Docket Nos. 2072 & 2073	Date of Decision: 2/23/99
Appeal Type: [ ] Bid Protest	[X] Contract Claim
Procurement Identification: Under Maryland Dept. of Transportation State Highway Adm. Contract Nos. AW-769-501-085 & AW-770-501-085	
Appellant/Respondent: Alcatel NA Cable Systems, Inc. formerly known as Alcatel Contracting (NA), Inc. Maryland Dept. of Transportation State Highway Administration	

Board of Contract Appeals - Jurisdiction

The Board of Contract Appeals lacks jurisdiction over affirmative State claims for money damages asserted for the first time in an appeal. However, the Board of Contract Appeals has jurisdiction to receive and entertain as a defense to a contractor's claims evidence that would support an affirmative State claim for money damages.

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeals of Alcatel NA Cable Systems, Inc. formerly known as Alcatel Contracting (NA), Inc.	)
	) **Docket Nos. MSBCA 2072 & 2073**
Under Maryland Dept. of Transportation, State Highway Adm. Contract Nos. AW-769-501-085 & AW-770-501-085	)
FAP Nos.: IVH-9224(002)3N & CMG-0005(294)N	)

APPEARANCES FOR APPELLANT:

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APPEARANCE FOR RESPONDENT:

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MEMORANDUM OPINION

The construction contracts that are the subject of the above captioned appeals, which are consolidated for the purposes of this decision, concern installation of equipment for SHA's traffic detection system. Appellant has filed Motions to Dismiss the counterclaims asserted in the Answers filed in the above appeals by Respondent, State Highway Administration (SHA). The counterclaims, which are based on the liquidated damages clauses of the contracts, seek $443,630.00 (Contract No. AW-769) and $458,055.00 (Contract No. AW-770). At the time Appellant filed its appeals with this Board there was only $67,220.00 remaining in the funds allocated to Contract No. AW-769 and

$92,393.00 remaining in the funds allocated to Contract NO. AW-770. Appellant raises two issues in its Motions to Dismiss:

> Issue 1. The counterclaims should be dismissed because this Board does not have jurisdiction over an affirmative claim by SHA against Appellant.
>
> Issue 2. If the Board otherwise has jurisdiction, SHA has not complied with the applicable statutes and regulations regarding appeals to this Board.

Such issues have been briefed and argued by counsel.

Findings of Fact

The facts necessary to determine the issues raised by Appellant in its Motions are not in dispute and are set forth in the Board's decision below.

Decision

Issue 1.

In support of the first issue Appellant cites University of Maryland v. MFE, Incorporated, 345 Md. 86(1997), in which the Court of Appeals of Maryland stated:

> There is no provision in Section 15-217 or, to our knowledge, in any other part of the subtitle, permitting the state unit to file either a protest or a contract claim.

MFE at p. 92.

In response to Appellant's first issue in which Appellant asserts that this Board has no jurisdiction to hear SHA's counterclaims, SHA argues that "MFE . . . is a narrow ruling, pertaining only to . . . stand alone money claims" and that, since Appellant initiated the disputes process, it "must submit to the adjudication of any . . . counterclaim within the jurisdiction of the forum."

As further explained below we agree in part and disagree in part with the assertions of both parties. In MFE, the Court of Appeals of Maryland observed that:

> This whole statutory structure is established to deal with protests and contract claims, and, as we have noted, only a contractor - a "person who has been awarded a procurement contract" - is authorized to file a contract claim. . . . There is no statutory basis of BCA jurisdiction over a claim filed by anyone else, including the State unit. The legislative history of the procurement law indicates that that limitation was not inadvertent.

MFE at pp. 93-94.

In a detailed discussion of the history of Maryland's procurement law, the Court of Appeals found that the legislature "exclude[d] contract claims made by State units." MFE at p. 96. In support of its ruling, the Court cited at length a letter from a then Assistant Attorney General expressing his concern with the statute's failure to permit claims by the State in the same proceeding as that initiated by the contractor:

> *The problem I perceive is that the scope of controversies covered within the settlement and appeal processes is too narrow. There is no provision for including claims by the State against contractors and there is no provision for including claims by the State against third parties (such as architects and engineers) arising out of claims made against the State by a contractor.*

MFE at p. 98.

