

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Hensel Phelps)
Construction Company)
) Docket No. MSBCA 1167
Under MTA Contract No.)
NW-07-07)

January 20, 1984

Burden of Proof - A procurement officer's final decision is not entitled to a presumption of correctness since procedures before the procurement officer are ex parte in nature.

Burden of Proof - Since the burden of proof is an evidentiary concern, COMAR 21.10.06.20.A provides the presiding Board member with authority to shift from one party to the other the burden of proof as well as the burden of going forward with the evidence on any given issue.

Burden of Proof - Where the State seeks recovery of contract overpayments, it has the burden of proof in the de novo hearing before the MSBCA even though the contractor has the statutory duty of filing the appeal with the Board and seeking final administrative resolution of the dispute.

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MEMORANDUM OPINION

In Hensel Phelps Construction Company, MSBCA 1080, Appellant alleged that it was entitled to \$706,603 in additional compensation under the captioned contract. In its Answer to the Amended Complaint filed in the foregoing appeal, the Maryland Mass Transit Administration (MTA) raised a counterclaim alleging that Appellant owed it \$83,386.40 for overpayment for work performed under said contract. Shortly thereafter, an issue arose as to whether this Board had jurisdiction to hear MTA's counterclaim. However, that issue became moot when the MTA reduced its overpayment claim to a final written determination by its procurement officer. Appellant subsequently took an appeal of that decision to this Board which we docketed as MSBCA 1167. For purposes of discovery and trial, MSBCA 1080 and 1167 now have

been consolidated. As a preliminary matter, both parties have requested that this Board make a determination as to which party shall have the burden of proof of the overpayment claim.

MTA initially argues that an administrative agency's final decision is presumed valid and that the burden of proof rests with the Appellant to prove that there was an error in reaching that decision. It further argues that under Maryland administrative practice the shifting of the burden of proof is only allowed when provided for by statute or regulation. Since there is no statutory or regulatory provision for the shifting of the burden of proof in Board proceedings, it is said that the Appellant must overcome the presumption of the correctness of MTA's final decision. We disagree with this proposition for the following reasons.

It is true that in Maryland there is a presumption of validity and correctness attributed to a final administrative decision and that an Appellant has the burden of overcoming that presumption by proving that an error was committed in reaching that decision. Hugh J. Courtney v. Board of Trustees of the Maryland State Retirement Systems, 285 Md. 356, 362, 402 A.2d 885 (1979). However, that presumption of correctness applies to final administrative decisions where basic rules of fairness as to parties appearing before the agency have been observed. Compare Dickinson-Tidewater, Inc., et al. v. Supervisor of Assessments of Anne Arundel County, 273 Md. 245, 329 A.2d 18 (1974). Under the administrative procedure prescribed by the legislature for resolving State contract disputes however, the procurement officer's decision-making process is essentially ex parte. An Administrative Procedure Act (APA) type hearing is not provided by the procurement officer and there is no opportunity for a party to call witnesses and conduct cross examination. Art. 21, Md. Ann. Code §7-201(b). Findings of fact made under such circumstances are unworthy of the presumption of correctness advocated by Respondent. L. Rosenman Corporation v. United States, 182 Ct.Cl. 586, 588, (1968).

It also is evident that the legislature did not intend for the presumption of correctness to apply to a decision rendered by a procurement officer. Instead the legislature provided that the Board be established as an independent agency and that it adopt procedures consistent with the contested case provisions of the APA resulting in a written final decision containing findings of fact and conclusions of law. Art. 41, Md. Ann. Code, §254; Art. 21, Md. Ann. Code §7-202(a)(2) and §7-202(c)(2). Such a decision expressly was to be subject to judicial review under the standards set forth in Art. 41, Md. Ann. Code §255. Under this framework, the Board obviously was to provide a de novo hearing based upon the objective consideration of all evidence presented by the affected State agency and its contractor. Compare Southwest Welding & Manufacturing Co. v. United States, 188 Ct.Cl. 925, 413 F.2d 1167 (1969); Space Age Engineering, Inc., ASBCA 26028, 82-1 BCA ¶15,766 (1982).

