

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

K-B Offset Printing, Inc.,	:	
Petitioner	:	
	:	No. 2137 C.D. 2011
v.	:	Submitted: March 9, 2012
	:	
Department of General Services,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: April 18, 2012

K-B Offset Printing, Inc. (K-B) appeals an order of the Board of Claims (Board) that sustained the preliminary objection to its jurisdiction filed by the Department of General Services (Department) and dismissed K-B's claim. Specifically, K-B asks whether the Board erred in determining K-B failed to exhaust its administrative remedies under the Procurement Code¹ before filing a claim before it, and in subsequently concluding it lacked jurisdiction on that basis. Upon review, we affirm.

This case arises out of a five-year contract between K-B and the Department for various printing services provided by K-B. Reproduced Record (R.R.) at 3a. Under the contract, the Department was required to recalculate and adjust its payment price every six months. *Id.* At the expiration of the contract, in

¹ 62 Pa. C.S. §§101-4509.

May 2011, K-B conducted an audit, and it discovered the Department did not periodically adjust its payment price. R.R. at 18a. Thereafter, in June 2011, K-B's president wrote the Department a letter asserting entitlement to over \$1 million as a result of its underpayment from failure to adjust its pricing. R.R. at 15a, 18a-19a.

The Department responded by letter in July 2011. R.R. at 12a. The Department informed K-B that while it recognized it did not make price adjustments in accordance with the terms of their contract, it would not redress the oversight. According to its letter, the Department based its decision on its belief that K-B's potential claims were barred by the six-month statute of limitations imposed by the Procurement Code.

Thereafter, in July 2011, K-B filed a claim with the Board averring breach of contract, and alternatively, unjust enrichment and promissory estoppel. In response, the Department filed preliminary objections asserting the Board lacked jurisdiction because K-B did not exhaust its administrative remedies. In particular, the Department argued K-B prematurely filed its claim before the Board because it did not first file a claim with the Department's contracting officer after its claim accrued. Furthermore, the Department objected in the nature of demurrer.

In September 2011, an administrative law judge (ALJ) ordered a status conference to address the jurisdictional question raised by the Department. As a result of the status conference, the parties entered into a stipulation acknowledging the contract in dispute, and K-B's June 2011 demand letter to the Department. R.R. at 15a. The ALJ sustained the Department's jurisdictional

objection, did not reach the preliminary objection in the nature of demurrer, and dismissed K-B's action.² K-B petitions for review.

On appeal,³ K-B contends the Board erred in sustaining the Department's jurisdictional objection because it exhausted its administrative remedies before filing its action with the Board. Specifically, K-B argues its June 2011 letter was sufficient to constitute a claim to the contracting officer so as to allow it to proceed before the Board. In essence, K-B argues it could, and did, file a claim with the contracting officer prior to the claim accruing because a known controversy existed at that time.

Section 1712.1 of the Procurement Code governs pre-litigation procedure relating to contract disputes between a contractor and the Commonwealth. 62 Pa. C.S. §1721.1. In pertinent part, Section 1712.1 states:

(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 claim. --A claim shall be filed with the contracting officer within six months of the date it

² According to K-B, upon the advice of the ALJ, K-B filed a claim with the Department's contracting officer following the ALJ's decision. That claim is now proceeding simultaneously with this appeal. Pet'r Br. 16.

³ Our review of a Board decision is limited to determining whether the Board committed an error of law, whether the necessary findings were supported by substantial evidence, or whether constitutional rights were violated. Wayne Knorr, Inc. v. Dep't of Transp., 973 A.2d 1061 (Pa. Cmwlth. 2009). Our standard of review of an order sustaining preliminary objections based on an issue of law is de novo, and our scope of review is plenary. Buchart Horn, Inc. v. Dep't of Transp., 1 A.3d 960 (Pa. Cmwlth. 2010)

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 a claim and issue a final determination in writing ... 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 ... the contractor may file a statement of claim with the board.

62 Pa. C.S. §1712.1 (emphasis added).

In Darian Capital Management, Incorporated v. Public School Employees' Retirement System, 549 Pa. 1, 700 A.2d 395 (1997), our Supreme Court adopted the two-prong standard previously developed by this Court to determine when a claim accrues:

[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.

Id. at 7, 700 A.2d at 397 (emphasis in original). Both prongs must be satisfied for a claim to be considered to have accrued, and only then will the limitation period

commence. Ferguson Elec. Co., Inc. v. Dep't of Gen. Servs., 3 A.3d 681 (Pa. Cmwlth. 2010).

This Court addressed a question similar to the one raised here in Buchart Horn, Incorporated v. Department of Transportation, 1 A.3d 960 (Pa. Cmwlth. 2010), when we considered whether a petitioner could overcome a technical defect in its filing before the Board by fulfilling the spirit of the prescribed administrative remedy. There, the petitioner paid the Department of Transportation (DOT) under protest. Later, after exchanging correspondence with DOT, the petitioner filed a claim for reimbursement with the Board. DOT filed preliminary objections challenging Board jurisdiction since the petitioner did not first exhaust its administrative remedies. The petitioner argued the filing of a claim with DOT “would have been pointless” in light of DOT’s insistence that it was not entitled to reimbursement. Id. at 963. The Board determined it lacked jurisdiction, and the petitioner’s failure to strictly adhere to the administrative remedies scheme was fatal to its claim. We agreed, and affirmed.

Here, K-B’s claim accrued when it received the Department’s July 2011 letter, which informed K-B the Department would not make any payments. At that time, and for the first time, K-B was capable of ascertaining the amount in controversy and of preparing a concise and detailed statement detailing the injury. See Darian. Thus, upon receipt of the July 2011 letter, K-B’s claim accrued, and it had six months to file a claim with the Department’s contracting officer. However, K-B did not file a claim with the Department; rather, it proceeded directly to the Board. As K-B did not exhaust its administrative remedies before filing a claim with the Board, the Board lacked jurisdiction. Buchart Horn.

Furthermore, we reject K-B's contention that its June 2011 letter, which triggered the Department's affirmative notice of its denial of payment, was also sufficient to constitute a claim to the contracting officer. See Buchart Horn. Although filing a claim with a contracting officer after learning such claim will likely be rejected may appear "pointless," it is nonetheless required to perfect a claim before the Board. See Clairton Slag, Inc. v. Dep't of Gen. Servs., 2 A.3d 765 (Pa. Cmwlth. 2010) (administrative remedies are assumed to be adequate and not futile). Therefore, K-B's argument is without merit.

Accordingly, we affirm.

ROBERT SIMPSON, Judge

