BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ENTERPRISE SYSTEMS, INC.	)	
	)	Docket No. MSBCA 2010
Under Dept. of Assessments and Taxation Contract No. 95-SDAT-0007A	)	

APPEARANCE FOR APPELLANT: Howard L. Stern, Esq.
Camp Springs, MD

APPEARANCE FOR RESPONDENT: David M. Lyon
Assistant Attorney General
Baltimore, MD

September 30, 1997

Interpretation of Contracts - Invitation for Bid - The rule that provisions of a contract shall, if reasonably possible, be construed as a whole to give effect to all of such provisions applies as well to the provisions of an Invitation for Bid.

Equitable Adjustment - Oral Agreement - The doctrine of sovereign immunity bars a claim based on an alleged oral contract modification. See ARA Health v. Department of Public Safety, 344 Md. 85(1996).

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim for $35,402.10 for the development of Real Property Public Release menus and screens. Respondent moves for summary disposition on grounds that the Appellant's claim is barred by sovereign immunity. The Board grants the motion and denies the appeal for reasons that follow.

Findings of Fact

1. On April 6, 1995, the parties entered into a contract for the provision of direct dial telephone access to information collected by the State Department of Assessments and Taxation (SDAT).
2. Pursuant to the terms of the Contract the Appellant was to develop and operate a "900" telephone service for the purpose of providing public access to SDAT's Corporate, Uniform Commercial Code (UCC), and Real Property Public Release data files for direct telephone dial-up service using personal computers.
3. The Contract was executed on April 6, 1995. The term of the Contract was set forth at Paragraph (1) Scope of Contract as follows:

The contract term will be for two (2) years from the date of execution of this Contract. SDAT has three (3) options to extend the term of the Contract for one (1) additional year each. Each option shall be exercised by notifying the Contractor at least thirty (30) days before termination of the concurrent term. Therefore, the total term of the Contract cannot exceed five (5) years.

Thus the initial term was for two years from April 6, 1995 to April 5, 1997, with the possibility of extension through exercise of the options until April 5, 2000.

4. SDAT retained the unilateral right to require changes in the scope of services so long as the changes were within the general scope of work to be performed under the Contract.

5. For purposes of this decision the Board assumes the accuracy of Appellant's assertion that (1) Upon the verbal instruction of SDAT employees, the Appellant prepared software for the Real Property Public Release data files and the system went on-line thereafter and (2) The software cost $35,402.10.

6. For purposes of this decision the Board will assume Appellant held the subjective belief at all relevant times that the language of Paragraph (6) Contract Modifications which provides that "[N]o amendment to this Contract (other than that allowed under Paragraph (1) Scope of Contract) is binding unless it is in writing and signed by both parties and has received appropriate State approvals"[1] permitted an oral extension of the Contract to be made pursuant to the provisions of Paragraph (1) Scope of Contract.[2]

7. By cover letter dated January 3, 1996, SDAT sent a BB-4 (internal transmittal form) and proposed Contract Amendment expanding the services under the Contract to public access for customers to SDAT's data via "800" toll telephone service, local telephone service, or dedicated telephone service, in addition to the "900" telephone service access. The BB-4 is a control document used by the then Department of Budget and Fiscal Planning (DB&FP)[3] to approve or disapprove procurements by other agencies and contract modifications to such procurements. See COMAR 21.02.03.02C. The DB&FP approved the Contract Amendment (Modification) attached to the BB-4. The Contract Amendment bears a date of January 25, 1996 for the date the Contract Amendment was entered into. However, a DB&FP employee noted a contract start date on the BB-4 of February 1, 1996 and a completion date on the BB-4 of April 30, 1997.[4]

8. By letter dated February 28, 1997, Appellant was advised by SDAT that SDAT would not

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1 Paragraph (6) Contract Modifications provides in its entirety as follows:

This Contract constitutes the entire agreement between the parties and supersedes all communications between them prior to the execution of this Contract, whether written or oral, with reference to the subject matter of this Contact. No amendment to this Contract (other than that allowed under Paragraph (1) Scope of Contract) is binding unless it is in writing and signed by both parties and has received appropriate State approvals. Amendments may not change significantly the scope of the Contract (including the cost of the Contract).

2 Paragraph (1) Scope of Contract as set forth in Finding of Fact No. 3.

3 The DB&FP is presently known as the Department of Budget and Management (DBM).

4 The Board assumes as suggested by Appellant that a DB&FP employee rather than a SDAT employee wrote in these dates on the BB-4. This is the most logical assumption based on the record.

exercise the option to extend the Contract and that the Contract would terminate on April 5, 1997.

