BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of ARUNDEL ENGINEERING CORPORATION	)	
	)	
	)	**Docket Nos. MSBCA 1929,**
Under Mass Transit Administration Contract No. MTA-90-44-11	)	**1940 & 1957**
	)	

APPEARANCE FOR APPELLANT:	**Henry Eigles, Esq.** **Columbia, MD**
APPEARANCE FOR RESPONDENT:	**Jay N. Bernstein** **Assistant Attorney General** **Baltimore, MD**

MEMORANDUM OPINION BY CHAIRMAN HARRISON ON RESPONDENT'S MOTION TO PARTIALLY DISMISS MSBCA 1929 AND FULLY DISMISS MSBCA 1940

Respondent, Mass Transit Administration, (MTA) moves to dismiss a portion of MSBCA 1929 and all of MSBCA 1940 in the above consolidated appeals arising out of a contract for construction as defined in COMAR 21.01.02.01(23) and involving the rehabilitation of the Rogers Avenue Metro Station in Baltimore City. For the reasons that follow we shall grant the motion in part and deny the motion in part.

Preliminarily we observe that since its inception fifteen years ago the Board has recognized, considered and granted motions for summary disposition[1], although not specifically provided for under the Administrative Procedure Act, because of its belief that to do so is consistent with legislative direction to provide for the "informal, expeditious, and inexpensive resolution of appeals . . . ." Section 15-210, Division II, State Finance and Procurement Article; See, e.g., Intercounty

[1] The word disposition is used rather than judgment because the Board is not a court and has no equitable powers or equitable jurisdiction.

Construction Corporation, MDOT 1036, 1 MSBCA ¶11 (1982); Dasi Industries, Inc., MSBCA 1112, 1 MSBCA ¶49 (1983).

In all instances the legal standards the Board will apply to determine the appropriateness of summary disposition remain the same. The party moving for summary disposition is required to demonstrate the absence of a genuine issue of material fact. See Mercantile Club, Inc. v. Scheer, 102 Md. App. 757 (1995). In making its determination of the appropriate ruling on the motion, the Board must examine the record as a whole, with all conflicting evidence and all legitimate inferences raised by the evidence resolved in favor of the party (in this instance the Appellant) against whom the motion is directed. See Honaker v. W.C. & A.N. Miller Dev. Co., 285 Md. 216 (1979); Delia v. Berkey, 41 Md. App. 47 (1978), Affd. 287 Md. 302 (1980).

The purpose of summary disposition is not to resolve factual disputes nor to determine credibility, but to decide whether there is a dispute over material facts which must be resolved by the Board as trier of fact. Coffey v. Derby Steel Co., 291 Md. 241 (1981); Russo v. Ascher, 76 Md. App. 465 (1988); King v. Bankerd, 303 Md. 98, 111 (1985). Therefore, summary disposition is not appropriate if a general issue of material fact is in dispute. Furthermore, for purposes of a motion for summary disposition, even where the underlying facts are undisputed, if they are susceptible of more than one permissible factual inference, the choice between those inferences should not be made, and summary disposition should not be granted. See Heat & Power Corp. v. Air Products, 320 Md. 584, 591 (1990); King v. Bankerd, supra, 303 Md. at 111.

A. MSBCA 1929

Appellant's Complaint in MSBCA No. 1929 consists of two counts. In Count I, Appellant argues that the final decision

issued by the Procurement Officer on October 25, 1995 should be reversed or vacated because it responded to a claim that Appellant had not submitted. According to Appellant the Procurement Officer was asked to rule on MTA's failure as a matter of contract administration to set forth in writing its position regarding the engineering fees asserted to be due to S.Z. Schwartz & Associates, Inc. for services allegedly rendered to Appellant that at least in part, benefitted the Contract performance. Appellant complains that instead, the Procurement Officer addressed the recoverability of those fees.

The Procurement Officer's final decision of October 25, 1995 responded to an October 18, 1995 letter submitted to MTA by S.Z. Schwartz & Associates, Inc. on behalf of Appellant which was stated to be on the following:

> *SUBJECT: Request for Final Decision of the Procurement Officer.*
> *MTA's verbal denial of the allowability of this firm's fees for professional Engineering services rendered in connection with the subject contract, coupled with MTA's refusal to reduce any of its positions to writing.*

The above reference from the S.Z. Schwartz & Associates, Inc. letter of October 18, 1995 thus identifies two topics for consideration by the Procurement Officer. 1) MTA's verbal denial of Appellant's claim for engineering services; and 2) MTA's alleged refusal to set forth that denial in writing.

