

COMMONWEALTH OF PENNSYLVANIA

HEMPT BROS., INC. : BEFORE THE BOARD OF CLAIMS
: :
VS. : :
: :
COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA TURNPIKE COMMISSION : DOCKET NO. 4181

FINDINGS OF FACT

1. Plaintiff, Hempt Bros., Inc. (“Hempt”) is a Pennsylvania corporation with its principal place of business at 205 Creek Road, Camp Hill, Pennsylvania 17011. (Statement of Claim ¶ 1 (uncontested); Board Finding)

2. Hempt is a heavy and highway contractor that regularly performs highway construction projects in the Commonwealth of Pennsylvania. (Statement of Claim ¶ 2 (uncontested); Board Finding)

3. Defendant, the Pennsylvania Turnpike Commission (“PTC”) is a Commonwealth agency which has its principal place of business at 700 South Eisenhower Boulevard, Middletown, Pennsylvania 17057. (Statement of Claim ¶ 3 (uncontested); Board Finding)

4. Hempt filed a Statement of Claim (“Claim”) with the Board of Claims (“Board”) on March 2, 2018. (BOC Docket No. 4181)

5. PTC filed preliminary objections and a brief in support to Hempt’s Claim on March 28, 2018. (BOC Docket No. 4181)

6. In its preliminary objections, PTC raised lack of jurisdiction pursuant to Pa.R.C.P. 1028(a)(1) and failure to exhaust administrative remedies pursuant to Pa.R.C.P. 1028(a)(7), based on PTC’s assertion that Hempt’s claim accrued on November 30, 2015 when the PTC provided Hempt with “final” quantities for work on the project and, accordingly, its administrative claim, filed on July 7, 2017 was not timely filed in accordance with 62 Pa.C.S. §§1724 and 1712.1. (Respondent’s Preliminary Objections to Statement of Claim, filed March 28, 2018, BOC Docket No. 4181)

7. On July 26, 2018, Hempt filed its Answer and New Matter to Defendant’s Preliminary Objections and Brief of Hempt Bros., Inc. in Opposition to Pennsylvania Turnpike Commission’s Preliminary Objections to Hempt’s Statement of Claim. (BOC Docket No. 4181)

8. In its response to PTC’s preliminary objections, Hempt asserted, *inter alia*, that the quantities provided by PTC on November 30, 2015 were not final quantities triggering the six-month period allowed to file an administrative claim pursuant to 62 Pa.C.S. § 1712.1(b); that its administrative claim on the project did not accrue until May 2017; and that, accordingly,

Hempt's claim was timely filed. (Brief of Hempt Bros., Inc. in Opposition to Pennsylvania Turnpike Commission's Preliminary Objections to Hempt's Statement of Claim)

9. An evidentiary hearing was held before the Board on May 25 and 26, 2021. (N.T. 1; BOC Docket No. 4181)

10. Pursuant to the Procurement Code, 62 Pa. C.S. §§ 101 et seq., Hempt and the PTC entered into a \$48,619,928.51 contract for the full depth construction and widening of the Pennsylvania Turnpike from two to three lanes in each direction between the Carlisle and Blue Mountain interchanges between mile markers 210.92 and 206.89, respectively (the "Contract"). Among other things, the project necessitated reconstruction of bridge structures, culverts, and drainage structures along the way. (N.T. 21-23)

11. The project was awarded in April 2013, and the original Contract completion date was November 21, 2014. Early into the Project, Hempt encountered delays related to inter alia, Hempt's access to the work site, the diversion of streams, alleged design errors related to the placement of the median barrier and east end tie-in. (N.T. 21-25, 201-210)

12. By way of letter dated January 30, 2015, PTC's engineer project manager, Wendell Livengood, offered "informal" adjustments to the contract dates changing the completion date to December 19, 2014, with additional weather-sensitive items of work tentatively extended through May 21, 2015. However, these time extensions/adjustments were subject to approval via a change order that would be considered by the PTC Commissioners at some unspecified later date. (N.T. 25, 31-32; Exhibit 125)

13. The project was declared substantially complete by the PTC, with the roadway open to six lanes of traffic, on December 19, 2014. (N.T. 29-31, 159)

14. On January 27, 2015, TCMS (aka Trumbull Corporation) which initially served as PTC's third-party construction manager on the project, wrote to Hempt and provided Hempt with "Semi-Final Quantities for Estimates 9 thru 20" for the work that had been completed through January 2, 2015. (Exhibit 104)

15. In a February 5, 2015 letter to the PTC staff (John Ozimok), Hempt disputed two items on the "Semi-Final Quantities for Estimates 9 thru 20" provided by the PTC, raising issues related to a substantial change in the quantity and costs of performing undercuts and additional concrete crushing costs incurred by Hempt on the project. (Exhibit 105)

16. On February 5, 2015, TCMS responded to Hempt via letter, advising that it was reviewing Hempt's disputed items and indicating, inter alia, its belief that costs associated with disposal of excavated roadway materials (relating to the concrete crushing issue) should be costs to Hempt, not to PTC. (Exhibit 20)

17. On October 29, 2015, Hempt made submissions through PTC's online payment system ("Kahua") seeking \$662,693.47 in additional compensation for costs related to undercut underrun and concrete crushing issues. (Exhibits 21 and 22; N.T. 82-105)

18. On November 25, 2015, Mr. Livingood sent an email to Kerry DeLizio (Hempt's construction manager for the project), asking whether, other than the concrete crushing issues, there were any other outstanding issues. (Exhibit 113)

19. On November 25, 2015, Mr. DeLizio, responded by email to Mr. Livengood, asserting that final quantities had never been provided by the PTC, and requesting that PTC provide it with official final quantities. (Exhibit 113)

20. On November 30, 2015, TCMS responded to the Hempt email and attached the "Work Progress Summary 11-30-15.pdf." PTC asserts that this November 30, 2015 email constituted PTC's provision of final quantities on the project to Hempt, and triggered the six-month period in which Hempt could file its administrative claim. (Exhibit 113; Respondent's Proposed Findings of Fact and Conclusions of Law at ¶¶ 123, 128)

21. On December 23, 2015, Hempt also requested PTC's final approval of additional cost for trees and other plantings. (Exhibit 115)

22. On December 28, 2015, Hempt again wrote to PTC staff regarding ongoing negotiations respecting prices for concrete crushing and undercuts. (Exhibits 24 and 116)