The Court then discussed the solutions offered by a then Assistant Attorney General to this problem:

> To remedy the problem, he suggested two amendments to the bill: amending Section 7-201(a) to add the State as "one of the parties entitled to demand a negotiation and

> settlement of disputes" and adding a new Section 7-201(f)(3) permitting the State, in any appeal to the BCA by a contractor, to assert any counterclaim it may have against the contractor and any third party claim arising out of the facts.

MFE at p. 99.

The Court of Appeals then noted that the Assistant Attorney General's concerns, as expressed above, had not been addressed by the legislature:

> Although the dispute resolution part of the procurement statute has been amended twice since 1980 - in 1986 and 1988 - the concerns expressed by the Attorney General's Office with the limiting language were not addressed and, indeed were exacerbated.

MFE at p. 100.

The Court concluded with the following:

> Two things are evident from this history. The first is that the General Assembly gave a great deal of attention to the drafting of the State procurement law. The second is that, notwithstanding that it had the opportunity to provide for subjecting contract claims by a governmental unit to the administrative BCA [Board of Contract Appeals] procedure, notwithstanding that, in the early drafts, it, in fact, provided for the administrative adjustment and resolution of such claims, and notwithstanding that it was specifically warned by the attorney general's office that the change in language inserted in 1978 excluded those kinds of claims, the General Assembly, on three occasions - in 1980, 1986, and 1988 - nonetheless proceeded to limit the procedure to contract claims filed by the contractor.

MFE at p. l02.

Thus, it is clear to this Board that it lacks jurisdiction over an affirmative State claim for money damages. We do not believe as asserted by SHA that this lack of jurisdiction is limited to stand alone money claims and that by submitting a claim a contractor becomes liable for any government counterclaims. However, we believe that this Board does have jurisdiction to receive and entertain as a defense to the Appellant's claims, evidence that Appellant's claims must fail because of the very same reasons Respondent, SHA, asserts in its counterclaims. In other words, the Board is able to hear evidence that would be related to the counterclaims in these appeals as a matter of defense to the Appellant's claims but is not able, i.e., lacks jurisdiction, to make any award of money damages to the State.

There is, however, an exception to this jurisdictional prohibition for consideration of an affirmative State demand for money damages. The State may withhold moneys appropriated for the contract at issue and not yet paid to the contractor. As noted by the Court of Appeals in MFE.

> Ordinarily, a governmental unit having a claim against a contractor will know of the basis for its claim before it has accepted performance and paid the full amount of the contract price. In that circumstance, all the unit need do is make a claim and inform the contractor that the claim will be set off against funds owing on the contract. The contractor would then make a claim for the disputed amount, which would be subject to the BCA procedure. In most instances, therefore, it is unnecessary to make specific provision for the administrative adjudication of State contract claims. They can effectively be adjudicated in the context of the contractor's claim.
>
> . . .
>
> The COMAR regulations recognizing State contract claims can be read in harmony with §15-217 if they are construed to apply only when, and to the extent, the State is seeking to set off its claim against funds otherwise

owing to the contractor under the contract.

MFE at pp. 102-103, 104.

There is also another set of circumstances that could lead to this Board's jurisdiction in the context of a State claim. That set of circumstances is presented by this appeal. The State's counterclaims are predicated on liquidated damages for alleged inexcusable delay of 218 workdays at $2,035 per day in Contract No. AW-769 and alleged inexcusable delay of 243 workdays at $1,885.00 per day in Contract No. AW-770. The contracts as permitted by §13-218(a)(4) of the State Finance and Procurement Article (SF&P) contained a liquidated damages clause which set forth the aforementioned liquidated damage parameters. Under COMAR 21.07.01.14, a liquidated damages clause is a mandatory provision for those procurement "contracts deemed appropriate by the procurement officer in consultation with the Office of the Attorney General." Since a liquidated damages clause has a specific statutory basis in the General Procurement Law we believe this Board has jurisdiction to determine any issue arising under such a clause where the State assesses liquidated damages pursuant to such clause in the contact, the contractor disputes the assessment at the agency level with the Procurement Officer, the State actually (or constructively under the 180 day rule for construction contracts) reaffirms its assessment of such damages in whole or part and the contractor then appeals such assessment to this Board. We do not believe that such jurisdiction is defeated where, as in the instant appeals, the amount withheld by the State under the appropriations for the contracts is less than the amounts of the assessments of liquidated damages.

