BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of BOLAND TRANE ASSOCIATES, INC.	)	
	)	Docket No. MSBCA 1084
Under University of Maryland Request to Bid No. 35666-H	)	

May 22, 1985

Jurisdiction - The Board of Contract Appeals only has jurisdiction to entertain an appeal based on a dispute arising out of a written contract with the State. The Board does not have jurisdiction over an implied in law contract under an unjust enrichment theory; nor does the Board have jurisdiction over an implied in fact contract based on the theory that a contract can be constructed through circumstantial evidence rather than in an explicit set of words.

Bid Protest - Damages - The Board is not empowered to award or fashion any monetary relief respecting a dispute relating to the formation of a State contract.

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OPINION BY CHAIRMAN HARRISON ON UNIVERSITY'S MOTION RAISING PRELIMINARY OBJECTION

This appeal arises out of the award of a contract by the University of Maryland at College Park (University) for replacement and installation of two air conditioning chillers for the Hornbake Library. The University filed a Motion Raising Preliminary Objection requesting that the appeal be dismissed on grounds of sovereign immunity. Following a hearing on the motion the Board permitted limited discovery on specifics of the University's budget process and received supplemental memoranda from the parties on the motion.

Findings of Fact

1. In February 1982, the second of two air conditioning chillers for the University's Hornbake Library broke down. The University's Department of Physical Plant decided it would not be economical to repair the chillers for the air conditioning season beginning May 1, 1982 and that they would have to be replaced as quickly as possible.

2. On or about March 5, 1982, the University, acting pursuant to its emergency procurement powers orally solicited bids from Appellant and three other vendors for installation of two centrifugal chillers, removal of the two steam absorption chillers currently in place and all necessary electrical and mechanical demolition services and installation services necessary to completion of the work. This verbal solicitation was conducted by Mr. David Vogts, supervisor of the University's refrigeration shop. Responses to the oral solicitation were due by 3:30 p.m. on March 5, 1982.

3. Appellant submitted its bid by 3:30 p.m. on March 5, 1982 and shortly after 3:30 p.m. on March 5, 1982 was advised by Mr. Vogts by telephone that it was the successful bidder and instructed to proceed with the work to include placing an order for the chillers. At no time was Appellant ever issued nor did the parties ever enter into a purchase order or other written agreement confirming the oral award by Mr. Vogts.

4. While continuing to treat the procurement as an emergency, the University determined to rebid the work using written rather than oral procedures. Appellant was made aware of this decision sometime between March 8 and March 11, 1982. It protested the rebidding procedure by letters dated March 16 and March 23, 1982 contending that it had already been awarded the contract and had expended substantial monies in carrying out portions of the work to include arranging for and accomplishing the delivery of the two centrifugal chillers to the contract site.

5. Appellant was notified by letter dated March 24, 1982 from Mr. Ronald C. Jones, the University's Director of Procurement and Supply, of the University's position that no contract had been awarded to it. This letter also advised Appellant that sealed bids had been solicited and would be opened at 2:00 p.m. EST on Friday, March 26, 1982.

Three bids were received. All three were determined to be nonresponsive and were rejected. Responsive bids were sought from each of the vendors by telephone and were followed up with confirming telegrams or letters.

These revised bids were deemed responsive and the low bidder was awarded a contract on April 2, 1982. By letter dated April 8, 1982, Appellant protested the award still maintaining it had already been awarded the contract on March 5, 1982 and had expended funds in reliance thereon.