23. On February 8, 2016, one of Hempt's subcontractors (for parking lot paving) responded to the Work Progress Summary 11-30-15.pdf document by indicating the subcontractor disagreed with quantities. Hempt also conveyed this to PTC staff. (Exhibit 117)

24. The PTC prepared a "Final Punchlist Form" updated as of July 30, 2015, showing most punch list work completed by the Summer of 2015, with some items carried out into 2016. Testimony confirmed that Hempt's work continued into the Spring of 2016. (Exhibit 107; N.T. 114)

25. On March 14, 2016, in response to PTC's February 4, 2016 instruction that Hempt break out the costs for the crushing and undercut items separately, Hempt sent a letter addressing crushing costs and asking for \$389,280.93 in crushing costs. (Exhibit 25; N.T. 82-105)

26. A "final inspection report" for the project was issued on April 7, 2016. However, Hempt continued to perform punch list work at least through May of 2016, including repairs requiring new change authorizations. (Exhibits 10, 13, 31-33; N.T. 113-115)

27. On May 24, 2016, JMT (the entity that acquired TCMS/Trumbull Corporation, and served as successor to TCMS, the original third-party construction manager for the PTC on the project) sent a letter to Hempt offering a reduced amount for the crushing costs. (Exhibit 26, 27; N.T. 33, 82-105)

28. On May 25, 2016, Hempt tentatively agreed to the quantity and dollar amounts proposed by PTC staff for the concrete crushing. (Exhibits 27 and 119)

29. It was not until November 9, 2016, that Hempt was advised of PTC staff's proposed offer for the undercut item which had been raised by Hempt. (Exhibits 28-29, 120-121)

30. On November 9, 2016, Hempt tentatively agreed to the quantity and dollar amount proposed by PTC staff for the undercut items. (Exhibits 29, 121)

31. A change order was necessary to effectuate and make payment on the changed quantities and pay amounts for concrete crushing and undercut proposed by PTC staff on May 24, 2016 and November 9, 2016, respectively, as well as any other changes to pay items listed in the Contract. (N.T. 238-241; Exhibits 13, 41; Findings of Fact (“F.O.F.”) 27-30)

32. A change order was also necessary in order to effectuate the time extension initially proposed by PTC staff by letter of January 30, 2015. (N.T. 238; Exhibit 125; F.O.F. 12)

33. On January 9, 2017, Lori Corden from PTC sent an email to Kerry DeLizio of Hempt providing proposed final quantities for all work on the project, including the proposed amounts on the crushing and undercuts, in a “work progress summary” attached to the email. (N.T. 48-50; Exhibits 5 and 6)

34. In the January 9, 2017 email, Ms. Corden asks Mr. DeLizio whether DeLizio agrees with the asphalt adjustments that Corden sent him. (Exhibit 5)

35. On February 3, 2017, PTC delivered its Pay Estimate 28 (dated 2/3/17) to Hempt’s offices. (N.T. 80-82, 236-242; Exhibit 17)

36. Pay Estimate 28 (dated 2/3/17), which identified itself as “Final”, reflected all the pay items, quantities and prices in the accompanying final “work progress summary” and represented the sum total of the final remaining amounts proposed by PTC staff to be paid to Hempt on the project, including amounts for concrete crushing costs and undercut. (N.T. 80-82, 236-242; Exhibits 9, 13, 17)

37. On February 27, 2017, Hempt responded to the January 9, 2017 email to update PTC on Hempt’s review of the final quantities and dollar amounts provided by PTC staff on January 9, 2017 and February 3, 2017. This response letter raised issues related to extra work items, retainage held by PTC, issues related to Change Order 6, and Pay Estimate 28, as well as requesting interest on Pay Estimate 28, raising additional items which Hempt said were “significantly underrun” and seeking compensation for extra costs that arose during the course of the project, including those for delay, inefficiency, and acceleration costs. (Exhibit 36)

38. The delay/inefficiency/accelerations costs claimed by Hempt included, inter alia, costs related to Hempt’s assertion that its work had been delayed and forced out of sequence in several ways by the PTC. (Exhibits 36 and 40)

39. Additional “costs” claimed by Hempt included interest on the retainage amount held by PTC, which Hempt asserts should have been paid within 45 days of December 19, 2014 (the date substantial completion was declared on the project). (N.T. 311-315; Exhibits 15-18, 36, 38, 40, 41 and 46)

40. On March 10, 2017, PTC wrote to Hempt in response to Hempt's February 27, 2017 letter, asserting, among other things, that the undercut and rock crushing quantities had already been resolved, and that the retainage would be paid when it paid Hempt the negotiated amounts for the undercut and crushing. In addition, PTC noted that it disagreed with the "new issues" and most other issues raised by Hempt in its February 27, 2017 letter. (Exhibits 37 and 123)

41. Change Order 6 was the vehicle utilized to formalize and effectuate the "informal" time extension offered back in January 2015, as well as the changes to the quantities and dollar amounts for crushing, undercut, and several other pay items to finally be paid on the Contract. (N.T. 238-241; Exhibit 41)

42. Change Order 6 proposed an overall deduction of \$3,302,592.65 to the original Contract amount and included, inter alia, approval of a time extension proposed back in January 2015, as well as changes to a number of items, including the undercut and crushing pay items. (Exhibit 41)

43. Change Order 6 was a "Category 2" Change Order because it sought approval of a time extension to Hempt on the project and because of the dollar amount of the proposed changes, occasioned, in significant part, by the reduction to the quantity of the undercut performed on the project. (N.T. 201-204, 238-241, 244-248; Exhibits 13, 14, 41, 50, and 125)

44. A "Category 2" Change Order is one that must be approved by vote of the PTC Commissioners to be effective and binding. (N.T. 238-241, 244-248; Exhibits 13, 14, 41 and 50)

45. PTC asked its consultant, Michael Baker, Inc., to review Change Order 6 and make a recommendation to the PTC Commissioners regarding action on this proposed change order for the Commissioners' meeting scheduled for May 16, 2017. (N.T. 251-253; Exhibit 41)

46. PTC's Commissioners met on May 16, 2017, and voted to approve Change Order 6. This included changed amounts for undercuts, crushing, and several other pay items in the Contract made in order to balance estimated items to actual work completed, including: changes for removal of concrete glare screen, basin repair, pothole repairs, barrier reset and repair, protective coatings, temporary slope pipe, excavation (including undercut), reset temporary impact attenuators, seeding and erosion control, temporary stream diversion, additional concrete crushing, guiderail repairs, and asphalt, diesel and steel fluctuations for a revised not-to-exceed amount of \$45,596,974.20. (Exhibits 41 and 50)

