

COMMONWEALTH OF PENNSYLVANIA

MBR CONSTRUCTION SERVICES, INC. : BEFORE THE BOARD OF CLAIMS
: :
v. : :
COMMONWEALTH OF PENNSYLVANIA, : :
DEPARTMENT OF GENERAL SERVICES : DOCKET NO. 4182

FINDINGS OF FACT

1. MBR Construction Services, Inc. (“MBR” or “Plaintiff”) is an electrical, mechanical and plumbing contractor with an office address of P.O. Box 14775, Reading, PA 19612. (N.T. 10; Ex. A)

2. The Department of General Services (“DGS” or “Defendant”) is an agency of the Commonwealth with offices located at 18th and Herr Streets, Harrisburg, PA. 17125. (Exs. A, D)

3. On or about July 25, 2014, DGS and MBR entered into a Standard Form of Construction Contract (“Contract”) for the performance of certain electrical work on a project known as Construction of Academic Classroom and Office Building at West Chester University in West Chester, Chester County, PA (“Project”). (N.T. 10; Preliminary Objections at ¶ 1; Response to Preliminary Objections at ¶ 1; Ex. A)

4. MBR commenced its work on the Project on or about September 2, 2015. (Preliminary Objections at ¶ 2; Response to Preliminary Objections at ¶ 2)

5. The Contract documents include, *inter alia*, the General Conditions. (N.T. 13-14; Ex. A)

6. Article 17 of the General Conditions sets forth a three-step resolution process to be followed by the parties in the event of a dispute regarding the Project: the Field Dispute Resolution Meeting (Step 1); the Claim Settlement Conference (Step 2); and Filing a Claim at the Board of Claims (Step 3). (N.T. 13-15; Ex. G)

7. On February 17, 2017, MBR’s President, Brendon Field, submitted a written request for a field dispute review (Step 1) to DGS, setting forth its request for compensation for additional costs MBR stated it incurred due to the termination of the general contractor and the subsequent issuance of a 140-day time extension on the Project. (Preliminary Objections at ¶ 3; Response to Preliminary Objections at ¶ 3; N.T. 17-18; Ex. B)

8. Following a Field Dispute Resolution Meeting on February 27, 2017, DGS issued a formal response to MBR’s request for additional compensation on April 20, 2017. (N.T. 18-20; Ex. C)

9. On October 17, 2017, Mr. Field submitted a Request for a Claims Settlement Conference on behalf of MBR (Step 2) to DGS Deputy Secretary for Public Works, Elizabeth O'Reilly. (N.T. 21-22; Ex. D)

10. The parties stipulate that MBR's October 17, 2017 letter constituted MBR's administrative claim as provided at Section 1712.1(b) and (c) of the Procurement Code, 62 Pa. C.S. § 1712.1(b) and (c). (N.T. 23-25)

11. Mr. Field "was handling" the above dispute with DGS on MBR's behalf through the submission of the October 17, 2017 letter. (N.T. 22)

12. Ms. O'Reilly is the contracting officer for DGS under the provisions of 62 Pa. C.S. § 1712.1. (N.T. 44)

13. Ms. O'Reilly, as DGS's contracting officer, did not issue a final determination on MBR's October 17, 2017 administrative claim. (N.T. 45, 48)

14. There was no correspondence or communication between DGS and MBR subsequent to October 17, 2017. (N.T. 36-37, 48)

15. Aside from Section 17.7 of the General Conditions (the meaning of which is in dispute), there was never any other agreement between DGS and MBR to extend any of the deadlines that are outlined at 62 Pa. C.S. § 1712.1. (N.T. 36-37, 46)

16. Section 17.7 of the General Conditions sets forth the procedure to be followed for the third step in the dispute resolution process, the filing of a claim with the Board, as follows:

17.7. STEP 3: FILING A CLAIM AT THE BOARD OF CLAIMS. The third step in the dispute resolution process is filing a Statement of Claim with the Board of Claims, which is a more formal step in the process and is described in general in §1712.1 and §1721 *et seq.* of the Commonwealth Procurement Code.

