BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DAVIDSONVILLE DIVERSIFIED SERVICES	)	
	)	Docket No. MSBCA 1339
Under SHA Contract No. B-698-508-472	)	

January 29, 1988

MSBCA - Jurisdiction - A subcontractor may not maintain an appeal to the MSBCA in its own name since §11-137(f) State Finance and Procurement Article, Ann. Code of Md. permits an appeal of the final action of a procurement agency only by a person having a contract with a State agency.

MSBCA - Jurisdiction - MSBCA only has jurisdiction to entertain an appeal based on a dispute arising out of a written contract with the State.

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APPEARANCE FOR RESPONDENT: William A. Kahn
Assistant Attorney General
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OPINION BY MR. LEVY

This is an appeal arising under s State Highway Administration (SHA) contract for the construction of a portion of the North West Expressway. Appellant, a subcontractor, appeals its contract termination by the general contractor. SHA has filed a Motion to Dismiss alleging this Board does not have jurisdiction to hear this appeal.

Findings of Fact

1. Hempt Brothers, Inc. (HEMPT) was the general contractor on SHA contact No. B-698-508-472 for the construction of Rt. I-795, North West Expressway, Owings Mill Boulevard Exchange, Baltimore County, Maryland.

2. Appellant entered into a subcontract for the above SHA project dated January 25, 1984 with Hempt to provide certain seeding and landscaping services for $123,827.50. Appellant was a minority owned business and its participation in this SHA contract was arranged through the Department of Transportation Office of Minority Business Development.

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3. Appellant's work was supervised on a daily basis by a SHA field engineer who had authority to order changes in the contract work. (Tr. p. 24). Appellant alleges that the field engineer required it to apply urea and lime, which was beyond the scope of its subcontract with Hempt.

4. The Maryland Water Resources Administration (MWRA) issued a field investigation report and site complaint on September 9, 1985 to Hempt on this project. It ordered Hempt to seed and mulch all disturbed areas at final grade not being worked by September 16, 1985. It also ordered all other construction activities to cease if the stabilization work was not completed by September 16, 1985.

5. Hempt immediately informed Appellant of the MWRA order and directed Appellant to complete the stabilization work by the September 16 deadline. This was confirmed by a letter dated September 11, 1985 from Hempt to Appellant.

6. Appellant did not complete the stabilization by the deadline and Hempt terminated Appellant's subcontract on September 16, 1985. Appellant was advised the same day that another company, Penn Line Service, Inc., would be brought in to perform the subcontract work.

7. Appellant has not filed a written claim with the procurement officer, therefore, a final written decision has not been issued. The Appeal of Termination of Subcontract filed with this Board on June 12, 1987 by Appellant challenges the alleged action taken by SHA in September 1985 of approving Hempt's termination of Appellant's subcontract. Appellant also alleges that Hempt failed to maintain proper schedules and failed to organize work in such a way as to allow for the effective utilization of Appellant

consistent with the terms of the subcontract; that Hempt required work outside of the scope of the subcontract; and that Hempt failed to make any payments to Appellant consistent with the terms of the subcontract.

8. SHA has filed a Motion To Dismiss or For Summary Disposition for lack of Board jurisdiction. It alleges that Appellant's appeal does not set forth a claim against a State respondent cognizable by this Board; the claim was not the subject of a procurement officer's decision; and no procurement officer's decision having ever been requested, the appeal is untimely.

9. At the hearing on SHA's Motion Appellant alleged (Tr. p. 4-5) that because of the extensive control exercised by the SHA field engineer over its work on a daily basis and because of the conduct of MWRA, an implied contract was actually created between Appellant and the State which this Board should take jurisdiction of.

It also alleged that within 30 days of its subcontract termination it contacted the SHA Minority Business Development officer and complained to him rather than the procurement officer since it was that office which had arranged the original subcontract with Hempt. (Tr. p. 18). Appellant alleged it was directed to an Assistant Attorney General who looked into the matter. (Tr. p. 19). Appellant further stated it was given no advice with regard to a possible suit on Hempt's payment bond or otherwise how to pursue its claim under the procurement regulations.

10. In addition to supporting its arguments that this Board lacks jurisdiction to hear this appeal, SHA advised the Board at the hearing that it has paid Hempt the full amount of its contract and that Hempt has made no claim for additional monies due. (Tr. p. 23). SHA acknowledged that the

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project engineer may have had authority to require changes to Hempt's contract but he had no authority to obligate the State under a new contract. (Tr. p. 24-25).

Decision

It is clear from the appropriate law and the prior decisions of this Board that we do not have jurisdiction to entertain this appeal.

Section 11-138(c)(1)[1] provides that this Board shall have jurisdiction to hear and decide all appeals arising under the provisions of §11-137(f). That section in turn provides ". . . a contractor may appeal the final action of a procurement agency to the Appeals Board: . . . (ii) within 30 days after receiving notice of a final action relating to a contract that has been entered into." (Underscoring added). Section 11-101(m) defines "contractor" to mean "a person having a contract with a State agency." In Jorge Company, Inc., MSBCA 1047, 1 MICPEL ¶20 (July 7, 1982) we held this to mean that a subcontractor was not entitled to bring a direct appeal to this Board since it did not have a contract with a State agency. In the instant appeal Appellant is a subcontractor to Hempt and does not have a written contract with SHA. Accordingly, it cannot maintain this action in its own name.