47. Because Change Order 6 was a Category 2 change order requiring an affirmative vote by the PTC Commissioners before the changed amounts were actually approved and payable to Hempt, all changed amounts previously proposed by PTC staff and the grant of a time extension to Hempt remained uncertain until the PTC Commissioners approved this final Change Order 6. (F.O.F. 31-46)

48. PTC staff signed and issued Pay Estimate 28 (dated 5/17/17) on May 17, 2017, following the vote of PTC's Commissioners at the May 16, 2017 meeting to approve Change Order 6. (N.T. 192-201, 255-258, 276-277, 299-302; Exhibits 18, 41 and 50)

49. As if to underscore the uncertainty of the total amounts Hempt would be paid on the project until the Commissioners actually voted on Change Order 6, the final Pay Estimate 28 (dated 5/17/17) differed from Pay Estimate 28 (dated 2/3/17)(proposed on February 3, 2017 by PTC staff) by an additional \$11,821.78. This had to be done in order to match the final pay estimate to the final changes approved by vote of the Commissioners in Change Order 6 on May 16, 2017. (N.T. 192-201, 255-258, 276-277, 299-302; Exhibits 17, 18, 41 and 50)

50. Because Change Order 6 was not effective and final until the date the PTC Commissioners met and voted to approve it; and because Pay Estimate 28 (dated 5/17/17) was then adjusted to match the amounts determined by Change Order 6, we find that Pay Estimate 28 (dated 5/17/17) became the actual and effective final statement of all amounts Hempt would be paid by the PTC for the project. Accordingly, it was only then, May 17, 2017, when Hempt was: reasonably able to ascertain the full extent of its damages on the project; able to prepare a concise and specific statement detailing its injury; and affirmatively notified what items and extra costs would and would not finally be paid by PTC on the project. (F.O.F. 20-49; Board Finding)

51. In sum, we have found that, as of November 30, 2015: work on the project was still being performed by Hempt and would continue into the Spring of 2016; there were significant unresolved pay item differences between Hempt and the PTC, including quantity and pay item differences for undercut and concrete crushing (both of which had been raised, were under negotiation, and involved significant dollar amounts); the work progress summary document presented by PTC at that time does not identify itself as final; the document and related circumstances indicate it was part of a typical negotiation process expected, eventually, to arrive at a final overall price for this type of quantity-based contract project; the pay item amounts proposed for the unresolved undercut and crushing work in the November 30, 2015 document was issued by TCMS (the PTC's original third-party consultant on the project) but could only be decided/approved by a vote of the PTC Commissioners themselves; the Contract time extension issue pending since May of 2014 also required such a vote by the Commissioners to become binding; and no such vote had occurred. (F.O.F. 10-32, 41-46; Board Finding)

52. Because of the facts in this case described in Paragraphs 10 to 46, and summarized in Paragraph 51 immediately above, we further find that, as of November 30, 2015: the full extent of Hempt's claim on the project could not yet be reasonably ascertained; Hempt could not prepare a concise and specific statement detailing its injury; and Hempt had not yet received an affirmative and unequivocal denial on all its outstanding payment items in dispute on the project by the person(s) with authority to make such decisions. (F.O.F. 10-51; Board Finding)

53. Because we have found that: Hempt's work on the project continued into the Spring of 2016; it was not until May 24, 2016 and November 9, 2016 when PTC staff proposed quantities and dollar amounts to Hempt to resolve the outstanding disputes over concrete crushing and undercut excavation pay items, respectively; it was not until January 9, 2017 when

PTC staff sent its proposed final quantities for all work on the project to Hempt (including those for undercut and concrete crushing); it was not until February 3, 2017 when PTC staff sent Pay Estimate 28 (dated 2/3/17), which identified itself as “Final”, reflected all the pay items, quantities and prices in the accompanying final “work progress summary”, and represented the sum total of the final remaining amounts proposed by PTC staff to be paid to Hempt on the project (including amounts for concrete crushing costs and undercut); and because we have also found that the final quantities and final payment amounts proposed by PTC staff would not be effective or binding on the PTC until the PTC Commissioners themselves voted to approve Change Order 6 (which finally adjusted all quantities and amounts to be paid on the project, including those for undercut and concrete crushing as well as a long pending time extension for work on the project); and because Change Order 6 was not approved by vote of the PTC Commissioners until May 16, 2017 and Pay Estimate 28 (dated 5/17/17) was not signed and issued by PTC staff to Hempt until May 17, 2017 (stating with certainty the total of all amounts which would and would not be paid to Hempt on the project) when: the full extent of Hempt’s claim on the project could be reasonably ascertained; Hempt could prepare a concise and specific statement detailing its injury on the project; and Hempt received an affirmative and unequivocal denial on all its outstanding payment items in dispute by the person(s) with authority to make such decisions. (F.O.F. 10-52; Board Finding)

54. On May 26, 2017, Hempt wrote to PTC indicating it had received notice of payment to be made on May 30, 2017 from PTC but stating that it “does not believe that this payment constitutes final payment.” (Exhibit 39)

55. Hempt was paid the final amount reflected in Change Order 6 and Pay Estimate 28 (dated 5/17/17) on May 30, 2017. (N.T. 192-201, 255-258, 276-277, 299-302; Exhibits 18, 38, 41 and 50)

56. On July 7, 2017, Hempt submitted its administrative claim to the contracting officer at the PTC. (Exhibit 40).

57. PTC’s contracting officer denied Hempt’s claim on February 19, 2018. (PTC’s Preliminary Objections, ¶ 4 and Exhibit 1; Hempt’s Answer and New Matter to PTC’s Preliminary Objections, ¶ 4)

58. Hempt filed its Statement of Claim with the Board of Claims on March 2, 2018. (BOC Docket No. 4181)

CONCLUSIONS OF LAW

1. Pennsylvania Rule of Civil Procedure (Pa.R.C.P.) 1028(a)(1) addresses preliminary objections filed on the grounds of lack of jurisdiction over the person and/or subject matter of the action. Pa.R.C.P. 1028(a)(7) addresses preliminary objections filed on the grounds of failure to exhaust administrative remedies. Pa.R.C.P. 1028(a)(1) and (7).

