

Docket Nos. MSBCA: 1988, 1989, 1990, 1991 & 1992	Date of Decision: 10/7/98
--	---------------------------

Appeal Type: <input type="checkbox"/> Bid Protest	<input checked="" type="checkbox"/> Contract Claim
---	--

Procurement Identification: Under MTA Contract No. 90-44-11

Appellant/Respondent: Arundel Engineering Corporation Mass Transit Administration
--

Decision Summary:

Board of Contract Appeals - Jurisdiction - The Board only has jurisdiction over a claim that is timely filed under and otherwise meets the requirements of COMAR 21.10.04 (Chapter 04 of COMAR 21.10) as that regulation implements the statutory provisions regarding final agency action in contract claims for construction contracts and appeal to the Board as set forth in Sections 15-211, 15-215, and 15-217 and 15-219 of the State Finance and Procurement Article.

Board of contract Appeals - Jurisdiction - The Board only has authority to compel document production pursuant to the exercise of the Board's discovery rules and subpoena power (see the provisions of COMAR 21.10.05 and COMAR 21.10.06) in connection with an appeal over which the Board has jurisdiction. It has no pre-appeal jurisdiction to compel production of documents. Accordingly, the Board lacks jurisdiction over an appeal that seeks adjudication of rights under the Maryland Public Information Act (PIA) regarding requests for documents. Judicial enforcement of the PIA is reserved to the Circuit Courts under §10-623 of the State Government Article.

Issues of Board jurisdiction may often be determined as a matter of law. To the extent factual matter need be considered, 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 record 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). See also 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). 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.

As noted above, where the Board lacks jurisdiction, there is no reason not to dismiss an appeal through preliminary process and for the reasons that follow we shall dismiss the above captioned appeals for lack of jurisdiction resolving as we must all permissible factual inference in Appellant's favor.

By way of background we note that these five captioned appeals are part of seventeen (17) total appeals filed by Appellant.² All seventeen appeals involve in some fashion a claim by Appellant Arundel for at

² MSBCA Docket Nos. 1929, 1940 and 1957 (consolidated) and MSBCA Docket Nos. 1988, 1989, 1990, 1991, 1992, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2093 and 2094.

least "\$300,000" for "financial and time damages" (MSBCA Docket No. 1940, amended upward in Appellant's Second Amended Complaint to \$573,986), a claim on behalf of S.Z. Schwartz and Associates for engineering fees (MSBCA Docket No. 1929) and an affirmative State claim for liquidated damages (MSBCA Docket No. 1957). Additionally, the Appellant in its appeal docketed as MSBCA Docket No. 2093 seeks \$269,763.53 related to "Claim #8." The Board has previously granted Respondent's motion to dismiss that portion of MSBCA Docket No. 1940 and MSBCA Docket No. 1929 that requested that the Board direct MTA to reduce alleged verbal directives to writing. This interlocutory decision dated January 3, 1997 which is incorporated herein by reference³ was appealed by Appellant to the Courts and ultimately remanded back to the Board since the Board's January 3, 1997 interlocutory decision did not constitute a final order as to the appeals and was thus not ripe for judicial review. Arundel Engineering Corporation v. Mass Transit Administration, No. 1408, Md. Ct. of Spec. App.; September Term, 1997 unreported (May 7, 1998) Certior Denial Ct. of Appeals, Pet. Docket No. 205, Sept. Term 1998 (August 28, 1998). MSBCA Docket Nos. 1988, 1990 and 1992.

