BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

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In the Appeal of Star Computer Supply, LLC	*	Docket No. MSBCA 3002
	*	
Under the State Board of Elections Contract No. 060B2490022	*	

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MEMORANDUM OPINION AND FINAL ORDER BY CHAIRMAN BEAM

Respondent has filed a Motion for Reconsideration of this Board's Opinion dated September 15, 2017, the contents of which are incorporated by reference herein. In its Motion, SBE contends that this Board's decision was predicated on the following erroneous findings of facts:

1. The Board "ignored the fact that CCU provided Star with notice and an opportunity to respond to the set-off,"

2. The Board ignored the fact that "SBE followed the correct statutory procedures in considering Star's contract claim," and

3. The Board ignored "evidence that Star obtained the credit from its distributor on behalf of SBE in the full amount of the refund request prior to filing its claim…."

SBE further contends that this Board "erred by taking a simple case and elevating it to one of constitutional proportion."

SBE asserts six (6) separate arguments in support of its request for this Board's reconsideration:

1. SBE was not obligated to proceed under SF&P §15-219.1.

2. There is no evidence that SBE breached the Contract.

3. The State has a common law and statutory right to offset.

4. Star was afforded due process.

5. Star was not entitled to adjudication prior to SBE transferring the delinquent account to CCU.

6. The Board lacks jurisdiction to define the scope of CCU's authority or direct CCU to take specified actions.

We address each of these contentions in turn.

With respect to SBE's contention that the Board "ignored the fact that CCU provided Star with notice and an opportunity to respond to the set-off," we disagree. We did not ignore this fact—we found that when the disputed contract claim was forwarded to CCU for *collection* by SBE, the procedures established by law for resolving a dispute regarding a contract claim had not been followed. Before collection proceedings should commence, a dispute regarding a contract claim must be resolved. It is not a legally enforceable debt that is ripe for collection unless and until both parties have had an opportunity to be heard. This is fundamental due process.

On March 9, 2016, SBE demanded a refund. On March 18, 2016, SBE threatened to send the matter to *collection*. Star testified that it formally disputed the demand on March 19, 2016. At this juncture, SBE had two options: first, it could follow the procedures set forth in SFP §15-219.1 and render a "decision of the reviewing authority [that] is the final action of the unit" and that is appealable to this Board. At the conclusion of this process, a disputed contract claim could become a legally enforceable debt (assuming the State prevails on any appeal). This is the normal course for resolving disputed contract claims.

Alternatively, as we explained, SBE could have referred the case to CCU—not for *collection*, but for adjudication of this disputed contract claim. As we stated previously, under CCU's convening authority, SFP §3-304(a)(1):

> when a claim is referred to CCU by an agency, CCU is authorized to "institute, in its name, any action that is available under State law for collection of a debt or claim; or, without suit, settle the debt or claim." MD. CODE ANN., STATE FIN. &

> PROC., §3-304(a)(1). In other words, CCU is authorized to file suit, whether with this Board, with the Office of Administrative Hearings, or in a court of general jurisdiction, as the case may be, and bring a claim in a neutral forum to have it legally determined to be a debt before taking enforcement actions to collect an alleged debt. CCU is the enforcement arm of the State; it is not vested with the authority to adjudicate disputed claims. Unless it has been legally determined that a debt is owed, CCU has no authority to collect an alleged debt.

While CCU did indeed provide Star with notice of its intent to collect the alleged debt via set-off, it did not have the legal right to take Star's money from other accounts at that point in time because it had not settled the alleged debt or claim, nor had it instituted an action "under State law for collection of a debt or claim."

Moreover, Mr. Albiniak, on behalf of Star, testified that he repeatedly attempted to resolve the debt with not only SBE but also with CCU. He stated in an email dated May 19, 2016, to SBE that he was formally disputing the debt, stating that this was "formal notice of my intent to dispute and defend against this invoice." He sent a response to CCU's initial notice of intent to offset and called them to discuss it. He was even told by CCU not to make partial payments because this would be deemed an admission of liability. He hired an attorney, who wrote a letter on Star's behalf on July 19, 2016, unequivocally disputing the alleged debt. Mr. Albiniak's testimony was unrebutted.

Yet despite his protests that Star did not owe this alleged debt, CCU conducted a purported "investigation" and prepared a half-page report, concluding that "[a]ccording to SBE, Star Computer was unable to provide the warranty repair service…[and] [a]fter review by the Office of Attorney General, it was determined that the debt referral to CCU was proper." This report clearly confirms that no attempts were made by CCU to communicate with Star or otherwise resolve the disputed claim. CCU relied solely on SBE and the Office of the Attorney General in determining, *ipse dixit*, that the disputed contract claim was a valid debt.