2. Challenges to Board jurisdiction may be addressed during the preliminary objection phase by application of the law and, if necessary, by taking evidence to resolve any material issues of fact relevant to the challenge. 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) (approving the Board's procedure of conducting evidentiary hearings to determine preliminary objections based on lack of jurisdiction).

3. Once the jurisdictional issue is properly raised, the burden of proving jurisdiction is upon the party asserting it, in this case, Hempt. Deyarmin v. CONRAIL, 931 A.2d 1, 14 (Pa. Super. 2007).

4. As the finder of fact, the Board is charged with the duty of determining the credibility of evidence and resolving conflicting testimony. The Board may believe all, or part, or none of the testimony of any witness. The Board's factual findings must be supported by substantial evidence. Department of Gen. Servs. v. Pittsburgh Bldg. Co., 920 A.2d 973, 989 (Pa. Cmwlth. 2007); A.G. Cullen Constr., Inc. v. State Syst. of Higher Educ., 898 A.2d 1145, 1155 (Pa. Cmwlth. 2006); Commonwealth v. Holtzapfel, 895 A.2d 1284, 1249 (Pa. Cmwlth. 2006); Miller v. C.P. Centers, Inc., 483 A.2d 912, 915 (Pa. Super. 1984).

5. The Procurement Code at 62 Pa.C.S. § 1724(a)(1) 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).

6. 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 office 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 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 1 Pa.C.S. (relating to administrative law and procedure) shall not apply to this section.

62 Pa.C.S. § 1712.1(a)-(f).

7. The Board’s jurisdiction is prescribed and controlled by statute. 62 Pa.C.S. §§ 1724 and 1712.1; Buchart Horn, Inc. v. Department of Transp., 1 A.3d 960, 964 (Pa. Cmwlth. 2010), quoting Department of Gen. Servs. v. Pittsburgh Bldg. Co., 920 A.2d 973, 981 (Pa. Cmwlth. 2007).

8. 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.

9. The Pennsylvania Supreme Court has adopted a two-prong test for determining when a contract claim accrues. That test provides as follows:

[A] claim accrues when (1) a claimant is first able to litigate his or her claim, e.g., when the amount due under the claim is known and the claimant is capable of preparing a concise and specific written statement detailing the injury, and (2) the claimant is affirmatively notified that he or she will not be paid by the Commonwealth.

Darien Capital Mgmt., Inc. v Public Sch. Employees' Retirement Syst., 700 A.2d 395, 397 (Pa. 1997).

10. Both prongs of the Darien standard must be satisfied for a claim to have accrued, and only then will the six month limitation period to file a claim with the agency's contracting officer commence. Id.

11. The agency's denial of a contractor's request for payment must be unequivocal for a claim to accrue; however, an agency need not use specific words such as "denied" or "will not be paid." Id.; see also Dean Inst. of Tech., Inc. v. Commonwealth of Pennsylvania, Dep't of Labor and Indus., BOC Docket No. 3972, Opinion and Order of July 29, 2013, pp. 23 and 43, aff'd, 88 A.3d 317 (Pa. Cmwlth. 2014).

12. On a project where there are multiple disputes affecting payment due the contractor, the contractor's claim (for the purpose of commencing the six month time period set forth by statute) does not accrue piecemeal, but as a whole, and then, only when the contractor knows the full extent of its claim, i.e., when the contractor is advised of the agency/owner's decision with respect to all outstanding issues affecting payment. See, Darien, 700 A.2d at 397-99; Wayne Knorr, Inc. v. Department of Transp., 973 A.2d 1061, 1088-90 (Pa. Cmwlth. 2009); C.J. Langenfelder & Son, Inc. v. Department of Transp., 404 A.2d 745-750 (Pa. Cmwlth. 1979); Penn-Jersey Contractors, Inc. v. Commonwealth, Gen. State Auth., 315 A.2d 920-923 (Pa. Cmwlth. 1974).

13. To be effective at establishing accrual and commencing the six month filing period, advice as to the agency's position on a contractor's request for payment must result from a decision made by a person or persons at the agency with authority to make such decisions. Wayne Knorr, Inc. v. Department of Transp., BOC Docket No. 3680, Opinion and Order of July 25, 2008, aff'd, 973 A.2d 1061, 1089-90 (Pa. Cmwlth. 2009); Lobar Assoc., Inc. v. Pennsylvania Turnpike Comm'n, BOC Docket No. 4173, Opinion and Order of June 28, 2018, aff'd, 216 A.3d 526 (Pa. Cmwlth. 2019), appeal denied, 225 A.3d 1104 (Pa. 2020).

14. Because we have found, as matters of fact, that as of November 30, 2015: the full extent of Hempt's claim on the project could not yet be reasonably ascertained; Hempt could not prepare a concise and specific statement detailing its injury; and Hempt had not yet received an affirmative and unequivocal denial on all its outstanding payment items in dispute by the person(s) with authority to make such decisions, we conclude that Hempt's claim did not accrue on or before November 30, 2015. See Conclusions of Law ("C.O.L.") 9-13

15. Because we have found, as matters of fact, that it was not until May 17, 2017 when the full extent of Hempt's claim on the project could be reasonably ascertained; Hempt could prepare a concise and specific statement detailing its injury on the project; and Hempt

received an affirmative and unequivocal denial on all its outstanding payment items in dispute by the person(s) with authority to make such decisions, we conclude that Hempt's claim, as a whole, did not accrue on this project until May 17, 2017. C.O.L. 9-14

16. Because we have found that Hempt's claim, as a whole, did not accrue on this project until May 17, 2017, we further conclude that Hempt's administrative claim was timely filed with the PTC on July 17, 2017. 62 Pa.C.S. § 1712.1; C.O.L. 5-15

17. Because Hempt's administrative claim was timely filed in accordance with Section 1712.1 of the Procurement Code, the Board has jurisdiction over this claim pursuant to Section 1724. 62 Pa.C.S. §§ 1712.1 and 1724; C.O.L. 5-16.

OPINION

Introduction

This case is before the Board of Claims (“Board”) to rule on the preliminary objections filed by Respondent, Commonwealth of Pennsylvania, Pennsylvania Turnpike Commission (“PTC”) to the Statement of Claim of Claimant, Hempt Brothers, Inc. (“Hempt”). The case commenced on March 2, 2018, upon the filing of a statement of claim with the Board. On March 28, 2018, PTC filed preliminary objections and brief in support. On July 26, 2018, Hempt filed its answer and new matter to the preliminary objections and brief in support. Upon review of the parties’ filings, the Board determined that a fact hearing was needed for proper determination of the objections to the Board’s jurisdiction.

