

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. KO-004-821-001)

May 11, 1988

Procurement Officer-Procedures for Resolving Claims-Attempt to Encourage Settlement - The procurement code and the procurement regulations contemplate that the Procurement Officer attempt to resolve disputes through informed discussion prior to issuing a final decision. A final decision, if issued prior to this effort being made, does not constitute final agency action and is not sufficient to serve as the basis for a subsequent appeal to this Board.

Summary Disposition - A motion for summary disposition will be granted by the Board only where there are no genuine issues as to any material fact and it appears that one party clearly is entitled to a decision as a matter of law. Appellant's motion for summary disposition of a portion of an affirmative State claim in the amount of \$221,230.00 was denied where there was a factual dispute as to the actual effort made to apprise Appellant of the affirmative State claim so as to permit discussions and encourage settlement.

Procurement Officer's decision-Expert Opinion - The General Assembly in creating a two tier process for resolving contract disputes intended that some effort be made at the agency level to apprise the contractor of an affirmative State claim so as to permit discussions and encourage settlement. However, the statutory and regulatory requirements for resolution of complaints at the agency level do not require that the claimant be afforded an opportunity to cross examine or rebut the oral and preliminary written report of an expert retained by the agency where the expert's opinion forms the basis for the procurement officer's denial of the claimant's request for relief.

Affirmative State Claims - The State failed to adequately set forth an affirmative claim at the agency level respecting withholding of \$509,384.04 due Appellant for work performed under its contract. Upon Appellant's request for a procurement officer's decision on the propriety of such withholding, the procurement officer found that Appellant, an architectural and engineering firm, had breached its contract causing the State to owe additional compensation to a general contractor for delay costs resulting from the breach in the amount of \$221,230.00. While stating that the State could withhold the \$221,230.00 found by the procurement officer to be attributable to Appellant's breach, the procurement officer also stated that the State could withhold sums due

¶ 176

Appellant that exceeded \$221,230.00 pending a final determination of the general contractor's claims in the amount of \$1.7 million each and ultimate liability therefore. The grounds for this determination was the possibility that this Board or a reviewing court might disagree with the procurement officer's previous determinations that the general contractor was only entitled to \$221,230.00, award the general contractor additional compensation and further find that such additional compensation was owed as a result of Appellant's breach of contract. However, such mere speculation concerning what this Board or reviewing court might ultimately find with respect to the claims of the general contractor did not constitute adequate articulation of an affirmative State claim as to amounts exceeding the \$221,230.00 found to be attributable to Appellants breach.

APPEARANCES FOR APPELLANT:

Bardyl R. Tirana, Esq.
Silverstein and Mullens
Washington, D.C.

James F. Lee, Jr., Esq.
Carr, Goodson, Lee &
Foret, P.C.
Washington, D.C.

APPEARANCES FOR RESPONDENT:

Brian W. Craver
Allan B. Blumberg
Assistant Attorneys
General
Baltimore, MD.

MEMORANDUM OPINION BY CHAIRMAN HARRISON

Appellant, an architectural and engineering firm, appealed the final decision of the procurement officer denying it any compensation for architectural and engineering services performed pending the final determination of claims filed by one of the general contractors on the same project involving construction of the Eastern Correctional Institution (ECI) in Princess Anne, Somerset County.

The Department of General Services (DGS) filed a counterclaim in response to Appellant's appeal asserting that Appellant should be paid no money until it finally determined whether (1) DGS owes any additional

money on the claims of one of the general contractors which are presently pending at the Board, and (2) whether any money that may ultimately be determined to be owed by DGS to the general contractor should be withheld from the Appellant because of improper performance (i.e. breach) of its contract for providing architectural and engineering services for the ECL. Appellant has filed a Motion for Summary Disposition of Counterclaim. For reasons that follow we shall grant in part and deny in part Appellant's motion.

