BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

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

* * * * * * * * * * * *

OPINION BY CHAIRMAN BEAM

This appeal is from the denial of a claim for breach of contract filed by Appellant, Star Computer Supply, LLC ("Star") against Respondent, State Board of Elections ("SBE"), arising from Respondent's purchase of warranties for 31 Ballot-on-Demand Okidata Printers. Respondent contends that it never received what it contracted and paid for, while Star contends that it fully performed its obligations under the contract. The central issue in this case is whether a State Agency can unilaterally claim that a debt is owed by a contractor and collect the alleged debt via set-off against unrelated contract accounts, without first adjudicating the validity of the disputed debt. For the reasons that follow, the Board finds in favor of Star.

FINDINGS OF FACT

On June 26, 2012, the Department of Information Technology ("DoIT") issued a Request for Proposal for Hardware and Associated Equipment and Services 2012, Project No. 060B2490022 (the "RFP"). The purpose of the RFP was to "procure hardware and associated equipment and services…, installation and training services for the hardware, and manufacturer's

extended warranty, for the State of Maryland." The Functional areas to be addressed by the Master Contract included Functional Area V, for Manufacturer's Extended Warranty.[1]

According to the RFP, DoIT intended to award a Master Contract to an unlimited number of Offerors that are authorized by the Manufacturer or Distributor to sell the proposed products and services, and manufacturer's extended warranty, and determined by the State to be qualified. Each request for hardware, installation and/or training services, and/or manufacturer's extended warranty would be issued by the Requesting Agency in a Purchase Order RFP. All Offerors awarded a Master Contract for the specific manufacturer's products and/or services for which a PORFP is issued would be invited to compete for award, and a Master Contractor would be selected to provide the requested hardware, installation and/or training services, and/or manufacturer's extended warranty.

On or about July 20, 2012, Star, a one-person small business reseller that purchases supplies from distributors and provides them to end-user customers, submitted Technical and Financial Proposals in response to the RFP. Star was selected by DoIT to be a Master Contractor, and the Hardware and Associated Equipment and Services 2012 Contract ("Hardware 2012 Contract") was signed by Star on October 11, 2012 and by DoIT on November 14, 2012. The Hardware 2012 Contract was approved by the Board of Public Works on November 14, 2012.

The terms of Star's Technical Proposal were incorporated into the Hardware 2012 Contract via Section 2.1 thereof, including Star's return policy, which is set forth in Section 3.4.2.4 of its Technical Proposal. Star's return policy provided that Star would "accept returns on all undamaged products within 30 days, with no restocking fees." The Respondent's return policy

---

[1] Functional Area I was for Servers and Associated Peripherals; Functional Area II was for Printers and Associated Peripherals; Functional Area III was for Network Communications Equipment; and Functional Area IV was for Installation and Training Services associated with said equipment.

stated in Section 2.2.2 of the RFP provided that "Master Contractors shall refund to the State within 30 calendar days of receipt of the returned hardware, the purchase price of the returned hardware, including shipping costs. The State shall not be charged restocking fees."[2]

On or about August 13, 2015, Respondent, acting as a Requesting Agency under the Hardware 2012 Contract, issued PORFP No. D38P6400041 to approximately 14 Master Contractors (the "PORFP"). Section 4—Scope of Work of the PORPF requested quotes under "Functional Area V—Manufacturer's Extended Warranty." The "Warranty Requirements" were identified as requiring a "1 year fix or replace maintenance contract on 31 Ballot-on-Demand Okidata Printers model C9650" for the period September 7, 2015-September 6, 2016. The "Deliverable" was identified as requiring a "document confirming support is in effect." The PORFP also included a detailed list of all 31 Okidata printers, including the address where each printer was located and serial number of each printer.

The PORFP was jointly prepared by Ms. Whitney LeRoux, the Respondent's Procurement Officer ("PO"), and Mr. Vincent Omenka, the Respondent's Director of Information Technology. The PORFP specifically requested quotes for a manufacturer's extended warranty on the Okidata printers, as reflected by the selection of the box marked "Functional Area V—Manufacturer's Extended Warranty." This was a specification determined by Mr. Omenka, who determines the

---

[2] Section 2.1 of the Hardware 2012 Contract provided the following:

> If there are any inconsistencies between this Contract and Exhibits A through G, the terms of this Contract shall control. If there is a conflict among the Exhibits, the following order of preference shall determine the prevailing provisions:
>
> Exhibit A - The RFP.
> Exhibit B - The Purchase Order (when executed).
> Exhibit C - The PORFP (when released).
> Exhibit D - Master Contractor's response to the PORFP (when submitted).
> Exhibit E - The Technical Proposal.
> Exhibit F - The Financial Proposal.
> Exhibit F - State Contract Affidavit executed by the Contractor and dated 10/11/12.

technical specifications of the IT products necessary to meet Respondent's needs and also determines the sufficiency of the quotes. Ms. LeRoux, on the other hand, administers the procurement process.