In short, contrary to SBE's assertion that this Board "ignored the fact that CCU provided Star with notice and an opportunity to respond to the set-off," this Board found that CCU did not have a legal right to collect money from Star without first following the procedures for resolving a disputed claim. CCU's notice of its intent to *collect* the alleged debt via set-off did not provide Star with a full and fair opportunity to be heard regarding the disputed contract claim, as required by Maryland law, and CCU's collection of Star's money without first following Maryland law for resolving a disputed claim was unlawful. We did not ignore CCU's "notice and opportunity to respond to the set-off;" we found it lacking and insufficient to satisfy the due process requirements under the law.

SBE also contends that this Board ignored the fact that "SBE followed the correct statutory procedures in considering Star's contract claim which did not result in any prejudice to Star, since that claim was ultimately addressed by the Board." As discussed *infra,* SBE did not follow the correct statutory procedures in considering Star's disputed contract claim. SFP 15-219.1 sets forth the procedures for resolving a contract claim against a contractor:

> §15-219.1. Contract claim against a contractor.
>
> (a) *Written notice; contents; procedure upon receipt of claims*. – (1) A unit may assert a contract claim against a contractor by sending written notice to the contractor and the procurement officer that states:
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> (i) the basis for the contract claim;
>
> (ii) to the extent known, the amount, or the performance or other action, requested by the unit in the contract claim; and
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> (iii) the date by which the contractor is required to provide a written response to the contract claim
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> (2) On receipt of a contract claim from a unit, a procurement officer:
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> (i) shall review the substance of the contract claim;
>
> (ii) may request additional information or substantiation through an appropriate procedure; and
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> (iii) may discuss or, if appropriate, negotiate the contract claim with the unit or contractor.
>
> (3) **The procurement officer shall proceed under subsection (b) of this section if the contractor fails to respond, provides an inadequate response,**

or denies the contract claim or the relief sought by the unit in whole or in part. (emphasis added).

Subsection (b) provides:

> (b) *Proposed decision upon claim when no resolution is reached*. – (1) If the contractor and the unit do not resolve the contract claim, the procurement officer **shall** prepare a proposed decision on the contract claim, including:
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> (i) a description of the contract claim;
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> (ii) references to pertinent contract provisions;
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> (iii) a statement of factual areas of agreement or disagreement; and
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> (iv) a statement in the proposed decision wholly or partly granting or denying the relief sought, with supporting rationale.
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> (2) Unless otherwise provided by regulation, the procurement officer **shall** submit the contract claim and proposed decision to:
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> (i) the head of the unit; and
>
> (ii) the head of the principal department or other equivalent unit of which the unit is a part.
>
> (3)(i) The reviewing authority **shall** approve, modify, or disapprove the proposed decision.
>
> (ii) In disapproving a proposed decision, the reviewing authority may remand the contract claim with instructions to the procurement officer.
>
> (iii) On remand, the procurement officer shall proceed as required under this subsection and in accordance with the instructions of the review authority.
>
> (4) The decision of the reviewing authority is the final action of the unit. (emphasis added).

SBE did not follow these procedures. While the statute provides that a unit "may" assert a contract claim against a contractor, we do not interpret this as "discretionary" language; rather, we read this as a grant of authority by the legislature that allows a unit or agency to pursue a claim against a contractor, where it did not have that authority prior to enactment of the statute.[1]

[1] Prior to 2004, only a contractor could file a contract claim against the State. The State did not have the right to file an affirmative contract claim against a contractor. The Court of Appeals held in *University of Maryland v. MFE International/NFP Architects, Inc.*, 345 MD 86 (1997) that the State had no statutory authority to file a contract claim against the defendants, and MSBCA had no jurisdiction over the State's contract claim. The Court explained that under the statutory scheme in existence at that time, the State could generally resolve any dispute it might have with a contractor by set off, that is, refusing to release funds it was holding that were otherwise due to the contractor, thereby forcing a *defacto* claim by a contractor to obtain those funds. But that is not the situation here, where SBE was no longer holding funds that would otherwise be due to Star (SBE had fully paid Star), and where the statutory scheme in existence when the *MFE* case was decided has changed.