Findings of Fact

1. On July 22, 1987, DGS informed Appellant by letter that it was withholding payment on Appellant's requests for payment which, at that time, totaled \$501,921.18.¹ The reason asserted by DGS in this letter for withholding payment was Appellant'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 one of the general contractors, J. Roland Dashiell (Dashiell), that built a portion of the ECL. Based on Appellant's alleged breach of contract, DGS also asserted a right to withhold in addition to the \$501,921.18 then owed Appellant, any additional sums that might otherwise become due to Appellant up to the amount

¹The July 22, 1987 DGS letter is attached to Appellant's motion as Exhibit B. At the time DGS first asserted its claim, the amount withheld by the State totaled \$501,921.18. By letter dated August 20, 1987, Appellant 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. Since that time Appellant has continued to work without compensation and has submitted invoices totalling another approximately \$663,000.00.

of the claims of Dashiell totalling approximately \$1.7 million each.² Copies of the Dashiell complaint before this Board in one claim and the other Dashiell claim then still before DGS for consideration were attached to the letter.

2. By letter dated August 7, 1987, Appellant disputed DGS' right to withhold the money, denied responsibility for any construction delays and requested a final decision of the procurement officer respecting payment of its invoices.³ The parties met on September 24, 1987 to discuss the matter. The results of this meeting were apparently inconclusive.

3. The procurement officer's final decision dated December 4, 1987 provides in relevant part as follows:

Dewberry's obligation to design contract documents and review and approve shop drawings extended to all portions of the ECI, the construction of which was performed under sixteen separate contracts, known as Bid Packages. Bid Package #4 involved construction of two Housing Support Buildings and Gatehouses, and was awarded by competitive bidding to J. Roland Dashiell & Sons, Inc. ("Dashiell"). Notice to Proceed was given to Dashiell on January 16, 1985, which established the original contract substantial completion date at September 7, 1986.

A major portion of Dashiell's scope of work included the purchase and erection of specially fabricated structural steel, followed by construction of the exterior and interior masonry walls of the Housing Support Compounds. The contractor experienced delays to fabrication and erection of structural steel, and to commencement and completion of the follow-on masonry work. As a result of these delays, Dashiell did not substantially complete its work under Bid Package #4 until June, 1987.

²Appellant's contract provides at PART IV, FEES AND PAYMENTS as follows:

H. The compensation payable to the A/E under this agreement may be reduced by reason of additional costs of constructing the Project incurred by the State of Maryland as a result of errors in, and improper coordination of, the drawings and specifications comprising the Construction Documents. The amount of such reduction in compensation, if any, shall not exceed the amount of such additional costs of constructing the Project.

³See Appellant's motion at p. 2.

³See Appellant's motion, Exhibit C.

Dashiell submitted two requests for additional compensation and time extensions. The first such request was submitted by letters dated February 20, 1986, March 18, 1986 and October 16, 1986, which letters collectively request additional compensation of \$1,739,060.00 and a time extension of 282 calendar days. In that claim (hereinafter the "steel drawings claim"), the contractor alleged that after the contractor's steel fabrication subcontractor had commenced production of shop drawings for the structural steel, Dewberry issued a variety of design changes affecting the structural steel members depicted on the shop drawings. Dashiell alleged that this required changes to the completed shop drawings and delayed commencement of steel fabrication. In addition, Dashiell alleged that Dewberry's review time for shop drawings was unreasonably lengthy, leading to further delays. Finally, Dashiell alleged that as a consequence of the delays to the structural steel, the number of masons necessary to maintain the planned level of productivity was unavailable when the masonry work finally became available, leading to further project delays.

The second request submitted by Dashiell, by letter dated May 1, 1987, sought a time extension of 283 calendar days and additional compensation of \$1,689,056.00. Dashiell states in the second claim that, in essence, the claim constitutes a second basis for recovering the same damages that gave rise to the first claim. The second claim (hereinafter "the hollow metal frames" claim) alleged an entitlement to additional time and money based on Dewberry's allegedly deficient coordination and wrongful disapproval of the contractor's hollow metal door and window frame shop drawings, and of related hardware submittals.