Mr. Omenka is in charge of overseeing all IT infrastructure, including ballot printers, because these are critical for the state elections. He uses a spreadsheet to track each printer, with dates of service, dates of warranty expiration, serial numbers, and companies responsible for providing support. His standard practice is to start a new procurement process to renew a warranty approximately 60 days before a warranty is scheduled to expire. The warranty in place prior to the PORFP at issue here was provided by a third-party vendor called Office State Depot.

On September 8, 2015, Star submitted its bid for the PORFP via email to Ms. LeRoux. Star's quote was for an OKIcare warranty, which is an Okidata manufacturer's extended warranty and described on the quote as "Oki OKIcare—1 Year—Service—On-Site—Maintenance—Parts & Labor—Electronic and Physical Service," for 31 printers at a price of $20,994.75. This quote included a markup for Star's profit of 1.75%, or $361.09. Star was the only Master Contractor to submit a bid in response to the PORFP.

On September 10, 2015, Star was selected for award of the purchase order, which was signed by Mr. Omenka the same day, and which directed Star to furnish the State of Maryland with "Functional Area V—Manufacturer's Extended Warranty" with a "1 year fix or replace maintenance contract on 31 Ballot on Demand Printers Model C9650."[3] On behalf of Star, Mr. Steve Albinak had obtained the lowest price for the "OKIcare" Okidata manufacturer's extended

[3] The warranty under the Hardware 2012 Contract, and for which the PORFP was issued, was a manufacturer's extended warranty, as opposed to a third-party warranty. Mr. Steve Albinak testified on behalf of Star that third-party warranties are not covered under the Hardware 2012 Contract at issue here, but are instead covered under the CATS± contract with DoIT (*i.e.*, Consulting and Technical Services± contract), which is a service contract, not a hardware and manufacturer's extended warranty contract.

warranty from one of its distributors, Synnex. According to Mr. Albinak, Okidata is "old-fashioned" and sells its extended warranties unlike other manufacturers. Okidata's OKIcare warranty is sold as a warranty card for each printer, which requires the user to complete the warranty card with the serial number of the printer, then mail the warranty card back to Okidata for activation. After it was notified of the award, Star purchased and arranged with Synnex to have the 31 warranty cards shipped directly to Respondent at its offices in Annapolis via Federal Express. According to the FedEx Tracking report, the package was delivered to Annapolis on September 24, 2015, at 4:38 p.m. and was signed for by "TJennings."

Mr. Albinak testified that Star's procedure is to issue an invoice only after the product has been received by the customer. On September 25, 2015, one day after the packaged was delivered to Annapolis, Star issued an invoice to Respondent in the amount of $20,994.75. Within a couple of days thereafter, Respondent sent a check to Star as payment, along with a copy of the invoice with various handwritten notations on it from an unidentified person(s), including a stamp with the words "GOODS AND SERVICES RECEIVED" and a signature directly beneath the stamp that appears to be the same signature that appears on the signed purchase order (*i.e.*, Vincent Omenka's).

On or about February 11, 2016, Mr. Omenka received a telephone call from the Frederick County Board of Elections requesting service on its Okidata Ballot-on-Demand printer. Mr. Omenka then contacted Star via email to Mr. Albinak requesting documentation confirming the purchase. Mr. Albinak responded the same day stating that the documentation was delivered as physical warranty cards and provided Mr. Omenka with the FedEx tracking report confirming delivery. Mr. Omenka was unable to locate them anywhere in the office.

During the period between February 11, 2016, through approximately March 9, 2016, Mr. Albinak diligently attempted to assist Respondent in resolving this problem. Mr. Albinak contacted and maintained a continuing dialogue with both its distributor, Synnex, and the manufacturer, Okidata, trying to obtain a refund for Respondent or find a way to activate the missing warranty cards. During these efforts, the parties learned from Okidata that the printers' original manufacturer's warranty had expired in January 2014, and that extended manufacturer's warranties could not be purchased on these printers. In an email to Mr. Albinak from Okidata dated March 9, 2016, Okidata stated that if the warranty cards had been returned to Okidata for activation as instructed, it would have discovered that the printers were out of manufacturer's warranty and that the warranty cards were invalid.