On November 24, 2020, the Board issued its sixth revised scheduling order, setting an evidentiary hearing to determine all factual issues pertinent to the Board’s jurisdiction over the claim.¹ The evidentiary hearing was held on May 25 and 26, 2021. On July 22, 2021, Hempt filed proposed findings of fact, conclusions of law, and a brief in opposition to the preliminary objections. On August 23, 2021, the PTC filed proposed findings of fact, conclusions of law, and a brief in support of the preliminary objections. Hempt filed a reply memorandum on September 7, 2021. On October 6, 2021, PTC filed a supplemental brief in support of preliminary objections and in response to Hempt’s reply brief. The matter is ripe for disposition.

General Background

As set forth in the findings of fact, Hempt and PTC were parties to a contract for the total reconstruction and widening of approximately 4 miles of the Pennsylvania Turnpike between the

¹ Hearing on this matter was postponed several times for a multiplicity of reasons both before and during the Covid-19 epidemic.

Carlisle and Blue Mountain interchanges (mile markers 210.92 to 206.89). The project was awarded in April 2013 and, despite a number of problems and disputed issues arising during the project, was declared substantially complete in December 2014. Thereafter, a relatively long string of intermittent “communications” ensued between various representatives of each party, culminating with an administrative claim being filed with the PTC’s contracting officer on July 7, 2017. The contracting officer denied Hempt’s claim on February 19, 2018. Hempt filed its Statement of Claim with the Board on March 2, 2018.

Discussion

PTC asserts preliminary objections based on lack of jurisdiction over the subject matter of the action or the person of the defendant pursuant to Pa.R.C.P. 1028(a)(1) (POs ¶ 55-58), and failure to exhaust a statutory remedy pursuant to Pa.R.C.P. 1028(a)(7) (POs ¶ 55, 73, 75). In this case, the objection under subsection (a)(1) and the objection under subsection (a)(7) raise the same issue. The issue to be determined to rule on both of the preliminary objections is whether or not Hempt timely filed its administrative claim on July 7, 2017. This, in turn, requires a determination as to when Hempt’s claim first accrued.

For the Board to have jurisdiction over this claim pursuant to Section 1724 of the Procurement Code, Hempt must have complied with the statutory requirements of Section 1712.1. 62 Pa.C.S. § 1724. Among these requirements, Subsection 1712.1(b) prescribes that:

[an administrative] claim shall be filed with the contracting officer within six months of the date the claim accrues.

62 Pa.C.S. § 1712.1(b).

However, before we turn our attention to the concept of claim accrual, the Board finds it necessary to first clarify what is and what is not at issue at this stage of the case. Specifically, we believe it to be well-settled that the Board’s jurisdiction is controlled by statute. See, e.g.,

Buchart Horn. Inc. v. Department of Transp., 1 A.3d 960, 964 (Pa. Cmwlt. 2010), quoting Department of Gen. Servs. v. Pittsurgh Bldg. Co., 920 A.2d 973, 981 (Pa. Cmwlt. 2007) (requiring adherence to the provisions of Section 1712.1 as a prerequisite to Board jurisdiction). Accordingly, it is Hempt’s compliance with the statutory provisions at 62 Pa.C.S. §§ 1712.1 and 1724, which prescribe the Board’s jurisdiction, that we must now assess. It is not Hempt’s compliance with contractually imposed notice provisions (which may vary from contract to contract) now proffered as a defense by the PTC that we must determine at this time.²

Moving on to Hempt’s compliance with the statutory provisions controlling the Board’s jurisdiction, we return now to the issue of claim “accrual.” For legal guidance on claim accrual, we, of course, look to the standard established by the Pennsylvania Supreme Court in Darien Capital Mgmt., Inc. v. Public Sch. Employes’ Retirement Syst., 700 A.2d 395 (Pa. 1997).

As stated in Darien:

A claim accrues when: (1) a claimant is first able to litigate his or her claim, e.g., when the amount due under the claim is known and the claimant is capable of preparing a concise and specific written statement detailing the injury and (2) the claimant is affirmatively notified that he or she will not be paid by the Commonwealth. Such denial of payment must be affirmative and unequivocal.

Darien, 700 A.2d at 397 (emphasis in original).

Part of the Court’s reasoning in establishing this “two-pronged” standard, which we believe to be quite pertinent to the case at hand, is provided later in that opinion. Reversing the lower court’s decision, the Supreme Court stated:

... the Commonwealth Court’s “clarification” of the standard for claim accrual in this case which discards the general standard’s second requirement of an

² While the PTC may or may not have a defense to Hempt’s claim based on these contract notice provisions, all such defenses based on compliance with the contract are more properly dealt with together following a hearing on the merits of the case. It is then when evidence pertinent to all such defenses may be presented by both parties and fully explored by the Board. For this reason, we expressly decline further comment on this issue and leave its determination to a later day.

affirmative and unequivocal notice of refusal of payment was also in error, and, therefore is specifically rejected by this court.

Thus, we embrace the well-established [two-prong] standard for claim accrual

...

Common sense dictates no less. To hold that a claim accrues solely when a party is able to prepare a detailed statement of the claim, would negatively impact both contractors and the Commonwealth by encouraging needless and premature litigation. Specifically, any time the Commonwealth does not pay an invoice within six months, a contractor will be forced to file a precautionary law suit or risk being barred at a later time . . . Nevertheless, to protect itself in the event of a subsequent refusal to pay, a prudent contractor will initiate a prophylactic action or be subject to the possibly ruinous effects of the statute of limitations.

Moreover, the filing of a myriad of protective law suits will necessarily create an administrative burden for the Commonwealth, as well as for the Board. To find that a claim accrues merely when a contractor is able to prepare a detailed statement of a claim would be tantamount to encouraging unnecessary litigation, something that this court is loathe to do. In sum, we believe that the strong public policy of minimizing needless litigation would be ill-served by adopting a rule of claim accrual which fails to include a requirement of affirmative and unequivocal notification of the denial of a claim against the Commonwealth.

Darien, 700 A.2d at 399.

