

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of FLOMAX)
ENTERPRISE)
) Docket No. MSBCA 1425
Under Department of Natural)
Resources - Lease of)
Piney Point Facility)

February 6, 1989

Board Jurisdiction - The Board has no jurisdiction over a dispute involving a lease or its formation where the State is the landlord. Mere acceptance of property other than cash money as rent does not convert a lease into a procurement.

APPEARANCE FOR APPELLANT: None
APPEARANCE FOR RESPONDENT: Thomas A. Deming
Assistant Attorney General
Annapolis, MD

MEMORANDUM OPINION BY CHAIRMAN HARRISON

This appeal raises the question of whether a lease of State property for a consideration consisting of oyster larvae supplied to the State by a lessee constitutes a procurement covered by the General Procurement Law.

Findings of Fact

1. Mr. Max E. Chambers is the owner of the Appellant Flomax Enterprise. Flomax Enterprise apparently is a marine nursery dealing in oysters.
2. On December 9, 1987, the Office of the Attorney General issued on its letterhead an opinion addressed to the Secretary of the Department of Natural Resources (DNR). The opinion was signed by both the Chief Counsel for Opinions and Advice of the Office of the Attorney General and the Assistant Attorney General who serves as counsel to DNR. The opinion addressed the effect of two provisions in the State Finance and Procurement Article, Sections 10-305 and 11-103(a)(2), on the leasing of land under the jurisdiction of DNR. At the time the opinion was issued these statutes (which remain materially unchanged) provided as follows:

§ 10-305. Transfers of State real or personal property - In general

(a) Power; consideration; conditions. - Any real or personal property of the State or a unit of the State government may be sold, leased, transferred, exchanged, granted, or otherwise disposed of:

(1) to any person, to the United States or any of its units or to any unit of the State government, for a consideration the Board [of Public Works] decides is adequate;

* * *

(f) Applicability of section - This section does not apply to any lease or other temporary transfer, grant, or disposition of State real or personal property in connection with a procurement made subject to § 11-103(a)(2) of this article.

§ 11-103. Applicability; notice by procurement agency; modification or waiver of requirements.

(a) In general. - This Division II applies to:

(2) every procurement by a State agency, even if any resulting contract will involve no State expenditure and will produce revenue for the State, for services that are to be provided:

(i) At a State facility, including a State school, hospital, institution, or recreational facility, for the benefit of State officials, State employees, or students;

(ii) at a State hospital or institution, for the benefit of clients or patients;

(iii) at a State recreational facility, for the benefit of the public; or

(iv) at a State transportation or State higher education facility, for the benefit of the public, to the extent required by the Board....

The questions posed by the Secretary of DNR which led to issuance of the opinion related to the circumstances under which the General Procurement Law applies to a lease of DNR land. The opinion concluded that those leases of DNR land that were within the ambit of the General Procurement Law and hence outside the scope of § 10-305 were those that were merely ancillary to the contracts covered by § 11-103(a)(2) of the General Procurement Law. The opinion described the distinction as follows:

The pertinent distinctions can be illustrated, even if they cannot be fully defined in the abstract. On the one hand, if the Department of Natural Resources leased a few hundred square feet of

park land for a year or two to a concessionaire to operate a soda stand, that lease would plainly be a subsidiary element of a revenue-generating contract subject to the Procurement Code. Hence, the Board of Public Works need not approve the lease. On the other hand, if the Department were to propose a long-term lease of land that the lessee would use for its own purposes (as distinct from the provision of services to the users of a facility that the State continues to operate for its purposes), the lease would be subject to the Board's approval authority under §10-305. The question, in each case, is whether the lease is the tail or the dog.

