

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

In the Appeal of Mascaro)
Construction Company, L.P.)
)
) Docket Nos. MSBCA 2578
Under DPSCS Contract Nos.)
KN-000-050-C01 - Phase 5A and)
KN-000-050-C02 - Phase 5B)

APPEARANCE FOR APPELLANT: None

**APPEARANCE FOR RESPONDENT: Alan D. Eason
Assistant Attorney General
Baltimore, Maryland**

OPINION BY CHAIRMAN BURNS

Respondent Maryland Department of Public Safety and Correctional Services moves to Dismiss Appellant Mascaro Construction Company, L.P.'s Appeal for lack of jurisdiction. For the reasons that follow, Respondent's Motion to Dismiss is granted.

Findings of Fact

1. By way of a letter dated May 30, 2008, Appellant Mascaro Construction Company, L.P. ("Mascaro") filed "Notice of Appeals" with the Maryland State Board of Contract Appeals ("Board") regarding a dispute arising under two contracts with Respondent, the Maryland Department of Public Safety and Correctional Services ("Department").
2. The two contracts at issue are designated KN-000-050-C01-Phase 5A and KN-000-050-C02-Phase 5B.

3. There is no statement in the letter of Appeal filed by Mascaro that Mascaro has filed a notice of contract claim with, or an actual contract claim or claims with, the procurement officer involved herein.
4. There is no other evidence that Mascaro has filed a notice of contract claim with, or an actual contract claim or claims with, the procurement officer involved herein.
5. The Board docketed Mascaro's Appeal on June 1, 2007.
6. Mascaro has taken no further action, nor has Mascaro filed any further pleadings or papers, with the Board since the initial "Notices of Appeal" letter of May 30, 2007.
7. On or about November 27, 2007, the Department filed a Motion to Dismiss for Lack of Jurisdiction or, in the alternative, for Failure to Prosecute.
8. Mascaro has not filed any response to the Department's Motion to Dismiss.
9. No hearing was requested on the Department's Motion to Dismiss by either party herein.
10. The Board accepts as true the facts asserted by Respondent through its counsel in support of its Motion to Dismiss.

Decision

Respondent Department of Public Safety and Correctional Services has filed a Motion to Dismiss this Appeal for lack of jurisdiction or, in the alternative, for failure to prosecute the appeal by Appellant Mascaro.

The Department's arguments are correct and this appeal will be dismissed for lack of jurisdiction by the Board.

Prior to filing an appeal of a contract dispute with the Board of Contract Appeals, a contractor such as Mascaro must first follow certain mandated procedures. These procedures

include a requirement that unless a lesser period is prescribed by law or by contract, a contractor shall file a written notice of claim with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known. COMAR 21.10.04.02A. These procedures also include the requirement that 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. COMAR 21.10.04.02B. After the procurement officer has issued a final decision on a contract claim or, for construction contract disputes such as at issue in this appeal, has failed to issue a final decision within 180 days of the receipt of the claim, a contractor may then file an appeal with the Board. COMAR 21.10.04.04; COMAR 21.10.04.09.

There is no evidence that Mascaro has filed either a notice of claim with the procurement officer or a claim with the procurement officer herein.

COMAR 21.10.06.02B. requires an appellant to indicate within its appeal to the Board "the procurement officer's decision from which the appeal is taken." Mascaro's "Notice of Appeals" letter fails to identify any such decision.

There is, therefore, no evidence of any procurement officer's decision from which Mascaro may appeal to this Board. Nor is this a situation where a claim is deemed to be denied by the procurement officer, for the simple reason that no claim has apparently ever been filed with the procurement officer.

The Board has jurisdiction over appeals from final procurement officer/agency decisions. Based on the evidence before the Board, Mascaro has no such final decision from which to appeal because Mascaro has never filed the required claim(s) with the Department.

The Board lacks jurisdiction to hear an appeal where no final agency decision has been issued. See, e.g., Hess Fence & Supply, MSBCA 2061, 5 MSBCA ¶438 (1998); Advance Presort Service, MSBCA 1891, 5 MSBCA ¶384 (1995). In the absence of any final decision from the procurement officer/agency here, the Board lacks jurisdiction over this appeal.

Accordingly, this appeal must be dismissed for lack of jurisdiction and the Department's Motion to Dismiss will be granted.


Because of this finding, there is no need to consider the Department's Motion to Dismiss for lack of Prosecution by Mascaro of this appeal.


Wherefore, it is Ordered this ^{28th} day of April, 2008 that the above-captioned matter is dismissed with prejudice.

Dated: 28 April 2008


Michael W. Burns
Chairman

I Concur:


Michael J. Collins
Board Member


Dana Lee Dembrow
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 2578, appeal of Mascaro Construction Company, L.P. under DPSCS Contract Nos. KN-000-050-C01 - Phase 5A and KN-000-050-C02 - Phase 5B.

Dated:

April 28, 2008



Michael L. Carnahan
Deputy Clerk