BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of	)	
GRANITE CONSTRUCTION COMPANY	)	Docket No. MDOT 1011
	)	
Under MTA Contract No. NW-04-04	)	

June 17, 1982

Motion for Reconsideration — Where a non-diligent litigant seeks to introduce new evidence on reconsideration, such evidence shall not be received. However, a party may argue on reconsideration, new lines of reasoning based upon previously established facts.

Unjust Enrichment/Quasi-Contract — Where an express contract exists concerning a particular subject matter, there can be no implied contract arising out of the same facts. Hence since the contract between Appellant and the MTA expressly required the relocation of certain gas mains, Appellant was not permitted to recover the cost of this work under a quasi-contract theory.

OPINION BY CHAIRMAN BAKER
ON MOTION FOR RECONSIDERATION

On July 29, 1981, the Board issued its opinion in the captioned appeal ruling that Appellant contractually was required to relocate certain gas mains. Appellant filed a timely motion for reconsideration of the decision on August 28, 1981. This motion did not challenge the findings or conclusions made by the Board in its decision, but instead sought to apply the doctrine of unjust enrichment to the facts established in the appeal. On November 25, 1981, the Board denied this motion without consideration of the substantive issues raised. In so doing, the Board concluded that "...the raising of new issues on reconsideration unduly protracted the adjudicative process and undermined the achieving of an expeditious and inexpensive resolution of the controversy." See also, Appeal of Fruin-Colnon and Horn Construction Co., Inc., MDOT No. 1002, April 24, 1981. By motion dated December 15, 1981, Appellant asked the Board to reopen the appeal and apply federal agency standards which permit consideration of new arguments based upon evidence already in the record. The MTA opposed this motion on the grounds that the existing standard for reconsideration was fair and that the MTA would be prejudiced by the raising of a new line of reasoning at this late date.

By letter dated December 24, 1981, the Board apprised the parties that "[i]n view of the arguments set forth by Appellant...and the importance of establishing a fair and equitable standard for administering prospective motions for reconsideration...," the captioned appeal would be reopened. Having now fully considered the arguments presented by both parties, the Board hereby rules as follows:

I. Grounds for Reconsideration

Board Rule 30[1] permits motions for reconsideration as follows:

> A motion for reconsideration, if filed by either party, shall set forth specifically the ground or grounds relied upon to sustain the motion, and shall be filed within thirty (30) days from the date of receipt of a copy of the decision of the Board by the party filing the motion.

This rule is identical to the procedural rule governing reconsideration as utilized by most of the federal boards of contract appeals. For this reason, Appellant asks that we look to the decisions of those boards as guidance for determining the proper scope of review on motions for reconsideration. In this regard, Appellant contends that the traditional federal standard permits reopening of an appeal whenever it appears that a significant injustice has been done.

In G. M. Co. Manufacturing, Inc., ASBCA No. 5345, 60-2 BCA ¶2759, the government sought to introduce additional evidence on reconsideration. Appellant objected on the ground that the proferred evidence was not newly discovered. In agreeing to receive this evidence over Appellant's objection, however, the Armed Services Board (ASBCA) stated as follows:

> Whether proferred evidence, be it newly discovered or not, should be accepted in connection with a timely motion for reconsideration rests within the sound discretion of this Board, and such evidence may be accepted when the Board believes, upon a disclosure of what the evidence will be, that it is essential to a proper reconsideration of the original decision.
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> It is sufficient to say, however, for the purpose of this decision on reconsideration, that the very function of a timely motion for reconsideration is to draw attention to possible error in a decision, and that the Board reserves the right, in its discretion, to correct or modify its prior decision at any time before finality has rested therein.

