

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of EASTERN SHORE)	
ASSOCIATES L.P./HARMANS)	
ASSOCIATES L.P.)	Docket Nos. MSBCA 1517,
Under DGS Contract Nos.)	1518 and 1519
LA-65-87; LA-35-85)	

November 29, 1990

Jurisdiction - The Board lacks jurisdiction over a dispute involving a contract claim relating to a lease of real property.

APPEARANCE FOR APPELLANT: David G. Lane, Esq.
Venable, Baetjer & Howard
McLean, VA

APPEARANCE FOR RESPONDENT: John H. Thornton,
Assistant Attorney General
Baltimore, MD

MEMORANDUM DECISION BY CHAIRMAN HARRISON
ON BOARD JURISDICTION

The Board has requested the parties to address as a preliminary matter whether the Board has jurisdiction over the instant disputes involving Appellant's requests for equitable adjustments. For reasons that follow the Board concludes that the disputes arise out of contract claims relating to a lease of real property over which the Board has no jurisdiction pursuant to SF§15-211(a)(2) and COMAR 21.02.02.02.¹

Findings of Fact

1. In 1985 and 1987 the Department of General Services (DGS) issued Request for Proposals (RFPs) seeking construction of a dormitory/student union building² at Salisbury State University (1985 RFP) and construction of a building complex for the State Highway Administration (SHA) on land owned by the State near Baltimore-Washington International Airport (1987 RFP).

¹The parties were orally advised of the Board's determination that it lacked jurisdiction on September 27, 1990. On October 24, 1990, the parties requested that the Board withhold issuance of its opinion. Subsequently on November 27, 1990, the parties requested issuance of the opinion.

²Ultimately only construction of a student union was approved.

2. The RFPs envisioned the construction of the buildings under a lease/ lease-back arrangement or other creative financing methodology involving deferred payment because of a lack of appropriated funds to pay for the construction of the buildings over the time estimated for construction (approximately one year to fifteen months).

3. Appellant submitted the winning proposal under each of the RFPs. Each proposal as accepted by DGS was referred to in Appellant's offers as a "municipal lease" and presented to and approved by the Board of Public Works as a lease transaction.

4. The essence of each transaction involved contemporaneous execution of several documents by Appellant and the State; a Ground Lease, Conditional Purchase Agreement and a Facility Agreement. These agreements, all interrelated, were similar for both the student union building and SHA buildings transactions and provided substantially as follows³.

A. Ground Lease. The State leased to Appellant a vacant and unimproved parcel of land for a term from March 15, 1986 until October 1, 2019. Pursuant to the terms of the lease Appellant was deemed to own in fee simple all improvements (i.e. the student union building) that it constructed on the property. During the term of the lease Appellant was to pay \$1.00 per year in ground rent, unless the Purchase Agreement (described below) was terminated because of the State's non-appropriation of funds or default, in which case the rent became \$24,000.00 per year (with increases after the fifth year based on the Consumer Price Index).

³For illustrative purposes the specifics of the student union building transaction are presented.

While the building was to be the sole property of Appellant during the term of the Ground Lease upon the expiration or earlier termination of the Ground Lease, the building would "automatically be and become the fee simple property of [the State]." In the event of damage, destruction, demolition or removal of the building Appellant had no duty to restore or rebuild, but was required to pay rent. In the event of a total condemnation, Appellant was entitled to the portion of any award allocable to the building.

B. Facility Agreement. Under the Facility Agreement, Appellant agreed to perform all the work necessary to construct the building in accordance with the requirements of the RFP. Pursuant to the agreement Appellant also agreed to obtain all funds to pay for the design, erection and construction of the facility through a public or private offering of Certificates of Participation issued pursuant to the terms and conditions of a trust agreement for the benefit of the holders of the Certificates of Participation.

The Facility Agreement provided on its face that "[t]his Agreement shall be subject to the provisions of Division II, General Procurement Law (Title 17, Administrative and Civil Remedies), State Finance and Procurement Article, Maryland Annotated Code and COMAR 21.10."

Appellant could not commence work on the building until it obtained written authorization from a State procurement officer. The building was not deemed completed until Appellant's architect certified to the procurement officer that Appellant had fully performed all work, and the State inspected and accepted the building in accordance with procedures set forth in the Facility Agreement. The State had the right to require Appellant to make any corrections to the building for work not performed as required in the RFP.

In the event that the building was not completed before the completion date set forth in the Facility Agreement, Appellant was liable for all purchase installments as provided in the Purchase Agreement (described in paragraph C below) until the facility was completed by Appellant and accepted by the State.

