

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of AMERICAN COOPERAGE &
STEEL DRUM, INC.

)
) Docket No. MSBCA 1050
)

Under SHA Contract No. 3008-79
)

April 20, 1983

Motion To Dismiss - Sovereign Immunity — Where Appellant's claim was based on the breach of a post-July 1976 written contract with the State Highway Administration, the defense of sovereign immunity statutorily was not available to bar her claim.

Motion To Dismiss - Filing of Claim After Final Payment — Although the State Highway Administration contended that its standard clauses addressing disputes and final payment required timely notice of claims as a condition precedent to consideration thereof, such claims were determined to be inapplicable to breach of contract claims.

Motion To Dismiss - Statute of Limitations — Maryland Annotated Code, Art. 21, §7-301, providing that breach of contract suits involving State contracts be filed within one year of final payment, was determined to be inapplicable to administrative procedures. Instead, the Legislature delegated authority to the procuring agencies to promulgate regulations pertaining to the timely filing of administrative claims. However, regulations have not been promulgated to limit the time for filing breach of contract claims administratively.

Laches — On the basis of the record before it, the Board was unable to determine whether Appellant's late filing of its breach of contract claim precluded the State Highway Administration from avoiding damages or defending the claim. Accordingly, Appellant's claim was not barred by the doctrine of laches.

MEMORANDUM OPINION AND ORDER
BY CHAIRMAN BAKER ON SHA'S MOTION TO DISMISS

For the limited purpose of resolving SHA's Motion To Dismiss, the following factual allegations are assumed by the Board to be true:

1. American Cooperage & Steel Drum Co. (Appellant) entered into Contract No. 3008-79 with the State Highway Administration (SHA) on March 9, 1979. This contract called for the purchase and removal of 55 gallon steel paint drums from various SHA facilities.

2. A total number of 5,397 steel drums actually were removed by Appellant. SHA was paid \$31,415.30 for these drums. Final payment under the contract was made on February 5, 1980.

3. In April 1980, the Maryland Department of Natural Resources instituted an enforcement action against Appellant resulting from the alleged dumping of certain 55 gallon drums containing hazardous materials. Appellant was ordered to clean-up the plant premises where the dumping occurred. Further

action in this regard also was taken by the Maryland Department of Health and Mental Hygiene.

4. On or about October 16, 1980, Appellant filed suit in the Superior Court of Baltimore City alleging, among other things, the SHA had breached a contract obligation to provide empty steel paint drums. This action was dismissed by the Court on or about August 5, 1981 on the basis that Appellant had not exhausted its administrative remedy.

5. Chapter 418 of the Laws of Maryland of 1978 created a board of Contract Appeals within the Maryland Department of Transportation. The jurisdiction of this Board was as follows:

§2-603(B) - The Board shall have jurisdiction over all disputes other than labor disputes arising under a contract with the Department, or as a result of a breach of a contract with the Department. The Board has no jurisdiction over the awarding of a contract with the Department.

6. The foregoing statute was repealed by §21 of Chapter 775 of the Laws of 1980. Effective July 1, 1981, all appeals pending before the Department of Transportation Board were transferred to the Maryland State Board of Contract Appeals. With regard to contracts entered into by the State prior to July 1, 1981, 25 of the Act further provided that:

...although a presently existing obligation or contract right might not be impaired in any way by this Act, the procedural provisions of this Act, including those requiring review by the Maryland State Board of Contract Appeals, may at the option of the contractor, apply to contracts in force on the effective date of such provisions.

7. By letter dated August 27, 1981, Appellant filed its claim with the SHA Administrator, the procurement officer for the captioned contract. Appellant's claim was denied as untimely by final decision dated October 19, 1981.

8. Pursuant to MD. Ann. Code, Art. 21, §7-201(D)(2), Appellant filed a timely appeal with this Board on November 16, 1981.

Discussion

SHA seeks dismissal of this appeal on the grounds that: (1) it is barred by the defense of sovereign immunity; (2) it is barred because it was filed after final payment; and (3) it is barred by the statute of limitations. In addition to these grounds, the Board also requested that the parties address the issue of whether the doctrine of laches would operate under the facts at hand to bar the claim. These grounds for dismissal and the defense of laches, hereafter, will be discussed seriatim.

I. Sovereign Immunity

SHA contends that Appellant's claim sounds in tort and that sovereign immunity continues to be a complete defense to such actions. While Appellant acknowledges that the facts in this case could support an action for negligence, fraud or deceit, it submits that it is claiming only that SHA breached the express written contract between the parties.

The pleadings in this appeal indicate Appellant's position to be that it contracted to purchase clean 55 gallon steel paint drums. Appellant further alleges that it received a number of paint drums containing a hazardous substance. It is contended, therefore, that the failure of SHA to furnish clean 55 gallon drums constituted a breach of contract.