We reach this conclusion based on (1) the provisions of §15-211 of the SF&P which confers jurisdiction on this Board to hear and decide an appeal arising from the final action of a unit on a contract claim concerning "performance," and (2) the decision of the Court of Appeals

in Driggs Corp. v. Md. Aviation, 348 Md. 389(1998). Driggs Corp. v. Md. Aviation, which was decided subsequent to the decision in MFE, involved the termination for default of a construction contract by the State which action was contested by the contractor at the agency level and then appealed to this Board. This Board upheld the termination for default but did not determine any damages. Driggs appealed to the Circuit Court which dismissed Driggs' petition for judicial review on procedural grounds. The Court of Appeals granted certiorari.

In its opinion the Court of Appeals made the following factual determinations and observations which we believe are germane to the issue of whether this Board has any jurisdiction over affirmative State claims.

> *The fact is that the petition for judicial review was premature. As we shall explain, there remained at issue the question of damages, which (1) was part of MAA's claim, (2) had been bifurcated by BCA, and (3) had not apparently been resolved by BCA when the petition was filed. Ordinarily, only final administrative decisions resolving the entire claim before the agency are appropriate for judicial review, and the order sought to be reviewed in this case did not qualify either as a final decision or as the kind of special interlocutory order for which immediate judicial review is available.*
>
> . . .
>
> *The contract in question was approved by the Board of Public Works on April 14, 1993. It called for Driggs to complete certain work (Phases 1 and 2) on Runway 10-28 within 200 days after issuance of a Notice to Proceed. The completion date was eventually extended by MAA to December 31, 1993. The contract also incorporated two clauses mandated by a State Procurement Regulation. One, required by COMAR 21.07.02.07, was a Termination for*

Default clause, authorizing MAA to terminate the contract "[i]f the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as shall insure its completion within the time specified in this contract, or any extension thereof. . . ." In the event of such a termination, the clause made Driggs and its surety liable for any damage to the State resulting from Driggs' failure to complete the work within the specified time. The other clause, mandated by COMAR 21.07.02.09, was a Termination for Convenience provision, authorizing the State to terminate the contract "whenever the procurement officer shall determine that such termination is in the best interest of the State." If the State invoked that clause, it would be liable to Driggs for certain costs and expenses enumerated in the clause.

On October 21, 1993, MAA invoked the Termination for Default clause and terminated the contract on the grounds that Driggs had (1) "failed to prosecute the contract work with such diligence as would have assured completion of Phases 1 and 2 within the time and as required by the terms of the contract" and (2) also failed "in its obligation to submit a schedule by August 13, 1993 showing a realistic plan to complete Phases 1 and 2 by December 31, 1993."

Driggs filed a complaint with BCA, asking that the termination be overturned because of excusable delays, waiver by MAA of its right to terminate for default, and material breaches by MAA. It also asked that the termination for default be converted to a termination for convenience and that it be awarded damages accordingly. MAA answered the complaint, asking that Drigg's claim challenging the termination for default be dismissed. In an accompanying counterclaim, MAA asserted that, because of its default,

Driggs was responsible to MAA "for all damages occasioned by [Drigg's] default" and asked that BCA affirm the termination.

On October 18, 1994, afer some discussion between BCA and the parties, BCA decided that, as the procurement officer had not yet resolved the question of what damages MAA would be entitled to because of the termination for default, that issue was not properly before BCA but, when resolved by the procurement officer, would be dealt with by BCA in a separate proceeding. The pending proceeding would therefore be limited to "entitlement, i.e., the propriety of the procurement officer's final decision terminating Driggs' contract for default." That was confirmed when the hearings actually commenced and MAA advised that it was not planning to offer any evidence as to damages but intended to proceed only on the issue of liability. That bifurcation decision set the stage for the prematurity problem noted above.

