

STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
6 St. Paul Street
Suite 601
Baltimore, Maryland 21202-1608
Telephone: (410) 767-8228
Toll Free Telephone: 1-800-827-1135

SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2268	Date of Decision: 07/05/02
Appeal Type: [] Bid Protest	[X] Contract Claim
Procurement Identification: Under The Strategic System Development Agreement of The State Retirement Agency of Maryland, dated May 13, 1998	
Appellant/Respondent: Syscom, Inc. State Retirement Agency of Maryland	

Decision Summary:

Board of Contract Appeals - Jurisdiction - Absence of Final Decision - The Board of Contract Appeals lacks jurisdiction to hear an appeal where no final agency decision has been issued.

the evidence is all documentary.

Findings of Fact

1. On May 13, 1998, Appellant entered into the Strategic System Development Agreement (Contract) with the State Retirement and Pension System of Maryland (Agency) for the sum of \$32,648,649 (subsequently increased to \$37,313,125). The Contract was for the design and delivery to the Agency of a comprehensive, fully-integrated data processing and electronic document management system by October, 2000 (subsequently changed to October, 2001).
2. In the summer of 2001, the Agency expressed concern about possible discrepancies between the Contract design requirements and the software as created by Appellant. Concern was also expressed about Appellant's ability to evaluate the software, given the alleged absence of "plain English" or narrative documentation accompanying the program specification documents drafted in "pseudo code".
3. By letter dated November 28, 2001, the Agency directed Appellant to implement an assessment, recovery, and remediation plan. In particular, Appellant was directed to measure the degree of completion, document its work in "plain English", review the design for gaps between the constructed software's design and the Agency requirements, and develop a resolution plan for each of the identified gaps.
4. On December 6, 2001, Appellant wrote to the Agency and advised that "Syscom will not implement [the November 28, 2001] directive," and asserted that it was not obligated to perform without "an approved Change Order."
5. The Appellant's letter of December 6, 2001 did not meet the requirements of COMAR 21.10.04.02B regarding the filing of a claim. We also find that it did not contain a Notice of Claim under COMAR 21.10.04.02A.
6. The Procurement Officer issued a final decision by letter

dated December 21, 2001 which addressed the dispute created by the Agency's November 28, 2001 directive to proceed, and Appellant's December 6, 2001 refusal to comply with that directive. The Procurement Officer resolved that dispute by directing Appellant to proceed or face termination for default. The decision noted that the parties disagreed on whether the directed work was or was not changed work. The State argues that the decision did not purport to resolve that question but specifically reserved the change issue for any claim that Appellant subsequently would choose to submit. The Board finds, however, that a fair reading of the Procurement Officer's December 21, 2001 final decision is that she determined that the directed work was required by the Contract and therefore did not constitute a change. The decision stated that, whether Appellant's position that the directive constituted extra work was correct or not, it had an obligation to proceed as directed.

7. On December 31, 2001, Appellant wrote to the Agency, stating that ". . . Syscom will comply with the directive contained in Ms. Abramson's letters of November 28 and December 21, 2001." Appellant further stated that its "compliance with this directive is made without prejudice of its right to claim, and recover, compensation for any and all work performed that is beyond the scope of the Agreement"
8. On January 9, 2002, Appellant again wrote to the Agency, stating that it had "commenced work on the 'assessment, recovery, and remediation' directive as defined in Ms. Abramson's November 28, 2001 letter. . . . [We] remind you that to the extent Syscom is directed to perform work which is outside the scope of the contract, Syscom is entitled to file a claim for compensation."
9. On January 18, 2002, Appellant provided the Agency with a "Written Notice of Claims," including claims involving two

rejected change orders and "[f]or work performed and to be performed pursuant to the Agency's directive contained in its letter of December 21, 2001, and for an interpretation of the contract regarding the scope of the work required by the Agency's directive."²

10. On January 18, 2002, Appellant also appealed the December 21, 2001 final decision to this Board.
11. In its Prehearing Conference Statement dated May 2, 2002 Appellant stated, "Syscom is not disputing the Procurement Officer's 'authority to direct Syscom to comply with the Agency's directive.'" (emphasis in original).
12. At the Prehearing Conference, the Board requested that the parties brief the issue of whether the Procurement Officer's final decision constituted the resolution of a dispute (beyond the authority of an agency to direct a contractor to perform work) over which the Board has jurisdiction.
13. Briefs and oral argument of counsel have been received and entertained on the issue of whether the Procurement Officer's decision resolves a dispute which the Board has jurisdiction to review.