Maryland Annotated Code, Article 21, §7-101 provides as follows:

Unless otherwise specifically provided by the laws of Maryland, the State of Maryland, and every officer, department, agency, board, commission, or other unit of State government may not raise the defense of sovereign immunity in the courts of this state in an action in contract based upon a written contract executed on behalf of the State, or its department, agency, board, commission or unit by an official or employee acting within the scope of his authority.
(Underscoring Added)

Since the captioned appeal involves an action based upon a written contract executed on behalf of of the state, the defense of sovereign immunity does not apply.

II. Requirement That Claim Be Filed Before Final Payment

Contract Specifications Section 10.05-16 (May 1975 Supplement)¹ is entitled "Disputed Work and Claims" and provides, in pertinent part, as follows:

"Provision is made elsewhere in these Specifications to establish appropriate adjustments to quantities, prices and/or time allowances when necessary. Such provisions appear in Sections 10.04-3, 10.04-4 and 10.08-8. Particular attention is called to the fact that it shall be the responsibility of the Contractor to promptly notify the Engineer of the existence of conditions which he feels differ materially from those described by the Plans and/or Specifications. Where such notification has been given or where the Engineer finds it necessary to initiate changes as described in Section 10.04-3, the Engineer and the Contractor will negotiate appropriate adjustments.

¹Although Appellant does not agree that the May 1975 Supplement has been incorporated as part of the contract, it is necessary to rule on this issue for purposes of SHA's Motion To Dismiss.

"The Engineer, in consideration of what he deems to be the best interests of the Administration and the travelling [sic] public, may issue written orders to the Contractor to pursue the work on the item(s) involved during the period of negotiation and any subsequent period of consideration of a claim as herinafter described. In the issuance of such an order, the Engineer shall set forth the basis upon which the computation of estimate payments for the work will be founded. The Contractor and the Engineer shall keep daily records of the work in accordance with the provisions of Section 10.09-4 until a settlement satisfactory to both parties has been reached.

"If and when the Contractor concludes that the negotiations with the Engineer cannot yield what he considers to be an acceptable solution, he shall notify the Chief Engineer in writing of his intention to file a claim for additional compensation and/or time allowance. Complete documentation of the claim including supporting data shall be submitted as soon as possible. Failure to submit such documentation within thirty (30) days of completion of work on the item(s) involved will constitute a waiver of the right to claim and acceptance of the terms set by the Engineer in his notice to pursue the work, except that applicable bills for materials, equipment or services not in hand at the time of preparation of the claim may be submitted as received. (Underscoring added).

SHA contends that this provision establishes a mandatory administrative procedure for the resolution of contract disputes and that the failure to timely notify the SHA Engineer as to the existence of a claim or thereafter provide an estimate of the additional costs within thirty days of completion of any changed work constitutes a waiver of that claim.

It is apparent from Specifications 10.04-3, 10.04-4 and 10-.08-8 that the parties contemplated that certain changes to contract quantities or the plans and specifications might be required during contract performance. An administrative procedure contractually was provided, therefore, so as to permit such changes and establish a mechanism for payment of an appropriate consideration. Where disputes were to arise as to these contract changes, or the cost of additional work, they were required to be resolved pursuant to Specifications 10.05-16. Under this clause, Appellant expressly is made responsible for performing disputed work during the pendency of negotiations or consideration of its claim.

Whether a contractor is responsible for performing disputed work during the pendency of a claim, however, must depend upon whether the changed work fairly and reasonably was within the contemplation of the parties when the contract was entered into. Compare Freund v. U.S., 260 U.S. 60, (1922). Obviously, the parties to this contract should have anticipated that the ultimate number of 55 gallon steel drums might vary to a degree from the number estimated in the specification. What would have happened, however, if SHA had sought to change drastically the size of the steel drums so that they lost their commercial value? Under such circumstances, would Appellant have been required to take them? We believe not. The change provisions in the contract necessarily permit only those changes which are consistent with the general scope of the contract. A change which would alter the general scope of the contract clearly would not be considered within the contemplation of the parties at the time of contract and its imposition, we believe, would constitute a breach of contract. Compare Air-A-Plane Corp. v. U.S., 187 Ct. Cl. 269, 408 F.2d 1030 (1969).

Here Appellant alleges that instead of being given clean 55 gallon drums, SHA turned over drums containing hazardous substances. These substances were said to be difficult or impossible for Appellant to clean. Additionally, these substances allegedly subjected Appellant's principals to criminal penalties under the State environmental laws governing the transportation and disposal of such substances. Assuming, arguendo, that these allegations are true, we conclude that the charges complained of could not have been within the reasonable contemplation of the parties at the time of contract. The substitution of 55 gallon drums containing hazardous substances for contractually promised clean drums thus would not have constituted a change under Specifications 10.05-16, but rather a breach of contract. Accordingly, the procedures outlined in Specifications 10.05-16 did not limit Appellant's right to pursue its breach of contract claim.