Despite Star's continuing efforts to resolve the problem, Respondent advised Star on March 9, 2016, that it was moving forward with procuring warranties from another vendor[4] and demanded a refund. Ms. Shelly Holland, Respondent's Director of Budget and Finance, sent an invoice to Star on March 9, 2016 (*i.e.*, Invoice No. AA160309) demanding payment in the amount of $20,994.75 not later than April 9, 2016. At the bottom of the Invoice was the following statement: "Pursuant to State regulations, this agency is mandated to turn over any uncollected accounts to the Central Collection Unit of the Department of Budget and Management. At such time, a 17% collection fee will be added to your account. When applicable this debt will be reported to the credit agency and may affect your credit rating. Thank you for your business!"

[4] Ultimately, Respondent was able to obtain a 1-year maintenance contract on the printers with a third-party vendor through a separate procurement. This procurement was not initiated as a PORFP under the DoIT Hardware 2012 Contract. Instead, it was an open procurement published on the eMaryland Marektplace and was open to all vendors, not just hardware Master Contractors. The warranty ultimately purchased was not an OKIcare manufacturer's extended warranty.

Mr. Albinak responded to Ms. Holland on the same day that he was continuing to work with Okidata to get a refund "outside of the 30-day return period, which ended on October 24, 2015." Mr. Albinak further explained that if Okidata approved this exception, Star would issue a refund as soon as possible, "which may or may not be before 4/9/2016." However, on May 15, 2016, Ms. Holland advised Mr. Albinak that she would be sending the account to the Central Collection Unit of the Department of Budget and Management ("CCU") for collection on May 18, 2016.

By email dated May 19, 2016, Mr. Albinak advised Ms. Holland that "this email [is] formal notice of my intent to dispute and defend against this invoice." After summarizing the sequence of events, Mr. Albinak stated that "[y]our refund demand 4 months after the 30-day return period ended was not approved by us, and we did not then and do not now agree to be invoiced for it."

Respondent's Procurement Officer did not conduct a review and investigation of the claim as required by MD. CODE ANN., STATE FIN. & PROC., §15-219.1(a) and COMAR 21.10.04.06, and did not follow any of the procedures for disposition of a procurement agency claim pursuant to MD. CODE ANN., STATE FIN. & PROC., §15-219.1(b) and COMAR 21.10.04.08.

Ultimately, as a result of Mr. Albinak's efforts to resolve this issue on behalf of Respondent, Okidata advised Star that it would issue a credit to Synnex, which would in turn issue a credit to Star. On or about March 25, 2016, Star was advised by Synnex that it had issued a credit toward Star's account.[5] This credit could only be used against future purchases; it was not a cash refund that could be passed on to Respondent. Mr. Albinak testified that Star was not in a financial position that it could issue a cash refund to Respondent in the amount demanded.

[5] Okidata issued a credit invoice to Synnex on March 9, 2016, in the amount of $20,576.25. Synnex issued a credit invoice to Star on March 25, 2016. Although both invoices reflected that the credit was issued as a result of a "return," there was no evidence that Respondent actually returned the warranty cards to either Star or Okidata or Synnex.

On June 11, 2016, CCU issued a Notice of Intent to Offset funds that were due to Star under other contracts with the State of Maryland in the amount of $24,563.86. This amount included a collection fee of $3,569.11, which is 17% of the amount demanded in the Invoice. The notice also advised that if Star believed the debt was not due or legally enforceable, Star must send a written request and evidence to support its position to CCU. No time period for this submission was indicated.

On June 23, 2016, CCU sent Star a "First Notice" advising that Star's "overdue balance" was due immediately. Attached as page 2 was the CCU Collection Policy, which provided that if Star did not believe that under the law the payment should be offset, Star had the "right to request an investigation of the circumstances and confirm or modify the existence of amount or the debt."

In response to these demands for payment, Mr. Albinak contacted CCU in writing and by telephone to dispute the debt and the offset and to request an investigation. Mr. Albinak testified that the CCU representative he spoke with instructed him not to make partial payments as that would be admitting liability.

On July 19, 2016, Star, through counsel, sent a letter via UPS Overnight Delivery to both Whitney LeRoux, Respondent's PO and the Director of Procurement and Contract Compliance, and to CCU. Star's counsel provided a lengthy summary and description of the events leading up to the dispute, and formally disputed the debt. Neither Star nor its counsel received a response to this letter from either Ms. LeRoux or CCU.