3. By letter dated April 6, 1988, the Secretary of DNR responded to certain questions that had been posed by Appellant's attorney in correspondence dated March 1, 1988 concerning lease of the DNR facility at Piney Point with the State accepting oyster larvae in lieu of rent. The Secretary's response stated in pertinent part:

The Department of Natural Resources plans to use the Piney Point facility as a center of aquaculture projects, both finfish and shellfish. We are currently negotiating a lease for a portion of this facility to a private concern that plans to produce oyster larvae. Although the negotiations are not yet finalized, we are considering accepting eyed-larvae in lieu of cash payment for rent or a portion of the rent. Other conditions of the lease are currently under negotiations. We do not envision "purchasing" either larvae or spat at this point.

4. On May 17, 1988, Appellant's attorney again wrote the Secretary of DNR contending that the proposed lease of the "Piney Point Facility" constituted a procurement and alleging Appellant's interest in competing therefore. The letter provided in pertinent part:

On April 6, 1988, in response to inquiry, you advised that the Department of Natural Resources is negotiating a lease for the Piney Point Facility. You indicated that the Department is considering accepting eyed-larvae in lieu of cash payment for rent. Although you suggested that the arrangement was not considered by your department as the "purchasing" of larvae or spat, I believe the transaction nevertheless falls within the purview of Section 13-201, et seq., State Finance and Procurement Article, Maryland Code.

The awarding of State contracts is governed by these statutory provisions. The preferred method for awarding of state contracts is by competitive sealed bidding; and, Section 13-202 requires that public notice of the invitation for bids be given. If for some reason competitive sealed

bidding cannot be used, and if there is more than one available source for the subject of the contract, the contract can be awarded by competitive negotiation as outlined in Section 13-203. Nevertheless, public notice of the intended procurement must be given and any written or oral negotiations must be conducted with all responsible offerors.

The bargained-for exchange of the Piney Point facility in consideration for larvae or spat is a state contract under the State Finance and Procurement Article. To date, my client believes that you have violated the provisions of Section 13-201, et seq., in connection with the proposed lease/purchase. Accordingly, please allow this letter to serve as the initiation of a Complaint on behalf of Max Chambers, a prospective bidder and one of the available sources for the subject of the contract, pursuant to Section 11-137 of the State Finance and Procurement Article. If any additional forms are required to initiate the complaint procedure, kindly supply the undersigned with same.

Kindly forward this letter to the procurement officer of the procurement agency, if that officer be someone other than you. Please advise the undersigned of the name and address of the procurement officer so that he can be contacted directly.

5. On June 13, 1988, the Assistant Attorney General serving as counsel to DNR responded on behalf of the Secretary to the letter of May 17, 1988 from Appellant's attorney. In pertinent part this letter stated:

Secretary Brown asked that I respond to your letter of May 17, 1988 concerning a proposed lease of a portion of the Piney Point facility. You suggest that this transaction would be a contract under the State Finance and Procurement Article.

Since the enactment in 1986 of State Finance and Procurement Article, §11-103, the question of whether a given revenue-producing contract is a service contract under the procurement code or a property agreement under the Board's authority to dispose of State property, has been particularly confusing. Last year the Department obtained the attached advice from the Attorney General's Office. You will note that it is within the Board's discretion to decide close questions.

I sincerely believe that the proposed transaction involving the Piney Point facility falls under the Board's authority to dispose of State property. As suggested in Dr. Brown's letter of April 6, 1988, what is under consideration is a lease of a specific area for a defined term. The possibility that a larvae-in-lieu-of-cash provision may be included relative to rent does not change the basic nature of the transaction. Under State Finance and Procurement Article, §10-305, the Board is authorized to dispose of State property "for a consideration the Board decides is adequate". Nothing in the provisions of this statute or its

legislative history suggest that "consideration" must always be cash, and indeed the Board has approved many transactions over the years involving other forms of consideration.

Please understand that the Department did not embark on these negotiations as a means of obtaining oyster larvae. This is simply a novel form of consideration that was raised during the discussions of what started out to be, and will be if the Board approves, a lease of State property.

6. By letter dated July 13, 1988, Appellant (Mr. Chambers) wrote to DNR's counsel. This letter stated in pertinent part:

I have given myself time to mull over your reply to my protest concerning the purchase of oyster spat/eyed larva by the State DNR in exchange for a lease on the Piney Point facility.