A. TIME TO FILE A STATEMENT OF CLAIM. Within fifteen (15) days of:

1. The mailing date of the Deputy Secretary's final determination denying a claim; or
2. Within 135 days of the date the Contractor files a claim with the Deputy Secretary if no final determination has been rendered and no extension has been agreed to, whichever occurs first, the Contractor may proceed to the third stage of the dispute resolution process by filing a claim with the Board of Claims in Harrisburg.

(Ex. G)

17. Prior to the dispute with DGS over the West Chester Project, MBR had pursued disputes with Commonwealth agencies on other projects but none had progressed to the stage of filing a statement of claim with the Board, and none had required MBR to retain legal representation. (N.T. 14-15, 33)

18. Mr. Field understood the language of Section 17.7(A), “**Within fifteen (15) days of: . . . Within 135 days of the date the Contractor files a claim with the Deputy Secretary if no final determination has been rendered and no extension has been agreed to . . .**”, to mean MBR had a total of 150 days from the submission of his administrative claim to file a claim with the Board (Step 3). (N.T. 26-27, 35-36; Ex. G)

19. Mr. Field was not familiar with Section 1712.1 of the Procurement Code, referenced in Section 17.7 of the General Conditions. (N.T. 35; Ex. G)

20. In approximately November 2017, Mr. Field contacted Attorney Shawn Farrell of the law firm Cohen Seglias to advise him of the pending dispute with DGS and requested that Cohen Seglias file a statement of claim with the Board if the matter was not resolved. (N.T. 22-23, 28-32, 37-38)

21. At that time, Mr. Field provided Cohen Seglias with “background documents” related to the dispute with DGS as well as a copy of the October 17, 2017 administrative claim letter that Mr. Field had drafted and filed with DGS. (N.T. 22-23, 30-32, 37-38)

22. Attorney Farrell of Cohen Seglias made the determination of when to file the Statement of Claim (Complaint) with the Board. (N.T. 38-39)

23. MBR offered no evidence that Attorney Farrell or anyone else from Cohen Seglias relied on the language in Paragraph 17.7(A) of the Contract General Conditions to determine when a statement of claim needed to be filed with the Board. (N.T. 1-65; Board Finding)

24. On March 16, 2018, Attorney Farrell of Cohen Seglias filed the Statement of Claim (Complaint) with the Board on MBR’s behalf. (N.T. 28; Ex. F)

25. MBR’s Complaint was filed 150 days after the date that MBR submitted its administrative claim to DGS. (N.T. 21-25, 28; Exs. D, F; Findings of Fact (F.O.F.) 9-10, 22-24)

CONCLUSIONS OF LAW

1. Under Pennsylvania Rule of Civil Procedure 1028(a)(1), a preliminary objection may be filed on the grounds of "lack of jurisdiction over the subject matter of the action or the person of the defendant" Pa. R.C.P. 1028(a)(1).

2. When a preliminary objection raises lack of jurisdiction, the defendant has the initial burden of supporting its objection to the court's jurisdiction with facts and legal argument. See Schmitt v. Seaspray-Sharkline, Inc., 531 A.2d 801, 803 (Pa. Super. 1987).

3. Once the jurisdictional issue is properly raised, the burden of proving jurisdiction is upon the party asserting it (i.e. the plaintiff). Deyarmin v. CONRAIL, 931 A.2d 1 (Pa. Super. 2007).

4. When a preliminary objection raises the jurisdictional issue, the court's function is to determine whether the law will bar recovery due to a lack of jurisdiction. Arbor Resources, LLC v. Nockamixon Twp., 973 A.2d 1036, 1042 (Pa. Cmwlth. 2009).

5. Challenges to Board jurisdiction may be addressed during the preliminary objection phase by application of the law and by taking evidence to resolve any material issues of fact relevant to the challenge. Pa. R.C.P. 1028(b)(2); Ferguson Elec. Co., Inc. v. Dep't of Gen. Servs., 3 A.3d 681, 688 (Pa. Cmwlth. 2010).

6. 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).

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

§ 1712.1. Contract controversies

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

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

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

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

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

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

62 Pa.C.S. § 1712.1(a)-(f).

8. Section 1712.1 sets forth not only the pre-litigation procedure for resolving disputes between a contractor and a Commonwealth agency, but also the prerequisites for the assertion of the Board's jurisdiction over said disputes. Hanover Insurance Company v. SWIF, 35 A.3d 849, 854-855 (Pa. Cmwlth. 2012); Ferguson Elec. at 689.

