

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DEWBERRY & DAVIS/PHILLIPS
SWAGER ASSOCIATES, A JOINT VENTURE) Docket No. MSBCA 1365
Under DGS Contract No. K1-000-821-001

Appeal of J. ROLAND DASHIELL & SONS,) Docket Nos. 1324 and 1360 INC.
Under DGS Contract No. KO-004-821-001

June 28, 1988

Board of Contract Appeals - Practice and Procedure - Consolidation of Appeals-
-While the Board has not specifically authorized consolidation of appeals in its rules, consolidation of appeals may be considered on a case by case basis where appropriate to provide a just, inexpensive and expeditious determination of disputes.

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MEMORANDUM OPINION BY CHAIRMAN HARRISON

The Department of General Services (DGS) has moved to consolidate the above referenced appeals for discovery and hearing on grounds (1) that the appeals of Dewberry in MSBCA 1365 and Dashiell in MSBCA 1324 and 1360¹ present the same factual and legal issues and (2) that joining these appeals will promote a more inexpensive and expeditious resolution than if the appeals were to be processed and heard separately. For the reasons that follow the motion to consolidate is denied.

¹The Board has consolidated the appeals of Dashiell in MSBCA 1324 and 1360.

Finding of Fact

1. The referenced appeals arise out of disputes in connection with the design and construction of a portion of the Eastern Correctional Institution (ECI) in Princess Anne, Somerset County. Specifically the disputes involve the design and construction of housing support compounds at ECI under Bid Package #4.²

2. Dewberry was the architect/engineer for the entire project and Dashiell was the general contractor for the work under Bid Package #4 only.

3. Dashiell filed two claims with DGS. The first was in the amount of \$1,739,060.00 and sought a time extension of 282 calendar days for alleged damages and delay relating to structural steel design changes and review of shop drawings (steel drawings claim). The second claim sought a time extension of 283 calendar days and additional compensation of \$1,689,056.00. The second claim was based on alleged deficient coordination and wrongful disapproval of its hollow metal door and window frame shop drawings and related hardware submittals (hollow metal door claim).

4. Based on an analysis by an independent consultant, the DGS procurement officer concluded that Dashiell was responsible for the delay on the hollow metal door claim and that, in any event, such delay had no effect on critical path activities.

5. Based on an analysis by the same consultant of the steel drawings claim, the DGS procurement officer concluded that "DGS is responsible for only 78 calendar days of delay as a result of design changes. . . .an additional 21 calendar days of concurrent delay will be allowed for time extension purposes only, for delays caused by both Dashiell and Dewberry." Thus the

²The construction of ECI was performed under sixteen separate contracts known as Bid Packages.

procurement officer allowed Dashiell a time extension of 99 days. The procurement officer further found Dashiell entitled to additional compensation of \$221,230.00 as a result of delay attributable to DGS

6. Dashiell appealed both of the above final determinations to this Board, which have been docketed as MSBCA 1324 and MSBCA 1360.

7. On July 22, 1987, DGS informed Dewberry by letter that it was withholding payment on Dewberry's requests for payment under its contract, which at that time totaled \$501,921.18. The reason asserted by DGS was Dewberry's alleged breach of its contract to provide architectural and engineering services and alleged resulting responsibility for all delay costs that might be incurred and attributed to DGS by Dashiell. DGS also asserted a right to withhold in addition to the \$501,921.18 in invoices already submitted by Dewberry,³ any additional sum that might otherwise become due to Dewberry up to the amount of the claims of Dashiell totalling approximately \$1.7 million each.

8. By letter dated August 7, 1987, Dewberry disputed DGS' right to withhold the money, denied responsibility for any construction delays and requested a final decision from the procurement officer respecting payment of its invoices.

9. The procurement officer issued a final decision denying Dewberry's claim for payment of its invoices on the basis that Dewberry "is liable to DGS for any amounts awarded by the MSBCA to the contractor in either of the pending appeals on the basis of acts or omissions which constitute the failure of Dewberry adequately to perform its duties under its agreement with DGS."

³By letter dated August 20, 1987, Dewberry submitted additional invoices to the DGS procurement officer, bringing the total of submitted invoices to which DGS claimed a right not to pay to \$509,384.04.

10. Dewberry appealed the final decision of the procurement officer which was docketed as MSBCA 1365. In its appeal Dewberry asserted that the State's withholding of payment was groundless. In response, DGS alleged breach of contract in a pleading denominated a counterclaim asserting that DGS was entitled to withhold payment from Dewberry pending this Board's determination of the claims of Dashiell. Additionally, DGS requested that the Board in its opinion on the Dashiell claims identify the amount of any additional compensation awarded Dashiell attributable to a breach of Dewberry's contract for purposes of setoff. Concurrently, DGS moved to consolidate the appeals in MSBCA 1324, 1360 and 1365 both as to discovery and hearing.