Specifications 10.09-7 (May 1975 Supplement) provides, in pertinent part, that:

When the Contractor has completed a contract and it has been finally accepted...the Engineer will promptly proceed (a) to make any necessary final surveys, (b) to complete any necessary computation of quantities, and (c) to submit to the Contractor...for his consideration, a tabulation of the proposed final quantities...

* * *

The Contractor shall then have a period of fourteen (14) working days...in which (a) to decide whether or not he will accept Final Payment upon such a basis, and (b) to notify the Engineer, in writing, of his decision.... In the event the Contractor notifies the Engineer that he protests Final Payment on such a basis, that notification shall outline the reason(s) for said protest.

SHA reads this provision to bar Appellant's right to pursue a claim where notice thereof is not given prior to final payment.

SHA specifications provide for progress (partial) payments on a monthly basis. These partial payments are to be based on the Engineer's estimate of quantity, including materials and/or equipment complete in place. Pursuant to Specifications 10.09-6, "...[a]ll quantities, estimates and fractions will be reasonably accurate approximations and as such are subject to correction (a) in subsequent current estimates, (b) in any semi-final estimate and, (c) in final payment." Specifications 10.09-7, in our view, was intended to prescribe the procedure for reconciling differences between estimated and actual quantities of work performed for purposes of the final payment.

Although SHA reads Specifications 10.09-7 more broadly to require a contractor to provide notice of claims as part of the final payment procedure, we decline to do so. Provisions which tend to cause injury or loss, such as forfeiture or exculpatory clauses, must be construed strictly and no wider scope should be given to such language than is plainly required. Williston On Contracts, Third Edition, 626. Thus, in the absence of clear language concerning the waiver of claims, Specifications 10.09-7 should be construed only as requiring a contractor to take issue with the Engineer's computations of quantities prior to accepting final payment.

III. Statute of Limitations

Maryland Annotated Code, Article 21, §7-103, provides that "[a] claim is barred unless the claimant filed suit within one year from the date on which the claim arose or within one year after completion of the contract giving rise to the claim, whichever is later." Since final payment occurred on February 5, 1980 and Appellant did not file its claim with the SHA Administrator until August 27, 1981, SHA alleges that Appellant's claim is barred by the foregoing statute of limitations.

The statute of limitations provisions contained in Article 21, however, precludes only the filing of an untimely suit. The term "suit" means an action at law or equity brought in a court having jurisdiction over the subject matter. Since an administrative agency is not a court, the one year limitation is not applicable to actions filed with an agency procurement officer. Nelson v. Real Estate Comm'n, 35 Md. App. 334, 341, 370 A.2d 608, cert. denied, 280 Md. 733 (1977).

In creating the existing administrative procedure for resolving disputes, the legislature provided that:

Upon timely demand, as defined in regulations promulgated by the Department, by a prospective bidder or offeror, bidder or offeror, or contractor, the responsible procurement officer of the using agency may, consistent with the budget and all applicable laws and regulations, negotiate and resolve disputes relating to the formation of a contract with the State or a contract which has been entered into by the State. Disputes relating to the formation of a contract include but are not limited to those concerning the qualification of bidders of offerors and the determination of the successful bidder or offeror. Disputes relating to a contract which has been entered into by the State include but are not limited to those concerning the performance, breach, modification, and termination of the contract.
(Underscoring added).

Md. Ann. Code, Art. 21, §7-201(a). The issue of timeliness, therefore, was left to the discretion of the procuring agencies who were to promulgate regulations in this regard. While regulations ultimately were developed which adequately prescribe the time periods provided for filing claims arising under the contract², there are no regulatory provisions addressing the time period for receipt and consideration of breach of contract claims. Accordingly, Appellant's claim is not barred by existing law or regulation.

IV. Laches

In Oak Lawn Cemetary v. County Commissioners, 174 Md. 280, 291 (1938) the Court of Appeals stated the following:

²See COMAR 21.07.02 which contains a mandatory remedy granting contractual clause. Such provisions as the "changes" clause (21.07.02.01) and the "Differing Site Conditions" clause (21.07.02.04) require claims arising thereunder to be filed no later than the date of final payment.

The doctrine of laches is an application, of the general principles of estoppel. 4 Pomeroy's Eq. Juris., sec. 1140. And, as stated in Chase v. Chase, 20 R. I. 202, 37A. 804: "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against assertion of the right."