DGS hired an independent construction consultant, Hill International, Inc. ("Hill"), to analyze both of the above - described claims. With respect to the steel drawings claim, Hill found that Dewberry had issued post-award changes to the contract drawings that created delays to the critical path of Dashiell's work. Hill's analysis concluded that Dewberry had caused this delay, and based on Hill's recommendation the procurement officer issued a final decision on February 6, 1987. In that final decision, the following finding was made: "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." Final Decision dated February 6, 1987 at 5. The procurement officer concluded, on the basis of Hill's analysis, that Dashiell was entitled to a time extension of 99 days and additional compensation of \$221,230.00. Dashiell appealed that final decision to the Maryland State Board of Contract Appeals, and it was docketed as MSBCA No. 1324.

Hill's analysis of Dashiell's hollow metal door frame claim yielded the result that the delays to hollow metal door fabrication, while allegedly caused by Dewberry, were actually caused by Dashiell and its subcontractors. Further, it was determined that those delays had no effect on critical path activities. Based on Hill's analysis, the procurement officer denied the hollow metal door frame claim on November 2, 1987. Dashiell appealed that decision to the Maryland State Board of Contract Appeals on December 2, 1987.

By letter dated July 22, 1987, DGS informed Dewberry that DGS would suspend further payment on all invoices from Dewberry, since the amount due and owing Dewberry at that time was less than the potential liability of approximately \$1.7 million that faced DGS, as a result of Dewberry's deficient performance, by virtue of Dashiell's two claims.

* * * *

The correspondence exchanged on this matter and the views discussed at the meeting of September 24, 1987 [a meeting between representative of DGS and Appellant] reveal two disputes requiring resolution. First, DGS takes the position that Dewberry is responsible to DGS for any amounts that are ultimately paid to Dashiell as a consequence of the two claims that are on appeal at the MSBCA. In support of this position, DGS points out that its independent consultant determined Dewberry to be responsible for 99 calendar days of delay on the steel drawings claim, by virtue of having issued incomplete or inadequate contract drawings and due to its failure properly and promptly to review the contractor's shop drawings and other submittals. Based on the consultant's analysis, a final decision was issued on the steel drawings claim awarding \$221,230.00, along with a compensable time extension of 78 calendar days, with the remaining 21 days deemed excusable due to contractor-caused concurrent delays. Dashiell appealed that decision and DGS now faces additional costs in excess of \$1,700,000 for deficiencies in Dewberry's performance. As to the hollow metal frames claim, the consultant discovered no critical path delays and consequently that claim was denied in its entirety by the procurement officer. But since that decision also has been appealed, DGS is faced with a second alleged basis by which the contractor seeks essentially the same damages for what is alleged to be Dewberry's deficient performance. In light of the above, DGS takes the position that pursuant to Part IV, Fees and Payments, 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.

4. Appellant timely appealed the final decision of the procurement officer. In its appeal Appellant asserted that the State's withholding of payment was groundless.⁴ In response, DGS raised breach of contract in a pleading denominated a counterclaim asserting that DGS was entitled to withhold payment from Appellant pending this Board's determination of the claims of Dashiell and requesting that the Board in its opinion on the

⁴See Appellant's Complaint, Paragraph 16, filed January 13, 1988.

Dashiell claims identify the amount of any additional compensation awarded Dashiell attributable to a breach of Appellant's contract for purposes of set-off.⁵

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

6. At oral argument on the motion for summary disposition, DGS conceded that, subject to review of certain of Appellant's invoices and excepting some minor discrepancies in Appellant's invoices, it would not contest that the amounts sought by the invoices were due and owing and that it would honor the invoices but for the two claims of Dashiell that are presently before the Board in MSBCA 1324 and MSBCA 1369.

Decision

Appellant's motion raises the threshold issue of whether it is permissible for a State agency to deny a claim by contractor A for payment of an undisputed amount for services performed until it is finally determined whether the agency will be held liable for the claim(s) of another contractor (contractor B) in an amount equal to or exceeding the amount otherwise owed contractor A because of contractor A's alleged breach of contract. The Board may find in an appropriate case that the State has the right to withhold funds otherwise due under one contract that is being performed by a contractor as a result of the same contractor's breach of contract in another contract with the State. This might be appropriate even where the contractor disputes that it has breached the second contract, at least where the disputed breach may be determined in a neutral forum such as a board or court. See

⁵See Respondent's Answer and Counterclaim, filed January 19, 1988.