Clearly, the Pennsylvania Supreme Court expresses a marked aversion to requiring a contractor to file multiple “prophylactic” administrative claims for each individual dispute over a particular pay item, extra cost issue, time adjustment request, or the like that may arise at various times during the course of a project. Id. Instead, Darien, and a long line of Commonwealth Court cases adopt the position that, on a project where multiple disputes arise, a contractor’s “claim” (for the purpose of commencing the six month time period set forth by statute) does not accrue piecemeal, but as a whole, and then, only when the contractor can calculate the full extent of its injury, i.e. when the contractor is advised of the agency/owner’s decision with respect to all outstanding payment disputes. See e.g., Penn-Jersey Contractors, Inc. v. Commonwealth, Gen. State Auth., 315 A.2d 920-923 (Pa. Cmwlth. 1974) (despite

receiving a flat denial on one of two payment issues early in the project, the contractor's claim did not accrue until the Commonwealth agency issued a final decision on all outstanding items in dispute, as it was only then when the full amount of the contractor's claim was known and a detailed statement of its claim could be prepared); C.J. Langenfelder & Son, Inc. v. Department of Transp., 404 A.2d 745-750 (Pa. Cmwlth. 1979) (holding that contractor did not know the full extent of its claim and the claim did not accrue until it received the department's certificate of final settlement amount which conveyed the department's decision on final payment for all issues); Wayne Knorr, Inc. v. Department of Transp., 973 A.2d 1061, 1088-90 (Pa. Cmwlth. 2009) (holding that "a claim does not accrue until the claimant knows the full extent of his claim" which did not occur until the department issued its notification of final quantities and statement of final payment amount).

Moreover, to be effective at establishing accrual and commencing the six month filing period, advice as to the agency's position on such payment disputes must result from a decision made by the person or persons at the agency with the authority to do so. See, Wayne Knorr, Inc. v. Department of Transp., BOC Docket No. 3680, Opinion and Order of July 25, 2008, aff'd, 973 A.2d 1061, 1089-90 (Pa. Cmwlth. 2009) (finding various communications from PennDOT representatives regarding pay issues not effective to satisfy the second prong of Darien until issued by the person with actual decisional authority). See also, Lobar Assoc., Inc. v. Pennsylvania Turnpike Comm'n, BOC Docket No. 4173, Opinion and Order of June 28, 2018, aff'd, 216 A.3d 526 (Pa. Cmwlth. 2019), appeal den'd, 225 A.3d 1104 (Pa. 2020).

In sum, we believe that Pennsylvania case law directs that, in a case like the one at hand, where multiple pay items and cost disputes arise throughout the project, the contractor's claim does not accrue piecemeal, but as a whole, and only when it is informed of the agency's decisions

on all such outstanding disputes, provided such decisions have been made by the person or party at the agency with the authority to make such decisions. With the foregoing principles in mind, we turn our attention to the operative facts of the case and the contrasting dates for accrual proposed by the parties.

The PTC's Version of Accrual

In its briefings, the PTC complains adamantly about the approximate two and a half years between substantial completion of the project and the filing of Hempt's administrative claim on July 7, 2017. The PTC appears to consider this a purposeful and impermissible delay by Hempt in presenting the full scope of its "exorbitant" damage claim. In particular, the PTC alleges that Hempt never raised with it the delay/acceleration/inefficiency claims that comprise a large part of the claim now before the Board.

Having described what it views as the fundamental unfairness of such a circumstance, the PTC argues that the Board should consider November 30, 2015 as the date Hempt's claim accrued (a date well outside the six month time limit in which to file the administrative claim). According to the PTC, it was on this date when it provided Hempt with what it characterizes as "final quantities" for the project and the point at which Hempt "was fully capable of preparing a statement of its alleged damages and was able to litigate its claim."³ As a result, asserts the PTC, the first prong of Darien was met on this date.

However, in an apparent acknowledgment that it did not, at that time, communicate an affirmative and unequivocal denial to all of Hempt's payment and/or cost disputes on the project,

³ Like the majority of the PTC's contracts for construction projects, the Contract here was quantity-based. This means, inter alia, that the original overall price was determined through a summation of Hempt's unit pricing for the many individual work items detailed in the PTC's specifications, and applied to the estimated quantities for these line items provided by the PTC. However, this also means that the final Contract price could (and typically does) change, depending upon whether the actual quantities for the individual line items varied from the estimates developed for the project. Accordingly, the provision of final quantities was a necessary step toward concluding the project. See Ex. 1; N.T. 23-24.

the PTC goes on to argue that the Board should not require compliance with the second prong of Darien in order to find accrual on this November 30, 2015 date. The PTC's reasoning for this rather extraordinary request seems to revert back to its assertion that Hempt has manipulated the Darien criteria and thwarted its usefulness by withholding its claims for delay, acceleration, and inefficiency, among others. The PTC asks, in essence, "how can an agency/owner give an affirmative and unequivocal denial of a claim (and create a timely accrual) if the contractor fails to ask for such damages?"

The PTC also spends considerable time arguing that Hempt failed to adhere to the Contract's dispute notice provisions, and that this should also preclude Board jurisdiction. Here again, the PTC emphasizes the delay between substantial completion of the project and Hempt's administrative claim, and complains of the fiscal strain such delay imposes upon the agency to prudently manage the public's tax dollars.

Although the Board does share the PTC's concern over the potential problem it describes with respect to the Darien standard for accrual, we do not believe the problem to be insurmountable.⁴ Moreover, the Board finds itself in disagreement with much of the PTC's remaining arguments and characterizations.

As stated earlier, we do not find the PTC's insistence on the contractual notice provisions relevant to the jurisdictional issue currently before the Board. See 62 Pa. C.S. §§1712.1 and 1724; see also, Buchart Horn, 1 A.3d at 964. In addition, we believe the Pennsylvania Supreme Court was very clear that it will not condone an exception to the two-prong standard for accrual it set forth in Darien, 700 A.2d at 399. Accordingly, we decline the PTC's invitation to create such an exception.

⁴ We discuss this issue in more depth infra at pp 22 to 25.

Turning now to apply the current Pennsylvania case law, discussed above, to the facts adduced at hearing, we conclude that the November 30, 2015 date proposed for claim accrual by the PTC fails for several reasons. For one, it is clear that work on the project was still being performed by Hempt on that date and continued into the Spring of 2016.⁵ Common sense alone dictates that Hempt could not yet know for sure the full extent of its injury nor prepare a concise and specific statement of damages for the project, as a whole, while work was still ongoing. The PTC cites no case law example for such a finding, and the Board is aware of none.

