

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
Subsurface Technologies, Inc.)
)
) Docket No. MSBCA 2801
)
Under SHA Contract Nos.)
AX8565149 & AX8565159)

APPEARANCE FOR APPELLANT: Gregory A. Dorsey
Darren H. Weiss
Kelly Dorsey, P.C.
Columbia, Maryland

APPEARANCE FOR RESPONDENT: Elizabeth S. Morris
Assistant Attorney General
Baltimore, Maryland

MEMORANDUM ORDER AND OPINION

This contract claim dispute came to be heard before the Maryland State Board of Contract Appeals (Board) on April 10, 2013 for oral argument on the March 1, 2013 Motion for Summary Decision filed by the State Highway Administration (SHA), to which appellant Subsurface Technologies, Inc. (STI) filed its opposition on March 25, 2013 and SHA filed its Reply on April 5, 2013. The instant Order serves to memorialize and supplement the ruling from the bench verbally delivered on the record following that hearing, at which time the State's Motion for Summary Decision was granted in part, dismissing most of appellant's claim and holding the balance of the State's Motion *sub curia*.

Appellant was the low bidder and contract awardee on a certain Invitation for Bids (IFB) issued by SHA on or about February 24, 2010 by which SHA sought to identify a contractor to perform work generally identified by the terms of the initial IFB and intended to be further particularized by subsequent individualized site-specific task orders issued by SHA to the

contract awardee. The work which SHA desired to be performed by STI arose in part from a Consent Decree made and entered into by and between SHA and the Maryland Department of the Environment (MDE) requiring SHA to repair, replace, and/or upgrade a number of oil and petroleum product distribution systems and tanks at various SHA facilities located throughout the State and for which upgrades were thereby required to be completed by December 2013. The affected SHA fuel depots include both above ground storage tanks (ASTs) and underground storage tanks (USTs). For purposes of the IFB, SHA divided the State into three regions for which STI was ultimately selected as the low bidder and contract awardee for two of the State's regions, namely, the western region and the central region. Under this task order work arrangement, the nature of the conditional contracts anticipated to be offered by SHA and accepted by STI required SHA to outline a scope of work for each task order it desired to be performed by STI, after which STI was required to provide to SHA an itemized estimate of the cost for performing such work, with SHA thereafter permitted to request modifications to the estimate and ultimately to direct STI to perform the specified work on those jobs for which SHA desired STI to proceed with the task order following SHA approval of STI's cost estimate.

On or about June 25 and July 1, 2010, SHA issued to STI its initial Notices to Proceed on work required in the central and western regions of the State, respectively, following which planning discussions were conducted between the parties toward the objective of coordinated work performance. Early in the course of SHA's management of the task orders issued to STI there arose a dispute concerning the labor classifications required to be employed on the job and the resulting pay rate obligations imposed upon the contractor pursuant to Maryland's prevailing wage law as set forth in the Maryland Annotated Code, State Finance and Procurement Article (SF&P) § 17-201 *et seq.* and the Code of Maryland Regulations (COMAR) § 21.11.11. Specifically, the IFB as amended set forth three labor classifications, namely,

foremen, skilled laborers, and power equipment operators. Pursuant to the terms of the IFB, only the labor category of foreman carried the requirement of certification. Although STI's initial job performance began at the SHA's Frederick facility in timely fashion on or about August 31, 2010, that work was stopped by SHA a few days later, on or about September 2, 2010, as a result of confusion and dispute between the parties about the labor classifications required to be engaged at the work site. SHA demanded that STI comply with SHA's interpretation of the labor classifications it stated in its IFB, to which STI had a contrary understanding, and as a consequence, later that month, on or about September 24, 2010, SHA warned STI of potential contract termination for failure to comply with SHA directives. A contentious dispute continued between the parties for the next eight months, which delayed the work that SHA desired and that STI sought to perform. In the course of that dispute, between September 30, 2010 and April 19, 2011, agents of STI directed numerous offensive and belligerent e-mails to SHA which included profanity, name-calling, and other unprofessional and unacceptable communications directed by STI to the very state employees from whom STI sought to be authorized to commence work.