. . .

As we observed, because the MAA procurement officer had not issued a final agency determination of damages when the Driggs complaint was filed, BCA decided to bifurcate the damage issue and deal first, and separately, with whether MAA was justified in terminating for default. From the point of view of administrative convenience, that was not an inappropriate decision in this case. The very entitlement to damages would depend on how the termination for default issue was resolved; if Driggs was successful in converting the termination into a termination for convenience, it, not MAA would likely be entitled to monetary relief. The problem was, however, that monetary relief was part of both parties' respective claims. Neither was interested solely in an academic determination of whether the contract was properly

terminated for default. MAA's counterclaim specifically asserted the right to damages, and the right of Driggs to monetary recoupment was explicit in the termination for convenience clause.

. . .

We pointed out in Holiday Spas that, as a general rule, "an administrative order that determines liability but does not decide damages is not final" and that that general rule was "in accord with the rule that a judicial order that does not dispose of the entire case is ordinarily not final." Id. at 396-97, 554 A.2d at 1200. The salutary purpose of the finality requirement is to avoid piecemeal actions in the circuit court seeking fragmented advisory opinions with respect to partial or intermediate agency decisions. Not only would a contrary rule create the real prospect of unnecessary litigation, as a party choosing to seek review of an unfavorable interlocutory order might well, if the party waited to the end, be satisfied with the final administrative decision, but the wholesale exercise of judicial authority over intermediate and partial decisions could raise serious separation of powers concerns. Whether, for administrative purposes, the damages issue is treated as part of the claim but simply bifurcated and deferred or is treated as a separate claim, judicial review ordinarily must wait until the entire controversy is decided. That, of course, was not done here. The petition, seeking review of the June 25, 1996 [BCA] decision was premature and should have been dismissed on that basis.

Accordingly, we shall vacate the circuit court judgement of January 13, 1997 and remand the case to the circuit court. If the damages issues has not yet been resolved by BCA, the court shall dismiss the petition as

> *being premature and remand the matter to BCA for a final decision. If, by now, the damages issues has been resolved by BCA, the court should allow Driggs to file a new petition or amend the existing one, as appropriate, and then proceed in accordance with § 10-222 and the applicable rules to provide judicial review.*

Driggs, 348 Md.at pp. 392 - 393, 406, 407 - 408.

Thus it would seem that the Court of Appeals has determined that this Board may exercise jurisdiction to hear monetary issues involving State damages in the context of the termination for default clause - a mandatory contract clause set forth at COMAR 21.07.02.07 (construction contracts) and having a statutory basis in the General Procurement Law at §13-218 of the SF&P.

In MFE the Court of Appeals noted that the Board of Public Works may not adopt regulations that would be inconsistent with the General Procurement Law or the legislative intent behind it. Thus the Court held that the COMAR regulations recognizing State contract claims can be read in harmony with §15-217 of the SF&P (which limits claims to that of the contractor) if they are construed to apply only when, and to the extent, the State is seeking to set off its claim against funds otherwise owing to the contractor under the contract. However, since the termination for default and liquidated damages clauses of State contracts have a statutory basis in the General Procurement Law we believe the COMAR regulations governing their treatment to include review by this Board may be read in harmony with §15-217 of the SF&P.

We recognize that should this Board affirm an assessment of liquidated damages practical problems are presented. Thus where insufficient funds remain in the agency budget for such contract to satisfy the liquidated damage amount upheld by this Board, and should such decision of this Board become final, the practical problem of

collection of the liquidated damages from the contractor that exceed funds remaining in the contract will require, absent voluntary contribution by the contractor, recourse to the Courts.[1] In this limited circumstance involving application of a liquidated damages clause we believe that this Board has jurisdiction to hear and decide upon an appeal of such assessment by the contractor the validity of such assessment and the amount thereof. However, at this juncture the Board lacks jurisdiction over the counterclaims based on the liquidated damages clauses of the contracts (although we are able to receive evidence that Appellant's claims should be denied because of untimely completion) because the assessment did not occur at the agency level but was asserted for the first time in a pleading on appeal. This observation leads us to a consideration of Appellant's second issue.