It is also clear that there were significant unresolved pay item differences as of November 30, 2015. These included quantity and pay item differences for undercut and crushing (both of which had been raised, were under negotiation, and involved significant dollar amounts). N.T. 45-46, 50-51. Moreover, the November 30, 2015 document itself does not support the suggestion that it was intended as the PTC's final position on all of the various pay items.⁶ Rather, these documents and related circumstances indicate they were part of a typical negotiation process expected, eventually, to arrive at a final overall price for this type of quantity-based contract project.

Yet another indicator that the November 30, 2015 document is more properly viewed as a step in the negotiating process, is the fact that the pay item amounts proposed for the unresolved undercut and crushing work in the November 30, 2015 document issued by TCMS (the PTC's original third-party consultant on the project) could only be decided/approved by a vote of the Turnpike Commissioners themselves. In addition, a Contract time extension issue pending since

⁵ Despite the declaration of substantial completion of the project on December 19, 2014, Hempt identifies a number of "punchlist" work items running into March, April and May of 2016. N.T. 113-114, 219-220.

⁶ The November 30, 2015 document was titled "Work Progress Summary 11-30-15.pdf" and sent by TCMS (the PTC's third party consultant). It was one in a long line of such work summaries issued on the project. Exs. 3 and 4; N.T. 41-47; Board Finding.

May of 2014 also required such a vote to become binding. That is to say, neither TCMS/JMT (TCMS's successor) nor the PTC staff which became involved in trying to close out this project had authority to finally determine the time extension or the amounts which would eventually be paid for the undercut and crushing items. That authority had been reserved to a vote of the Commissioners themselves. N.T. 201-204, 238-239, 244-248.

For the foregoing reasons, as well as others noted in our Findings of Fact, we find that, as of November 30, 2015: the full extent of Hempt's claim on the project could not yet be reasonably ascertained; Hempt could not prepare a concise and specific statement detailing its injury; and Hempt had not yet received an affirmative and unequivocal denial on all its outstanding payment or cost items in dispute by the person(s) with authority to make such decisions. As a result, and in keeping with established Pennsylvania case law (discussed above at pp 14 to 17), we must conclude that Hempt's claim on the project did not accrue on or before November 30, 2015.

Hempt's Version of Accrual

Turning now to Hempt's arguments, we note that its post-hearing brief begins poorly. Specifically, its argument that the PTC's challenge to the Board's jurisdiction based on failure to adhere to the six month time limit should be viewed as an affirmative defense misconstrues the Board's approach to the early resolution of jurisdictional disputes. Further, it ignores completely the statutory language of Section 1724, the purpose of Pa.R.C.P. 1028, and the actual holding in the case of Ferguson Elec. Co., Inc. v. Department of Gen. Servs., 3 A.3d 681 (Pa. Cmwlth. 2010) app. denied, 2011 Pa. LEXIS 971 (Pa. April 26, 2011).⁷

⁷ In Ferguson, the Commonwealth Court confirmed the Board's holding that respondent's challenge to Board jurisdiction based on claimant's failure to timely file its claim was properly considered as a preliminary objection. This affords the opportunity for a fact hearing pursuant to Pa.R.C.P. 1028 (if and as needed) to ascertain a fair and early determination of the jurisdictional dispute. The alternative treatment as new matter urged by Hempt would

Not surprisingly, Hempt also presents a somewhat different view than the PTC of the factual circumstances which preceded the filing of its administrative claim. It does so by focusing on the series of communications, and/or the lack thereof, between both parties subsequent to November 30, 2015. On many of these points, we are in substantial agreement with Hempt.

For one thing, evidence presented by Hempt shows that a good portion of the “two and a half year delay” so adamantly complained of by the PTC was due to the PTC’s own inaction. For instance, the evidence established that it was not until November 9, 2016 when PTC staff proposed a tentative resolution of the large outstanding pay item for undercut.⁸ Also at that time Hempt’s request for a time extension on the project was still pending.⁹

Further evidence confirmed the tentative nature of the foregoing time extension and the dollar amounts proffered for undercut and crushing by PTC staff. It was not until January 9, 2017 when PTC staff issued its proposed final summary of quantities for all work on the project. It was February 3, 2017 when PTC staff issued Pay Estimate 28 (dated 2/3/17), which represented the final dollar amounts proposed by staff to be paid to Hempt for all work on the project, including the adjusted amounts for undercut and concrete crushing. Moreover, uncontroverted testimony from the PTC’s own witnesses established that, due to the PTC’s own internal policy, the change order (Change Order 6) needed to actually approve and pay the amounts for undercutting and crushing finally proffered by PTC staff (and to approve the time

only serve to forestall resolution of such a seminal issue which could well be dispositive of the case (and avoid needless amounts of additional litigation) given the Board’s jurisdictional restrictions.

⁸ Hempt requested a combined adjusted payment for undercut and crushing of \$662,693.47 on October 29, 2015. (Exs. 21, 22; N.T. 82-105). Pursuant to subsequent direction from the PTC in February 2016 to break out amounts for each item separately, PTC staff and/or PTC’s third-party consultant advised Hempt of the PTC’s tentative offer of \$324,667.28 for concrete crushing on May 25, 2016 and \$218,286.65 for undercut on November 9, 2016. (Exs. 20, 25, 26, 27 and 29; N.T. 99-100).

⁹ Hempt requested a time extension on November 18, 2014 and was given an “informal” extension by JMT/PTC staff on or about January 30, 2015, with a promise of formal approval to come. (Ex. 125).

extension and all other changed amounts) had to be voted on affirmatively by the Commissioners themselves. N.T. 238-241, 244-248.

Accordingly, all the amounts proffered by PTC staff for undercut and concrete crushing (as well as the time extension and numerous other changed pay items addressed in Change Order 6) remained uncertain until formal vote by the Commissioners on May 16, 2017. As a result, it was not until May 17, 2017, when Hempt was advised of this approval and Pay Estimate 28 (dated 5/17/17) was signed and issued by PTC staff, when its claim on the project, as a whole, accrued. That is to say, it was not until then when: the full extent of Hempt's claim on the project could be reasonably ascertained; Hempt could prepare a concise and specific statement detailing its injury on the project; and Hempt received an affirmative and unequivocal denial on all its outstanding payment items in dispute by the person(s) with authority to make such decisions. See, e.g., Darien, 700 A.2d at 397-399; Knorr, 973 A.2d at 1088-90; C.J. Langenfelder, 404 A.2d at 750; Penn-Jersey, 315 A.2d at 923. Moreover, because we have found that Hempt's claim, as a whole, did not accrue on this project until May 17, 2017, we further find that its administrative claim was timely filed with the PTC on July 17, 2017, well within the six month time period allowed by statute.