9. Appellant alleges, and for purposes of this decision the Board will assume the truth thereof, that: (1) on various occasions the SDAT Procurement Officer and various other employees of SDAT told Appellant and others that the Contract had been extended for three years, i.e. until April 5, 2000; and (2) in reliance on such oral representations Appellant undertook the real property software preparation and entered into the Contract Modification of January 25, 1996 to supply additional "800" number services not required under the original Contract.

10. By letter dated March 31, 1997, Appellant filed its claim for $35,402.10 for costs allegedly arising out of development of the software for the Real Property menus and asserting its belief that SDAT orally exercised options for a three-year extension of the Contract.

11. By final agency decision dated April 3, 1997, SDAT denied the claim on grounds that:

> *The Invitation for Bid and contract clearly reflected that the only expenses that were to be reimbursed to ESI were for $7,500 in programming costs. That has not been changed by any written modification to the contract. Therefore any costs incurred by ESI in developing and implementing the Real Property data system must be absorbed by ESI.*

12. In addition to denying the claim, the Procurement Officer denied that SDAT had extended the Contract either orally or in writing. Regarding extension of the Contract the SDAT Procurement Officer also stated that:

> *SDAT does not have the authority to independently exercise an option to extend a contract either in writing or orally. Approval by the Department of Budget and Management and/or the Board of Public Works is required for the exercise of any option, COMAR 21.02.01.04A.(1)(c)(iv). Consequently, the placement for the option language in Paragraph 1 of the contract did not give the Department legal authority to orally extend the length of the contract.*

13. Appellant appealed the SDAT agency final decision to this Board on April 24, 1997.

14. Respondent filed a motion to dismiss on June 23, 1997, Appellant responded thereto on July 18, 1997 and the Board heard argument thereon on September 8, 1997.

Decision

In determining whether Respondent's Motion should be granted relative to dismissal of Appellant's claim on sovereign immunity grounds we make the following observations.

Since its inception sixteen years ago the Board has recognized, considered and granted motions for summary disposition[5], particularly as to issues of Board jurisdiction, although not specifically provided for under the Administrative Procedure Act, because of its belief that to do so is consistent with legislative direction to provide for the "informal, expeditious, and inexpensive

5 The word disposition is used rather than judgment because the Board is not a court and has no equitable powers or equitable jurisdiction.

resolution of appeals . . . ." Section 15-210, Division II, State Finance and Procurement Article; See e.g. Intercounty Construction Corporation, MDOT 1036, 1 MSBCA ¶11 (1982); Dasi Industries, Inc., MSBCA 1112, 1 MSBCA ¶49 (1983).

In all instances the legal standards the Board will apply to determine the appropriateness of summary disposition remain the same. The party moving for summary disposition is required to demonstrate the absence of a genuine issue of material fact. See Mercantile Club, Inc. v. Scheer, 102 Md. App. 757 (1995). In making its determination of the appropriate ruling on the motion, the Board must examine the record as a whole, with all conflicting evidence and all legitimate inferences raised by the evidence resolved in favor of the party (in this instance the Appellant) against whom the motion is directed. See Honaker v. W.C. & A.N. Miller Dev. Co., 285 Md. 216 (1979); Delia v. Berkey, 41 Md. App. 47 (1978), Affd. 287 Md. 302 (1980).

The purpose of summary disposition is not to resolve factual disputes nor to determine credibility, but to decide whether there is a dispute over material facts which must be resolved by the Board as trier of fact. Coffey v. Derby Steel Co., 291 Md. 241 (1981); Russo v. Ascher, 76 Md. App. 465 (1988); King v. Bankerd, 303 Md. 98 (1985) at p. 111. Therefore, summary disposition is not appropriate if a genuine issue of material fact is in dispute. Furthermore, for purposes of a motion for summary disposition, even where the underlying facts are undisputed, if they are susceptible of more than one permissible factual inference, the choice between those inferences should not be made, and summary disposition should not be granted. See Heat & Power Corp. v. Air Products, 320 Md. 584 (1990) at p. 591; King v. Bankerd, supra, 303 Md. at p. 111.

Herein, we find that there are no material facts in dispute which must be resolved by the Board as trier of fact in order to decide the Respondent's Motion; nor does it matter which permissible factual inference arising from any material fact might be adopted.