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

10. The issue before the Board is whether or not Section 17.7 of the General Conditions to the Contract constitutes an agreement to extend the time for the filing of a claim with the Board from 135 days to 150 days from the filing date of the administrative claim at DGS. MBR's Brief in Opposition to DGS's Preliminary Objections at pp. 5-6; DGS's Proposed Findings of Fact at ¶22.

11. MBR interprets the language of Section 17.7(A) of the General Conditions requiring the filing of a claim at the Board “Within fifteen (15) days of: . . . Within 135 days of the date the Contractor files a claim with the Deputy Secretary if no final determination has been rendered and no extension has been agreed to, whichever occurs first,” as an agreement by the parties to extend the time for the filing of a claim with the Board provided at 62 Pa. C.S. § 1712.1(e) to 150 days after the filing of an administrative claim with the contracting officer where no final determination is issued. 62 Pa. C.S. § 1712.1(e); Ex. G; Conclusions of Law (hereinafter “C.O.L.”) 7, 10.

12. DGS does not interpret the language of Section 17.7 of the General Conditions as an agreement by the parties to extend the time for the filing of a claim with the Board provided at 62 Pa. C.S. § 1712.1(e). It asserts that Section 17.7, despite grammatical error, still means that a claim must be filed with the Board within 135 days of the filing of an administrative claim where no final determination is rendered by the Deputy Secretary. 62 Pa. C.S. § 1712.1(e); Ex. G; C.O.L. 7, 10.

13. A contract will be found ambiguous if, and only if, it is reasonably or fairly susceptible to different construction and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. Dept. of Transportation v. Brozzetti, 684 A.2d 658, 663 (Pa. Cmwlth. 1996).

14. A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends; and **a contract is not rendered ambiguous by the mere fact that the parties do not agree upon the proper construction** (emphasis in original). Id.

15. A written instrument is ambiguous if it is reasonably or fairly susceptible of more than one construction. When a contract is ambiguous, the rule of contra proferentem requires the language to be construed against the drafter and in favor of the other party if the latter’s interpretation is reasonable. State Pub. Sch. Bldg. Auth. v. Noble C. Quandel Co., 585 A.2d 1136, 1144 (Pa. Cmwlth. 1991); See also, Dep’t of Transp. v. Semanderes, 531 A.2d 815, 818 (Pa. Cmwlth. 1987).

16. The question of whether an ambiguity exists is to be determined by the court as a question of law. State Highway and Bridge Authority v. E.J. Albrecht Co., 430 A.2d 328, 330 (Pa. Cmwlth. 1981).

17. Because we have found that Section 17.7 of the General Conditions sets forth the contract procedure for filing a claim with the Board, and explicitly references the process as the one “described in general in § 1712.1” of the Procurement Code; and because Section 1712.1 prescribes that a statement of claim be filed with the Board within 135 days of the submission of an administrative claim when no final determination has been issued, we conclude that the language of Section 17.7 requiring the filing of a claim “Within fifteen (15) days of: . . . Within 135 days of the date the Contractor files a claim with the Deputy Secretary if no final determination has been rendered and no extension has been agreed to, whichever occurs first,” while grammatically incorrect, cannot reasonably be read, and is not fairly susceptible of being interpreted as, an agreement by DGS to extend the statutory time frame to file a claim at the Board beyond 135 days from the filing of the administrative claim. 62 Pa. C.S. § 1712.1; Brozzetti at 663; Quandel at 1144; Albrecht at 330; Ex. G; C.O.L. 6-16.

18. Section 17.7(A) of the Contract General Conditions is not reasonably or fairly susceptible of a construction that would extend the time period for the filing of a statement of claim with the Board. 62 Pa. C.S. § 1712.1(e); Ex. G; C.O.L. 16-17.