We are mindful of Appellant's arguments at the hearing on the motion where it urged for the first time that an implied contract was created between Appellant and either SHA or MWRA. While we believe Appellant would have a very difficult task to establish that such a contract was created, we will not have to determine if in fact one was since (1) the appeal to the Board only raised the issue of a wrongful termination of its subcontract with Hempt, and (2) even if an implied contract existed, we

[1]All references to statutory sections are to the State Finance and Procurement Article, Ann. Code of Md., 1987 Supp. Unless discussed in the decision, there have been no substantive changes to those sections in the Article applicable to this decision since Hempt's termination of Appellant's subcontract in 1985.

have held that this Board does not have jurisdiction over an implied in law contract created under an unjust enrichment theory or an implied in fact contract not evidenced by a writing.

In Boland Trane Associates, Inc., MSBCA 1084, 1 MICPEL ¶101 (May 22, 1985) we held that this Board only has jurisdiction to entertain an appeal based on a dispute arising out of a written contract entered into by the State. While there have been some minor changes in the procurement statute, noted below, since we issued the Boland decision in 1985, they would not alter our holding. The Boland decision was based on a discussion of the effect of the Legislature's waiver in 1976 of sovereign immunity as a defense to actions against the State based on only written contracts.[2] That law still remains the same and is presently codified in §12-201 State Government Article, Ann. Code of Md., 1987 Supp. What we stated in Boland, supra, at p. 4 is still applicable today, "[s]ince 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." The jurisdiction of this Board is established in §11-138(c)(1) which is discussed above. As noted, it is based on the language found in §11-137(f), "a contractor may appeal the final action of a procurement agency to the Appeals Board: . . . (ii) within 30 days after receiving notice of a final action relating to a contract that has been entered into." (Underscoring added). In Boland, "contract" was defined at Article 21 §11-101(f) as follows:

> (f) 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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[2]Chapter 450 of the Laws of MD, 1976.

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(i) Awards and notices of award;

(ii) Contracts of a fixed-price, cost-reimbursement, cost-plus-a-fixed-fee, fixed-price incentive, or cost-plus incentive fee type;

(iii) Contracts providing for the issuance of job or task orders;

(iv) Leases;

(v) Letter contracts;

(vi) Purchase orders;

(vii) Supplemental agreements with respect to any of these; and

(viii) Orders;

(2) "Contract" does not include:

(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

(ii) Medicaid, judicare, or similar reimbursement contracts for which user eligibility and cost are set by law or by rules and regulations.

Based on this definition, we stated in Boland, supra, at p. 5,

> 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. . . . We think it clear that the Legislature in using the phrase "contract[s] entered into by the State" as set forth in [Article 21] §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.

The Legislature amended the definition of "contract" in 1986 and it is presently found at §11-101(k).

> (k) Contract.—(1) "Contract" means an agreement in whatever form entered into by a State agency for the lease as lessee of real or personal property or the acquisition of supplies, services, construction, construction related services, architectural services, or engineering services.
>
> (2) "Contract" does not include:
>
> (i) a collective bargaining agreement with an employee organization or an agreement creating an employer-employee relationship, as defined in §15A(a)(3) of Article 64A of the Code; or
>
> (ii) a Medicaid, judicare, or similar reimbursement contract for which user or recipient eligibility and price payable by the State are set by law or regulations.

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We believe that what we said in Boland above is still correct today. The Legislature intended the definition to be satisfied only by a written document in "whatever form entered into by a State agency." The addition of the words "in whatever form entered" takes the place of the enumeration of the separate types of contract forms included in the prior Article 21, §11-101(f) definition of "contract." It does not mean that the requirements for a writing is removed since the Legislature has not changed the application of the waiver of the defense of sovereign immunity. It can still be waived only in actions against the State based on written contracts. Again, as we said in Boland, supra, at p. 6, "[f]or 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."

While SHA's additional arguments (that Appellant's claim was not the subject of a procurement officer's decision and that no procurement officer's decision having ever been requested, the appeal is untimely) would also be dispositive of this appeal, we will not have to address them here. They are both based on the assumption that this Board might have been able to gain jurisdiction but for the noncompliance with certain procedural requirements. However, since we find Appellant had no direct written contract with the State, it cannot maintain this action under any circumstances.

Appellant's real argument before this Board is an equitable one; i.e., that we should somehow find a way to take jurisdiction of this matter to help Appellant who has otherwise exhausted all of its other remedies. While we might sympathize with Appellant's plight, we cannot create jurisdiction for this Board. That is the job of the Legislature.

For all of the above reasons, we will grant SHA's Motion to Dismiss.

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