During the months of June and July, 2016, CCU collected money that was allegedly owed to Respondent by offsetting against moneys owed to Star on other contracts. The full amount CCU collected from Star from other contracts was $24,563.86.

On September 22, 2016, Ms. LeRoux, as PO on behalf of Respondent, issued a letter constituting the "final agency action" in response to Star's counsel's July 17, 2016 letter of dispute. Respondent treated Star's letter as a contract claim, and concluded that (1) the claim was untimely filed because it was not filed within 30 days after the basis for the claim is known or should have been known, (2) Star failed to provide the warranty service, (3) the State has a common law right to set-off, and (4) Star's due process rights were not violated.

On November 3, 2016, CCU completed a purported investigation, which was initially requested by Star, through counsel, on July 19, 2016, and, after receiving no response, was requested again on October 18, 2016. CCU issued a half-page report, signed by "H. Pierce," stating 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." No one ever contacted Star during or regarding this purported investigation.

On November 17, 2016, Star filed a Complaint and Request for Hearing with this Board, asserting two causes of action: (1) breach of contract, and (2) violation of Due Process as guaranteed under Article 24 of the Maryland Declaration of Rights. Star initially sought relief in the form of money damages in the amount of $24,563.86, plus attorneys' fees. On July 26, 2017, Respondent filed a "Motion to Dismiss and for Summary Disposition" on the grounds that this Board lacks jurisdiction to hear Star's complaint.[6] On August 1, 2017, Star filed an Opposition to Respondent's Motion. On August 14, 2017, a hearing was held on all pending motions and on the

[6] This Motion was denied on the record at the hearing held on August 14, 2017, and a separate opinion will be issued addressing Respondent's jurisdictional arguments.

merits of Star's claim. At the hearing, Star amended its claim to request only the collection fees it incurred in the amount of $3,569.11, as well as its attorneys' fees in the amount of $11,462.50.[7]

DECISION

Here we are faced with a small business contractor, comprised of one man, poised to earn a mere $361.09 in profit on a contract to provide the State with a product it could not use; a company that has now incurred over $15,000 in collection costs and attorneys' fees, representing approximately 50 times its anticipated profit, as a direct result of the State's clear and unequivocal violation of law. This case presents a classic comedy of errors, which would make a perfectly hilarious stage play were the consequences to this contractor not so tragic and dire. The State's actions nearly put this man out of business, and likely would have done so, but for his own efforts to mitigate the damages caused by the State, by turning to and relying upon the strength of his relationships with the manufacturer and distributor, which gratuitously issued him a credit where no credit was actually due. We are profoundly disappointed to say that we cannot award Star its attorneys' fees since our legal authority to do so is constrained to making such awards only in construction cases. If ever a case warranted an award of attorneys' fees, this is it.

The outrageous nature of this case leaves this Board struggling with where to begin. We are tempted to begin our analysis by careful and thorough examination of the tortuous fact pattern set forth above concerning this $3,569 claim, representing the 17% collection fee unilaterally imposed by CCU. Was there a breach of contract by either party? Did Respondent order, or did Star deliver, the wrong product? Did Respondent have an obligation to pay for the product that was delivered to it, which it apparently lost? Did the State have the right to demand a refund

[7] These fees reflected services provided through August 8, 2017 and did not include attorneys' fees incurred in preparation of, and through the date of, the hearing on August 14, 2017.

outside Star's 30-day return policy? Was CCU entitled to exercise a broad set-off right by deducting from unrelated payment obligations to Star the amount Respondent claimed to be due for breach of the parties' contract?

Before we begin this analysis, we are compelled to first address both Respondent's and CCU's egregious violation of Star's constitutional rights. Due process is the most fundamental centerpiece of Anglo-Saxon jurisprudence. It is enshrined in Article 24 of the Maryland Declaration of Rights, adopted in 1867, and provides that "[n]o man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." For the past 150 years, that Article has stood for the proposition that the State may not take a person's property without due process of law. It is nothing less than the foundation of the noble principal of justice for all.