6. By letter dated May 28, 1982, Mr. Jones issued a procurement officer's final decision denying Appellant's protest. The decision states in part as follows:

On or about March 5, 1982, Dave Vogts, Supervisor of the University's refrigeration shop contacted Trane, as well as three other vendors, to inquire whether they had the necessary chillers available to obtain an estimated price. He notified his superiors in the Department of Physical Plant of the results. The Department of Physical Plant requested a determination from the Department of Procurement and Supply that (1) an emergency procurement was necessary; and (2) that an order be given to Trane. As to the first, I made the determination with the concurrence of the Assistant Vice Chancellor for Administrative Affairs, that the procurement would have to be made on an emergency basis. I did not, however, extend that approval to an award to Trane for two reasons: (1) I was aware that none of the vendors other than Trane had had an opportunity to give a quotation on installing the chillers; and (2) I was concerned considering the size of the project that there were not as yet any written specifications for the project. The Department of Physical Plant apparently, incorrectly, interpreted my approval of an emergency procurement as approval, as well, of an award to Trane, and directed Mr. Vogts to inform Trane to place the order for the chillers. Mr. Vogts did so by phone on March 5.

7. Appellant noted a timely appeal to this Board on June 11, 1982 seeking by reason of the University's alleged breach of Mr. Vogts' oral award of March 5, 1982, costs and expenses in excess of $110,000.

Decision

Appellant contends it had a contract with the University which the University breached. The alleged agreement, however, was never reduced to writing and Appellant concedes that it never entered into a written contract with the State. (Hearing, Motion Raising Preliminary Objection, Tr. 19, 23, 27, 35 and 39). Therefore, the University contends that sovereign immunity has not been waived as to this alleged agreement since sovereign immunity was only waived as to 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." Chapter 450 of the Laws of Maryland, 1976. Appellant counters that the University is liable for damages and costs even under an oral agreement, since it has been given the authority to sue and be sued by the Legislature and there are funds available to the University to pay a money judgment, i.e., both prongs of the test laid down by the Court of Appeals of Maryland concerning what must be found to exist for immunity to have been waived by the Legislature have been met. University of Maryland v. Maas, 173 Md. 554, 557-559, 197 A. 123 (1937). See: Maryland Port Administration v. I.T.O. Corporation of Baltimore, 40 Md. App. 697, 395 A.2d 145 (1978), cert. denied, 284 Md. 745 (1979).

While we have determined that a jurisdictional issue arises out of the facts before us which prevents us from deciding this appeal, we nevertheless will briefly address whether the doctrine of sovereign immunity would otherwise bar Appellant from the relief it seeks. The bar to recovery set forth in University of Maryland v. Mass, supra, is stated as follows:

> So it is established that neither in contract nor tort can a suit be maintained against a governmental agency, first, where specific legislative authority has not been given, second, even though such

authority is given, if there are not funds available for the satisfaction of the judgment, or no power reposed in the agency for the raising of funds necessary to satisfy a recovery against it.

554 Md. at p. 559.

The parties apparently do not dispute that the University may be sued.

Briefs and argument of counsel principally focus on the issue of whether there are funds available to the University to pay a money judgment, i.e., whether the second prong of the test ennunciated in University of Maryland v. Mass has been met. The operations of the University are financed entirely by appropriations from the General Assembly of Maryland, which appropriations are incorporated into and form a part of the annual budget of the State of Maryland. Appellant does not argue that the University is authorized to raise funds to pay a money judgment but insists that it may pay a money judgment from appropriated funds budgeted for other purposes, since the University's records establish that it does transfer funds appropriated in the budget for a specific item to pay unanticipated expenses arising in another item. These transfers take place both within Department budgets and between Department budgets. In our opinion, however, this flexibility only extends to a transfer of funds from one specifically designated item in the budget to another specifically designated item in the budget, and Appellant concedes that the University does not provide in its budget a specific item for payment of judgments. Therefore, it seems to us that the second prong of the test regarding payment of a judgment cannot be met.

We also have certain reservations without reference to the implications of enactment of Chapters 450 and 775 of the Laws of Maryland concerning whether the first prong of the test set forth in University of Maryland v. Mass is satisfied when the contract sued upon is oral.