19. Because we have found that Section 17.7 requiring the filing of a claim “Within fifteen (15) days of: . . . Within 135 days of the date the Contractor files a claim with the Deputy Secretary if no final determination has been rendered and no extension has been agreed to, whichever occurs first,” while grammatically incorrect, cannot reasonably be read, and is not fairly susceptible of being interpreted as, an agreement by DGS to extend the statutory time framed to file a claim at the Board beyond 135 days from the filing of the administrative claim, we conclude that this Contract provision is not ambiguous and will not apply the rule of contra proferentum to read same as an agreement to extend the statutory time frame of 135 days. 62 Pa. C.S. § 1712.1; Brozetti at 663; Quandel at 1144; Albrecht at 330; Ex. G; C.O.L. 7-18.

20. Section 17.7 of the Contract General Conditions adopts the provisions of Section 1712.1 of the Procurement Code, 62 Pa. C.S. § 1712.1, and does not constitute an agreement between DGS and MBR to extend the time period for the filing of a statement of claim with the Board. 62 Pa. C.S. § 1712.1(e); Ex. G; C.O.L. 7-19.

21. Section 17.7(A) of the Contract General Conditions does not extend the time period for the filing of a statement of claim with the Board. Ex. G; C.O.L. 17-20.

22. Because Section 1724 of the Procurement Code grants the Board exclusive jurisdiction over certain contracts with Commonwealth agencies that have been filed in accordance with Section 1712.1 but provides that the Board shall have no power and exercise no jurisdiction over such a claim unless it is filed with the Board in accordance with section 1712.1; and because Section 1712.1 of the Procurement Code requires that a statement of claim be filed with the Board within 135 days of the submission of an administrative claim “if no extension is agreed by the parties”; and because we have found that there has been no agreement by the parties to extend the statutory time frame to file a claim at the Board beyond 135 days from the filing of the administrative claim; and because MBR’s statement of claim (Complaint) was filed 150 days after the date of its administrative claim, we conclude that the Board does not have jurisdiction over MBR’s claim. Ex. G; C.O.L. 6-21.

OPINION

On March 16, 2018, Plaintiff MBR Construction Services, Inc. (“MBR”) filed a statement of claim with the Board (“Complaint”) against Defendant Department of General Services (“DGS”) alleging that DGS breached its Contract with MBR for the performance of certain electrical work on a project known as Construction of Academic Classroom and Office Building at West Chester University in West Chester, Chester County, PA (“Project”), by failing to compensate MBR for extra work required due to suspension of work and changes in the work ordered by DGS as well as project delays outside of MBR’s control. On April 16, 2018, DGS filed preliminary objections and brief asserting that the Board lacks jurisdiction over MBR’s Complaint because MBR failed to file the Complaint within the time set at Section 1712.1 of the Procurement Code, at 62 Pa.C.S. § 1712.1. MBR filed response to the preliminary objections and brief on June 20, 2018. On July 13, 2018, the Board issued an order scheduling an evidentiary hearing to determine all factual issues pertinent to the Board’s jurisdiction over the claim, which hearing was held October 25, 2018. MBR filed proposed findings of fact, conclusions of law, and brief on November 5, 2018. DGS submitted its proposed findings of fact, conclusions of law, and brief on November 21, 2018.

Factual and Procedural Background

The above-captioned case is based on a contract entered into by DGS and MBR on or about July 25, 2014, under which MBR was to perform certain electrical work on the West Chester Project. MBR commenced its work on the Project on or about September 2, 2015. On or about February 17, 2017, MBR submitted to DGS a request for a field dispute review of its request for compensation for additional costs it incurred due to the termination of the general contractor and the subsequent issuance of a 140-day time extension on the Project. A field dispute review meeting was held on

February 27, 2017, and DGS issued its formal response to MBR's request for a field dispute review on April 20, 2017. On October 17, 2017, MBR submitted a Request for a Claims Settlement Conference to DGS Deputy Secretary for Public Works, Elizabeth O'Reilly. The parties stipulate that MBR's October 17, 2017 letter constituted MBR's administrative claim as provided at Section 1712.1(b) and (c) of the Procurement Code, 62 Pa.C.S. § 1712.1(b) and (c). No further communication ensued between DGS and MBR subsequent to the October 17, 2017 administrative claim letter, nor did DGS issue a final determination on MBR's October 17, 2017 administrative claim. MBR then filed its Complaint with the Board on March 16, 2018, 150 days after the submission of its administrative claim on October 17, 2017. DGS filed preliminary objections to MBR's Complaint on April 16, 2018.