The due process obligations of law applicable to the resolution of this contract dispute are expressly set forth in Section 15-219.1 of the State Finance and Procurement Article of the Maryland Annotated Code, which establishes and defines a certain explicit procedure that the State must follow in order to assert a claim against a contractor, and certainly before unilaterally depriving a contractor of property without providing it an opportunity to be heard. Whether through ignorance or negligence, there is no question that both Respondent and CCU ignored this statutory process and took Star's money without due process of law.[8]

With that predicate, we begin our analysis with the inescapable conclusions that Respondent ordered an item it could not use, paid for it after it was delivered, promptly lost what

[8] We pause here to note that we are not rendering any opinion as to whether Star's due process rights under federal law have been violated. We do not have jurisdiction to address any such federal claim. Our opinion is strictly limited to Star's claim that Respondent violated Article 24 of the Maryland Declaration of Rights.

it had ordered, never returned it for a refund within the 30-day timeframe for returns set forth in Star's Technical Proposal, demanded a refund five months later, and resorted to self-help by taking the claimed refund and assessing a collection fee from monies due to Star under other unrelated contracts, all without ever filing a claim against Star and having such claim legally determined to be a legitimate debt.

Mr. Omenka and Ms. LeRoux issued a PORFP under the Hardware 2012 Contract that specifically requested an extension of the manufacturer's warranty—not a third-party warranty. Ms. LeRoux and Mr. Omenka failed to understand the difference, and negligently conducted a procurement process set out from the beginning to fail. Mr. Omenka should have known at the time they were creating the PORFP that the Okidata printers' manufacturer's warranty had already expired. He also should have known that it was not possible to purchase an extended manufacturer's warranty once the original manufacturer's warranty had expired. He certainly knew that the warranty in effect at that time was not the manufacturer's warranty, but a third-party maintenance contract in place with Office State Depot.

Ms. LeRoux, who prepared the actual PORFP, checked the box marked "Functional Area V—Manufacturer's Extended Warranty," and issued the PORFP to Master Contractors under the Hardware 2012 Contract. But she relied upon Mr. Omenka to determine the technical specifications of the warranty needed. Apparently, neither Ms. LeRoux nor Mr. Omenka understood that they were ordering an item that could not be used. It was not Star's responsibility to determine the Respondent's needs—it was Mr. Omenka's. Mr. Omenka testified that it was the contractor's responsibility to provide warranties that comply with the PORFP specifications and to provide guidance on warranties and support. But it was Mr. Omenka's responsibility to issue specifications for a product that would satisfy Respondent's needs. Respondent prepared a PORFP

with defective specifications (*i.e.*, an extended manufacturer's warranty) and, as we have held in previous cases, a contractor has the right to rely upon the implied representation that the Respondent's technical specifications were carefully prepared and based on all relevant information in its possession. *See*, *Appeal of Martin G. Imbach, Inc.*, MSBCA No. 1020, 1 MSBCA ¶52 (1983); *see also*, *Appeal of Manuel Luis Construction, Co., Inc.*, MSBCA No. 2875 (2014). That did not happen here because Mr. Omenka failed to accurately specify what was needed—a 1-year warranty *service* contract, not a manufacturer's extended warranty.

Compounding the error, Respondent lost the warranty cards after they were delivered. Star produced evidence that the warranty cards were delivered by FedEx to Annapolis and signed for by "TJennings" on September 24, 2015; that Star invoiced Respondent the very next day; and that a check was issued by Respondent and sent to Star with a copy of Star's invoice stamped "GOODS AND SERVICES RECEIVED" and signed by Vincent Omenka. Respondent attempts to shift the blame to Star, straining credibility with the suggestion that the warranty cards were returned to Okidata and/or Synnex by virtue of the fact that Okidata and Synnex agreed to issue Star a credit on its account.[9] However, Respondent offered no evidence that the warranty cards were, in fact, returned. The only evidence Respondent offered in support of this contention were the credit memos issued to Star, which had a "return" notation on them. The Board is not persuaded that this notation is conclusive evidence that the warranty cards were indeed returned to either the distributor or the manufacturer, particularly in the absence of evidence that Respondent took steps to return them after it accepted delivery.

[9] This credit was a "store credit" and could only be used against future purchases. It could not be converted to cash. Okidata and Synnex had no obligation to do this. It was a gratuitous credit, or, in essence, a gift.

Had Respondent's employees been diligent in performing their duties, particularly given the critical nature of these ballot printers, the warranty cards would not have been lost and would have been completed, signed, and returned to Okidata, whereupon Respondent would have discovered what it should have known all along: that a manufacturer's extended warranty could not be purchased for printers that were no longer under a manufacturer's warranty. At that point, under Star's 30-day return policy, Respondent would have undoubtedly been entitled a refund. Mr. Omenka should not have paid Star's invoice until the warranties were confirmed to be in effect, and he should have contacted Star forthwith when he failed to receive any indicia of delivery of the warranties. Instead, Mr. Omenka paid for a product before inspecting it to ensure that it complied with the contract specifications, then accused Star of non-performance when the defect in warranty coverage was discovered five months later.

