Public Parking Authority of Pittsburgh, 76 A.2d at 624; Mechanical Contractors Ass’n, 674 A.2d at 754; see also Tragresser, 169 A. 378 (interpreting the state statute providing a third class borough with authority for expending funds on construction projects in pari materia with the Separations Act).

In Tragresser v. Cooper, 169 A. 376, 378 (Pa. 1933), the Court specifically rejected an argument that “public building” means “where the public congregates” and held that the phrase “any public building” (as used in the General Borough Act for procurement of construction by a municipality) means “any building owned. . . by the borough and used. . . for public purposes.” In In re Public Parking Authority of Pittsburgh, 76 A.2d 620, 624 (Pa. 1950), the Court considered whether or not a public parking garage was a “public building” subject to a statutory requirement that public buildings have separate bids taken for plumbing, heating, ventilating and electrical work. The Court noted that, generally, “the words ‘any public building’ ‘must be construed . . . to refer, as their words in fact state, to ‘any public building,’ that is, any building owned or to be owned by the borough and used or to be used for public purposes.’” Id. at 624, quoting Tragresser v. Cooper, 169 A. 376, 378 (Pa. 1933).

In other cases, Pennsylvania Courts have interpreted these terms and found that “public structures” are those owned by a government entity. See, e.g., Cellco Partnership, d/b/a Verizon

⁸ Both the Procurement Code and the Separations Act address the expenditure of public funds on construction projects. The overlapping nature of the Procurement Code and the Separations Act is indicated explicitly in Section 322 of the Procurement Code. 62 Pa.C.S. §322

Wireless v. North Annville Township Zoning Hearing Board, 2006 WL 6031709 (Ct. Com. Pleas, Lebanon Cty., 2006), aff'd, 939 A.2d 430 (Pa. Cmwlth. 2007) (holding that a privately-owned cell phone tower was not a public structure because private commercial uses are contrary to a zoning ordinance's intent to exempt municipally-owned structures that benefit the public); Bay Harbor Marina Limited Partnership v. Erie County Board of Assessment Appeals, 177 A.3d 406 (Pa. Cmwlth. 2018) (holding that a privately-owned marina on land leased from the Commonwealth was not public property used for public purposes).

In Mechanical Contractors Ass'n of Northwest Pennsylvania v. Senior Citizen Health Care Council of Erie County, 674 A.2d 752 (Pa. Cmwlth. 1996), cited by the Defendants in their post-hearing brief, the Commonwealth Court applied In re Public Parking Authority of Pittsburgh to hold that a building owned by a private nonprofit corporation was not a "public building". The court noted that the essential missing element was either government ownership or government control, and concluded that the lower court erred in finding the building was a "public building" simply because it was "open to the public and secured through public funds." Id. at 754-755, citing In re Public Parking Authority of Pittsburgh, 76 A.2d 620, 624 (Pa. 1950).

Also of highly persuasive value, in our view, is the U.S. Supreme Court's pronouncement that a privately-owned commercial establishment does not lose its private character merely because the public is generally invited to use it for designated purposes. Lloyd Corporation, Ltd. v. Tanner, 92 S.Ct. 2219, 2229 (1972). The United States Supreme Court made this pronouncement while specifically addressing the public property – publicly accessible property distinction. See also, Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life. Ins. Co., 485 A.2d 1, 8 (Pa. Super. 1984).

In sum, the Board finds that the overwhelming body of Pennsylvania and other case law indicates that the terms “public structure” and/or “public improvement to . . . public real property” is most appropriately considered to mean publically owned or controlled, particularly in a context involving the expenditure of public funds. Accordingly, we conclude that a privately-owned CNG fueling station located on privately-owned property is not a “public structure” or a “public improvement . . . to any public real property” as these terms are used in the definition of “construction” in Section 103 of the Procurement Code even though the public is invited onto the property for the limited purpose of purchasing CNG fuel. Because of this, we must conclude that the grant agreements here do not procure “construction” as that term is defined in Section 103 of the Procurement Code and conclude further that these grant agreements at issue do not have the primary purpose of procuring construction for the grantor as set forth in Section 102(f). Accordingly, the written agreements here at issue are grants, not procurement contracts. Moreover, because we find that the written agreements here at issue are grants, not procurement contracts as these terms are used in Section 102(f), the dispute here is not subject to application of the Procurement Code or the Board’s jurisdiction. 62 Pa.C.S. §102(f) and 1724; Telwell, Inc. v. Public School Employees’ Retirement System, 88 A.3d 1079 (Pa. Cmwlth. 2014).