The IFB to which STI responded and later accepted contract award contained a standard and unambiguous "termination for convenience" clause mandated by State regulation and affording SHA wide latitude to terminate the contract for virtually any reason upon mere determination by the procurement officer that contract termination is in "the best interest of the State." Even the principal appellate authority used and relied upon by counsel for appellant appears to the Board to assert the principle that, unlike in private contracts, in government procurement contracts, the government enjoys "near care-blanche power to terminate", though a footnote to that *dicta* states, "Nothing in this Opinion should be construed as commentary on how we would interpret a termination for convenience clause in a contract involving the State of Maryland." Questar v. CB

Flooring, 410 Md. 241, 978 A.2d 664 at 669-670 (2009).

Moreover, Questar stands for the proposition that a termination for convenience clause is enforceable but is subject to an implied obligation to exercise the right to terminate in good faith; however, the holding in Questar is inapposite to the instant appeal because Questar dealt with a contract between private parties, in contradistinction to a public procurement. At the same time, Questar also reviews the history of termination for convenience clauses in public procurement contracts and concludes that the government's right to terminate for convenience is subject to an implied obligation to act in good faith, but it further asserts that a private party challenging a termination for convenience must present "'well-nigh irrefragable proof' that the government acted in bad faith." (*Id.* at 668.)

The State's wide latitude lawfully to terminate a contract for convenience is especially broad when applied to task orders such as the one here at issue which constitute conditional contracts, giving rise merely to the prospective opportunity of actual issuance and approval of a task order from the State, without assurance or guarantee made or implied by the very nature of the parties' contracting arrangement. On or about May 12, 2011, SHA terminated its contract with STI permitting SHA to issue task orders to STI. It is undisputed that the procurement officer authorized to terminate the STI contract for mere convenience of the State did determine that the exercise of such termination right was in the best interest of the State, though appellant claims that that decision was made by the procurement officer in bad faith. At the Motions hearing the Board rejected the proposition asserted by SHA that the State is permitted to act in bad faith, adopting the contrary view asserted by appellant that there exists an implied obligation for the State to act in good faith.

By this appeal, STI complains that the State's May 12, 2011 exercise of its right to terminate the contract was improper and unlawful, in part on the basis of STI's allegations that the

determination by the procurement officer to terminate the contract in the best interest of the State was made in bad faith and also that SHA did not correctly understand the obligations of Maryland's prevailing wage laws as imposed by the Maryland Department of Labor, Licensing and Regulations (DLLR) and further, that SHA deliberately included in its IFB vague definitions of its specified labor classifications which caused the underlying dispute between the parties. With respect to the particular facts posited by appellant in this matter, the Board evaluates appellant's evidentiary proffers and conjectures in the light most favorable to STI, and thereby determines for purposes of factual assumptions in evaluating the State's Motion for Summary Decision that indeed, SHA could have set forth the job classifications contained in its IFB in a more definitive fashion. But at the same time, the Board is compelled to conclude that the mere finding that SHA's definitions of labor categories may have been deliberately vague is insufficient as a matter of law to support appellant's factual and legal allegation of bad faith under the circumstances present here.

To iterate the sequence of some of the events underlying this appeal, following contract termination on May 12, 2011, STI filed two contract claims against SHA, including one on or about June 6, 2011, for which claim details were submitted to SHA on or about July 20 and September 9, 2011. SHA denied that claim by final determination dated January 5, 2012 following which STI noted its appeal before the Board on January 27, 2012 and later filed its proof of costs on September 17, 2012. STI contends in that appeal that SHA is indebted to it in the approximate amount of \$1.4 million representing the value of work that STI never performed for SHA but for which STI claims that it should have had the opportunity to perform. The quantum of that component of appellant's demands also includes its asserted entitlement to a profit margin of 26%. By separate appeal STI also contends that it is entitled to be paid by SHA the additional sum of \$16,127 as its labor costs claim for work actually performed at SHA sites in