Then, to make matters worse, Respondent demanded a refund—outside of Star's 30-day return policy, and without returning the product as required—refusing to acknowledge its own culpability in this kaleidoscope of errors. Star, to its credit, in an attempt to provide good customer service, made Herculean efforts to negotiate with Okidata and Synnex to obtain a refund that it could pass along to Respondent. Star had no obligation to do so because Star had fully performed in accordance with the terms of the purchase order and the Hardware 2012 Contract. Star delivered the product that was purchased, and was paid in full by Respondent. If the product was defective (or, if it did not meet Respondent's needs), Respondent had a duty to inspect the product and return it for a refund within 30 days. It did not. [10]

---

[10] Respondent argues that it was entitled to a refund because the return/refund policy in Star's Technical Proposal conflicts with the return/refund policy in the PORFP and that the order of preference set forth in Section 2.1 of the Hardware 2012 Contract establishes that the PORFP return/refund policy trumps and thus negates the Technical Proposal return/refund policy. We disagree. Star's return policy set forth in its Technical Proposal provides as follows: "[w]e accept returns on all undamaged products within 30 days, with no restocking fees." Section 2.2.2 of the Scope of Work section of the PORFP provides that "Master Contractors shall refund to the State within 30 calendar

Respondent's defense is a bad offense: Respondent accuses Star of breaching the parties' contract. Respondent argues that it did not receive the 1-year fix and replace warranty it purchased from Star, but refuses to acknowledge, or seemingly understand, that it used the wrong procurement process to order the wrong thing. Respondent instituted a PORFP procurement process (under the Hardware 2012 Contract) to purchase an Okidata manufacturer's extended warranty, known as an OKIcare warranty, seeking quotes under Functional Area V. It did not initiate a procurement for a 1-year fix and replace maintenance contract (*i.e.*, a *service* contract), nor did it initiate a Task Order RFP under DoIT's CATS± contract. Respondent did not receive a 1-year fix and replace warranty because that is not what it ordered. Respondent entered into a contract with a hardware reseller to purchase an OKIcare extended manufacturer's warranty. And that is what Star delivered.

If Respondent believed that Star had breached the parties' contract, Respondent failed to follow Maryland law in having its claim adjudicated before proceeding to collect the money it alleges it was owed. As we stated *supra*, Respondent completely circumvented the statutory and regulatory process clearly laid out for adjudicating such contract claims. It took money owed to Star on other contracts, without adjudicating its claim in a neutral forum and giving Star a full opportunity to be heard, that is, without ever having its claim legally determined to be a debt. The legal process for adjudicating a disputed claim against a contractor is clearly and unequivocally set forth in MD. CODE ANN., STATE FIN. & PROC., §15-219.1 and COMAR 21.10.04.05-.08.

---

days of receipt of the returned hardware, the purchase price of the returned hardware, including shipping costs." We do not see any conflict between these provisions. Quite simply, Respondent had a duty to return the undamaged product to Star within 30 days, and Star had a duty to issue a refund to Respondent "within 30 calendar days of receiving the returned hardware. There is no evidence that Respondent ever returned the undamaged product to Star; therefore, Star did not have a duty to issue a refund to Respondent.

Respondent wholly ignored this statutorily-prescribed process, issued Star an Invoice demanding a refund, then sent its claim to CCU for collection.

While it was undoubtedly chutzpah to issue an invoice to Star demanding a refund within 30 days, we reluctantly agree with Respondent that the invoice can be treated as a "demand" for payment. However, even so, this demand did not follow the requirements of the procedural process established by Maryland law. Under MD. CODE ANN., STATE FIN. & PROC., §15-219.1(a)(1), if a unit or agency desires to assert a contract claim against a contractor, it must first send written notice to both the contractor and the procurement officer, that states: "(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 (iii) the date by which the contractor is required to provide a written response to the contract claim." *Id.*; *See also*, COMAR 21.10.04.05A. A "contract claim" is defined as "a claim that relates to a procurement contract." MD. CODE ANN., STATE FIN. & PROC., §15-215(b). The Purchase Order at issue here arises from a PORFP under the Hardware 2012 Contract, and is clearly a procurement contract. The Invoice, or demand for payment, is a claim relating to this procurement contract and is, therefore, a contract claim.