The same two topics are identified on page 10 of the October 18, 1995 letter, which requests that a final decision be rendered "on each of the following aspects." These "aspects" were MTA's verbal refusal to accept responsibility for Appellant's engineering costs, and to process for payment Appellant

change proposals which included said costs (items a and b); and, the refusal of MTA to set forth its position on these matters in writing (items c and d).

In response to the S.Z. Schwartz & Associates, Inc. letter of October 18, 1995, the Procurement Officer issued a final decision dated October 25, 1995 which is the subject of this appeal. As requested by Appellant, the final decision addressed MTA's verbal refusal (denial) to acknowledge responsibility for Appellant's engineering fees. The Procurement Officer found that the engineering fees which Appellant sought to recover were claims for consultant costs which the Procurement Officer found as a matter of law were not recoverable. Since this Procurement Officer's October 25, 1995 decision responded to a matter which the contractor presented to the Procurement Officer for resolution, the Board has jurisdiction to hear the matter on appeal, and to adjudicate whether or not the engineering costs incurred by Appellant are recoverable as part of an equitable adjustment.[2]

Although the October 25, 1995 final decision addressed Appellant's request for a final decision on MTA's refusal to pay engineering costs, the Procurement Officer did not address the request for a final decision on MTA's alleged failure during contract administration to express its position on this issue in

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[2] Respondent agrees the Board has jurisdiction to hear this matter of Appellant's entitlement to engineering fees. Appellant, however, argues that the October 18, 1995 letter is not a claim for the engineering fees themselves and thus the Board lacks juris-diction to hear any claim for engineering fees. The Board finds that its jurisdiction has been properly invoked concerning Appellant's claim for engineering fees as clearly set forth in the S.Z. Schwartz & Associates, Inc. letter of October 18, 1995. This October 18, 1995 letter speaks for itself and is incorporated herein by reference.

writing. MTA thus argues that this Board lacks jurisdiction to consider the failure to express a position in writing issue since there is no final agency decision thereon. MTA argues that pursuant to COMAR 21.10.04.04E(1), the Procurement Officer had 180 days to respond to this request, or until April, 1996. Thus, according to MTA, the Procurement Officer's failure to reach a decision by April, 1996 is deemed a denial which, pursuant to COMAR 21.10.04.04E(2), may be appealed by Appellant but which to date has not been appealed.[3] The notice of appeal filed by S.Z. Schwartz & Associates, Inc. on behalf of Appellant on November 23, 1995 from the Procurement Officer's final decision of October 25, 1995 did not serve that purpose because, at that time, the 180 day period had not yet expired. Until Appellant files a notice of appeal challenging the Procurement Officer's failure to render a decision on MTA's alleged failure to express its position regarding engineering fees in writing, we agree that this Board has no jurisdiction to consider that claim.

Appellant, however, asserts that the 14th Amendment to the U.S. Constitution and the Maryland Constitution require the Board to hear the issue of whether verbal directives are legal and whether the alleged failure to put such in writing is legal

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[3] MTA argues on the merits that no provision of Maryland's General Procurement Law, or of Contract No. MTA-90-44-11 (to include the federal grant agreements incorporated therein), obli-gated MTA to confirm in writing its verbal communications rejecting Appellant's fees. MTA asserts that under the General Provisions of the Contract (GP-4.405, "Differing Site Conditions," GP-4.06, "Changes;" GP-5.14, "Claims;" GP-5.15, "Disputes;" GP-9.01, "Scope of Payment") the obligation of setting forth positions in writing falls upon the contractor, not the owner.

from a deprivation of a property or liberty interest perspective.

The Board agrees that it has jurisdiction to hear and determine a constitutional issue in the exercise of its statutory duty to resolve disputes under §15-211(a), Division II, State Finance and Procurement Article(SF). See, for example, Titan Group, Inc., MSBCA 1135, 1 MSBCA ¶63(1983) at pp 6-8 (Contract Dispute); Rainbow Interior Landscapers, MSBCA 1231, 1 MSBCA ¶102(1985) (Bid Protest).