Decision

The Board has jurisdiction to hear and decide all appeals arising from the final action of a unit on a contract claim concerning breach, performance, modification or termination of a contract. SF §15-211(a). The parties agree that the State may direct a contractor to perform work and if that question were all that was involved in this appeal the Board would dismiss the appeal. What remains at issue, however, is whether the December 21, 2001 final decision resolved any other dispute over which the

² Appellant's notice of claims and claims of January 18, 2002 included claims concerning the rejection by the Agency of two change orders (119 and 120) for which notice of claims were apparently also previously filed with the Agency on or about December 21, 2002.

Board would have jurisdiction. The Board has found that the Procurement Officer determined in her December 21, 2001 final decision that the work directed to be done was not changed work. Appellant asserts that the Board's legislatively-granted authority to hear and decide appeals from the final action of a unit on a contract claim concerning performance of a contract applies to the facts of this appeal. Specifically, the Appellant argues that it has brought before the Procurement Officer the assertion that the directed work constitutes a change and that such assertion constitutes a contract claim. The Procurement Officer, according to Appellant's argument, has denied this asserted contract claim by finding in an appealable final decision that the directed work is within the scope of work required by the contract documents and thus does not constitute changed work. Appellant asserts that such finding constitutes a matter the correctness of which the Board has jurisdiction to review even though the total cost to Appellant of performance of the directed work is not now known and will not be fully known until after the directed work is completed.³

The Respondent Agency asserts that the Procurement Officer did not decide whether the directed work constituted a change and thus the Board lacks jurisdiction to decide an issue not decided by the agency. We reject that argument on the basis that we find that the Procurement Officer did decide that the directed work was work required by the contract documents and thus did not constitute a change involving extra or additional work.

The question the Board believes is key to disposition of the instant motion is whether the assertion by the Appellant in its December 6, 2001 letter, that the work is changed work that will cost Appellant money to perform, constitutes a contract claim for purposes of SF §15-211(a). For the reasons stated below we determine that such assertion by Appellant in its December 6, 2001

³ Appellant has been submitting claims for costs as the work progresses.

letter does not constitute the filing of a contract claim and therefore the Board lacks jurisdiction to proceed with the appeal, the duty to perform as directed having now been acknowledged by Appellant.

SF §12-101(b) authorizes the Board of Public Works (BPW) to implement the provisions of the General Procurement Law by adopting regulations. In the matter of contract claims the BPW had done so by promulgating COMAR 21.10.04. In relevant part COMAR 21.10.04 dealing with contract claims and disputes provides:

01. Definitions.

A. In this chapter, the following words have the meanings indicated.

B. Terms Defined.

(1) "Claim" means a complaint by a contractor or by a procurement agency relating to a contract subject to this title, except a real property lease.

(2) "Reviewing authority" means:

(a) With respect to the Department of Transportation, the Administrator or designee;

(b) With respect to any other procurement agency, the agency head or designee.

Filing of Claim by Contractor.

A. Unless a lesser period is prescribed by law or by contract, a contractor shall file a written notice of a claim relating to a contract with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier.

B. Contemporaneously with or within 90 days of the filing of a notice of a claim on a construction contract, or 30 days of this filing on a nonconstruction contract, but no later than the date that final payment is made, a contractor shall submit the claim to the appropriate procurement officer. On conditions the procurement officer considers satisfactory to the unit, the procurement officer may extend the time in which a contractor, after timely submitting a notice of claim, must submit a contract claim under a procurement contract for construction. An example of when a procurement officer may grant an extension includes situations in which the procurement officer finds that a contemporaneous or timely cost

quantification following the filing of the notice of claim is impossible or impractical. The claim shall be in writing and shall contain:

- (1) An explanation of the claim, including reference to all contract provisions upon which it is based;
- (2) The amount of the claim;
- (3) The facts upon which the claim is based;
- (4) All pertinent data and correspondence that the contractor relies upon to substantiate the claim; and
- (5) A certification by a senior official, officer, or general partner of the contractor or the subcontractor, as applicable, that, to the best of the person's knowledge and belief, the claim is made in good faith, supporting data are accurate and complete, and the amount requested accurately reflects the contract adjustment for which the person believes the procurement agency is liable.

