

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ACKERLEY-BWI AIRPORT	)	
ADVERTISERS	)	
	)	Docket No. MSBCA 1318
Under SAA RFP No.	)	
SAA-RFP-86-001	)	

February 13, 1987

Board Jurisdiction - The Board has no jurisdiction over a dispute involving a lease or its formation where the State is the landlord.

APPEARANCES FOR APPELLANT:	James L. Winston, Esq. Steven J. Stone, Esq. Rubin, Winston & Diercks Washington, D.C.
APPEARANCE FOR RESPONDENT:	Peter W. Taliaferro Assistant Attorney General Baltimore, MD

MEMORANDUM OPINION AND ORDER BY CHAIRMAN HARRISON

This is an appeal of the denial by the State Aviation Administration (SAA) of Appellant's protest of the award of a contract entitled "Lease and Concession Agreement" to a competitor for operation of a five year fixed display advertising program at BWI Airport. The request for proposals (RFP) required the selected contractor to pay SAA either a minimum annual guarantee (\$135,000.00) or a percentage (not less than 45%) of gross revenues, whichever was greater, on a contract year basis for use of space for fixed display advertising at specified locations in the BWI Airport terminal. The selected contractor was in turn to market this advertising space to third parties principally in order to develop and maintain a comprehensive contemporary commercial advertising program respecting materials, articles, and services of various manufacturers, industries, companies, and persons available in the Baltimore and Washington, D.C. regions.<sup>1</sup>

Appellant is in the business of providing advertising services at airports nationally and was the incumbent contractor at the time of the issuance of the RFP. SAA has moved to dismiss the appeal on grounds that the Board does not have jurisdiction over the contract in question because (1) it is a lease by SAA as landlord and (2) involves no expenditure of State funds.

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<sup>1</sup>The selected contractor was also required to accommodate advertisement of a political and public service nature.

This Board only has jurisdiction over State contracts as specifically defined by the procurement law at the time the dispute in connection therewith arises. §§17-202(c), 17-201(f), 17-201(e) and 11-101(f), Division II, State Finance and Procurement Article, Annotated Code of Maryland; Boland Trane Associates, Inc., MSBCA 1084, 1 MICPEL 101 (1985); James Julian, Inc., MSBCA 1222, 1 MICPEL 100 (1985); William E. McRae, MSBCA 1229, 1 MICPEL 99 (1985); Jorge Company, Inc., MSBCA 1047, 1 MICPEL 20 (1982); COMAR 21.02.02A. The procurement law in effect in the latter part of 1986 when the dispute herein arose did not embrace a lease where the State was the landlord. Although continuously included in the statutory definition of contract<sup>2</sup> since the procurement law was first enacted, the word lease was not defined. Effective July 1, 1986, however, lease was defined by the Legislature to mean "a contract under which the State uses real or personal property to which the State does not have title." §11-101(j), Division II, State Finance and Procurement Article, Annotated Code of Maryland. The exclusion of a lease where the State is the landlord from the operative definition of contract under the procurement law thus serves to limit this Board's jurisdiction to those contracts (leases) where the State is the lessee. SAA argues that the contract in question herein is a lease where SAA is the landlord such that the Board does not have jurisdiction over the appeal. Appellant argues that the contract herein is not a lease but a concession and that the space at BWI Airport that it pays to occupy, i.e. leases, for purposes of physical advertisement display, is merely incidental to the true purpose of the contract which is to provide advertising services that SAA chooses to procure from the private sector rather than provide itself. Alternatively, SAA argues that this Board has no jurisdiction over a dispute involving a contract unless an expenditure of State funds is involved. Since this contract involves no expenditure of State funds, SAA contends that the Board lacks jurisdiction.

We believe it is appropriate to deal first with SAA's alternate argument regarding jurisdiction. In Solon Automated Services, Inc., MSBCA 1117, 1 MICPEL 71 (1984) and Baltimore Motor Coach Company, MSBCA 1216, 1 MICPEL 94 (1985), this Board rejected arguments that it lacked jurisdiction over disputes arising from award of revenue generating concession contracts that did not involve expenditure of State funds. Solon involved the provision of clothes washer and dryer services in the residence halls of a State college where the award was to be made to the vendor who agreed to pay the college the highest percentage of gross income derived from use of its laundry machines. Baltimore Motor Coach involved a concession contract for provision of ground transportation services at BWI Airport where jurisdiction of this Board was challenged on grounds that the contract did not require the State to pay money to the contractor for provision of the transportation services involved. In both cases we concluded that expenditure of State funds was not necessary to establish this Board's jurisdiction. We reaffirm here our determination that the procurement law reaches State contracts where no State funds are expended and thus reject SAA's alternative argument that expenditure of State funds is a necessary predicate to this Board's jurisdiction.<sup>3</sup>

<sup>2</sup>See: §11-101(f)(1)(iv), Division II, State Finance and Procurement Article, Annotated Code of Maryland.

<sup>3</sup>In connection with its argument that an expenditure of State funds is a necessary element for this Board to have jurisdiction over a procurement, SAA cites provisions of Chapter 840 of the Laws of 1986, effective July 1, 1987 which will be codified as Section 11-103(a)(2)(iv), Division II, State Finance

We turn now to what we consider the nub of the matter. As set forth above, this Board does not have jurisdiction over disputes involving leases or their formation where the State is the landlord. The issue for resolution is thus whether the reality of the instant contract is an advertising services agreement with use of space at BWI Airport incidental thereto, or whether the reality of the instant contract is that it is a lease of space at BWI Airport for the conduct of a private advertising business for profit.

Appellant argues that there is no material distinction between the form of the transactions at issue in Solon and Baltimore Motor Coach and the form of the instant transaction. We think it unwise to engage in such comparisons, however, since all the Board decided in Solon and reaffirmed in Baltimore Motor Coach was that an expenditure of State funds was not necessary to establish this Board's jurisdiction.

What we must now decide is the nature of the contract arising out of the instant transaction. We find on the basis of the record as a whole that the contract which arose out of the proposed transaction is essentially a granting by SAA as landlord of a leasehold interest in space in the BWI Airport terminal building for use for limited purposes (advertising) for a consideration (rent). Having concluded that the contract arising out of the subject transaction is a lease where the State is the landlord, this Board has no jurisdiction over the matter and Appellant's appeal must be dismissed.

SO ORDERED.

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and Procurement Article. These provisions for the first time make specific reference to contracts that involve no State expenditure of funds. SAA contends that this first time specific reference to contracts involving no expenditure of State funds demonstrates that the Legislature never previously intended that such contracts were subject to this Board's jurisdiction and that Solon and Baltimore Motor Coach were wrongly decided. In view of the determination we reach herein we need not address the possible implications on existing law of a statute which is not yet effective.

