

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ENGINEERING)
TECHNOLOGIES ASSOCIATES, INC.)
Under DGS Project No. 08.39-5) Docket No. MSBCA 1362

March 15, 1988

Jurisdiction - The Board of Contract Appeals does not have jurisdiction over resolution of disputes respecting the formation of contracts for A/E services costing \$100,000 or less.

APPEARANCE FOR APPELLANT: Henry T. Meneely, Jr., Esq.
Annapolis, MD

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

OPINION BY CHAIRMAN HARRISON

This appeal arises out of Appellant's protest that it should have been selected to submit a price proposal and was improperly rejected for further consideration in this competitive negotiation procurement. For reasons that follow we shall dismiss the appeal for lack of jurisdiction.

Findings of Fact

1. On August 28, 1987, DGS published a solicitation in the Maryland Register under the heading ARCHITECTURAL AND ENGINEERING SERVICES which provided relevant part:

Solicitations

DEPARTMENT OF GENERAL SERVICES; A/E SERVICES \$100,000 OR LESS
ID No. 08.39.5: Engineering services program for preparation of technical handbook for mine drainage control structures, Bureau of Mines, Frostburg, MD
Information Due: Sept. 22, 1987, 4 p.m., 301 W. Preston St., Rm. 1305, Balto., MD 21201
Pre-Proposal Conf.: Pre-proposal conference date to be announced
Plans/Specs.: As established by the Reproduction Firms; fee not refundable

¹Factual findings are confined to those necessary to resolve the jurisdictional issue.

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Add'l Info.: The required services consist of developing a technical handbook for design of mine drainage control structures that will provide surface coal mine permit applicants recommended guidelines, with written text and standard plate drawings, for design of sediment control ponds, water quality improvements, storm water management facilities, ditches, haulroads, culverts and related structures.

Estimated date of A/E selection: Nov., 1987. Estimated time for completion of work, exclusive of review time by the State: 9 months. Major disciplines shall include but not be limited to: Civil, Mining and Geotechnical Engineers, Technical Writers, Illustrators/Graphic Artists, Print Shop Technicians, Geologists, Biologists and Environmental Specialists.

Proposed design fees for project(s) listed in this advertisement are expected to range from \$25,000 to \$100,000. Design fees exceeding \$100,000 are procured under separate regulations and can not be accepted for the services listed above.

Architect/Engineer firms wishing to obtain copies of the Program for the project(s) announced above may contact the following reproduction centers for specific duplicating prices. . . .

2. The procurement of these services was conducted pursuant to Code of Maryland Regulations (COMAR) 21.12.05.01 dealing with procurement of architectural and engineering (A/E) services for DGS costing "\$100,000 or less."

3. Pursuant to COMAR 21.12.05.01, interested firms were invited to submit letters of interest and other information identified in the solicitation. After evaluation of the responses, DGS would then select from among the interested firms those that would be invited to submit price proposals. Five firms submitted letters of interest by the date and time set for receipt of proposals. After evaluation of the information submitted, Appellant's submission was ranked third highest; however, DGS determined to invite submission of price proposals from only the two top ranked firms. Appellant, upon notification of this determination, and following a debriefing as to why it was not selected to submit a price proposal, filed a protest by letter dated October 15, 1987 with the DGS procurement officer asserting that its submission had not been properly evaluated and contending that it should have been selected to submit a price proposal.

4. The Agency Report characterizes the services as "engineering services."² Such characterization was not challenged by Appellant and the record otherwise reflects that "engineering services" were being sought by DGS.

5. On November 25, 1987, DGS issued a procurement officer's final decision denying Appellant's protest that it should have been selected to submit a price proposal.

Appellant timely appealed to this Board.

Decision

At the hearing of the appeal, DGS moved to dismiss on jurisdictional grounds. DGS in its Memorandum in Support of Motion to Dismiss sets forth the jurisdictional question as follows:

²Subsection (b) of Section 11-167, Division II, State Finance and Procurement Article of the Maryland Annotated Code dealing with DGS A/E procurements provides:

(b) Architectural and engineering services.—"Architectural and engineering services" means architectural services, engineering services, or both.

Engineering services is defined in subsection (q) of Section 11-101, Division II, State Finance and Procurement Article, as follows:

Engineering services.—(1) "Engineering services" means professional or creative work that is performed in connection with utilities, structures, buildings, machines, equipment, and processes and that requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences.