Even if this Invoice (*i.e.*, demand for payment of a contract claim) was submitted to the PO, Ms. LeRoux, as required by law, Respondent nevertheless failed to follow the requisite next steps. Pursuant to MD. CODE ANN., STATE FIN. & PROC., §15-219.1(a)(2), upon receipt of a contract claim from a unit, the PO "(i) shall review the substance of the contract claim, (ii) may request additional information or substantiation through an appropriate procedure; and (iii) may discuss or, if appropriate, negotiate the contract claim with the unit or contractor." *Id.*; *See also*, COMAR 21.10.04.05B; 21.01.04.06. There is no evidence that Ms. LeRoux had any further contact with Star after March 2, 2016. While Ms. LeRoux was copied on email correspondence

among Star and Mr. Omenka and Ms. Holland, she did not take any affirmative steps to negotiate or settle this claim or otherwise fulfill the PO's obligations under the law. Likewise, there is no evidence that Ms. LeRoux sought the advice of the Office of Attorney General, as provided in COMAR 21.10.04.06C.[11]

Under MD. CODE ANN., STATE FIN. & PROC., §15-219.1(a)(3), "[t]he 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." *See also*, COMAR 21.10.04.05C. Here, Star responded to the Invoice within two (2) hours of receipt by stating that it was continuing to work with the manufacturer to obtain a refund, even though it was outside Star's 30-day return policy, which may or may not be issued by the date of the demand for payment. To the extent that Respondent was dissatisfied with Star's response, it was required to follow the statutory steps in Section 15-219.1(b) for resolving a contract claim.

Instead, on May 15, 2016, Ms. Holland, Respondent's Director of Budget and Management, not the PO, advised Star that it would be sending "[Star's] account" to CCU on May 18, 2016. Star responded approximately 30 minutes later, with a lengthy detailed response denying and disputing this claim. A dialogue between Ms. Holland and Mr. Albinak ensued, and on May 19, 2016, Mr. Albinak, on behalf of Star, advised Respondent to "[p]lease accept this email as formal notice of my intent to dispute and defend against this invoice."[12] The evidence is clear and unequivocal that as of May 19, 2016, Star disputed Respondent's claim for a refund (*i.e.*, the alleged debt).

---

[11] It is concerning to this Board that the record does not reflect, and there is no evidence to suggest, that this claim was submitted to CCU for collection after first obtaining guidance from the Office of the Attorney General ("AG"). Were that the case, we are confident that any competent Assistant AG would have taken the necessary steps to ensure that Star's due process rights were protected (*i.e.*, that a claim was filed and adjudicated) before collection proceedings commenced.

[12] This email was also sent to Ms. LeRoux and Mr. Omenka.

The train then derailed. The PO did not follow the mandatory procedures set forth in MD. CODE ANN., STATE FIN. & PROC., §15-219.1(b) insofar as she did not "prepare a proposed decision on the contract claim, including: (i) a description of the contract claim; (ii) references to pertinent contract provisions; (iii) a statement of factual areas of agreement or disagreement; and (iv) a statement in the proposed decision wholly or partly granting or denying the relief sought, with supporting rationale." *Id.*; *See also*, COMAR 21.10.04.08. Likewise, she did not comply with §15-219.1(b)(2) or (3). She did not seek review of any such decision by the reviewing authority or the Office of the Attorney General, nor did she issue a "final action letter" advising Star of its right to appeal. MD. CODE ANN., STATE FIN. & PROC., §15-219.1(b)(2-4); COMAR 21.10.04.08.[13]

Shockingly, what Respondent did instead violated every tenet of fairness and equitable treatment that the procurement laws of the State of Maryland are designed to protect. Respondent made good on its threat and did indeed send its claim to CCU for collection, despite its knowledge that Star was disputing this claim. On June 11, 2016, Star received a Notice of Intent to Offset, and despite Mr. Albinak's telephone calls to CCU and his requests for investigation, over the next two months, CCU took monies that were owed to Star under other contracts, without ever having this disputed claim adjudicated as a legally enforceable debt.