Frederick and Laurel, which amount appears to have been calculated primarily on the basis of the wage rate differential between what SHA paid to STI for employee wages and the amount required by DLLR to be paid by STI to its employees pursuant to the State's prevailing wage law; but on the date of the hearing, counsel for STI was unable to assert whether STI actually paid those wages at the rate that STI may now seek to claim that it was obligated to pay its employees, which obligation constitutes the basis of STI's claim that it is entitled to obtain additional compensation from SHA. SHA claims that STI was paid in full on January 5 and February 2, 2011 for all of the work it actually performed prior to contract termination at both the Laurel and Frederick sites, respectively, and that STI accepted SHA's remittance on those dates as payment in full, thereby releasing SHA from any further payment obligation irrespective of the merits of any underlying claims later asserted.

Immediately following the Motions Hearing on April 10, 2013, the Board dismissed STI's claim for \$1.4 million for work it never performed, citing as authority for the appellant's inability to obtain expectation damages or anticipatory profit the MSBCA precedent of Delle Data Systems, Inc., MSBCA 2146, ¶ 493, (2001) in which the Board stated, "anticipatory profit (i.e., unrealized profit) for work not done will not be allowed" and "a contractor may not be compensated (beyond recovery of expenses where it is required to stand ready to perform) for work that it does not perform to include any anticipated profit on such unperformed work in a Maryland public procurement involving public funds." (pg. 19.) For all of the reasons set forth in the State's Motion for Summary Decision, which are hereby incorporated into this Order, the Board determines that STI is ineligible and unable to receive such expectation damages. In rendering that determination, the Board views all of appellant's factual allegations in the light most favorable to STI but deems immaterial to the outcome of the appeal most of appellant's recitation regarding the existence of disputed facts.

Also at the conclusion of the April 10, 2013 Motions hearing, the Board took under advisement the State's Motion for Summary Decision dismissing appellant's \$16,000 labor claim and other potentially recoverable aspects of its claim of entitlement to receive additional monies from SHA, including expenses actually incurred by STI on behalf of SHA or in reasonable reliance upon the State's contract assurances. At that time, the Board further directed counsel for appellant to inform the Board at a subsequent prompt date whether the \$16,000 claim for labor costs represented costs actually paid by STI to its employees pursuant to prevailing wage obligations, and secondly, whether appellant asserts any claim for reliance damages and if so, the date and manner by which such claim for reliance damages may have been made. The Board *sua sponte* noted that appellant's claim for reliance damages may pertain in part to STI's purchase of a truck needed by STI to perform the work it expected to be assigned to do by SHA. Counsel for appellant at the oral argument required additional time within which to point the Board specifically to the date of filing of that limited component of its overall claim. At the same time, the deferral of that aspect of this dispute afforded the Board additional time within which to review and analyze additional precedent offered by appellant, namely, Engineering Mgmt. Svcs. v. SHA, 375 Md. 211 (2003), which STI claims to support its contention that its claim for labor costs may be filed outside of what the State characterizes as the strict statute of limitations ordinarily imposed upon contract claims by SF&P § 15-219(b) and COMAR 21.10.04.02B. In light of that precedent, the Board concludes that granting the State's Motion for Summary Decision solely on the basis of untimely filing would be premature at this pre-hearing juncture, but only if appellant seeks to assert the existence of a genuine issue of material fact as to the trigger date which commenced the 30-day deadline by which appellant was obliged by law and regulation to file its appeal.

Accordingly, the Board has scheduled hearing to commence on June 26, 2013 on all issues unresolved by this *in limine* ruling or whatever subsequent determinations the Board may render.

SO ORDERED this _____ day of April, 2013.

Dana Dembrow
Board Member

I concur:

Michael J. Collins
Chairman

Ann Marie Doory
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 Memorandum Order and Opinion in MSBCA 2801, appeal of Subsurface Technologies, Inc. under SHA Contract Nos. AX8565149 & AX8565159.

Dated:

Michael L. Carnahan
Deputy Clerk