The appeals docketed by the Board as MSBCA Docket Nos. 1988, 1990 and 1992 involve inter alia a request by Appellant that the Board find that (1) Respondent engaged in improper economic coercion by threatening financial harm to Appellant if it exercised its remedial rights to pursue the claims process, (2) Respondent engaged in malicious interference with the contractual relations between Appellant and its subcontractors and Mr. Schwartz, (3) Respondent engaged in tortious conduct and denied Appellant due process and (4) Respondent failed and

³ The decision also deals with a discovery matter in MSBCA 1957, which is Appellant's appeal of the State's assessment of liquidation damages.

refused to changes to the contract under the changes clause of the Contract, GP-4.05. all as related in its claims in MSBCA Docket Nos. 1929 and 1940 and the State's assessment of liquidated damages in MSBCA Docket No. 1957. The activity complained of in MSBCA Docket No. 1988, i.e. economic coercion, malicious interference and tortious conduct occurred in 1994 and 1995. The State asserts that the notice of claims to the Procurement Officer contained in Mr. Schwartz's letter of October 18, 1995 involve claims that were known or should have been known by Appellant 30 days prior to the filing of Mr. Schwartz's October 18, 1995 letter with the Procurement Officer and thus the claims must be dismissed as untimely. In response Appellant argues that GP5-14 of the contract which provides for filing of notice of claims for damages with the Procurement Office within a thirty (30) day period and COMAR 21.10.04.02A which likewise requires filing of a written notice of claim with the Procurement Officer within thirty (30) days of when the contractor knew or should have known of such claim apply to claims for "labor, materials and equipment" and do not apply to claims that are based upon damages arising from Appellant's alleged wrongful administration of the contract as represented, for example, by the allegations of economic coercion, malicious interference and tortious conduct.

The Board holds that it only has jurisdiction over a claim that is timely filed under COMAR 21.10.04.02A as that regulation implements the statutory provisions regarding final agency action in contract claims for construction contracts and appeal to the Board as set forth in Sections 15-211, 15-215, and 15-217 and 15-219 of the State Finance and Procurement Article. Claim is broadly defined under COMAR 21.10.04.01B(1) to mean a complaint by a contractor or by a procurement agency relating to a contract. Appellant's allegations of economic coercion, fraudulent enter-prise, various tortious activities and

misconduct and denial of due process as set forth in the captioned appeals all, if true potentially constitute a breach of contract giving rise to a contract claim relating to the contract, i.e., a complaint relating to the contract governed by COMAR 21.10.04.02. Furthermore, COMAR 21.10.04.02 is binding on this Board and its provisions must be satisfied in order for this Board to have jurisdiction.⁴ COMAR 21.10.04.02A requires the filing of a written notice of a claim relating to a contract with the appropriate Procurement Officer within thirty (30) days after the basis for the claim is known or should have been known. COMAR 21.10.04.02C requires dismissal of a claim not filed within thirty (30) days after the basis for the claim is known or should have been known. Because an untimely claim is required to be dismissed, the Board lacks jurisdiction to hear it.

Resolving all inferences in Appellant's favor we find Appellant admits (through its various assertions in the pleadings in these appeals that it does not have to file timely written notice of claims and its failure to identify any such timely written notice of claims) that it did not timely file written claims related to its allegations of economic coercion, malicious interference and tortious conduct within thirty (30) days of the date it knew or should have known of such activity and the impact thereof as required by COMAR 21.10.04.02A. Thus, the appeal related to such claims and docketed as MSBCA Docket No. 1988 is dismissed with prejudice.

Claims alleging various breaches of contract for alleged agency misconduct in administering the contract as set forth in Mr. Schwartz's

⁴ The various cited provisions of COMAR 21.10.04 are regulations promulgated by the Board of Public Works (BPW) pursuant to statutory directive in the General Procurement Law. For a general discussion of the scope of the authority of the BPW to issue procurement regulations see Maryland State Police v. Warwick, 330 Md. 474 (1993) at pp. 480-482.

letters of October 25, 1995, October 30, 1995 and March 20, 1996, were not timely filed. Agency denial of these claims, which claims involving alleged misconduct in contract administration we find were not timely filed, form the basis for portions of Appellant's appeals in MSBCA Nos. 1990 and 1992. Appellant asserts that it is not required to file timely written claims. For the same reasons as discussed above regarding the dismissal of MSBCA Docket NO. 1988, the Board also dismisses with prejudice portions of MSBCA Docket Nos. 1990 and 1992 that deal with allegations of agency misconduct in contract administration.