Issue 2.

In support of the second issue (i.e., if this Board concludes it otherwise has jurisdiction under MFE) Appellant cites the absence of a decision from the SHA Procurement Officer which it argues is a necessary condition to this Board's jurisdiction under the appeal process.

In response to Appellant's assertion that SHA has not complied with the applicable statutes and regulations regarding appeals to this Board (i.e., the need for a Procurement Officer's decision), SHA admits that there was no Procurement Officer's decision, but asserts that such

[1] In this regard we note that a decision of this Board awarding an equitable adjustment to a contractor that becomes final is subject to the appropriation process, including Board of Public Works' approval where required, and may require judicial intervention should an agency refuse to pay after the appropriation process and Board of Public Works' approval, if required, is followed and secured. This is because this Board is an executive branch agency with no judicial or equitable powers concerning enforcement of an award of an equitable adjustment (i.e. damages).

a decision is not a precondition to this Board's jurisdiction. SHA argues that when a contractor files a claim and then appeals, any requirement for consideration of an affirmative State claim raised by the Agency on appeal as a counterclaim or set off is not subject to the agency review process by the Procurement Officer and agency head, such requirement being waived by the action of the contractor in filing a claim and then taking an appeal to this Board following receipt of an adverse decision by the Procurement Officer or under the 180 day rule. Thus SHA concedes that prior to the submission of SHA's counterclaims, SHA had not submitted the question of liquidated damages to the SHA's Procurement Officer, no decision on liquidated damages had been rendered by the Procurement Officer, and no funds had been withheld from Appellant by SHA as a result of Appellant's purported failure to perform in a timely manner.[2]

In order for this Board to have jurisdiction over an issue arising under a liquidated damages clause of a contract there must be an assessment of such damages at the agency level by the Procurement Officer, an objection to such assessment by the contractor, an actual or constructive (180 day rule) rejection of the contractor's objection by the Procurement Officer (and agency head) and an appeal by the contractor to this Board following the rejection by the Procurement Officer of its objection to the assessment. That has not happened here. Therefore, at this juncture this Board's jurisdiction is limited to receiving evidence that Appellant's claims should be denied because of Appellant's alleged unexcused failure to timely complete the work;

[2] As noted above, the counterclaims seeks $443,630.00 (Contract No. AW-769) and $458,055.00 (Contract No. AW-770). At the time Appellant filed its appeals with this Board there was only $67,220.00 remaining in the funds allocated to Contract No. AW-769 and $92,393.00 remaining in the funds allocated to Contract No. AW-770.

i.e., any extended performance time was the fault of Appellant and not SHA.

Accordingly, Appellant's Motions to Dismiss the counterclaims are denied insofar as they are based on lack of subject matter jurisdiction over an affirmative State claim and granted in so far as they are based upon the failure of the State to comply with the General Procurement Law and COMAR and properly assert an affirmative State claim based on the liquidated damages clauses of the contracts at the agency level.

Wherefore, it is Ordered, this day of February, 1999, that the counterclaims against Appellant seeking $458,055.00 under Contract No. AW-770 and $443,630.00 under Contract No. AW-769 pursuant to the liquidated damages clauses of the Contracts are dismissed on jurisdictional grounds for lack of a Procurement Officer's decision, provided that Respondent may present evidence that Appellant's claims should be denied because of alleged untimely performance of the work by the Appellant.

Dated:

_____
Robert B. Harrison III
Chairman

_____
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 2072 & 2073, appeals of Alcatel NA Cable Systems, Inc. formerly known as Alcatel Contracting (NA), Inc. under Maryland Dept. of Transportation, State Highway Adm. Contract Nos. AW-769-501-085 & AW-770-501-085; FAP Nos.: IVH-9224(002)3N & CMG-0005(294)N

Dated:

_____
Mary F. Priscilla
Recorder