The basis for this standard was more fully explained in Madison Park Clothes, Inc., ASBCA No. 4234, 61-1 BCA ¶3054 as follows:

> G. M. CO. MANUFACTURING, INC., is in accordance with the general rule, which is that an administrative tribunal, in the exercise of its authority to reconsider a decision which has not become final, may in its discretion receive and consider additional evidence, and the test applied in determining whether additional evidence should be received is whether it appears likely that an injustice has been done and that the additional evidence would probably produce a different

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[1] See COMAR 21.10.06.30.

result. The fact that the additional evidence is not newly discovered and might by the exercise of diligence have been offered at the original hearing will not preclude the administrative tribunal from receiving it on reconsideration when the opposing party has not been prejudiced by the delay in presenting such evidence.[2]

The MSBCA cited as authority for this proposition a decision rendered by the Connecticut Supreme Court of Errors in Olivieri v. Bridgeport, 126 Conn. 265, 10 A.2d 770 (1940). In that case, however, the reconsideration involved an award made under the Connecticut Workmen's Compensation Act. As earlier stated by the Connecticut Supreme Court in Fair v. Hartford Rubber Works Co., 95 Conn. 350, 356, 111 A. 193 (1920), "...the rule which denied a rehearing to a non-diligent litigant is not applied in cases where the State is interested for reasons of public policy," and the State is interested "...in seeing that the employer bears his statutory share of the burden [of loss to an employee by injury], lest the injured employee should become a public charge." In McCulloch v. Pittsburg Plate Glass Co., 107 Conn. 164, 167, 140 A. 114 (1927), the Connecticut Supreme Court further stated that "[i]n the absence of other than technical prejudice to the opposing party, the liberal spirit and policy of the Compensation Act should not be defeated or impaired by a too strict adherence to procedural niceties." Accordingly, the Connecticut line of cases stands solely for the proposition that mere inadvertence or negligence of a party, without an intentional withholding of evidence, "...particularly where there is no more than technical prejudice to the adverse party," should not debar the inadvertent or negligent party of his rights in a Compensation Act case, or where public policy otherwise would discourage such debarment. See Kearns v. Torrington, 119 Conn. 552, 117 A. 725 (1935).

There is no public policy or concept of fairness which mandates such a liberal procedure here. The Board was created, under Maryland law, to resolve State contract and bid disputes in an independent manner consistent with the contested case provisions of the Maryland Administrative Procedure Act. In so doing, the Board also was to develop procedures which were informal, inexpensive and expeditious. Pursuant to this legislative mandate, the Board promulgated procedural regulations designed to avoid surprise and permit the parties to develop and present all facts relevant to their dispute. While there may be times when such an adversary system will not afford proper justice due to the negligence or inability of an advocate in developing and presenting essential facts, this is a risk inherent in our system of justice. Although certain federal boards have sought to avoid this difficulty by reopening the administrative record to receive additional evidence, we believe that such a procedure would unduly protract the adjudicative process and undermine this Board's clear mandate to effect an expeditious and inexpensive resolution of any controversy brought before it. Accordingly, in the

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[2]At the time the ASBCA issued its decisions in G. M. Co. and Madison Park Clothes, the result was not particularly egregious since under existing law an aggrieved party to a Board proceeding was permitted to obtain a trial de novo in the U.S. Court of Claims. However, in 1963, the U.S. Supreme Court precluded the U.S. Court of Claims from granting a trial de novo after a Board decision and restricted the Court's role to one of review. United States v. Carlo Branchi & Co., 373 U.S. 709 (1963). Thereafter, the agency boards of contract appeals became more formalized and developed into true quasi-judicial bodies. Nevertheless, these early ASBCA decisions are being followed by certain agency boards even today. See Turner Construction Co., GSBCA No. 3549, 74-2 BCA ¶10934.

absence of a clear indication that good reasons exist for the failure to present evidence prior to the Board's decision, additional evidence will not be received by this Board on reconsideration. Compare Appeal of Fruin-Colnon Corp. and Horn Construction Co., Inc., MDOT 1002, motion for recon. denied, April 24, 1981 at pp 11-13; Tidewater Express Lines, Inc. v. U.S., 278 F.Supp. 561, 567 (D. Md., 1981).