The agreement also provided that the State had the right to approve Appellant's contracts with the architect and general contractor. The contracts had to contain an assignment to the State of all rights and remedies that Appellant had vis-a-vis the general contractor and the architect. Appellant agreed to inform the State of any changes or revisions to the general contractor's construction schedule and agreed to pay liquidated damages to the State in the event that the building was not timely completed. Further, in the event that Appellant refused or failed to prosecute the work with diligence to insure its timely completion, the State had the option, upon written notice to Appellant, to terminate Appellant's right to proceed with the work, to take over the work, and to prosecute it to completion.

The State had the right to enter upon the facility at all reasonable hours for the purpose of inspecting and testing the building and determining Appellant's progress. Appellant was required to procure insurance to protect the State from liability and had to file a certificate of insurance with the procurement officer.

In addition to all remedies that the State might have, Appellant guaranteed for two (2) years after completion that (i) the work would contain no faulty or imperfect material or equipment or any imperfect, careless or unskilled workmanship; (ii) all mechanical and electrical equipment would be adequate for the use for which it was intended; and (iii) Appellant would

replace with proper work, without cost to the State, any work that the State determine was improperly performed. Appellant also guaranteed the roofing, flashing and associated work for ten (10) years from the completion of the building and acceptance by the State and agreed for the entire duration of the guarantee, without financial limitation, to repair or replace any work which leaked water, deteriorated or otherwise failed to perform as required due to the failures of materials or workmanship. Appellant also assigned all of its right, title and interest in all such guarantees or warranties to the State and indemnified and held harmless the State from any and all claims arising out of the performance of the work.

Finally, in the event that Appellant defaulted in its obligations under the Facility Agreement the State was entitled to terminate the agreement and to procure whatever necessary materials were needed to finish the building. Appellant was liable to the State for any excess costs of the procurement. In the event of a termination, the State had the right to require Appellant to transfer title and to deliver to the State any completed work, materials or supplies and partially completed work, materials or supplies.

C. Conditional Purchase Agreement. The Purchase Agreement governed the financing of payments due for the State's right to use the building and its acquisition of the building. Upon completion of the building, Appellant agreed to (i) sublease its entire leasehold interest in the land to the State, and (ii) sell the building to the State under the terms of the Purchase Agreement. Appellant also granted the State the right to possession of the building after acceptance and until the State paid the purchase price set forth in the Purchase Agreement and covenanted to provide the State with quiet enjoyment of the building throughout the term, so long as the State was not

in default under the Purchase Agreement. For its part, the State agreed to perform all of Appellant's obligations under the Ground Lease (except for Appellant's obligation to pay rent) and to purchase the building on the terms set forth in the Purchase Agreement.

The Purchase Agreement was to remain in effect until the State paid the purchase price (principal and interest on the Certificates of Participation) through the trustee in installments to the certificate holders. The Purchase Agreement could only be terminated (i) if the State did not appropriate funds to pay the holders of the Certificates of Participation; (ii) in the event of condemnation; (iii) if the State obtained full ownership rights to building; (iv) in the event of a default and Appellant's election to terminate the Agreement; or (v) if the State paid all purchase installments to Appellant. If the State defaulted in its obligations under the Purchase Agreement, Appellant/trustee had the right to reclaim possession of the building and operate the building for any use in its discretion, including selling, leasing or sub-leasing the building.

During the first two (2) years of the Purchase Agreement, fee simple title to the building remained with Appellant, unless the building was completed and accepted by the State prior to that time. Otherwise, fee simple title to the building was to be transferred to the State upon payment of the fourth purchase installment, which, under the terms of the Purchase Agreement, was due April 1, 1988.⁴ Thereafter, the State stands in the position of a mortgagor relative to the building until full payment of the

⁴As of September 14, 1990, the date of presentation of oral argument on the instant jurisdictional issue, fee simple title had not yet been transferred to the State, although all conditions for such transfer had been met.

purchase price (for the benefit of the holders of the Certificates of Participation), whether at or prior to the end of the term with the option to prepay all or any portion of the purchase price outstanding on any installment payment date.

5. From the denial of Appellant's claims for equitable adjustments arising out of the construction of the buildings, Appellant filed timely appeals with this Board on June 12 and 13, 1990. Preliminarily, the Board has raised an issue concerning whether it has jurisdiction over the appeals.

6. The parties in their respective briefs on the issue of this Board's jurisdiction argue that the Board should assert jurisdiction over the appeal.

Decision

This Board has no jurisdiction over contract claims relating to a lease of real property. SFS15-211(a)(2)⁵; COMAR 21.02.02.02. See Map Automotive Warehouse, MSBCA 1376, 2 MSBCA ¶178 (1988).

