

**STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
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**SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

Docket No. 2509	Date of Decision: 01/23/06
Appeal Type: [] Bid Protest	[X] Contract Claim
Procurement Identification:	Dept. of Juvenile Services Contract No. 99-JJ- 010/V00B9000073
Appellant/Respondent:	Correctional Services Corp. & Youth Services International of Md, Inc. Department of General Services

Decision Summary:

Board of Contract Appeals - Jurisdiction - Absence of Final Decision -
The Board of contract Appeals lacks jurisdiction to hear an appeal on a contract claim where no final agency decision has been issued. The right to appeal on a deemed denied basis is limited by law to construction contracts.

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BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of Correctional)
Services Corp. & Youth Services)
International of Md, Inc.)
) Docket No. MSBCA 2509
Under Dept. of Juvenile Services)
Contract No. 99-JJ-)
010/V00B9000073)

APPEARANCE FOR APPELLANT: Scott A. Livingston, Esq.
 Lydia B. Hoover, Esq.
 Rifkin, Livingston, Levitan
 & Silver, LLC
 Greenbelt, Maryland

APPEARANCE FOR RESPONDENT: Robert T. Fontaine
 Assistant Attorney General
 Baltimore, Maryland

**OPINION BY CHAIRMAN HARRISON ON RESPONDENT'S
MOTION TO DISMISS**

Respondent moves to dismiss the above captioned appeal on grounds that no Procurement Officer's final decision has been issued and thus this Board lacks jurisdiction. Alternatively, Respondent moves for dismissal on grounds that if Appellant's appeal was authorized on a deemed denied basis then the appeal was not timely filed. For the reasons that follow, we shall grant the motion to dismiss.

FINDINGS OF FACT

1. On or about March 25, 1999, Appellant entered into the above captioned Contract with Respondent, the Department of Juvenile Services.

2. The Contract called for certain work, namely operation of the Charles H. Hickey, Jr. School (School). The Contract contained Article 6, which provided, in part:

The Procurement Officer shall render a written decision within 180 days of receipt of the Contractor's written claim, unless the Procurement Officer determines that a longer period is necessary to resolve the claim. If a decision is not issued within 180 days, the Procurement Officer shall notify the Contractor of the time within which a decision shall be rendered and the reasons for such time extension. The decision shall be furnished to the Contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt. The Procurement Officer's decision shall be deemed the final action of the State.

3. In November, 2003, the Respondent issued a draft audit related to Appellant's cost of performance for the period of July 1, 2001 through November 30, 2002 (i.e., Fiscal Year 2002), and on December 19, 2003 the parties met to discuss the draft audit.
4. Appellant set forth its reasons for disagreement with the draft audit by letter dated January 23, 2004. However, by letter dated February 9, 2004, Respondent's Secretary wrote Appellant to inform it of his decision to reduce payments to Appellant in the amounts identified in the draft audit.
5. By letter dated February 12, 2004, Appellant claimed the Secretary's decision not to pay its Fiscal Year 2002 (FY02) invoices in full jeopardized the Appellant's ability to provide services at the

facility, claimed the decision to withhold funds was improper and demanded full payment of its invoices. By letter dated February 18, 2004, Appellant formally notified Respondent of its claim for the amounts withheld from its invoices and requested a final decision by the Procurement Officer within 30 days.

6. On March 31, 2004, the Contract term expired, and the State resumed operation and management of the School.
7. On or about August 14, 2004, 180 days passed after the February 18, 2004 claim was filed. Also, by this time, there was no final decision of the Procurement Officer on the claim.
8. By letter dated December 15, 2004, Appellant requested an issuance of a final decision and advised the Procurement Officer that, if Respondent did not provide the Company with a final decision by December 31, 2004, it would consider the Respondent's inaction to be a rejection of the Appellant's claim and it would pursue the matter before the Maryland State Board of Contract Appeals.
9. By letter dated May 1, 2005, Appellant reiterated its belief that the Procurement Officer was required by the terms of the Contract to decide its claim within 180 days of submittal, and it repeated such belief by letter dated October 14, 2005.
10. Respondent's Procurement Officer responded to Appellant's October 14, 2005 letter, advising it that an audit was being conducted for the period of the Contract from July 1, 2001 to March 31, 2004 and that the time for issuance of a decision on the

claim was being extended, and further advising of the reasons therefor.¹

11. Appellant appealed to this Board from the absence of a decision on its February 18, 2004 claim related to FY02 on November 2, 2005, and on December 7, 2005 Respondent filed the instant Motion to Dismiss. As of the date of hearing on the Motion (January 17, 2006), no decision on Appellant's claim had been issued by Respondent.

DECISION

Section 15-211 of the State Finance and Procurement Article (SFP) of the Annotated Code of Maryland provides in part that "[t]he Appeals Board shall have jurisdiction to hear and decide all issues arising from the final action of a unit ... on a contract claim"

Appellant has appealed the presumed denial of its claim related to FY02 to this Board on a deemed denied basis. The Procurement Officer has allowed more than 180 days to lapse from the filing by Appellant of the FY02 claim. Thus, Appellant argues that its claim related to FY02 should be considered "deemed denied," giving this Board jurisdiction over its appeal therefrom. Respondent asserts in response, citing Maryland State Police v. Warwick Supply & Equipment Co., Inc., 330 Md. 474 (1993), that if the claim is deemed denied, then the Appellant's appeal is untimely because it did not file an appeal within 30 days of the 180th day.

¹ The time for issuance of a decision was subsequently extended by the Procurement Officer by letter dated December 7, 2005 and (as a result of the instant Motion) by letter dated December 23, 2005.

While the General Procurement Law specifically authorizes the concept of a "deemed denial" in a construction contract claim, there is no statutory obligation imposed on a procurement officer to issue the decision within 180 days for a nonconstruction contract, such as the instant Contract. Compare *SFP § 15-219(g)(2)* and *SFP § 15-218*. There is a provision in the instant Contract as set forth above requiring the issuance of a final decision within 180 days of receipt of the Contractor's written claim unless the Procurement Officer determines that a longer time period is necessary to resolve the claim. The Contract provision, however, may not create a right to appeal on a deemed denied basis when the General Procurement Law limits such right to construction contracts. This is not a construction contract. This is a contract involving the provision of services to operate the School. Therefore, the right to appeal to this Board will only arise upon the issuance of a final decision on Appellant's claim which has yet to occur.

This Board was established to hear and decide all appeals arising from the final action of a unit of State government. Appellant argues that the alleged unreasonable failure to issue a decision means this Board should deem the claim denied and ripe for appeal. We decline to do so assuming *arguendo* that the Procurement Officer herein has not reasonably extended the 180 days as permitted by the Contract provision set forth above. Such action is simply not authorized by the General Procurement Law. Herein there is no final action by Respondent on Appellant's claim from which to base an appeal. The Board thus lacks jurisdiction over the appeal.

Accordingly, the Motion is granted, and the appeal is dismissed for lack of jurisdiction.

Wherefore, it is Ordered this day of January, 2006 that the appeal is dismissed for lack of jurisdiction.

Dated:

Robert B. Harrison III
Chairman

Michael W. Burns
Board Member

Michael J. Collins
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 decision on Respondent's Motion to Dismiss in MSBCA 2509, appeal of Correctional Services Corp. & Youth Services International of Md, Inc. under Dept. of Juvenile Services Contract No. 99-JJ-010/V00B9000073.

Dated:

Michael L. Carnahan
Deputy Recorder