

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

Docket No. 2491	Date of Decision: 04/12/06
Appeal Type: [] Bid Protest	[X] Contract Claim
Procurement Identification:	Under University of Maryland Baltimore P.O. 844139, Contract No. 05-VCE027
Appellant/Respondent:	PMB Associates, LLC University of Maryland Baltimore

Decision Summary:

Equitable Adjustment - Attorneys Fees - The Board may not consider an award of reasonable costs and attorneys fees in a claim in a non construction contract.

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**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of PMB)
Associates, LLC)
) Docket No. MSBCA 2491
Under University of Maryland)
Baltimore P.O. 844139,)
Contract No. 05-VCE027)

APPEARANCE FOR APPELLANT: Daniel B. Loftus, Esq.
Frederick, MD

APPEARANCE FOR RESPONDENT: Dawna M. Cobb
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim for an equitable adjustment for t-shirts rejected by the Respondent under the above captioned Contract. For the reasons that follow, we shall sustain the appeal.

Findings of Fact

1. Appellant is a Maryland advertising, promotional, printing, graphic and design company. It has been in business for over twelve years. Appellant's President is Ms. Patty Bowers. Ms. Bowers has over twenty years of advertising and graphic arts experience.
2. Appellant was awarded the above captioned Contract by Respondent, University of Maryland, Baltimore (University), to provide pens, pencils, hats and t-shirts for its Institute of Human Virology Vaccine Trials Unit (IVTU) as provided for by a purchase order (that became the Contract) issued May 31, 2005. The total bid for the Contract was \$7,732.70. Of that amount,

- the t-shirts were priced at \$3,185.00.
3. Appellant provided the pens, pencils, hats and t-shirts. However, the University rejected the t-shirts and refused to pay Appellant for the t-shirts.
 4. Appellant wrote to the University's Procurement Officer on July 7, 2005 seeking payment for the t-shirts only. The University's Procurement Officer issued a final decision dated July 29, 2005 denying payment because certain of the colors on the t-shirts allegedly did not conform to the Contract specifications. Appellant filed an appeal from such final action with this Board on August 8, 2005. Appellant seeks payment of \$3,185.00 for the t-shirts plus costs and attorney's fees.
 5. The Contract provided, in relevant part:
 - Proof of wording, color are to be emailed to Sandra Wearins at wearins@umbi.umd.edu for approval.
 6. Ms. Sandra Wearins is the Director of Community Education and Research for the Institute of Human Virology Vaccine Trials Unit (IVTU).
 7. IVTU needed these pens, pencils, hats and t-shirts as a rush job for an upcoming IVTU awareness event involving HIV awareness where such items would be given away to the attendees.
 8. Appellant was never provided a printed hard copy proof or sample of what the t-shirts' colors would be. All Appellant received was a sample of the t-shirt design and color via e-mail in Portable Document Format (PDF) format. The University never required or requested a sample printed t-shirt proof before the delivery of the t-shirts.
 9. When Appellant was awarded the Contract, Ms. Wearins originally sent the wrong t-shirt design to PMB. When Ms. Wearins was informed of her mistake, she sent the correct t-

shirt design to Appellant, again via e-mail under the PDF format.

10. To ensure that Appellant was complying with Ms. Wearins' e-mails with the PDF format of the requested colors and art work for the t-shirts, Ms. Bowers, Appellant's President, attempted to send to Ms. Wearins by e-mail the art proof with the Pantone Matching System (PMS) numbers of the colors it would use on the t-shirts. PMS is the universal code or language of colors to ensure exactness in colors by use of the PMS numbers. This was used to make sure that the colors on Appellant's computer screen (and as printed) were identical to the colors registered on Mr. Wearins' computer screen (and as printed). However, the art proof attachment to the e-mail could not be opened, and, upon being advised of this, Appellant sent the art proof to Ms. Wearins with the PMS numbers via black and white facsimile.
11. Computer screens and printers from one manufacturer displaying colors under PDF format may not show the same colors as other computers and printers from another manufacturer. An analogous example would be TV screens with different screen colorations seen in an appliance store such as Circuit City.
12. Ms. Wearins approved the art proof in a telephone conversation with Appellant without actually seeing or requesting a printed hard copy color proof from Appellant. Ms. Wearins erroneously believed that the PMS references on the faxed black and white art proof all referred to the color black and assumed all the other colors on the t-shirts would be correct.
13. Once Appellant received approval from Ms. Wearins, Appellant printed, produced and delivered the t-shirts. However, the t-shirts were rejected by Ms. Wearins who claimed the colors on the t-shirts were wrong.
14. The University declined to pay for the t-shirts, and Appellant appealed this decision to the Procurement Officer.

15. In his final decision on the claim, the Procurement Officer wrote in relevant part:

You [Ms. Bowers] contend that the University should have paid attention to the Pantone Matching System (PMS) numbers that PMB added to the proof rather than the printed proof provided by the University¹, but this was not possible. The PMS numbers in the proof provided by PMB to the University did not correspond to any particular part of the t-shirt design. The University is not familiar with the PMS system and therefore the solicitation did not require PMS numbers.