The issue for decision is whether the Appellant's contract claims, i.e. Appellant's requests for an equitable adjustment arising out of the construction of the buildings, related to a lease of real property (in which case this Board lacks jurisdiction) or some other form of procurement.⁶ Normally procurement claims involving building construction involve a construction contract between the claimant general contractor and the State entity that procures the construction. In the instant appeals, however, the Appellants have themselves procured the construction pursuant to State guidelines and oversight from a third party general contractor who has no privity with the State. The contractual relationship between the Appellant and the State as

⁵SFS15-211(a)(2) provides that this Board has "jurisdiction to hear and decide all appeals...except for a contract claim relating to a lease of real property."

⁶Appellants' assert that the building being constructed represent procurements for construction. DGS argues that the buildings being constructed are things akin to personal property and that therefore procurements for supplies are involved.

approved by the Board of Public Works is that of landlord and tenant.


Pursuant to this relationship the Appellants as tenants on State property built the buildings with private (versus State) funds. The State will ultimately acquire the buildings free and clear of all encumbrance when (and if) the holders of the Certificates of Participation, whose purchase of the certificates upon a public offering thereof by Appellants' funded the construction, are paid off. The ultimate purpose of the transactions was to provide the State with buildings for its use on its lands with payment therefore spread out over the life of the Certificates of Participation. Indeed, title to the buildings (subject to a mortgage on the buildings and groundlease on the ground upon which the buildings are constructed) is to be conveyed to the State upon completion and acceptance of the buildings. We also note the high degree of State control over construction of the buildings.

Notwithstanding the above, however, we find that the contract claims or disputes at issue while arising out of construction type contracts relate to the underlying lease of the real property upon which the buildings were to be constructed. This Board only has such jurisdiction as is specifically conveyed upon it by the General Assembly. The Board's focus on its jurisdiction is a narrow rather than an expansive one and pursuant to such focus we have determined on several occasions that we lacked jurisdiction over an appeal.⁷

⁷See for example Randmark, Inc., MSBCA 1364, 2 MSBCA ¶170 (1988) (no jurisdiction over a dispute in the formation of a contract for employee funded dental services); Ackerly-BWI Airport Advertisers, MSBCA 1318, 2 MSBCA ¶142 (1987) (no jurisdiction over a dispute arising in the formation of a lease agreement involving promotional advertising at BWI); Flomax Enterprise, MSBCA 1425, 3 MSBCA ¶203 (1989) (no jurisdiction over a dispute respecting the formation of a lease of state property for a consideration consisting of oyster larvae in lieu of cash); Engineering Technologies Associates, Inc., MSBCA 1362, 2 MSBCA ¶174 (1988) (no jurisdiction over disputes respecting the formation of contracts for architectural and engineering services costing \$100,000 or less).

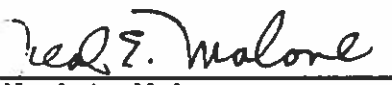
In the instant appeal, the transactions were presented to and approved by the Board of Public Works as leases of real property. The disputes arise out of contract claims relating to the leases. SF § 15-211(a)(2) provides that this Board has "jurisdiction to hear and decide all appeals...except for a contract claim relating to a lease of real property..." A statute should be interpreted, "according to its plain language with words presumed to be used in their ordinary and popularly understood meaning unless there is reason to believe from the face of the statute that its words were intended to have some other meaning. Drews v. State, 224 Md 186, 167 A.2d 341 (1961); Pressman V. Barnes, 209 Md. 544, 121 A. 2d 816 (1956)." Solon Automated Services, Inc., MSBCA 1117, 1 MSBCA ¶ 71 (1984) at 3. There appears to be no reason not to accord the words used in SF § 15-211(a)(2) their ordinary and popularly understood meaning. The word "relating" ordinarily connotes connection or association with something; in this case a contract claim connected or associated with a lease of real property. Since there is no doubt that the contract claims in this case relate to, i.e. are associated with, the ground lease, the Board lacks jurisdiction over such claims. Accordingly, the appeals are dismissed for lack of jurisdiction.

Dated: *November 29, 1990*


Robert B. Harrison III
Chairman

I concur:


Sheldon H. Press
Board Member


Neal A. Malone
Board Member

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1517, 1518 and 1519, appeal of EASTERN SHORE ASSOCIATES L.P./HARMANS ASSOCIATES L.P., under DGS Contract Nos. LA-65-87; LA-35-85.

Dated: *Nov. 29, 1990*

Mary A. Priscilla
Mary A. Priscilla
Recorder