COMAR 21.12.04.02(B)(2) defines engineering services as follows:

"Engineering services" means professional and creative work in connection with public or private utilities, structures, buildings, machines, equipment and processes for projects requiring engineering education, training, and experience and the application of special knowledge of the mathematical, physical and engineering sciences to such professional service or creative work as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design.

State Finance and Procurement Article Section 11-137 governs the resolution of complaints relating to the formation of a contract (bid protests) and complaints relating to contracts that have been entered into. Subsections (a) through (d) establish the process for review of complaints, which consists of the initiation of a complaint, review by the procurement officer and the agency head, and the issuance of a final agency decision. Subsection (f) provides for appeals from agency decisions to the Maryland State Board of Contract Appeals (MSBCA).

The statute becomes ambiguous in subsection (g), which provides that "[s]ubsections (a) through (d) of this section do not apply to disputes concerning formation of contracts to procure architectural services or engineering services," and which goes on to provide that such disputes, when generated by recommendation of the Transportation Professional Services Selection Board (the "TPSSB") of the Department of Transportation or the General Professional Services Selection Board (the "GPSSB") of the Department of General Services may be appealed to the Board of Public Works. The ambiguity is introduced by the fact that the TPSSB and the GPSSB only make recommendations for the formation of contracts for architectural and engineering (hereinafter "A/E") services in excess of \$100,000. SF Sections 11-157 and 11-175. In the case of A/E contracts less than or equal to \$100,000, award is made solely by DOT, SF Section 11-157.1 and COMAR 21.02.01.04C(1)(c), or by DGS, SF Section 4-207 and 4-406 and COMAR 21.02.01.04B(3), with no involvement on the part of the TPSSB or the GPSSB.

Should subsection (g) be construed to apply only to A/E contracts in excess of \$100,000? In that case, protests on such contracts would go through the same review and procurement-officer-decision process as other protests, with appeal lying to the Maryland State Board of Contract Appeals. Or should subsection (g) be constructed to exempt all protests on A/E contracts from the procurement officer process and appeal to MSBCA? If that construction is adopted, what agency or official decides the protest initially and to whom does an aggrieved party appeal?

DGS then concludes that the most reasonable construction is that subsection (g) applies only to A/E services costing in excess of \$100,000 and that a complaining offeror for A/E services costing \$100,000 or less would then lodge its protest with the procurement officer and appeal to the Board of Contract Appeals, as would a protester over the formation of a non-A/E services contract.³ DGS also suggests two other possible alternatives for appeals, one being an appeal directly to the Circuit Court following final review (and

³We note that DGS did not withdraw its Motion to Dismiss even though the Memorandum in Support of the motion concludes that this Board has jurisdiction.

denial) of a protest by DGS and the other being an appeal to the Board of Public Works for all A/E contracts regardless of whether they are over or under \$100,000.

This Board only has jurisdiction over disputes relating to the formation of State contracts as conferred by the Legislature and set forth in the State's General Procurement Law,⁴ notwithstanding the procedures that may or may not have been adopted by DGS to resolve disputes relating to the formation of contracts to procure A/E services costing \$100,000 or less. The Legislature has clearly conferred upon the Board of Public Works jurisdiction over contract formation disputes for A/E services costing over \$100,000. The question posed by this appeal is whether the Legislature intended this Board to have jurisdiction over resolution of disputes respecting the formation of contracts for A/E services costing \$100,000 or less. We conclude that it did not.

Subsection (g) of Section 11-137,⁵ Division II, State Finance and Procurement Article states plainly that "Subsections (a) through (d)⁶ of this section do not apply to disputes concerning the formation of contracts to procure architectural services or engineering services." The subsection goes on to set forth the procedures that apply respecting an appeal to the Board

⁴Division II, State Finance and Procurement Article, Md. Ann. Code.

⁵Prior to July 1, 1987, enactments of subsection (g) and its predecessors provided that: "Subsections (a) through [e] (f) of this section shall not apply to disputes concerning the formation of contracts to procure architectural and engineering services made under [Title 9] Title 19." Title 19 and its predecessor (Title 9 of Article 21, Md. Ann. Code) was the predecessor to the A/E selection procedures now set forth in Parts XIV and XV of Division II, State Finance and Procurement Article. Like present Parts XIV and XV, the most recent enactment of Title 19 dealt with A/E contracts costing over \$100,000 which were processed through the TPSSB and the GPSSB. Previous enactments of Title 19 and its predecessor dealt with TPSSB and GPSSB processing of contracts costing over \$25,000 and then over \$50,000. Present Part XIV for the first time contains a specific provision for procurement of transportation agency (units) A/E contracts costing \$100,000 or less.