Appellant claims the amount of $35,402.10 for costs allegedly arising out of the development of the software for the Real Property menus. Assuming that costs in such amount were actually incurred in development of the Real Property menus, Appellant by the terms of the Contract was paid $7,500 for development of the other two referenced menus (UCC and Corporate data). There is no dispute that Appellant has been paid $7,500.00 for menu development. The dispute is over whether the language of the Contract permits Appellant to be paid more than $7,500.00 for menu development. Appellant argues that the plain and unambiguous language of the Contract permits reimbursement for menu development in excess of $7,500.00, and would specifically allow reimbursement for the Real Property Public Release Menu development. Appellant argues alternatively that the Contract was extended by oral communication for three years which would allow Appellant to recoup the $35,402.00 alleged cost of the Real Property menu development through Appellant's share of Contract revenues to be collected during this period.

The Board finds that the language of the Contract was plain and unambiguous that only a total of $7,500.00 would be allowed for all menu development.

The operative language is:

(2) **Compensation and Method of Payment:**

SDAT will incur no liability for any expenses incurred by the Contractor under this Contract.

The Contractor will receive compensation for the services provided under this Contract and will be reimbursed for all costs associated with the implementation and maintenance of this service exclusively from the revenue generated by this "900" service. The total sum due the Contractor shall be determined at the rate of $.945 for each minute or partial minute of up to 14.4 baud on-line time. (As indicated on the Bid Form - Attachment D).

SDAT will set the fees to be charged to customers for "900" telephone service. The fees will always be higher than the sum of the $.945 per minute and the per minute charges of the telephone service provider. If there is an increase of the "900" charges by the telephone service provider, the fee for the service under this Contract will be adjusted accordingly upon notice by the Contractor to SDAT.

The Contractor must provide and administer a billing system under which, the consumer is billed for the use of this "900" service through the telephone service provider, the telephone service provider collects the service charges from the consumer and remits to the Contractor those funds (minus the "900" charge), the Contractor deducts its portion of those funds, and then pays over to SDAT the balance of the collected funds within 30 days of receipt. For any bill not collected, the Contractor will be solely responsible for any cost or expenses incurred, including any monies due the telephone service provider.

After payment of the long distance carrier and deduction of its portion of the revenue, the Contractor shall be reimbursed for the cost of the development of the menus from any remaining revenue received from the long distance carrier. The reimbursement for the cost of development of all menus and on-line instructions cannot exceed $7,500. Prior to reimbursement, the Contractor must receive approval of the menus from SDAT and provide to SDAT verification of the cost.

Appellant argues, however, that language included in the Invitation to Bid (IFB), page 4, paragraph 15 limits the $7,500.00 amount for menus to the Corporate and UCC data files and thus the $7,500.00 limitation in paragraph 2 of the Contract set forth above does not cover the Real Property menus. This paragraph provides:

15. **Instruction for the Public**

A. The vendor must develop user menus, including on-line instructions, for use of the system by the public for all the Corporate and UCC data files within the time for the initial implementation of the system according to Item 22. These

menus must be approved by SDAT prior to implementation.

B. Sample layouts and instructions for menus for the Real Property Public Release Files will be provided to the vendor for implementation. The vendor, with the approval of SDAT, can improve upon these layouts and instructions at the vendor's expense.

C. All rights, title and interest to the menus, including the documentation and file layouts and the instructions, become the sole property of SDAT upon implementation of the "900" service. A printed copy and an electronic media copy (e.g. word perfect, ASCII, etc.) of the documentation and file layouts must be delivered to SDAT prior to the commencement of this telephone service.

D. Vendor will provide SDAT's disclaimer of liability on all on-line menus and instructions.

E. If the vendor provides verification of the cost of developing menus, SDAT will reimburse the cost of up to $7,500, but only from receipts generated by this Contract.

F. The vendor must provide file layouts and documentation to customers upon request.

However, the IFB paragraph 22 (Item 22) mentioned in IFB paragraph 15 above and IFB paragraph 23 provide:

22. **Implementation of "900" Service**

The "900" service for the UCC and Corporate data files with approved menus and instructions must be implemented and working in a manner satisfactory to SDAT within 45 days of the award of this bid. The "900" service for the Real Property Public Release Files must be implemented and working in a manner satisfactory to SDAT within 90 days of the bid award. If SDAT exercises its right to extend this service to include real property sales data files and property attribute data files, then the vendor will be required to provide this information through its "900" service within 30 days of receipt of the initial data tapes from SDAT.