11. Dewberry moved for summary disposition of the DGS counterclaim, arguing that the Board has jurisdiction only over its right to be paid and not over any potential liability of Dewberry to DGS resulting from the Dashiell claims under the breach of contract theory alleged in the counterclaim.

12. The Board granted Dewberry's motion for summary disposition in part, dismissing without prejudice that portion of the DGS counterclaim that pertained to withholding amounts in excess of the \$221,230.00 determined by DGS to be owed to Dashiell on the basis of Dewberry's alleged breach of contract under Dashiell's steel drawings claim. The Board's opinion in this regard is incorporated herein as if fully set forth.

13. Dewberry and Dashiell have both opposed the DGS motion to consolidate.

Decision

Dashiell and Dewberry argue that the appeals may not be consolidated because the Board's rules do not provide for consolidation. While the Board has not specifically authorized consolidation of appeals in its regulations (rules), consolidation of appeals may be considered on a case by case basis

where appropriate to provide a just, inexpensive and expeditious determination of disputes. See Intercounty Construction Corporation, MDOT 1036, 1 MSBCA ¶11 (1982). We further believe that a determination concerning consolidation of appeals is a matter of discretion with the Board. See Monaco Enterprises, Inc., ASBCA No. 28434, 83-2 BCA ¶16901; Basic Construction Company, ASBCA Nos. 20510, 20581, 20585, 75-2 BCA ¶11611. Compare Rule 2-503, Maryland Rules; Litton Bionetics v. Glen Constr., 292 MD 34 (1981). Based upon the record before us and in the exercise of our discretion we have determined to deny DGS' motion for consolidation both as to discovery and hearing. We first examine the question of consolidation of the appeals for hearing.

The issues in the appeals of Dashiell center around who caused the alleged delay in Dashiell's work. Persons other than Dewberry may be potentially responsible for any critical delay experienced by Dashiell. To focus (through consolidation of the hearing) the issue of responsibility for delay entirely upon Dewberry may be counterproductive to a factual ascertainment of the actual causes of any delay experienced by Dashiell. The appeals of Dashiell and Dewberry only presently coincide vis-a-vis the DGS counterclaim respecting the 78 day time extension and award of \$221,230.00 in additional compensation to Dashiell that the DGS procurement officer determined Dewberry to be solely responsible for as a result of a breach of Dewberry's contract with DGS. Consolidation will inevitably invite litigation of matter that is beyond the scope of the DGS counterclaim in the Dewberry appeal. Since DGS contends that Dewberry may be liable for any delay experienced by Dashiell, consolidation will also inevitably involve receipt of evidence concerning whether Dewberry breached the standard of care of an architect/engineer under its contract with DGS. Dashiell it seems to us is

entitled to attempt to meet its burden of proof that it was delayed by someone (other than itself) without either having to demonstrate that the someone is Dewberry or participate or at least be present during that portion of the hearing dealing with Dewberry's professional conduct and DGS' attempt to shift responsibility for any delay to Dewberry.

Viewed from Dewberry's perspective, it simply seeks to be paid \$509,384.04 in invoices which are presently only disputed in the amount of \$221,230.00 relating to the Dashiell steel drawings claim. Consolidation with the appeals of Dashiell may unduly delay hearing and determination of Dewberry's entitlement to be paid the amount between \$221,230.00 and \$509,384.04, i.e. \$288,154.04.

For these reasons the motion of DGS to consolidate the appeals of Dewberry and Dashiell for hearing is denied.

We next examine the question of consolidation of the appeals for discovery. Based on comment of counsel for Dashiell and Dewberry, it appears that certain discovery in a consolidated mode would be duplicative or unnecessary to preparation of their respective appeals. Therefore, to the extent that consolidation of discovery would result in duplicative or unnecessary activity, the goal of achieving informal, inexpensive and expeditious resolution of disputes is not served. See Section 11-128(c), Division II, State Finance and Procurement Article. We also believe that counsel for all parties are capable of informal communication and exchange of information and documents that are necessary to a proper understanding and presentation of their respective cases in the separate appeals of Dewberry and Dashiell. Should difficulty arise in accomplishment of discovery at some future time, appro-

appropriate response to include consolidation for discovery purposes may then be considered. For the present, however, DGS' motion to consolidate the appeals for discovery purposes is also denied.