⁶Present subsections (a) through (g) of Section 11-137 are set forth in Appendix A.

of Public Works upon a notice of recommendation by the TPSSB or the GPSSB. DGS, however, would have us read into or add to the first sentence of subsection (g) the words "costing over \$100,000" and assert jurisdiction over disputes concerning the formation of contracts to procure A/E services costing \$100,000 or less. It argues that such a reading is consistent with the rest of the language of subsection (g) which deals with appeals from recommendations of the TPSSB and GPSSB, which entities, as set forth in Parts XIV and XV of Division II, are only involved in the formation of A/E contracts costing \$100,000 or more. Alternatively, DGS suggests that whether the words "costing over \$100,000" are read into the first sentence of subsection (g) or not, the goals expressed in Section 11-102,⁷ Division II, State Finance and Procurement Article are best served by the assumption of jurisdiction by this Board over appeals of contract formation disputes for A/E services costing \$100,000 or less.

⁷Section 11-102 provides:

(a) Liberal construction.—Unless otherwise indicated, this Division II shall be liberally construed and applied to promote in State procurement the underlying purposes and policies specifically enumerated in subsection (b).

(b) Purposes and policies.—The underlying purposes and policies of this Division II include to:

(1) provide for increased public confidence in the procedures followed in public procurement;

(2) insure the fair and equitable treatment of all persons who deal with the procurement system of this State;

(3) simplify, clarify, and modernize the law governing procurement by this State;

(4) permit the continued development of procurement regulations, policies, and practices;

(5) provide increased economy in State procurement activities and to maximize to the fullest extent the purchasing power of the State;

(6) provide safeguards for the maintenance of a procurement system of quality and integrity;

(7) foster effective broad-based competition through support of the free enterprise system; and

(8) promote development of uniform procurement procedures to the extent possible.

Finally, DGS suggests that the failure of present subsection (g) to exclude the time limits for appeals to this Board as set forth in present subsection (f) contrasts sharply with all previous enactments wherein the statute excluded subsection (e) [or (f)] dealing with the time limits for appeals to this Board as well as subsections (a) through (d). This contrast is said to evidence legislative intent to give this Board jurisdiction over disputes involving the formation of contracts for A/E services costing \$100,000 or less.

The cardinal rule in interpretation of a Maryland statute is to ascertain the intention of the Legislature. Maryland cases hold that in gleaning such intent a statute should be construed according to the ordinary and natural import of its language, unless a different meaning is clearly indicated by the context, without resort to subtle or forced interpretation for the purpose of extending or limiting its operation. See Smelser v. Criterion Ins. Co., 293 Md. 384, 388-389 (1982); James Julian, Inc., MSBCA 1222, 1 MSBCA ¶100 at pp. 6-7 (1985). The plain language of the first sentence of subsection (g) clearly excludes the application of subsections (a) through (d) to disputes in the formation of contracts for all A/E services; and, as noted below, this Board perceives that its jurisdiction is dependent on the application of subsections (a) through (d). We do not perceive the ambiguity or doubt in the language of subsection (g) that DGS has claimed in the quoted portion of its Memorandum in Support of Motion to Dismiss set forth above.

We note that existing side-by-side in the State's General Procurement Law since its enactment in 1980 (Chapter 775, Laws of 1980, codified as Article 21, Md. Ann. Code, effective July 1, 1981) have been two separate administrative remedies involving contract formation. One deals with disputes in the formation of contracts for A/E services over varying amounts

commencing at over \$25,000 and now over \$100,000 and involves the Board of Public Works. The other deals with other types of contracts and involves this Board. Nothing in the legislative history of the State's General Procurement Law to date suggests that the Legislature intended that the basic dichotomy between administrative remedies for A/E contracts and non A/E contracts in contract formation disputes was tempered by a dollar threshold such that disputes in formation of A/E contracts of \$25,000 or less, \$50,000 or less, and now \$100,000 or less were to be appealed to this Board.

In the context of determining the limits of our jurisdiction to resolve disputes we have repeatedly noted that the Board only has such jurisdiction as is specifically conferred upon it by the Legislature. William E. McRae, MSBCA 1229, 1 MSBCA ¶99 (1985); James Julian, Inc., MSBCA 1222, 1 MSBCA ¶100 (1985); The Driggs Corporation, MSBCA 1267, 2 MSBCA ¶121 (1986), Ackerley-BWI Airport Advertisers, MSBCA 1318, 2 MSBCA ¶142 (1987); Randmark, Inc., MSBCA 1364; ___ MSBCA ___ (1988).