United States v. Munsey Trust, 332 U.S. 234 (1947) See also Dale Ingram, Inc. v. United States, 201 Ct. Cl. 56, 76 (1973); Project Map, Inc. v. United States, 203 Ct. Cl. 52 (1973). Here, however, DGS argues that the State has the right to withhold payment from a contractor respecting its performance of a contract with the State in a situation where a second contractor has asserted a claim against the State for which it is possible the first contractor as a result of the first contractor's breach of its contract, might ultimately be found to be liable, in whole or in part, for any amount that the State might be held to be liable for under the second contractor's claim.

Assuming arguendo that Maryland's general procurement law may permit the State to withhold funds owed a contractor pending determination of the claims of another contractor, we nevertheless find based on the record before us that Appellant's motion should be sustained with respect to its invoices that exceed the amount of \$221,230.00. We so hold because DGS has failed to adequately set forth an affirmative claim at the agency level respecting amounts that exceed the \$221,230.00 found by the procurement officer to be attributable to Appellant's breach of contract. The procurement officer's decision reflects that on the basis of a written preliminary report by Hill he determined that Dashiell's hollow metal door frame claim was Dashiell's responsibility and not Appellant's. Counsel for DGS at the argument of Appellant's motion agreed that based on the preliminary written report by Hill, Appellant was "exonerated" on the hollow metal door frame claim. (TR 50-52). Based on the oral report of Hill, the procurement officer exonerated Appellant on the steel drawings claim excepting the amount of \$221,230.00 alleged to be the fault of Appellant. Despite such findings the procurement officer determined that this Board might differ with the procurement officer and render a decision favorable to Dashiell on one or both of its appeals each

seeking the same quantum of damages (approximately \$1.7 million) and that this Board could further find that any such damages were the responsibility of Appellant. However, mere speculation concerning what this Board might or might not find respecting Dashiell's claims on appeal, and what a reviewing court or courts might or might not ultimately have to say on the matter does not under the facts of the record before us constitute adequate articulation of an affirmative State claim. Accordingly, we grant Appellant's motion respecting that portion of the DGS counterclaim that exceeds an amount of \$221,230.00.

Appellant also argues that the Board lacks jurisdiction over the DGS counterclaim even in the amount of the \$221,230.00 that the procurement officer on the basis of the Hill report attributed to Appellant's breach of contract. Appellant asserts that its alleged breach of contract was first raised in the procurement officer's final decision and that it was never apprised of this affirmative State claim prior to issuance of the decision. We have held that this Board will likely not consider an affirmative claim of the State, whether called a claim or a counterclaim, that is initially raised in the procurement officer's final decision. Titan Group, Inc., MSBCA 1135, 1 MSBCA ¶63 (1983). Some effort must be made to apprise the contractor of an affirmative State claim so as to permit discussions and encourage settlement. A final decision, if issued prior to this effort being made, does not constitute final agency action and is not sufficient to serve as the basis for a subsequent appeal to this Board.

Appellant has sought summary disposition on grounds that there is no dispute concerning any material fact respecting the alleged failure of DGS to apprise it of the affirmative State claim so as to permit discussions and encourage settlement. We have held that a motion for summary disposition

shall be granted only where there are no genuine issues as to any material fact. Intercounty Construction Corporation, MDOT 136, 1 MSBCA ¶11 (1982). Here, however, the parties have presented differing versions of the actual efforts made to apprise Appellant of the affirmative State claim of the right to withhold and of the extent of any discussions prior to issuance of the procurement officer's decision. The record does not permit us to determine the exact extent of the State's effort here, although it is apparent that some effort was made. Since material facts on this issue are in dispute we must deny Appellant's motion respecting the DGS affirmative claim in the amount of \$221,230.00. Intercounty Construction Corporation, supra.