As indicated, however, we will not decide whether the University may be sued for money damages under an oral agreement, since the Board concludes for the reasons that follow that it only has jurisdiction to entertain an appeal based on a dispute arising out of a written contract entered into by the State and that it, therefore, lacks jurisdiction to consider this appeal. Prior to July 1, 1976 contract actions against the State were barred by the doctrine of sovereign immunity. Calvert Associates v. Department of Employment & Social Services, 277, Md. 372, 357 A.2d 839 (1976); Chas. E. Brohawn & Bros. v. Board of Trustees of Chesapeake College, 269 Md. 164, 304 A.2d 819 (1973); University of Maryland v. Maas, supra. However, effective July 1, 1976, the Legislature waived sovereign immunity as a defense in actions based on written State contracts. Chapter 450 of the Laws of Maryland, 1976. The Board of Contract Appeals was subsequently established by Chapter 775 of the Laws of Maryland, 1980 (codified as Article 21) in response to the waiver of sovereign immunity to permit resolution of disputes involving State contracts as defined by and under the procedures set forth therein. Since the Legislature sets the terms under which it waives sovereign immunity, it may prescribe what type of contracts with the State may properly be within the ambit of this Board's jurisdiction and what contracts are to be excluded. William E. McRae, MSBCA 1229 (April 22, 1985); Jorge Company, Inc., MSBCA 1047 (July 7, 1982). See: Lohr v. Potomac River Commission, 180 Md. 584, 26 A.2d 547 (1942).

The jurisdiction of the Board is specifically defined in Article 21 of the Annotated Code of Maryland. As to contracts entered into by the State of Maryland, the Legislature has provided the Board with jurisdiction to "hear and decide all appeals arising under the provisions of §7-201(d) of this article." Article 21, §7-202(c)(1). Section 7-201(d) provides in relevant part: "Within 30 days of receipt of notice of a final action disapproving a settlement or approving a decision not to settle a dispute relating to a contract entered into by the State, the contractor may appeal to the Maryland State Board of Contract Appeals." Section 7-201(d)(2). Contract is defined in Article 21 as:

> Contract. — (1) "Contract" means every agreement entered into by a State agency for the procurement of supplies, services, construction, or any other item and includes:
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> (i) Awards and notices of award;
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> (ii) Contracts of a fixed-price, cost-reimbursement, cost-plus-a-fixed-fee, fixed-price incentive, or cost-plus incentive fee type;
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> (iii) Contracts providing for the issuance of job or task orders;
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> (iv) Leases;
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> (v) Letter contracts;
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> (vi) Purchase orders;
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> (vii) Supplemental agreements with respect to any of these; and
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> (viii) Orders.
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> (2) "Contract" does not include:
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> (i) Collective bargaining agreements with employee organizations; and all agreements creating employee-employer relationships, as defined in Article 64A, §15A(a)(3) of the Code; or
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> (ii) Medicaid, judicare, or similar reimbursement contracts for which user eligibility and cost are set by law or by rules and regulations.

Section 1-101(f).

We find that the Legislature intended this definition to be satisfied only upon the execution of a written document by an authorized representative of the State evidencing its intention to be bound. While nothing in this definition specifically states that the several types of agreements referred to therein must be in writing, several sections of Article 21 refer to mandatory written requirements pertaining to State contracts. See, for example, Sections 2-301(c), 3-405 to 3-407 and 3-602(a) relating to physical incorporation by reference of mandatory contractual provisions (2-301(c)), bribery affidavits required to be submitted with a bid (3-405), required nondiscrimination clauses in State construction contracts (3-406), conflict of interest provisions respecting contracts over $25,000 in any one fiscal year (3-407) and mandatory clauses to be included in all construction contracts (3-602(a)). We think it clear that the Legislature in using the phrase "contract[s] entered into by the State" as set forth in §7-201(d) meant written contracts since requirements imposed by other sections of Article 21 respecting matters to be included in contracts can only be accomplished by a written instrument.