23. **Payments to the Vendor**

SDAT will incur no liability for any expenses incurred by the vendor in providing "900" service. Payments to the vendor of its

compensation under this Contract, i.e. the bid price, for the services provided plus the reimbursement of the development cost of all the menus will be exclusively from revenue derived from this service. Upon receipt of billings collected by the telephone provider, the vendor will determine its compensation due and deduct that amount from the total and forward the balance to SDAT. For any bill not collected, the vendor will be solely responsible for any cost or expenses incurred, including any monies due the telephone provider.

The reimbursement from revenues for the development of all the menus cannot exceed $7,500. Approval of the menus by SDAT will be required prior to reimbursement.

Provisions of a contract are to be read together in harmony and if reasonably possible be construed as a whole to give effect to all. Granite Construction Company, MDOT 1101, 1 MSBCA ¶8(1981) at p. 12. The same rule of construction applies to the IFB as well as all other documents that comprise the contract documents. Environmental Growth Chambers, MSBCA 1952, 5 MSBCA ¶398(1996) at p. 8. Reading the provisions of the IFB set forth above together in a manner which gives effect to all leaves no doubt that the total amount allowable for reimbursement for all menus to include the real property menus could not exceed $7,500.00. The same result obtains when the IFB and Contract are read harmoniously together. Since $7,500.00 has been paid, SDAT properly denied Appellant's claim.

Alternatively, Appellant argues that the Contract was orally extended for all three option years which extension would allow Appellant to recoup its costs for the Real Property menu development from anticipated profits included in Appellant's bid price. Appellant asserts that it only agreed to the Contract Modifications for the expanded "800" service in reliance on oral assurances from SDAT officials authorized to give such assurances that the Contract had been or would be extended and all necessary approvals and executions secured. While there clearly is a dispute between the parties concerning whether or not officials at SDAT purported to orally extend the Contract, such dispute is not material to the Board's determination because as a matter of law under the doctrine of sovereign immunity any contract extension beyond the initial two year term (April 6, 1995 to April 5, 1997) had to be in writing in order to be effective. Accordingly, assuming that authorized SDAT officials advised Appellant orally that the Contract was or would be extended by a written instrument with the necessary approvals and executions obtained, such oral advise has no legal effect even if Appellant actually relied thereon and may not serve as the basis for Appellant's assertion that the Contract was extended for thee years.

The doctrine of sovereign immunity precludes this Board from finding that the Contract was extended. The doctrine of sovereign immunity was recently discussed by the Court of Appeals in ARA Health v. Department of Public Safety, 344 Md. 85 (1996). In ARA Health the State agency had agreed to pay and had actually paid for medical services for inmates outside of a hospital. However, a legislative audit concluded that the contract had limited the payments to medical services provided in a hospital. At the insistence of the legislative auditors, the user agency withheld other

monies owed to the contractor to recover the unauthorized payments. On appeal, the Court of Appeals held that the written contract did not allow for payment and that any modification of the contract must have complied with the criteria for the waiver of sovereign immunity under State Government Article, §12-201(a). ARA Health, at 93. According to the Court an unwritten modification, even if agreed to by the user agency, does not satisfy that criteria. Accordingly, since the State has waived sovereign immunity only for claims based on written contracts, the defense of sovereign immunity bars a claim based on an unwritten modification.

State Government Article, §12-201(a) also requires the execution of any written contract to be within the authority of the signing State official or employee. Accordingly, the Court of Appeals in ARA Health also held that the State cannot be bound by the unauthorized acts of its employees. Therefore, it was the actual authority, not the apparent authority, that controlled and those contracting with the State were presumed to know the limitation of the agency's authority and bear the risk of loss resulting from conduct outside of the authority.

COMAR 21.02.01.04A(1)(c) requires that contract modifications for SDAT, including the exercise of an option that the contract may provide for, must be approved by the Department of Budget and Management (known at the time of the operative events herein as the Department of Budget and Fiscal Planning or DB&FP). Consequently, the Contract with Appellant could not have been extended nor could there have been an agreement to pay additional money without DB&FP approval. Appellant asserts, however, that the Contract was extended in writing by actions of SDAT and DB&FP. When the parties entered into the Contract Amendment (Modification) to expand the services to public access for customers to SDAT's data via "800" toll free telephone service, local telephone service or dedicated telephone service, a DB&FP employee wrote "4-30-97" on line 18 (entitled "completion date") of the BB-4 control document. Appellant argues that since the Contract only provides for "three (3) options to extend the term of the Contract for one (1) additional year each," that the unilateral extension by a DB&FP employee from April 5, 1997 to April 30, 1997 as reflected on line 18 of the BB-4 results in a one year extension.