The Board also dismisses with prejudice that portion of MSBCA Docket No. 1992 that challenges Respondent's failure to make documents available under the Maryland Public Information Act (PIA). This Board has discovery jurisdiction under the General COMAR after an appeal over which it has jurisdiction has been filed. The Board has no pre-appeal discovery jurisdiction, nor does the Board have any jurisdiction to judicially enforce the provisions of the PIA. Judicial enforcement of the PIA is reserved to the Circuit Courts. See §10-623 of the State Government Article.

The Board also dismisses the remaining of Docket No. MSBCA 1990 that dealt with the application of changes clause of the Contract, GP 4-05. Appellant asserts in MSBCA Docket NO. 1990 that it filed an appeal with the Board on November 27, 1996 because the Procurement Officer had not rendered a final decision within 180 days on Appellant's Request No. 10 (Claim No. 10) as set forth in Mr. Schwartz's letter of October 25, 1995. Resolving all inferences in favor of Appellant, the Board finds that Request No. 10 (Claim No. 10) constitutes a request for the opinion of the Procurement Officer regarding whether certain occurrences constitute a change under the Changes Clause of the Contract, GP 4-05.

It lacks equitable powers and only has such specific power and

authority as specifically conferred by statute. See Driggs Corporation, MSBCA 1262, 2 MSBCA ¶121(1986) and cases cited at p.4. The Board does not have the authority or jurisdiction to issue a declaratory judgement in contract dispute appeals absent a timely claim meeting all the requirements of COMAR 21.10.04. This includes the requirement set forth in COMAR 21.10.04.02B that a claim include the amount of the claim, i.e. cost quantification. We also observe that if the Board were to exercise authority akin to declaratory judgement power and only decide, as requested by Appellant, whether the changes clause applies to the facts alleged, the Courts would remand the matter to the Board for failure to issue a final decision that includes resolution of damages. See Driggs Corporation v. Maryland Aviation Administration, 348 Md. 389 (1998). Appellant has alleged no specific damages in MSBCA Docket No. 1990, and therefore the jurisdictional threshold set out in COMAR 21.10.04.02B has not been met. COMAR 21.10.04.02C requires dismissal of such a claim. Accordingly, Appellant's appeal in MSBCA Docket No. 1990 must be dismissed with prejudice.

MSBCA Docket Nos. 1989 and 1991

As indicated above the Board does not have jurisdiction to enforce the PIA. Judicial enforcement of the PIA is reserved to the Circuit Courts by statute. The Board does not have jurisdiction under the PIA to compel production of documents. The Board only has such authority to compel document production pursuant to the exercise of the Board's discovery rules and subpoena power (See the provisions of COMAR 21.10.05 and COMAR 21.10.06) in connection with an appeal over which the Board has jurisdiction. It has no pre-appeal jurisdiction to compel production of documents nor otherwise to direct how contracts between the private and public sectors are to be administered. Accordingly, the Board lacks jurisdiction over an appeal that seeks adjudication of rights under the PIA arising out of the MTA's response

to Mr. Schwartz's letters of October 25 and 30, 1995 regarding requests for documents contained therein. Therefore, Appellant's appeals in MSBCA Docket Nos. 1989 and 1991 are dismissed with prejudice.

Wherefore, it is this day of October, 1998, ORDERED that Appellant's appeals in MSBCA Docket Nos. 1988, 1989, 1990, 1991 and 1992 are dismissed with prejudice.

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 decision in MSBCA 1988, 1989, 1990, 1991 & 1992, Appeal of Arundel Corporation under MTA Contract No. MTA-90-44-11.

Dated:

Mary F. Priscilla
Recorder