Manipulation of the Darien Standard for Accrual

In reaching our conclusion that Hempt's claim, as a whole, did not accrue until May 17, 2017, and that this claim may include the damages asserted for delay, acceleration, and inefficiency, we remain mindful of the PTC's complaint that such a holding might allow a contractor to manipulate or thwart the standard for accrual set forth in Darien. Specifically, we note the PTC's concern that such a holding could allow a contractor to arbitrarily delay the accrual of all or some portion of its claim on a project (either substantially or indefinitely) by not

raising certain disputes with the agency until shortly before it wished to file an administrative claim.

Our response to this concern is two-fold. For one, we believe that Section 1712.1(c), as well as Darien and its related cases, instruct that all the individual disputes or differences which arise on a project like the one at hand are to be consolidated and treated as a whole (not separated out) for the purpose of presenting an administrative claim.¹⁰ It further appears that this is to be done without regard to the order in which such individual issues arise or the time prior to the accrual of the claim in which they are first presented by the contractor. Accordingly, we do not view the order or timing of Hempt's presentation to the PTC of the delay/acceleration/inefficiency issues in its current claim as fatal to our jurisdiction over this portion of the claim. It is sufficient that these issues were brought to the PTC's attention prior to accrual of its claim, as a whole, on May 17, 2017.¹¹

Turning to the more practical aspect of PTC's concern, we would first note how unusual it would be, to the Board's experience, that a contractor would purposefully delay accrual (and potential resolution and payment) of all or any portion of its claim on a construction project. That said, we believe a proper and prompt "close out" of a construction project by the contracting agency would prevent a contractor from purposefully delaying or preventing the accrual of all or some portion of its claim under the Darien standard by simply not asking to be compensated for same until some arbitrary time in the future.

¹⁰ Subsection 1712.1(c) states: "a claim shall state all grounds upon which the contractor asserts a controversy exists." 62 Pa. C.S. 1712.1(c) (emphasis added). See also Darien, 700 A.2d at 399; Knorr, 973 A.2d at 1088; C.J. Langenfelder, 404 A.2d at 750; Penn-Jersey, 315 A.2d at 923.

¹¹ It appears that Hempt raised the issue of delay damages resulting from delay/acceleration and/or inefficiency to the PTC by letter of February 27, 2017. Although not critical to our holding today, we also note that evidence was presented at hearing of a much earlier assertion of delay and related damages by Hempt to the PTC near the beginning of the project. See Exs. 36, 125; N.T. 31.

More specifically, in the case of a quantity-based contract such as the one at hand, we refer to the agency's formal issuance of both a final "final quantities" statement and a certificate or statement of the final settlement amount to be paid on the contract, issued by a person or persons at the agency with authority to do so. The formal statement of final quantities provides the agency's determination of what will and will not be paid on all quantity-based work items. The certificate/statement of final payment amount notifies the contractor of the final total amount it will be paid and, significantly, addresses any and all other legal or equitable additions and deductions to be made (including those for delay, acceleration and/or inefficiency).¹² In this way, we believe the agency has then conveyed its determinations on all quantity-based work items and denied any and all other claims (for which it has not already made allowance in its final payment statement) regardless of whether or not such claims be voiced or unvoiced by the contractor at that time.¹³

It is not by accident that both this Board and the Commonwealth Court have found the formal issuance of these two documents (or their equivalent) by the person(s) at the agency with authority to do so as the point of claim accrual in similar cases. See, e.g. Knorr, 973 A.2d at 1088-90 (finding PennDOT's "Notification of Final Quantities and Contract Settlement Amount" to be point of claim accrual); C.J. Langenfelder, 404 A.2d at 750 (finding receipt of agency's certificate of completion identifying final payment amount to set the time of claim

¹² For example, Section 110.08(c) of the Contract specifications used here states, in relevant part:
(c) Final Settlement Certificate Computations. The Representative will compute the entire amount of each contract work item performed and its contract value. The Representative will notify the Contractor of the amount for each item, including additions to and deductions from the contract quantity for each item of work, all other legal and equitable additions and deductions to be made, amounts previously paid, and the net amount of the final payment computations.

¹³ This is not the first time the Board has encountered the potential for manipulation of the Darien standard. See e.g. S.P. McCarl & Company, Inc. v. Commonwealth of Pennsylvania, BOC Docket No. 4007, Opinion and Order of May 8, 2012 (addressing an agency's failure to respond to a contractor's demand for payment thereby preventing attainment of Darien's second prong).

accrual). While we do not suggest now that such procedure is the only way to achieve claim accrual on a project in all circumstances, it is certainly a procedure that may be (and often is) utilized by an agency to set a clear accrual date on a quantity-based project like the one at hand.

Because such a procedure was not utilized here by the PTC in a prompt manner, and because of the PTC's own unique internal policy requiring a vote of the Commissioners to approve certain of the changes needed to arrive at a final payment amount on this project, we consider this further reason to agree with Hempt that a significant portion of the delay the PTC complains of was self-inflicted.¹⁴ We further agree that such circumstances do not present a good reason to ignore Darien and its related case law in order to accelerate claim accrual here as requested by the PTC.

For all the foregoing reasons, we find that Hempt's claim on the project here at issue did not accrue until May 17, 2017, and that its administrative claim was timely filed on July 7, 2017. Accordingly, we conclude that the Board has jurisdiction over Hempt's claim currently before us.

¹⁴ Pursuant to evidence presented at hearing, it appears the PTC never issued the specific document required by the PTC's own specifications at Section 110.08(c). N.T. 276-277. That said, we consider the final Pay Estimate 28 (dated 5/17/17) to be sufficient to close out the project and inform Hempt, finally, of what it would and would not be paid.

ORDER

AND NOW, this 8th day of March, 2022, the Board of Claims, upon consideration of the preliminary objections filed by the Pennsylvania Turnpike Commission to the Statement of Claim of Hempt Brothers, Inc., all subsequent filings of record, and the evidence presented at hearing, it is hereby **ORDERED** and **DECREED** that the preliminary objections to Board jurisdiction are **OVERRULED**. The Pennsylvania Turnpike Commission shall file its answer to Hempt’s Statement of Claim within 30 days from the date of this Order.

BOARD OF CLAIMS

ORDER SIGNED

Harry G. Gamble, P.E.
Engineer Member

ORDER SIGNED

Gregory C. Fajt, Esq., CPA
Citizen Member