Legal Standard

Under Pennsylvania Rule of Civil Procedure 1028(a)(1), a preliminary objection may be filed on the grounds of "lack of jurisdiction over the subject matter of the action or the person of the defendant" Pa. R.C.P. 1028(a)(1). When this occurs, the defendant has the initial burden of supporting its objection to the court's jurisdiction with facts and legal argument. See Schmitt v. Seaspray-Sharkline, Inc., 531 A.2d 801, 803 (Pa. Super. 1987). Once the jurisdictional issue is properly raised, as it has been here, the burden of proving jurisdiction is upon the party asserting it (i.e. the plaintiff). Deyarmin v. CONRAIL, 931 A.2d 1 (Pa. Super. 2007). When a preliminary objection raises the jurisdictional issue, the trial court's function is to determine whether the law will bar recovery due to a lack of jurisdiction. Arbor Resources, LLC v. Nockamixon Twp., 973 A.2d 1036, 1042 (Pa. Cmwlth. 2009). Challenges to Board jurisdiction may be addressed during the preliminary objection phase by application of the law and by taking evidence to resolve any material

issues of fact relevant to the challenge. Pa. R.C.P. 1028(b)(2); Ferguson Elec. Co. v. Dep't of Gen. Servs., 3 A. 3d 681, 688 (Pa. Cmwlth. 2010).

Summary of the Parties' Arguments

In its preliminary objection, DGS asserts that the Board lacks jurisdiction over MBR's Complaint because MBR failed to file the Complaint within the time set forth at Section 1712.1 of the Procurement Code, 62 Pa.C.S. § 1712.1. Specifically, DGS argues that since it did not issue a final determination with respect to MBR's October 17, 2017 administrative claim, the claim was deemed denied after 120 days, as of February 14, 2018, in accordance with Section 1712.1(d) of the Procurement Code, 62 Pa.C.S. §1712.1(d). Thus, in accordance with Section 1712.1(e), DGS argues, MBR was required to file its statement of claim (Complaint) with the Board within 135 days of the filing of the administrative claim, which was March 1, 2018. Because MBR's Complaint was not filed with the Board until March 16, 2018, DGS argues, the Board lacks jurisdiction.

In its response to DGS's preliminary objections, MBR argues that DGS agreed to extend the 135 day time period for the filing of a Complaint with the Board by 15 days, to 150 days where, as in the instant case, there was no final determination by the agency denying the contractor's administrative claim. MBR maintains that DGS did so "unambiguously" by the language in Section 17.7(A) of the General Conditions. However, MBR also argues, in the alternative, that if the language of Section 17.7(A) of the General Conditions is found by the Board to be ambiguous, the ambiguity must be construed against the drafter (DGS) and in favor of MBR, and should thus be read to constitute an agreement to extend the filing time to 150 days.¹

¹ MBR's Proposed Findings of Fact, Conclusions of Law, and Brief at p. 9.

DGS responds first that the language of Section 17.7(A) of the General Conditions, when read in conjunction with the preceding paragraph, is not ambiguous. To the extent that the Board finds that an ambiguity exists, DGS argues, MBR was required to seek clarification of the ambiguity before entering into the contract, citing Department of Transportation v. IA Construction Corporation, Inc., 488 A.2d 1327, 1330 (Pa. Cmwlth. 1990).² Because no evidence was presented at the hearing that MBR sought clarification of Section 17.7(A) of the General Conditions, DGS argues, that provision should not be interpreted against DGS.³ DGS also argues that any agreement to extend the statutory time limit at Section 1712.1(e) would have had to have been made after the filing of MBR's administrative complaint (October 17, 2017) and before the expiration of 120 days at which point the claim was deemed to have been denied.⁴

Discussion

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

² DGS's Post-Hearing Brief at p. 5.