SFP §15-219.1 was enacted in response to this decision and to "permit the State to file claims and take advantage of the same specialized procurement appellant process that contractors are afforded." *See*, HB 767, Fiscal

SBE fails to grasp the unequivocal fact that Star was forced to file a claim only after, and because, SBE violated the law and took its money without due process. SBE had a *claim* (as opposed to a *debt*) long before Star was forced to file its claim, whether SBE chooses to believe it or not, that SBE failed to prosecute properly.

On March 9, 2016, when SBE notified Star that it was moving on to other vendors and demanded a refund, SBE's demand for a refund constituted notice of its *claim* that Star had allegedly breached the contract by failing to deliver the requested warranties. This was a contract *claim*. It was not a *debt*. And this demand for a refund constitutes notice of that *claim*. Although the demand did not strictly comply with SFP §15-219.1(a), it was nevertheless the functional equivalent of notice by SBE that it considered Star in breach of the contract. And there is no doubt that Star vigorously disputed this claim.

SBE elected to ignore the statutory procedure for resolving this disputed claim and obtaining a refund in the face of its allegation of breach. SBE instead referred the matter to CCU as a debt to be collected. Whether SBE and CCU acted in concert is unclear, but the unequivocal fact remains, that neither SBE nor CCU followed the procedures for addressing disputed contract claims against a contractor that are clearly set forth in SFP §15-219.1.

SBE seems fixated on the mistaken belief that this Board erred regarding SBE's handling of Star's claim. SBE's focus and fixation is sorely misplaced. For some inexplicable reason, SBE cannot understand that the issue of concern is not how SBE handled Star's claim—our paramount concern is how SBE failed to follow the law in prosecuting its own claim, and taking Star's money before this disputed contract claim had been adjudicated and determined to be a

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and Policy Note, p. 2-3. The Task Force to Study Efficiency in Procurement (2003) noted that "the procurement officer and reviewing authority are not likely to find against themselves in the review process, but that the process will develop a record on which MSBCA can adjudicate." *Id.* at p. 3. Here, however, SBE failed to follow this process and develop a record upon which we could adjudicate, as was intended by the enactment of this legislation.

legally enforceable debt. It was this failure to follow the law that forced Star to file a claim to recover the damages is suffered after SBE took Star's money on other contracts and deprived Star of any meaningful due process.

SBE contends that Star suffered no prejudice because Star's claim was ultimately heard by this Board. Yet it fails to understand that Star's claim was adjudicated by this Board long after SBE took Star's money before, and without, resolving the disputed contract claim in accordance with the law. Star was indeed prejudiced; to suggest otherwise is preposterous.

SBE next contends that the Board ignored "evidence that Star obtained the credit from its distributor on behalf of SBE in the full amount of the refund request prior to filing its claim…." The Board did not ignore this fact. It simply found it irrelevant to the issue of breach. It is only relevant to the issue of damages since the credit served to mitigate the damages suffered by Star. Star did not have a duty to seek out this credit because it did not have a duty to issue SBE a refund. Star's attempt to obtain a credit on behalf of SBE was gratuitous. And it was good business practice done in an attempt to keep its customer happy. SBE utterly fails to understand that Star fully performed its obligations under the contract. It delivered what SBE ordered, which SBE promptly lost. Star went above and beyond its obligations and tried to get a refund for SBE, even though it had absolutely no duty to do so. And for its efforts, SBE took its money and charged it a collection fee. Star's receipt of a credit simply serves as mitigation of the damages caused by SBE when SBE took its money without due process.

Having addressed SBE's allegations that this Board ignored certain material facts, we now turn to SBE's six arguments.

1. <u>SBE Was Not Obligated to Proceed Under SF&P §15-219.1.</u>

We disagree. See discussion *infra*.

2. <u>There is no evidence that SBE Breached the Contract.</u>

Substantial evidence exists to unequivocally demonstrate that SBE breached the contract with Star by taking money from Star that SBE was not entitled to receive. The contract required Star to deliver a product, the specifics of which were clearly set forth in the contract. Star delivered the product as required. SBE accepted the delivery of the product. SBE did not inspect the product within 30 days to ensure that it complied with the contract specifications. SBE lost the product. Five months later, after discovering the product had been lost, SBE demanded a refund from Star. The contract provided that returns for refunds must be made within 30 days. SBE did not return the product to Star because it lost it and never found it.[2]

Star did not have an obligation to issue a refund to SBE. SBE was not entitled to a refund. By enlisting CCU to take Star's money from other contracts and assessing it a collection fee, before resolving this disputed contract claim with this Board, SBE breached the contract and caused Star to suffer damages. The practical effect of this wrongful taking was that Star never received the contract sum by SBE as required under the contract. Star was entitled to be paid the full contract sum. Not only did Star not get paid, it was assessed a collection fee. These damages all arose as a result of SBE's breach. The credit Star obtained from its distributer served to mitigate the damages caused by SBE when it took this money from Star's other accounts.