Nor in our view do we have jurisdiction over a so called implied in law contract under an unjust enrichment theory.[1] As stated by the Court of Special Appeals:

> As we have seen, sovereign immunity bars recovery unless waived or abrogated by the State and that the State has waived the defense only with respect to those contract claims which are "based upon a written contract executed on behalf of the State, . . . by an official or employee acting within the scope of his authority." Md. Ann. Code, Art. 21, §7-101. We have also seen that recovery for unjust enrichment is based upon an implied in law contract. The two concepts are incompatible. However meritorious a claim based upon an implied contract may be, if that claim is against the State or any of its agencies, it is barred because it is not based upon a written contract.

Mass Transit Administration v. Granite Construction Company, 57 Md. App. 766, 780, 471 A.2d 1121 (1984).

The total absence of any written instrument in this instance also precludes the Board from considering Appellant's appeal under an implied in fact contract based on the theory that a contract can be constructed through circumstantial evidence rather than in an explicit set of words. Mass Transit Administration v. Granite Construction Company, supra, at 773-776. For this Board to have jurisdiction over an appeal arising from a dispute concerning a contract, the parties must have memorialized their conduct at least in some gross fashion in writing. See: Mass Transit Administration v. Granite Construction Company, supra, 773-776.

Since we have determined that the Board only has jurisdiction over disputes arising out of written contracts and since Appellant never had a written contract with the State, we may not consider Appellant's appeal of its contract claim under §7-201(d)(2) of Article 21. Therefore, we dismiss Appellant's appeal on this ground.

However, as indicated in the Findings of Fact, (see Findings of Fact Nos. 4 and 5) Appellant may be viewed as having filed a bid protest with the University and upon receipt of the procurement officer's decision taken an appeal with this Board under the provisions of §7-201(d)(1) pertaining to

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[1] Unjust enrichment applies to a case where plaintiff confers a benefit upon the defendant, the measure of recovery being the gain to the defendant not the loss by the plaintiff.

disputes relating to the formation of State contracts.[2] We, therefore, shall treat Appellant's appeal as a bid protest where the essence of the protest is that it was improper for the University to have engaged in a new written solicitation of bids after Appellant was advised it was the successful bidder under the original oral solicitation. The Appellant's protest of the University's action was filed prior to bid opening. (Findings of Fact Nos. 4 and 5). See: COMAR 21.10.02.03. Cf. Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 39-43, 468 A.2d 1026 (1984).[3] The procurement officer's decision is dated May 28, 1982. Appellant's appeal was noted to this Board within 15 days from such date on June 11, 1982.

Appellant seeks monetary relief by way of reimbursement for costs and expenses flowing from the alleged improper resolicitation. Assuming, without deciding, that it was improper for the University to rebid the work, we could not afford Appellant the remedy it seeks, since this Board is not empowered to award or fashion any monetary relief respecting a dispute relating to the formation of a State contract. See: Kennedy Temporaries v. Comptroller of the Treasury, supra, at 35-36; Spruell Development Corporation, MSBCA 1203 (December 17, 1984).

We, therefore, deny Appellant's appeal under §7-201(d)(1) as well, grant the University's Motion Raising Preliminary Objection and dismiss the appeal with prejudice.

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[2]Section 7-201(d)(1) provides:

> Within 15 days of receipt of notice of a final action disapproving a resolution or approving a decision not to resolve a dispute relating to the formation of a State contract, the bidder or offeror or prospective bidder or offeror may appeal the action to the State Board of Contract Appeals. The decision of the Board is final only subject to judicial review.

[3]We acknowledge that the March 24, 1982 letter to Appellant respecting the decision to rebid and not consummate an award to Appellant could be found to represent final agency action requiring Appellant to have noted his appeal in this forum within 15 days of receipt thereof. In view of our determination otherwise disposing of the appeal we do not decide the question of whether Appellant's appeal was timely under these circumstances.