³ Id. DGS also argues in its Post-Hearing Brief that MBR has not established that DGS's conduct constitutes constructive fraud as described in Dep't of Gen. Servs. V. Pittsburgh Bldg. Co., 920 A.2d 973, 9840985 (Pa. Cmwlth. 2007) and Acchione & Canuso, Inc. v. Commonwealth, Dep't of Transp., 461 A.2d 765, 768 (Pa. 1983). Id. at p. 6. Because MBR has not raised the issue of constructive fraud in any of its pleadings and briefs, the Board does not address this issue.

⁴ Id. at p. 4.

procedure for resolving disputes between a contractor and a Commonwealth agency, but also the prerequisites for the assertion of the Board's jurisdiction over said disputes. Id. It states:

§ 1712.1. Contract controversies

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

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

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

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

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

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

62 Pa.C.S. § 1712.1(a)-(f).

Section 1712.1(b) requires, as a prerequisite to filing a claim with the Board, that a contractor initially file an administrative claim with the agency's contracting officer "within six months of the date the claim accrues." Id. Section 1712.1(d) provides that the agency's contracting officer is to review the administrative claim and issue a written determination within 120 days. If the claim is denied by the agency, the claimant then has fifteen days to file a complaint with the Board. 62 Pa.C.S.

§ 1712.1(d) and (e). If the contracting officer takes no action, the claim is deemed denied after 120 days and the claimant has 135 days from the date of the filing of the administrative claim to file with the Board of Claims. Id. Compliance by the contractor/claimant with each step is necessary in order for the Board to assert jurisdiction over the claim. 62 Pa.C.S. § 1724(a)(1) and (c). Buchart Horn, Inc. v. Department of Transportation, 1 A.3d 960, 965 (Pa. Cmwlth. 2010)

In the instant case, DGS does not assert that MBR failed to submit its administrative claim within six months of its accrual in accordance with Section 1712.1(b). As noted, the parties stipulate that MBR's October 17, 2017 letter constituted MBR's administrative claim as provided at Section 1712.1(b) and (c) of the Procurement Code. The sole issue presented is whether MBR's Complaint to the Board was filed in accordance with the time limit set forth at Section 1712.1(e).

As set forth above, Section 1712.1(e) provides that a contractor may file a Complaint to the Board within 15 days of the mailing by an agency of a final determination denying an administrative claim, or within 135 days of the filing of the administrative claim if no final determination is issued, "if no extension is agreed to by the parties . . . (emphasis added)." However, MBR argues that the parties did agree to extend, by 15 days, the 135 day time limit for filing a Complaint with the Board pursuant to the language found in Section 17.7(A) of the Contract General Conditions. Section 17.7 of the General Conditions reads as follows:

17.7. STEP 3: FILING A CLAIM AT THE BOARD OF CLAIMS. The third step in the dispute resolution process is filing a Statement of Claim with the Board of Claims, which is a more formal step in the process and is described in general in §1712.1 and §1721 *et seq.* of the Commonwealth Procurement Code.

A. TIME TO FILE A STATEMENT OF CLAIM. **Within fifteen (15) days of:**

1. The mailing date of the Deputy Secretary's final determination denying a claim; or

2. **Within 135 days of the date the Contractor files a claim with the Deputy Secretary if no final determination has been rendered and no extension has been agreed to**, whichever occurs first, the Contractor may proceed to the third stage of the dispute resolution process by filing a claim with the Board of Claims in Harrisburg (emphasis added).

Ex. G.

At the evidentiary hearing, MBR's president, Brendon Field, testified that he "was handling" the dispute on behalf of MBR through the submission of the October 17, 2017 administrative claim letter. He also testified that he understood the language of Section 17.7(A) of the General Conditions to mean that, if DGS did not issue a final determination, he had 150 days from October 17, 2017 to file a Complaint with the Board.⁵ (N.T. 22)

Both Mr. Field and DGS's Deputy Secretary O'Reilly testified that no communications took place between DGS and MBR subsequent to October 17, 2017, and Ms. O'Reilly never issued a final determination with respect to MBR's administrative claim. Ms. O'Reilly testified further that DGS never agreed to extend the time periods set forth at 62 Pa.C.S. § 1712.1. With the exception of the disputed meaning of Section 17.7, MBR offered no evidence of any other agreement to extend the 135 day time frame set forth in Section 1712.1(e).