Contrary to the suggestion by DGS, nothing in the goals expressed in Section 11-102, Division II, State Finance and Procurement Article nor the direction to liberally construe the provisions of Division II compels the conclusion that the Legislature intended this Board to have jurisdiction over the instant dispute.

The present language of subsection 11-137(g) states that subsections (a) through (d) do not apply to disputes concerning the formation of contracts to procure architectural services or engineering services. We reject the argument by DGS that we should read into this plainly worded limitation the caveat that it only applies to disputes involving the formation of contracts for A/E services over \$100,000. We also reject the suggestion by DGS that since only subsections (a) through (d) were stated not to apply, the failure to

exclude subsection (f) dealing with time frames to take an appeal to this Board shows an intention to confer jurisdiction on this Board.⁸ We reject this suggestion since exclusion of subsections (a) through (d) completely eliminates the process of final agency action, to include the procurement officer's decision, that is a prerequisite to an appeal upon which our jurisdiction is based. See The Driggs Corporation, supra.

For all of the above reasons we conclude that this board lacks jurisdiction over the instant appeal.⁹

⁸We note that subsection (f) not only provides for the time for noting an appeal in a contract formation dispute but also deals with the time for noting appeals respecting final action relating to a dispute in a contract that has been entered into. This Board clearly has jurisdiction over contract claims arising under all A/E contracts that have been entered into regardless of amount and subsections (a) through (f) clearly apply to such disputes.

⁹We think it inappropriate to speculate on the answer to the question posed by DGS in its Memorandum concerning what agency or official should decide this protest and to whom an aggrieved party should appeal.

§ 11-137. Resolution of complaints.

(a) *"Appeals Board" defined.* — In this Part XII, the term "Appeals Board" means the Maryland State Board of Contract Appeals.

(b) *Initiation of complaint.* — (1) A prospective bidder or offeror, a bidder or offeror, or a contractor may, by the filing of a timely demand as defined in regulations adopted by the appropriate department, initiate a complaint relating to the formation of a contract or relating to a contract that has been entered into.

(2) Complaints relating to the formation of a contract include those concerning the qualifications of a bidder or offeror and the determination of the successful bidder or offeror.

(3) Complaints relating to a contract that has been entered into include those concerning the performance, breach, modification, or termination of the contract.

(4) The provisions of Title 10, Subtitle 2 of the State Government Article (Administrative Procedure Act — Contested Cases) do not apply to the disposition of complaints under this section.

(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.

(d) *Review of officer's decision.* — (1) Unless otherwise provided by regulation, the procurement officer's decision shall be reviewed promptly by the procurement agency head and the head of any principal department listed in § 8-201 of the State Government Article of the Code (or equivalent unit of State government) of which the procurement agency is a part.

(2) The reviewing authority may approve, disapprove, or modify the decision, or may resubmit the complaint, with appropriate instructions, to the procurement officer who shall proceed under the provisions of paragraph (c) (1) of this section. A decision of the reviewing authority approving, disapproving, or modifying the decision of a procurement officer is the final action of the procurement agency.

(e) *Enforcement of determination.* — The determination of a complaint under subsections (b) through (d) is judicially enforceable in the appropriate court when it has become final and is no longer subject to judicial review.

(f) *Appeals to Board.* — (1) A bidder or offeror, a prospective bidder or offeror, or a contractor may appeal the final action of a procurement agency to the Appeals Board:

(i) within 10 days after notice of a final action as to a protest regarding the formation of a contract and, in which case, the Appeals Board shall decide the case expeditiously giving it precedence over other matters before the Appeals Board; and

(ii) within 30 days after receiving notice of a final action relating to a contract that has been entered into.

(2) Subparagraph (1) (ii) of this subsection does not apply to complaints relating to real property leases that have been entered into.

(g) *Applicability of section.* — Subsections (a) through (d) of this section do not apply to disputes concerning the formation of contracts to procure architectural services or engineering services. Within 10 days after receiving notice of a recommendation by the Transportation Professional Services Selection Board or the General Professional Services Selection Board to the Board of Public Works to enter into an architectural services or engineering services contract, a prospective offeror of architectural services or engineering services may appeal the recommendation to the Board of Public Works. On the appeal, the Board of Public Works may:

(1) approve the recommendation;

(2) disapprove the recommendation; or

(3) remand the matter to the Transportation Professional Services Selection Board or the General Professional Services Selection Board for further consideration.