I have reviewed and printed the PDF file submitted to the University for proof on different computers and printers and compared them with the t-shirt you provided with your letter ... In some instances the colors do not match. In particular the ribbon ... and second person from the left are red on the PDF file submitted by the University to PMB.

They are also red on the proof submitted by PMB to the University. However, when you compare these two documents to the t-shirt, the second person from the left on the t-shirt is brown while the both ribbon [sic] on the front and back of the shirt are red. Because all three were the same shade of red on both proofs, your t-shirt reader should have read the same color for all three. Additionally, the t-shirt you provided used purple for the water and the banner where blue was required by the University's proof. For these reasons, the University will not pay for the t-shirts.

16. The Board determines from the record that Appellant is entitled to be paid its total bid amount of \$7,732.70, which includes its bid amount of \$3,185.00 for the t-shirts. The

¹ The record reflects that the Procurement Officer erroneously believed that the university had provided a hard copy printed proof to Appellant. What Appellant received was an e-mail in Portable Document Format (PDF).

Board cannot determine from the record, however, how much Appellant has been paid to date.

Decision

The record reflects that Appellant complied with the terms and conditions of the Contract and was not fully paid for performing under the Contract. Thus, the University breached the Contract by failing to pay the entire amount of the bid, \$7,732.70.

Specifically, we find from the record that Appellant reasonably interpreted and relied upon the University's purchase order to provide the t-shirts with the colors as approved by Ms. Wearins.

This was a rush job, and, according to the purchase order, proof of wording and color were to be e-mailed to Ms. Wearins at her e-mail address for approval. Ms. Wearins needed these t-shirts quickly so they could be given away at an upcoming ITVU awareness event.

When Ms. Wearins sent the design of the t-shirts via e-mail using the PDF format, she (Ms. Wearins) was seeing certain colors on her computer screen/monitor. When Ms. Bowers opened the PDF file on her computer screen/monitor, she (Ms. Bowers) was seeing the design (first and second designs) and certain colors on her computer screen/monitor.

Knowing that different computers screens/monitors and printers may show different colors, hues and shades, Ms. Bowers attempted to send her art proof via e-mail to Ms. Wearins with the PMS numbers to ensure that they (Ms. Bowers and Ms. Wearins) were seeing the same colors. The purchase order provided that all wording, color and approval of the t-shirts were to be transmitted via e-mail. However, the attachment could not be opened, and, when advised of this, Ms. Bowers sent the art proof with the PMS numbers via facsimile to Ms. Wearins.

Ms. Wearins testified that when she saw the black and white

facsimile art proof, she never asked for a hard copy printed proof or sample of the t-shirts. She also testified that she thought the PMS numbers on the black and white faxed art proof all referred to the color black. She never made any inquiry as to the other colors.

Ms. Wearins had never used Appellant's services before. However, she orally approved the art proof without asking for a printed hard copy color proof, assuming that Appellant had provided the correct colors.

Ms. Wearins' reasons for thereafter rejecting the t-shirts were because the colors on the printed t-shirts did not match the PDF colors on her computer screen/monitor and such exact colors were important to IVTU in promoting awareness.

The Procurement Officer's rationale in denying Appellant's claim was that Appellant should not have added the PMS numbers to the proof because the solicitation did not require PMS numbers and because the University is not familiar with the PMS system.

However, the Board finds from the record that Appellant was acting reasonably and responsibly when it added the PMS numbers to the proof. Appellant was ensuring that it was complying with the Contract terms and conditions and that it and the University were in agreement with respect to the t-shirt colors. Use of PMS numbers is commercially reasonable and is not prohibited or in any way in conflict with the terms and conditions of the purchase order.

The record reflects that Appellant acted reasonably in attempting to comply with the terms and conditions of the Contract. It delivered the t-shirts to the University. Notwithstanding Ms. Wearins' oral approval of the art proof, the University refused acceptance. The University materially breached its Contract when it failed to accept the t-shirts and failed to pay Appellant the entire Contract amount. The record reflects that Appellant is still ready, willing and able to deliver the t-shirts.

Accordingly, the appeal is sustained.

Appellant also seeks costs and attorneys fees. The General Procurement Law and COMAR do not permit the award of costs or attorneys fees for this type of contract. Accordingly, the request for same is denied.

Wherefore, it is Ordered this day of April, 2006 that Appellant is awarded the amount that has not been paid of the total Contract amount of \$7,732.70, with pre-decision interest on such presently unpaid amount from the date (in July, 2005) that the Procurement Officer received Appellant's July 7, 2005 request for payment. Post-decision interest shall run from the date of this decision.

Dated:

Robert B. Harrison III
Chairman

I Concur:

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 in MSBCA 2491, appeal of PMB Associates, LLC under University of Maryland Baltimore P.O. 844139, Contract No. 05-VCE027.

Dated:

Michael L. Carnahan
Deputy Recorder