The thrust of your reply was as to the leasing of the facility and its appropriateness. At no time have I protested the leasing of the facility, I have only protested the purchase of oyster spat/larva by the State DNR, regardless of whether as a cash purchase or as a purchase by the granting of a lease or other form of compensation. As I view this situation you have ignored the fact that two transactions are involved:

1. The purchase of eyed larva/spat by the State DNR,
2. The leasing of property by the State DNR.

The method of payment for these two transactions amounts to a barter arrangement as payment but does not alter the fact of the two transactions.

Last winter/spring as the aquaculture hearings were being held in Annapolis it was learned, through casual conversations, that DNR intended to purchase 100 million spat in exchange for rent/use of the Piney Point facility and that all spat produced beyond the 100 million the operators of the facility would be free to sell.

I became interested because, based on previous track-records, no one in DNR had ever had that large a production. At a later time, the 100 million spat was changed to eyed-larva as the item to be purchased.

Following the above information early in the spring Steve Coons of the University of Maryland indicated he was going to operate the Piney Point facility and wanted a place to condition his broodstock for spawning. He ultimately placed them with Mr. Wilde at Shady Side, Md.

My initial letter was then prepared as I felt I had the production capability to produce either the 100 million spat or over a billion eyed larva in the event the contract called for that much.

* * * *

While you disagree that this transaction will constitute a procurement, the current tax laws make it a necessity for the leasing corporation to declare as income the fair market value of the use of the installation in exchange for their product. Considering the purchase price of Piney Point, the cost of repairs to make it usable for this operation (\$90,000 estimated) and the fact that they have a guaranteed market for their product it is difficult for me to see just how they are NOT going to have a sale and the State DNR is NOT making a purchase that will be reportable taxable income sale for the leasing corporation and is of so little magnitude that it should not have gone out for bids.

7. By letter dated August 17, 1988, Appellant's attorney wrote the Secretary of DNR and advised:

On May 18, 1988, your office received a Complaint on behalf of my client, Max Chambers. I received correspondence from Thomas A. Deming of the Attorney General's Office advising that the Board would ultimately decide whether the transaction falls under their authority to dispose of State property; however, I have not received any written decision by the Procurement Officer.

It would be necessary that the Procurement Officer's decision be reviewed promptly by the head of the Procurement Agency for approval, disapproval or modification. And, I understand that my client has a right to appeal from any adverse action within ten days to the Maryland State Board of Contract Appeals.

I would appreciate your advice concerning the status of my client's complaint. Almost three months have lapsed since it was initiated.

8. No further correspondence was forthcoming from DNR and by letter dated November 3, 1988, Appellant (Mr. Chambers) took an appeal to this Board.¹ The appeal was improperly addressed and was apparently initially received in the office of the General Accounting Division of the Comptroller of the Treasury on November 22, 1988. It was thereafter received in the Board's offices on November

¹ DNR has moved to dismiss the appeal on timeliness grounds asserting that the letter from DNR's counsel to Appellant's attorney of June 13, 1988 was intended to constitute final agency action on the matter (i.e. the procurement officer's decision on Appellant's protest as concurred in by the agency head [the Secretary of DNR]). However, this letter does not state that it constitutes final agency action nor set forth Appellant's right to appeal to this Board. Accordingly, we shall not dismiss the appeal on timeliness grounds as urged by DNR for failure to appeal to this Board within ten days of receipt of the June 13, 1988 correspondence. On the other hand, we accept DNR's proffer that the June 13, 1988 correspondence was intended as final agency action and shall proceed to determine the issue raised by the appeal.

28, 1988. Appellant is not represented by counsel in this proceeding.