However, notwithstanding a factual dispute as to efforts made to apprise it of the DGS affirmative claim, Appellant argues that as a matter of law the DGS claim may not be considered by this Board. In this regard, it asserts that it was never afforded access to the opinions of Hill on the Dashiell claims. Based on this assertion, it argues that this Board may not consider the DGS claim in the amount of \$221,230.00 because Appellant has been denied the opportunity to meaningfully respond at the agency level to the facts and rationale as set forth in the Hill analysis allegedly giving rise to the State's determination to withhold payment. DGS argues that the general procurement law does not require that an agency make such matter available to a claimant.

This Board may consider timely appeals in contract disputes after issuance of a written procurement officer's decision culminating in final agency action pursuant to the provisions of section 11-137, State Finance and Procurement Article, Md. Ann. Code. Both the State and the contractor may obtain such a final decision on a dispute, but, in the normal course of events, the contractor seeks the decision when confronted, typically, with a refusal to

pay money allegedly owed by the State. Here the Appellant requested a final decision on its right to be paid for work performed. The procurement officer, in part, on the basis of the oral and preliminary written reports of Hill analyzing the claims of Dashiell against the State under the Dashiell contract denied Appellant's request for compensation. There exists a factual dispute as to the extent to which Appellant was apprised of the underlying basis of the State's determination to withhold and of the opportunity of the Appellant to discuss its claim with DGS. However, the record reflects that neither appropriate personnel of Hill nor its report were made available for confrontation by Appellant concerning the correctness of the opinions regarding Appellant's liability. This failure, Appellant asserts, deprives this Board of authority to consider the appeal.

Section 11-137, supra does not specify in what detail the procurement officer must address the merits of a contractor's claim or a defense thereto. Subsection (c) of section 11-137, effective July 1, 1987, sets forth the requirements of review of a complaint as follows.

- (c) Duties of officer; decisions. - (1) Upon the initiation of a complaint under subsection (b) of this section, the procurement officer of the procurement agency involved:
- (i) shall review the substance of the complaint;
 - (ii) unless clearly inappropriate, shall seek the advice of the State Law Department;
 - (iii) may conduct discussions, and, if appropriate, conduct negotiations, with the person initiating the complaint proceeding;
 - (iv) may request additional information or substantiation through any appropriate procedure; and
 - (v) shall comply with any applicable requirements contained in regulations adopted by the appropriate department.
- (2) After complying with the requirements of paragraph (1) of this subsection, and consistent with the budget and applicable laws and regulations, the procurement officer shall promptly issue a decision in writing to the reviewing authority:
- (i) indicating that the complaint has been resolved by mutual agreement;
 - (ii) dismissing the complaint in whole or in part; or
 - (iii) granting the relief sought by the initiator of the complaint, in whole or in part.

COMAR 21.10.04.01A(3) requires that a contractor be afforded an opportunity to be heard and to offer evidence in support of his claim. We have noted above our belief that the General Assembly in creating a two tier process for resolving disputes intended that some effort be made at the agency level to apprise the contractor of an affirmative State claim so as to permit discussions and encourage settlement. Titan Group, Inc., supra. We have also noted that Appellant's motion must be denied in part since material facts are in dispute concerning the efforts made to apprise Appellant of the affirmative State claim and the extent of any discussions. However, we disagree with Appellant that as a matter of law a procurement officer must share with a claimant expert opinion that forms the basis of denial of the complaint or of the assertion of an affirmative State claim. Thus, we hold that the above statutory and regulatory requirements for resolution of complaints at the agency level do not require that the claimant be afforded an opportunity to cross examine or rebut the oral and preliminary written report of an expert retained by the agency where the expert's opinion, as in the instant case, forms, in part, the basis for the procurement officer's denial of the claimant's request for relief. Thus, Appellant's motion for summary disposition on the specific grounds of failure to provide it access to Hill and or its report is denied.⁶

In summary, we grant Appellant's motion in part and accordingly dismiss without prejudice that portion of the DGS claim that seeks to withhold an amount in excess of \$221,230.00 from Appellant until liability for the Dashiell claims is finally determined.

SO ORDERED:

⁶We note that this Board has discovery procedures under which the Hill report and/or its representatives may be made available to Appellant. See COMAR 21.10.06.14; 21.10.06.15; 21.10.05.02C and 21.10.05.05.