We also disagree that this Board does not have the authority to shift the burden of proof. Article 21, Md. Ann. Code, §7-202(C)(2) provides that this Board's proceedings " . . . shall be conducted in accordance with the provisions of the Administrative Procedure Act as they relate to contested cases before agencies . . ." and that the Board should " . . . adopt regulations which are not inconsistent with that act . . ." for the resolution of appeals before the Board. The Board's regulations clearly provide in pertinent part at COMAR 21.10.06.20.A that:

. . . Appellant and respondent may offer at a hearing on the merits such relevant evidence as they deem appropriate, subject, however, to the sound discretion of the presiding member in supervising the extent and manner of presentation of this evidence, the guidelines set forth in the Maryland Administrative Procedure Act (Article 41, §§244-256A, Annotated Code of Maryland), and applicable case law. . . .
(Underscoring added)

Since we perceive the burden of proof to be an evidentiary concern, the presiding Board member clearly has authority to shift from one party to the other the burden of proof as well as the burden of going forward with the evidence on any given issue.

We turn then to who has the burden of proof on the overpayment issue. It is well settled that the burden of proof rests with the party who seeks the affirmative of an issue. Joseph A. Bass Company v. United States, 340 F.2d 842 (1965). This principle is also firmly established in Maryland administrative law practice. Bernstein et al. v. Real Estate Commission of Maryland, 221 Md. 221, 156 A.2d 657 (1959). Likewise, it is generally acknowledged that the burden of proof rests with the defendant to establish its counterclaim in an action and that the same character of proof is required to establish a counterclaim as to sustain any other claim. Allis-Chalmers Manufacturing Co. v. United States, 79 Ct.Cl. 453 (1934). The issue to be decided here, therefore, is whether the burden of proof shifts from the MTA to Appellant because the overpayment issue changed its form from a counterclaim raised in an Answer to an appeal of a procurement officer's final determination. We believe that it does not.

It is important to distinguish here the difference between having the burden of proof of an issue and the burden of proceeding or going forward with the evidence. The burden of proof carries the need of establishing the existence and truth of a fact or set of facts by a preponderance of the evidence. The burden of going forward with the evidence requires the party with this burden to make a prima facie showing as to the fact or issue at hand. This means that a party need only establish evidence which proves a particular fact until contradicted and overcome by other evidence. Rice Cleaning Service, GSBICA No. 3136, 71-1 BCA ¶8787 (1971). The burden of proof generally does not shift and remains on the party having the affirmative throughout the proceeding. R. H. Fulton, Contractor, IBCA No. 769-3-69, 71-1 BCA ¶8674 (1971); Herman H. Fisher v. The Baltimore Transit Company, 184 Md. 399, 401 (1945). On the other hand the burden of proceeding with the evidence may shift between the parties as a case progresses. Macht v. Hecht Co., 191 Md. 98, 101, 59 A.2d 754, (1947).

In the instant case we believe that MTA has the affirmative of the issue and the concomitant burden of proof. While the Appellant had the statutory duty of filing the appeal and seeking final administrative resolution of the dispute, the MTA has the burden of proving by a preponderance of the evidence the facts essential to the so-called counterclaim. While the burden of going forward with the evidence ultimately may shift to Appellant to establish any defenses it might have and explain why it should not be required to refund the amount claimed, the overall burden remains with the MTA to establish its entitlement to the overpayments. The Federal boards of contract appeals have likewise held that where the government seeks recovery

from the contractor, the government has the burden of proof in the de novo hearing before the boards. Lykes Bros. Steamship Co., Inc. v. United States, 198 Ct.Cl. 312, 459 F.2d 1393 (1972).

For the above reasons, the MTA shall have the burden of proof of the overpayment issue in MSBCA 1167.