However, the Board believes that the administrative claims process as set forth in SF §15-219 & §15-220 that is the threshold to exercise of Board jurisdiction satisfies the 14th Amendment and Maryland Constitution relative to providing an effective administrative remedial forum (which is subject to judicial review) to address and redress any alleged liberty or property interest deprivation that may be involved in a State procurement dispute. The Board also believes that this administrative process must be followed. Appellant maintains that it is not required to follow the mandatory claims process set forth in SF §15-219 and COMAR 21.10.04 because the alleged wrong and the nature of the relief sought involves a liberty or property interest under the 14th Amendment and the Maryland Constitution. The Board, as noted, disagrees because it finds (1) the administrative claims process (which is subject to judicial review) to be adequate to protect the liberty and property interest that private and corporate citizens have in State procurement, and (2) it finds such administrative claims process must be invoked as a condition to this Board's exercise of jurisdiction. Thus we reject Appellant's argument calling for Board jurisdiction based on constitutional grounds.

We also decline to accept jurisdiction for a more fundamen-

tal reason. Appellant asks this Board to direct that a State agency put certain matters in writing upon the agency's refusal to do so. The Board lacks jurisdiction to grant such relief. The Board has jurisdiction only to resolve disputes. It lacks jurisdiction to direct an agency in matters of contract administration.

Lacking jurisdiction to grant such relief we would therefore dismiss on its merits that portion of MSBCA 1929 that requests the Board to require MTA to reduce alleged verbal directives to writ-ing. We shall proceed, however, to adjudicate Appellant's entitlement to engineering costs.

B. MSBCA 1940

By letter dated October 13, 1995, S.Z. Schwartz & Associ-ates, Inc. submitted on behalf of Appellant a request for a final decision of the Procurement Officer on two issues. The first was as follows:

> *MTA's long-term policy and practice of failing and refusing to confirm its numerous verbal change directives in writing, despite the Contractor's express request that it do so, and despite MTA's previous express commitment to comply.*

The letter also asserted as another related issue that MTA's failure to confirm verbal directives in writing "severely damaged"

Appellant, but failed to specify in this letter the nature and/or amount of the damages incurred. However, this letter referred to other letters that allegedly specified the damages incurred or anticipated to be incurred. The Procurement Officer issued a final decision on December 26, 1995. The final decision denied that MTA had the "long-term policy" alleged by Appellant; denied that MTA was legally obligated to confirm its verbal

directives in writing; and denied for lack of substantiation any claim for damages.

Appellant's claim in MSBCA 1940 that MTA failed to confirm verbal directives in writing is closely akin to its claim in MSBCA 1929 that MTA failed to reduce to writing its verbal position regarding engineering fees. For the same reasons that apply to MSBCA 1929, that portion of MSBCA 1940 that requests the Board to direct MTA to reduce alleged verbal directives to writing is dismissed.

We will not dismiss that portion of MSBCA 1940 that may constitute a claim for damages, because resolving all inferences in favor of Appellant we find that the October 13, 1995 letter may constitute a claim for damages resulting from alleged extra work arising out of the alleged oral directives.

Appellant's prayer for relief in its complaint before the Board seeks from MTA payment of at least "$300,000" for "financial and time damages" allegedly resulting from the policy of not reducing verbal field directives to writing. However, we cannot determine from the record whether or not any claim for costs incurred by Appellant due to verbal field directives has ever been submitted by Appellant to the Procurement Officer for final decision, nor whether Appellant has or has not submitted to the Procurement Officer any facts which would form a nexus between the challenged policy and the alleged incurrence of "financial and time damages." Since these actions necessary to Board jurisdiction have not on this record been shown not to have occurred, the Board will not dismiss the appeal.

Accordingly, MSBCA No. 1929 is to be limited to adjudicating Appellant's entitlement to engineering costs. Appellant's claim regarding MTA's failure to set forth its position in writing is dismissed. That portion only of MSBCA 1940 which challenges

MTA's alleged refusal to confirm verbal directives in writing is dismissed. MSBCA 1940 is to be limited to determining Appellant's entitlement to an equitable adjustment for "financial and time damages." So Ordered this day of January, 1997.

Dated:

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was

required by law to be sent to the petitioner; or (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Memorandum Opinion on Respondent's Motion to Partially Dismiss MSBCA 1929 and Fully Dismiss MSBCA 1940 in MSBCA Docket Nos. 1929, 1940 & 1957, appeal of Arundel Engineering Corporation under Contract No. MTA-90-44-11.

Dated:

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Mary F. Priscilla
Recorder