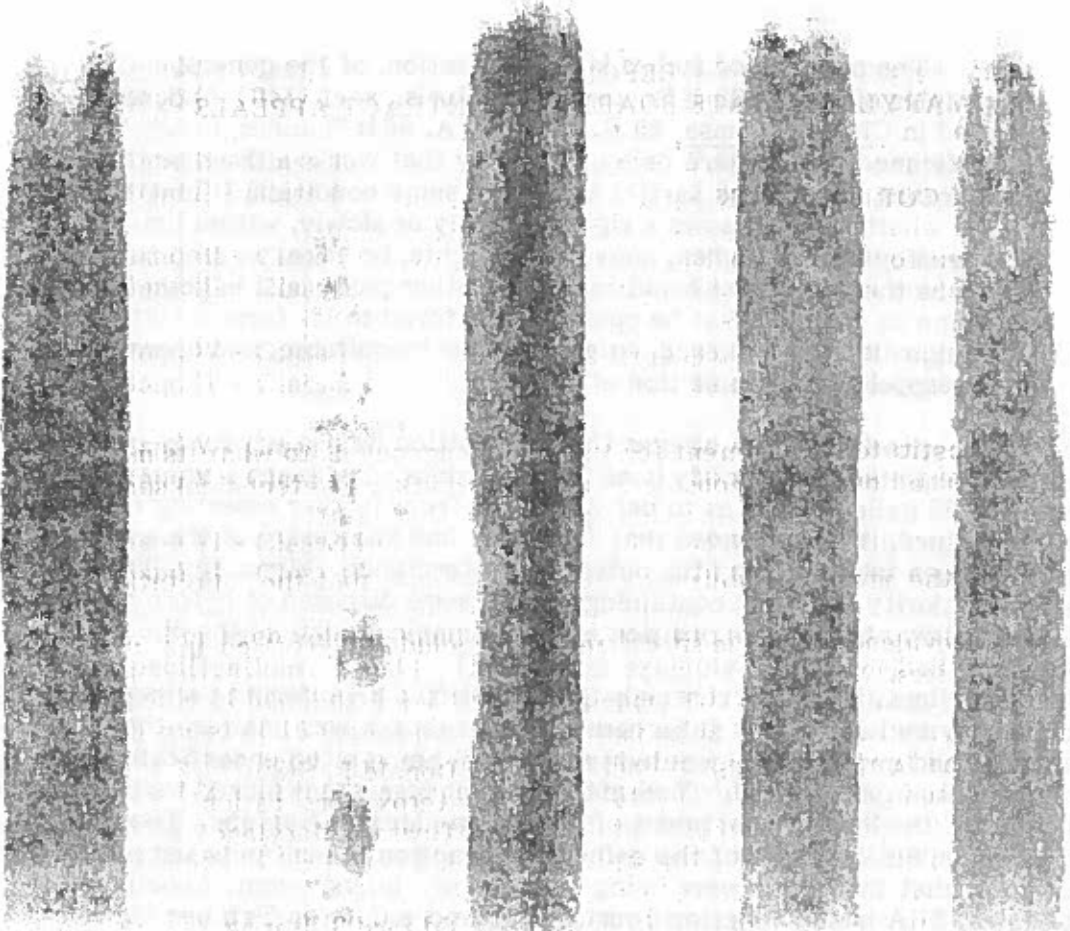
Pursuant to these principles, SHA alleges that its position was so adversely affected by Appellant's failure to promptly notify it of the hazardous substances purportedly contained in the 55 gallon drums as to bar Appellant from further asserting its contract rights. In this regard, it is contended that Appellant had knowledge of the existence of hazardous or foreign substances at the outset of performance. When Appellant waited until after the majority of drums containing wastes were disposed of before making its claim, SHA allegedly was put in a position of being unable to defend the claim.

Appellant, however, contends that it notified SHA during performance that the paint drums were not empty. It further contends that it was unaware that the substance contained in the drums was hazardous until being cited under State environmental laws in April 1980. Thereafter, it allegedly was required to dispose of the drums by order of the State Department of Health and Mental Hygiene. The record is unclear as to when SHA learned of the enforcement action taken by its sister agency, or whether it knew that the drums were being disposed of. In any event, Appellant then filed suit against SHA in the Superior Court of Baltimore City on October 16, 1980 alleging the same facts now before the Board.

In view of the factual dispute as to the sufficiency and timeliness of Appellant's notice of claim, we are unable to say whether SHA was deprived of an opportunity to avoid damages or defend the claim as a result of Appellant's silence. Accordingly, we decline to dismiss the appeal at this time on the basis of estoppel or laches. SHA may present further evidence in this regard during the hearing in this appeal and thereafter may renew its arguments in its posthearing brief.

V. Conclusion

For the foregoing reasons, SHA's Motion to Dismiss is denied. The Board expeditiously will schedule a prehearing conference to discuss the substantive issues remaining and establish a timetable for their resolution.



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