This Board disagrees. The BB-4 is a control document used to approve or disapprove a written contract. The 4-30-97 date written in by a DB&FP employee, whether viewed as a clerical error or deli-berate attempt to amend the Contract, is of no legal significance. The Contract Modification (Amendment) signed by the parties states that the terms and conditions of the contract are not altered. A BB-4 is not a contract. It is only a control document. As interpreted by the Court of Appeals in ARA Health a written contract or contract modification signed by an authorized State official is necessary to amend a contract. Consistent with the Court of Appeals decision in ARA Health, an authorized official of SDAT could extend the Contract if written approval (as reflected on a BB-4) was secured from DBM pursuant to COMAR 21.02.01.04A(1)(c). However, the BB-4 approving the expanded "800" service herein does not suffice to constitute such required approval. Only the expanded "800" service was the subject of the Contract Amendment (Modification) and no mention in the proposed Contract Amendment is made to a one year extension. In other words the focus must be on the written language in the Contract Amendment itself and not the BB-4 control document used to reflect DBM approval of the requested amendment.

Appellant also argues that the Contract was extended for one year when SDAT sent a letter

to Appellant dated April 21, 1997 which provided:

> *Reference is made to my letter to you of April 3, 1997.*
>
> *In that correspondence, you were advised that the contract between Enterprise Systems, Inc. (ESI) and the Department (SDAT) would terminate on April 5, 1997 and that ESI was in default on this contract for failing to pay to SDAT its share of the "900 service" revenue as required under the terms of the contract. The contract provides for the payment of the revenues received from the "900 service" on a monthly basis.*
>
> *ESI was given 10 days from receipt of that letter to pay $26,583.20 plus SDAT's share of the revenue for February 1997. The letter was received by ESI on April 4, 1997. No payment has been received from ESI as of the date of this letter. Consequently, ESI has not cured its failure to perform within 10 days of receipt of notice specifying such failure. Therefore, if for any reason it is determined that the contract did not expire on April 5, 1997 (as ESI has alleged), then this Contract is hereby terminated for default as of this date.*
>
> *Additionally, the expiration or termination of the Contract does not end ESI's responsibility to provide the monthly reports of the number of calls and the amount of revenue generated and to pay timely SDAT's share of the revenue from the contract. SDAT hereby demands immediate payment of all back monies plus the report and payment of February, 1997. Unless payment is received immediately, SDAT may take any and all legal action available to collect its share of the revenue under the contract.*

Appellant argues that this letter terminated the Contract as of April 21, 1997 and therefore the Contract must have been extended for at least one year because one could not terminate an already expired Contract. By its terms the letter purports to terminate the Contract "if for any reason it is determined that the Contract did not expire on April 5, 1997." Assuming arguendo that this April 21, 1977 letter constitutes a termination for default, it does not serve to extend the Contract because the required approval of DBM to do so is lacking.[6]

Finally, Appellant urges this Board to find that the termination for default, assuming there was one, was improper and thus convert the termination for default to one for convenience.[7] Even if we did not lack jurisdiction to consider the matter, a termination for convenience would not extend the Contract under the rationale we have discussed above.

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6 No appeal from the purported termination for default was ever taken and therefore this Board lacks subject matter jurisdiction to consider its propriety if in fact the April 21, 1997 letter is considered a termination for default. The Board also lacks jurisdiction over the affirmative State claim for $26,583.20 referenced in the letter. See Univ. of MD v. MFE, 345 Md. 86(1997). We were advised by counsel that the State is pursuing its affirmative State claim in the Circuit Court for Prince George's County.

7 Appellant claims that it should be found not to have been in default and thus the alleged default termination would be converted by operation of law to one for convenience. See e.g. COMAR 21.07.01.11.

Accordingly, we find that the Contract was never extended in writing as required by ARA Health and that by its clear terms reimbursement for all menus to include Real Property Public Release menus was limited to $7,500.00 which has been paid. Thus, Appellant's claim must be denied on entitlement grounds. Therefore, we grant Appellant's Motion and deny Appellant's claim.

Wherefore, it is Ordered this 29th day of September, 1997 that the appeal is denied.

Dated: September 29, 1997

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2010, appeal of Enterprise Systems, Inc. under Dept. of Assessments and Taxation Contract No. 95-SDAT-0007A.

Dated: September 30, 1997

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Mary F. Priscilla
Recorder