At the hearing, Respondent argued that it had an obligation under the CCU regulations to take aggressive action to collect its debts, which can take the form of an invoice as the demand for payment. Respondent further argued that "the State can collect a claim via offset." We disagree. The State may collect a *debt*, but not a disputed contract claim. Were this the case, any agency anywhere in the State could simply claim that it is owed money, send an invoice, and seize a

[13] Ms. LeRoux, as the PO on behalf of Respondent, did eventually issue a final action letter denying Star's claim, but not until September 22, 2016, long after Star disputed Respondent's claim for a refund and long after the damage to Star had been done.

contractor's money. This is certainly not what the Legislature intended, and contravenes the entire nature and purpose of the procurement laws and Article 24 of the Maryland Declaration of Rights.

The CCU regulations relied upon by Respondent describe the collection actions that are allowed against a "debtor." A "debtor" is defined as a "person, company, agency, corporation, or other entity ***legally obligated to pay money*** to the State or to an agency or office of the State in his official capacity." (emphasis added). COMAR 17.01.01.03. Here, Star was never adjudicated or legally determined to be a debtor because it was never determined that Star was "legally obligated to pay money to the State." Respondent took its claim for a refund, which was clearly disputed by Star, and magically turned it into a debt. That is not how the law works. An agency or unit may not circumvent this Board or any other administrative or quasi-judicial authority and collect on disputed contract claims that have not been properly adjudicated.

As for CCU, although it is not a party to this action, because of the significant harm to Star caused by the State's actions, we are nevertheless compelled to address CCU's own failure to comply with the law and its complicity in causing damage to Star. Under the CCU's convening authority, 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.[14]

The thrust of Respondent's case centers on the fact that Star obtained a credit from Okidata and Synnex and failed to pass this along to Respondent, or acknowledge, prior to filing its complaint, that a credit had been issued. Respondent finds this particularly disturbing, and we would too, but for the fact that Star had no obligation to undertake any efforts to obtain a credit, and had no duty to issue a refund to Respondent. Respondent fails to grasp the inescapable fact that Star fully performed all of its contractual obligations—any damage suffered by Respondent was wholly due to its own negligence and/or incompetence in ordering the wrong warranty to begin with, and failing to keep track of its purchase and activate the warranty cards when they were delivered. Respondent may not pass on its damages to Star, and Respondent's resorting to self-help by collecting upon this disputed claim is untenable.

In sum, we conclude that (1) Respondent breached the parties' contract when it failed to pay Star the contract amount that was owed,[15] and (2) Respondent (and CCU) violated Article 24 of the Maryland Declaration of Rights, depriving Star of its property without due process of law, when it collected monies allegedly owed by Star by offsetting against monies owed to Star under unrelated contracts, and assessing a 17% collection fee, without first adjudicating this disputed contract claim before this Board. Fortunately for Respondent, Star has taken steps to mitigate its damages by obtaining a credit from Synnex, thereby reducing the amount of Star's actual damages.

[14] This Board is troubled that the policies in effect at CCU do not have protections in place to ensure that due process rights are being protected before seizure of a contractor's property. Our concern emanates from the fact that (i) the report prepared by CCU reflects that CCU never contacted Star during its purported investigation and never gave Star an opportunity to be heard, and (ii) the AG Office participated in the determination that the debt referral to CCU and collection thereon was proper. A thorough investigation should have uncovered that this was a disputed contract claim, and the AG Office should have known that enforcement of this disputed contract claim was premature. CCU should have initiated an action with this Board to resolve this disputed claim before offsetting the money allegedly owed from Star's other contracts.

[15] Although Respondent initially paid Star, it took the money back, the net effect of which constitutes nonpayment.

Absent this credit, this Board would be awarding Star the full amount of the contract claim.[16] Accordingly, Star is entitled to recover the full amount of the collection fees wrongfully assessed by CCU in the amount of $3,569.11, plus interest at the legal rate as provided under MD. CODE ANN., STATE FIN. & PROC., §15-222, from the date of Star's letter. through counsel, formally disputing Respondent's claim, which was July 19, 2016. As we stated previously, the Board is not authorized to issue an award of attorneys' fees in contract claims that do not involve construction, and we are saddened and frustrated by our inability to fully compensate this aggrieved contractor the full extent of its damages.

/s/
Bethamy N. Beam, Esq.
Chairman

I concur:

/s/
Ann Marie Doory, Esq.
Member

/s/
Michael W. Stewart, Esq.
Member

[16] As it is, Respondent has reaped a windfall because it received a refund, via offset, that it was not entitled to receive.

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 Docket No. MSBCA 3002, Appeal of Star Computer Supply, under the State Board of Elections Contract No. 060B490022.

Dated: 9/15/17

/s/
Ruth W. Foy
Deputy Clerk