C. A notice of claim or a claim that is not filed within the time prescribed in Regulation .02 of this chapter shall be dismissed.

The Board has determined that it is bound by this BPW regulation and held that it only has jurisdiction over a claim that is timely filed under and otherwise meets the requirements of COMAR 21.10.04 as that regulation implements that statutory provisions regarding final agency action in construction contracts and appeal to the Board as set forth in SF 15-211, 15-215, 15-217 and 15-219. See Cherry Hill Construction, Inc., MSBCA 2056, 5 MSBCA ¶459(1999); Arundel Engineering Corporation, MSBCA 1940 et.al., 5 MSBCA ¶453(1998), aff'd Case No. 24-C-99-000074A Civil (Cir Ct. for Balto. City); aff'd No. 554 [unpublished](Md. Ct. Spec. App. July 30, 2001); cert. den. No. 387 (November 9, 2001). The Board has recently made the same determination regarding non-construction contracts. See Meridian Management Corporation, MSBCA 2248, _____ MSBCA _____ (5/28/02).⁴

⁴ The Board continues to believe that there is a category of claim over which it has jurisdiction that does not require a demand for money damages. For example, the Board believes that it has jurisdiction to preliminarily determine the appropriateness of

If the Board considered the Appellant's letter of December 6, 2001 to be a notice of claim, there ordinarily might be objection made by the State that the claim was not forthcoming within 30 days of December 6, 2001. However, we do not consider Appellant's letter of December 6, 2001 to be a notice of claim. We consider the December 6, 2001 letter to be a demand for a change order and a refusal to perform directed work in the absence of issuance of a change order. At this juncture we deal with matters of contract administration over which the Board has no jurisdiction and not the dispute resolution process.⁵ The Procurement Officer's December 21, 2001 final decision directs that work be done (no longer an issue) and finds the directed work to be required by the Contract documents. The letter also advises Appellant that if Appellant believes (as it does) that the direction to perform work constitutes a change to the Contract, Appellant may file a claim under the disputes procedures set forth in the Contract and in COMAR. Appellant filed a notice of claim and claim for the directed work on January 18, 2002 and has been filing updated monetary claims for the costs of such ongoing work over the past several months. Appellant also filed notices of claims and claims with its January 18, 2002 filing for the rejection of Change Orders 119 and 120.

By filing this appeal, which the Board believes it is required

a termination for default notwithstanding that damages resulting from the termination have not been determined by the procurement officer, provided that the Board may not issue a final decision until it has dealt with the issue of damages. See Driggs Corp. v Maryland Aviation Admin., 348 Md 389(1998). Appellant's letter of December 6, 2001 demanding a change order does not fall within this category.

⁵ For a federal perspective on why matters of contract administration shall not be subject to the dispute resolution process in the federal procurement system see Valley View Enterprises, Inc. v. The United States, 35 Fed. Cl. 378(1996). Much the same could be said concerning the separation of the dispute resolution process from matters of contract administration in the Maryland procurement process.

to dismiss, Appellant has protected itself from any subsequent judicial determination that the Procurement Officer's final decision of December 21, 2001 in fact covers this dispute to the extent necessary to confer jurisdiction on the Board such that Appellant would have lost its remedial rights absent this appeal. We would anticipate that the Procurement Officer will render a final decision on Appellant's January 18, 2002 notice of claims and claims to that date and subsequent claims in a reasonable period of time consistent with the duty and responsibilities imposed by COMAR 21.10.04.03 and .04. Thereafter, we anticipate an appeal to the Board should Appellant not be satisfied with such decision. The Board would have jurisdiction under such circumstances. In the meantime, however, the Board concludes it lacks jurisdiction to proceed with this appeal. Accordingly, it is Ordered this day of 2002 that the appeal is dismissed for lack of jurisdiction.

Dated:

Robert B. Harrison III
Board Member

I Concur:

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 in MSBCA 2268, appeal of Syscom, Inc. under The Strategic System Development Agreement of The State Retirement Agency of Maryland, dated May 13, 1998.

Dated:

Loni Howe
Recorder