Although the Board has concluded that building the CNG fueling stations does not meet the definition of “construction” in Section 103 because the CNG fueling stations are not public structures or public improvements to public real property, we will, for the sake of completeness, briefly address the issue of whether or not the construction was “for the grantor.” On this secondary issue, the Board once again finds itself in disagreement with Venture’s suggested interpretation of this phrase in Section 102(f). We also find Venture’s assertion that Sordoni

supports its view that the construction in this case was done “for the grantor” to be incorrect as the factual circumstances between to two cases are materially different.

As to Venture’s assertion that the construction of the CNG fueling stations was done “for the grantor” because these projects provide a general benefit to the Commonwealth (by contributing to the state’s goal of encouraging alternative fuel choices), we consider such a “general” benefit inadequate to accomplish the purpose of this closing phrase. To be clear, while the Board is amenable to interpreting “grantor” broadly as the Commonwealth (rather than limiting the term to the specific agency through which it acts), we believe interpreting the phrase “for the grantor” to be satisfied by providing a generalized good to the Commonwealth renders the phrase meaningless. That is to say, all grants are, at least theoretically, issued for the generalized good of the Commonwealth. If the phrase requires no more of a direct benefit than this to the Commonwealth, it provides no distinction from all other grants and becomes mere surplusage.

The Board also disagrees with Venture’s assertion that Sordoni supports its position that the construction of the CNG fueling stations here was done “for the grantor.” In Sordoni, the Board focused primarily on PennDOT’s extensive direction and control of the work on the project to determine that the construction was done “for the grantor.” PennDOT not only provided detailed and voluminous plans and specifications for the construction, its agents were present at the construction site on a regular basis, overseeing each phase of the project, and requiring that each phase of the project meet PennDOT specifications and obtain PennDOT approval.

The extensive direction and control exercised by PennDOT in Sordoni is contrasted by a virtually complete lack of direction and control by Defendants in this matter. Despite Venture’s bald assertions that the grant agreements include plans, policies, procedures and specifications for construction of the CNG fueling stations, Venture has failed to point to any provision in the grant

agreements by which Defendants provide construction plans, procedures or specifications or by which Defendant's participate in oversight or inspection of the actual construction. Venture presented no evidence that the Defendants oversaw actual construction of the fueling stations. In fact, the contrary is the case: Ryan Emerson testified convincingly that the Defendants were not even aware whether or not the CNG fueling stations had been constructed until Venture sought reimbursement under the grants after the stations were completed.⁹ (Exhibit 5; N.T. 23)

In sum, we have found that the Defendants did not provide or dictate any plans or specifications for the actual construction of the CNG fueling stations, exercised no direction, supervision or participation over the actual construction, and acquired no ownership interest in the stations or the proceeds from the stations, and no ownership or control by Defendants over the property where the stations are located. Moreover, because we do not find that the general good of the Commonwealth is sufficient to satisfy the requirement that the construction be done "for the grantor" because such an interpretation would make this language mere surplusage, we conclude that the primary purpose of these grant agreements was not to procure construction for the grantor, as required by Section 102(f) of the Procurement Code. For this reason as well, the grant agreements are not subject to application of the Procurement Code or the Board's jurisdiction. As this matter does not come under the Board's jurisdiction, the preliminary objections must be sustained.

⁹ It further appears that Venture was free to abandon its plans to construct the fueling stations and simply never seek reimbursement. This is in stark contrast to the typical construction procurement contract, where contracting parties are bound by contract to complete the construction. (Ex. 5; N.T. 23, 41)

ORDER

AND NOW, this 28th day of December, 2018, upon consideration of the preliminary objections filed by the Defendants, Commonwealth Department of Community and Economic Development, Commonwealth Financing Authority, and Scott D. Dunkelburger, Executive Director of the Commonwealth Financing Authority, to the Statement of Claim filed by U.S. Venture, Inc., and in accordance with the foregoing Findings of Fact, Conclusions of Law and Discussion, it is hereby **ORDERED** and **DECREED** that the Defendants' preliminary objections are **SUSTAINED** and the Statement of Claim is **DISMISSED**.

BOARD OF CLAIMS

ORDER SIGNED

Jeffrey F. Smith
Chief Administrative Judge

Gregory C. Fajt
Citizen Member

Harry G. Gamble, P.E.
Engineer Member