Appellant next argues that if this Board rejects the liberal federal standard governing motions for reconsideration, it still should permit a party to apply new legal reasoning to established facts on motion for reconsideration. In this regard, Appellant cites the ASBCA decision in E. V. Lane Corporation, ASBCA No. 8741, 9920 and 9933, 66-1 BCA ¶5472, wherein a contractor attempted to raise certain new claims on reconsideration. These new claims requested the ASBCA to determine and award acceleration costs and other increased costs due to wet weather paving. These costs were determinable based upon facts established at the prior hearing. The MSBCA concluded that this "...late introduction of a new application of established facts is not fatal to a claim" and, accordingly, proceeded to rule in the contractor's favor. We find this standard to be eminently fair in that it does not unduly protract litigation by requiring a second evidentiary hearing and yet precludes the forfeiture of rights where a party fails to precisely a alyze the appropriate theory for prosecution or defense of a claim. Compare John A. Johnson v. United States, 132 Ct. Cl. 645 (1955). In essence, the rule strikes a fair balance between the quest for justice and the need to bring an end to the litigation process. For this reason, we likewise shall permit a party to present new lines of reasoning on reconsideration provided they relate solely to the evidence adduced at hearing and do not otherwise prejudice the opposing party.

Appellant here seeks to apply the doctrine of unjust enrichment to the established facts of record. Before considering the substantive aspects of Appellant's claim, however, we first must consider whether the MTA would be prejudiced by such consideration at this time. The MTA argues that because the substantive requirements involved in a quasi-contract claim differ so significantly from the express contract claim litigated, it would be prejudiced by having to proceed without the benefit of additional testimony. The MTA, however, has omitted to identify any specific new evidence which would be essential to its defense. Instead the MTA has argued only that the Board has been deprived of legal argument pertaining to the scope of recovery in an unjust enrichment case. Since the parties were given a full and complete opportunity to brief the legal issues raised by Appellant's motion, and since the facts essential to Appellant's new theory were relevant to the original issues raised and were subjected to the adversary process, we are unable to find any prejudice to the MTA's position by our present consideration of Appellant's claim of unjust enrichment.

II. Unjust Enrichment

In order to sustain a claim based on unjust enrichment, the following three elements must be established:

1. A benefit conferred upon defendant by the plaintiff;

2. An appreciation or knowledge by the defendant of the benefit; and

3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

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Everhart v. Miles, 47 Md. App. 131, 136 (1980). Here Appellant undisputedly relocated certain gas mains with the complete knowledge of the MTA. It likewise is clear from the record that Appellant did not include the cost of this work in its bid price based upon the contract interpretation of its chief estimator and the unauthorized verbal concurrence therewith by the MTA's Murray Weiner. The issue to be resolved therefore is whether the circumstances in this case would make it inequitable for the MTA to avoid paying Appellant for the cost of the services performed in relocating the gas mains in dispute.

The gravamen of Appellant's complaint is that it allegedly was induced to prepare its bid, without money for the relocation of gas mains, by the representations of the MTA's Murray Weiner who was named in the contract documents to receive pre-bid inquiries concerning the specifications. Under such circumstances, Appellant contends that it would be inequitable for the MTA not to pay for the services ultimately performed in relocating the gas mains.

In the Board's July 24, 1981 decision in this appeal, we concluded that the written contract between the parties expressly required the relocation of the disputed gas mains. Further, we found that the contract bidding documents clearly established that Mr. Weiner had no authority to issue verbal clarifications of the specifications to a single bidder and that the MTA was not bound by any such clarifications which may have been given. It is well settled that where an express contract exists concerning a particular subject matter, there can be no implied contract arising out of the same facts. Schiavi v. Mayor and City Council of Baltimore, 40 F. Supp. 184, 190-91 (D. Md. 1941); Wilderness Society v. Cohen, 267 A.2d 820 (D.C. Ct. of Appeals, 1970); Environmental Utilities Corp. v. Lancaster Area Sewer Authority, 453 F.Supp. 1260 (D.E.D. Penn., 1978). This is true no matter how harsh the provisions of such contracts may seem in light of subsequent happenings. Durham Tenace, Inc. v. Hellertown Borough Authority, 148 A.2d 899, 394 Pa. 623 (1959). Thus, since the express contract between the parties precludes MTA contractual liability for any unauthorized oral pre-bid statements of its employees and requires the relocation of the disputed gas mains, the principle of unjust enrichment may not be applied here.

For the foregoing reasons, therefore, Appellant's Motion For Reconsideration again is denied. We accordingly do not reach the issue of whether the defense of sovereign immunity likewise would preclude recovery under a quasi-contract theory.