Mr. Field testified further that, in approximately November 2017, he contacted Attorney Shawn Farrell of the law firm Cohen Seglias to advise him of the pending dispute with DGS and

⁵ Mr. Field testified as follows:

Q. And what was your understanding, relative to the filing of the statement of claim following your submission of what we have been referred to as step two of the process?

A. I'm referring back to the - in reading the Article 17, let me see if I can find it. When I read this regarding the step three filing of the claim where it states in section A, the time to file the claim. When I read this and kind of mentally marked the timeframe, I read this as the timing was within 15 days of either A or B and the way that I read this was that it was either within 15 days of A, receiving a determination from the step two or within 15 days of step B, and which states within 135 days of submission of the step two request.

So in my mind, I looked at that and - and I guess, made the assumption that the - the claim filing needed to be made within 150 days. (N.T. 26-27).

request that Cohen Seglias file a statement of claim with the Board if the matter was not resolved. (N.T. 28-32, 37-38). Mr. Field stated that, at that time, he provided Cohen Seglias with “background documents” related to the dispute with DGS, including a copy of the October 17, 2017 administrative claim letter that Mr. Field had drafted and sent to DGS. (N.T. 22, 30, 37-37). Prior to the dispute with DGS over the West Chester Project, MBR had pursued disputes with Commonwealth agencies on other projects but none had progressed to the stage of filing a statement of claim with the Board, and none had required MBR to retain legal representation.

Mr. Field testified that he was not familiar with Section 1712.1 of the Procurement Code, referenced in Section 17.7 of the General Conditions. However, it was one or more of the attorneys at the law firm of Cohen Seglias, not Mr. Field, that made the determination of when to file the Statement of Claim (Complaint) with the Board. In fact, it was Attorney Farrell of Cohen Seglias who filed the Statement of Claim (Complaint) with the Board on MBR’s behalf on March 16, 2018. (N.T. 28; Ex. F). MBR offered no evidence that Attorney Farrell relied on the language in Paragraph 17.7 of the Contract General Conditions to determine when a statement of claim needed to be filed with the Board.⁶

The issue presented in the preliminary objections before us is whether or not DGS agreed, in Section 17.7(A) of the General Conditions, to extend the 135 day time period for the filing of a statement of claim with the Board. Ms. O’Reilly testified at hearing that DGS did not intend to extend the 135 day time period for the filing of a Complaint with the Board, and that its understanding of the language of Section 17.7 was that if no final determination is issued, a Complaint to the Board must

⁶ Neither Mr. Farrell or anyone from Cohen Seglias offered testimony on this filing issue.

be filed within 135 days of the date of the administrative claim as stated at Section 1712.1(e) of the Procurement Code.⁷

Looking to the language of Section 17.7(A) of the General Conditions, we acknowledge at the outset that the language cited by MBR (“Within fifteen (15) days of: . . . Within 135 days . . .”) is grammatically incorrect and clumsy at best. However, we cannot agree with MBR that the language in Section 17.7 clearly extends the 135 day time frame to 150 days or that this language is ambiguous. That is to say, for the reasons stated below, we do not believe the language of Section 17.7, albeit clumsy and grammatically incorrect, can reasonably be read to provide an agreement by DGS to extend the time frame for filing a claim with the Board beyond the 135 days specified in Section 1712.1(e). More specifically, we agree with DGS that, read in conjunction with the entirety of Article 17, it does not.

Article 17 of the General Conditions sets forth a three-step resolution process to be followed by the parties in the event of a dispute regarding the Project: the Field Dispute Resolution Meeting (Step 1; Section 17.5); the Claim Settlement Conference (Step 2; Section 17.6); and Filing a Claim at the Board of Claims (Step 3; Section 17.7). Both Section 17.6 and 17.7 of the General Conditions begin by specifically referencing Section 1712.1 of the Procurement Code. Section 17.7, at issue here, begins with the following language:

STEP 3: FILING A CLAIM AT THE BOARD OF CLAIMS. The third step in the dispute resolution process is filing a Statement of Claim with the Board of Claims, **which** is a more formal step in the process and **is described in general in §1712.1 and §1721 et seq. of the Commonwealth Procurement Code** (emphasis provided).