9. The Agency Report (filed by DNR's counsel) states in pertinent part:

1. As set forth in my letter of June 13, 1988 to Mr. Chambers' attorney, the matter of obtaining oyster larvae has never been handled as a procurement, but rather came up in discussions about a lease of the State's interest in certain real property. Specifically, the Department did not enter into discussions with the firm in question to obtain oyster larvae, but rather to lease the property in question to the private firm for oyster culture. The matter of substituting larvae for cash in terms of rent came up during discussions of the lease. But for the existence of the lease arrangement, the Department would not have been seeking at the time the lease was negotiated to obtain oyster larvae from anyone.

10. Appellant did not comment on the Agency Report. Neither party requested a hearing.

Decision

We note initially that if the transaction described above is truly a lease of property where the State is the lessor, then this Board lacks jurisdiction. This is so because the General Procurement Law only gives this Board jurisdiction over disputes in contract formation or disputes arising under an executed contract. There must be a contract as defined by the General Procurement Law sought or at issue. Contract is defined in the General Procurement Law² in pertinent part as an "...agreement for the lease as lessee of real or personal property." Section 11-101(k), Division II, State Finance and Procurement Article (1987 cumulative supplement). Lease is defined in the General Procurement Law as a contract under which the State uses real or personal property to which the State does not have title. Section 11-101(v), Division II, State Finance and Procurement Article (1987 cumulative supplement). Consequently, we believe that

² References are to the law in effect prior to July 1, 1988 since it appears that the transaction in question was consummated prior to such date. Pursuant to the adoption of the Code Revision on July 1, 1988, the applicable definitions are found at Sections 11-101(1) and (m), Division II, State Finance and Procurement Article wherein "procurement" is defined to exclude leasing real property a lessor and the word "Contract" "for clarity" is re-defined as "[p]rocurement contract."

this Board's jurisdiction over a dispute in the formation of a lease under the General Procurement Law is limited to leases where the State is the lessee. Ackerly-BWI Airport Advertisers, MSBCA 1318, 2 MSBCA ¶142 (1987).

Appellant claims, however, that the described transaction is not a lease but a purchase of a product (i.e. oyster larvae) in the guise of a lease in order to circumvent the General Procurement Law and purchase the larvae from a specific source. DNR disagrees.

Appellant bears the burden to demonstrate the truth of his allegations that the transaction was a mere sham designed to circumvent the General Procurement Law. This burden we find has not been met by Appellant.

Appellant's claim that the transaction was a sham is based upon the fact that the consideration paid for the use of the Piney Point property by the Appellant's alleged competitor in the oyster business was oyster larvae rather than cash money. However, we find that the possibility of the form of consideration being other than cash apparently came up during negotiations over what the parties to the transaction in good faith believed involved a lease. The ultimate acceptance by DNR of oyster larvae in lieu of cash as consideration (rent) for the leased premises does not in our opinion convert the transaction from a lease to a procurement. We do not know the particulars here of the relationship between fair market rent and the value of the oyster larvae given to the State in lieu of rent. However, there is absolutely nothing in the record to suggest that the Board of Public Works approved the lease for other than "a consideration the Board decides is adequate" as required by § 10-305(a)(1).

Further, there appears to be nothing out of the ordinary in the Board of Public Works accepting something other than cash as "consideration." According

to counsel for DNR, the Board has approved many transactions over the years involving forms of consideration other than cash money. We also note the provisions of § 10-306(b) Division I, State Finance and Procurement Article which specifically authorize receipt of property in lieu of cash as consideration:

(b) Real or personal property as consideration. -- If the consideration received for the disposition of any real or personal property of the State or any unit of the State government is other real or personal property, the real or personal property received shall be held and accounted for in the same manner as other property under the jurisdiction and control for the unit of the State government that receives the real or personal property.

Further, the record reveals no inconsistencies or dubious factual assertions in DNR's written comment on the transaction which might tend to suggest that the true intended nature of the transaction was a procurement of oyster larvae from a particular vendor without competition. Thus, given the state of the record which contains only the bare allegation by the Appellant that the transaction was a sham, we accept the representation of counsel for DNR in the Agency Report that an arms length transaction involving the lease of State property for adequate consideration was involved. As such the Board lacks jurisdiction to review the matter.