[2] SBE contends that we "erroneously rejected the evidence that the warranty cards were returned, discrediting the 'return' notation on the credit memos issued to Star…." SBE would have us believe that, despite Mr. Omenka's testimony that he searched high and low for the cards but could never find them, the cards were somehow magically transported back to BOTH the distributor AND the manufacturer, both of which noted the word "return" on the credit memo issued to Star. There is absolutely no evidence to suggest that these cards were found by SBE after they were delivered, accepted, and lost, much less that SBE returned them to either Star, the distributor, or the manufacturer. We do not find that a mere notation on the credit invoice is substantial evidence that the cards were, in fact, returned. We find that SBE's contention is simply not plausible and refuse to accept such fiction.

SBE invokes the doctrine of good faith and fair dealing in contending that Star had a duty to notify SBE that it had obtained the credit and work out a means by which to pass it along to SBE. We are continually shocked by SBE's chutzpah. Star was advised that it had received the credit on March 25, 2016, shortly after it had been notified, by way of an invoice, that SBE demanded a refund in full not later than April 9, 2016 or be subject to a 17% collection fee. Star had no duty whatsoever to SBE, having fully performed its obligations under the contract. Given SBE's unreasonable demands for a refund, it is no wonder that Star failed to disclose this credit, particularly after SBE, via CCU, took its money without due process. If any party is entitled to the benefit of good faith and fair dealing under the circumstances presented in this case, it is Star, not SBE.

3. <u>The State Has a Common Law and Statutory Right to Offset.</u>

We do not disagree. However, the State may only take what is rightfully the State's to take, and only with due process of law. That is not the case here. SBE did not perfect its contract claim. The claim was clearly disputed by Star. SBE ignored the law that clearly establishes how disputed contract claims are to be resolved. SBE took Star's money from other contracts via set-off at the hands of CCU, *before it was determined that this money was legally owed*. This Board has determined that the money was **<u>not</u>** legally owed, a decision that arose as a result of Star being forced to file a claim to recover money that was wrongfully taken.

4. <u>Star Was Afforded Due Process.</u>

We disagree. See discussion *infra*.

5. <u>Star Was Not Entitled to Adjudication Prior to SBE Transferring the Delinquent Account to CCU.</u>

We disagree. See discussion *infra*.

6. The Board Lacks Jurisdiction to Define the Scope of CCU's Authority or Direct CCU to Take Specified Actions.

This Board has original and exclusive jurisdiction over all appeals relating to disputed contract claims concerning breach, performance, modification, or termination. MD. CODE ANN., STATE FIN. & PROC., §15-211. A "contract claim" is defined as "a claim that relates to a procurement contract." MD. CODE ANN., STATE FIN. & PROC., §15-215(b). As we previously explained, the claim at issue in this case is a disputed contract claim. Accordingly, this Board has original and exclusive jurisdiction over Star's claim.

SBE's decision to refer this case to CCU does not deprive this Board of its jurisdiction. When the disputed claim was referred to CCU, CCU had the legal obligation to act *on behalf of SBE* and "institute, in its name, any action that is available under State law for collection of a debt or claim; or, without suit, settle the debt or claim." MD. CODE ANN., STATE FIN. & PROC., §3-304(a)(1). CCU failed to settle the claim, and failed to institute an action with this Board, on behalf of SBE, to adjudicate this claim and have it determined to be a legally enforceable debt. SBE, or any other agency, may not circumvent this Board's jurisdiction to adjudicate disputed contract claims merely by proclaiming that a disputed contract claim is a debt and referring the alleged debt to CCU for collection. Either SBE or CCU was required by law to institute an action with this Board to resolve this disputed contract claim and determine that it was a legally enforceable debt (which it was not) before taking Star's money. Neither did.

Finally, with regard to SBE's contention that this Board "erred by taking a simple case and elevating it to one of constitutional proportion," we simply respond that this statement is a perfect example of the proverbial "pot calling the kettle black." We feel no need to address this further.

Accordingly, based on the foregoing, it is this 25th day of October, 2017 hereby:

ORDERED that the Respondent's Motion for Reconsideration is DENIED.

/s/
Bethamy N. Beam, Esq., Chairman

I concur:

/s/
Ann Marie Doory, Esq.

/s/
Michael J. Stewart, Esq.