(Ex. G.).

⁷ N.T. 51-52.

Thus, Section 17.7 of the General Conditions explicitly states that it sets forth that a procedure for filing a claim with the Board that is **the same as that described in Section 1712.1(e) of the Procurement Code**.

While Mr. Field, who had not previously pursued a dispute with a Commonwealth agency to the Board, and was unfamiliar with Section 1712.1 of the Procurement Code, may have believed that Section 17.7(A) of the General Conditions gave MBR 150 days from October 17, 2017 in which to file its claim with the Board, the testimony clearly established that he retained legal counsel to handle such a claim. He did this, he testified, in approximately November 2017, well before the expiration of 135 days (or even 120 days) from the October 17, 2017 filing of the administrative claim. Moreover, it was Cohen Seglias, not Mr. Field, who interpreted this provision, and we have no testimony whatever that Cohen Seglias interpreted Section 17.7 in the same way as Mr. Field.

A contract will be found ambiguous if, and only if, it is reasonably or fairly susceptible to different construction and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. Com., Dept. of Transportation v. Brozzetti, 684 A.2d 658, 663 (Pa. Cmwlth. 1996). A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends; and **a contract is not rendered ambiguous by the mere fact that the parties do not agree upon the proper construction** (emphasis in original). Id.

Given the context of the provision at issue, as presented to the Board, we are not persuaded that Section 17.7 of the General Conditions, which makes specific reference to Section 1712.1 of the Procurement Code, could reasonably or fairly have been read to extend the time period for filing a statement of claim with the Board beyond that set forth at Section 1712.1(e). That is to say, although

we acknowledge that the language of Section 17.7 leaves something to be desired in terms of clarity due to the grammatical error in its presentation, we do not find that the language of Section 17.7 of the General Conditions, is “reasonably or fairly susceptible” to be read as extending the time to file a Board claim from the 135 day time limit to 150 days, especially by MBR’s legal counsel who actually filed the Complaint at the Board. Accordingly, we do not find the language of Section 17.7 to extend the time frame for filing a claim with the Board from 135 days to 150 days, or to be ambiguous.⁸

Finding that the language of Section 17.7 of the General Conditions could not reasonably be read as extending the time for the filing of a statement of claim with the Board and does not provide that a statement of claim may be filed with the Board beyond 135 days from the filing of the administrative claim, we find that no extension of the time period for the filing of a claim with the Board under Section 1712.1(e) of the Procurement Code was agreed to by the parties.⁹ Because no time extension was granted, and because the statement of claim (Complaint) in this matter was filed with the Board 150 days after the submission of MBR’s administrative claim to DGS on October 17, 2017, we find that MBR’s Complaint, filed with the Board on March 16, 2018, was not filed in accordance with 62 Pa.C.S. § 1712.1. Accordingly, the Board lacks jurisdiction to hear the matter pursuant to 62 Pa.C.S. §§ 1724(a)(1) and (c).

⁸ The Board makes this finding notwithstanding Ms. O’Reilly’s acknowledgement that the language at issue (“Within 15 days of: . . . Within 135 days . . .”) “is not as clear as [she] would like it to be” and in fact it has been changed in subsequent contracts. (N.T. 56).

⁹ We are not persuaded by DGS’s argument, made without citation to authority, that any agreement to extend the statutory time limit at Section 1712.1(e) would have had to have been made after the filing of MBR’s administrative complaint, since no such limitation for extending the statutory time limit appears at Section 1712.1(e). However, it does seem even less reasonable that DGS would unilaterally offer a blanket time extension of the 135 day statutory time limit at the very beginning of the project without any apparent reason, such as the initiation or progression of settlement discussions after a claim has been filed.

ORDER

AND NOW, this 20th day of December, 2018, upon consideration of DGS's Preliminary Objections and Brief, Plaintiff MBR's Response and Brief in Opposition, the evidentiary hearing held on October 23, 2018, and Proposed Findings of Fact, Conclusions of Law and Briefs filed by the parties, it is hereby **ORDERED** and **DECREED** that the Preliminary Objections are **SUSTAINED**, and MBR's Statement of Claim (Complaint) filed March 16, 2018, 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