

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of)
INTERCOUNTY CONSTRUCTION CORPORATION) Docket No. MDOT 1036
Under MTA Contract No. NW-01-06)

February 8, 1982

Summary Disposition — While the Board has not authorized motions for summary disposition in its regulations (rules), such motions may be considered, on a case by case basis, where appropriate to provide a just, inexpensive and expeditious determination of disputes.

Summary Disposition — A motion for summary disposition shall be granted only where there are no genuine issues as to any material fact and it appears that one party clearly is entitled to a decision as a matter of law.

Maryland Administrative Procedure Act (APA) — Notwithstanding § 251(a) of the APA (Art. 41, Md. Ann. Code), a formal evidentiary hearing need not be provided where it appears that one party clearly is entitled to a decision as a matter of law.

MEMORANDUM OPINION AND ORDER

This appeal involves a dispute between Intercounty Construction Corporation and the Maryland Department of Transportation Mass Transit Administration (MTA) concerning the proper interpretation of a contract for construction of the Charles Street subway station and line structures. The MTA contends that it is entitled to a decision on the merits as a matter of law and thus requests that the appeal be resolved in a summary manner without an evidentiary hearing. Appellant opposes this motion by alleging issues of material fact which are said to necessitate a hearing prior to disposition.

This Board's rules do not authorize specifically motions for summary disposition.¹ The MTA asks, however, that we look to the practice of the federal Boards of Contract Appeals who likewise have not promulgated a rule permitting summary disposition motions but nevertheless consider such motions, on a case by case basis, where appropriate to provide a just, inexpensive and expeditious determination of disputes. Compare Defoe Ship Building Company, ASBCA No. 17095, 74-1 BCA ¶10,537; Southern Pipe and Supply Company, NASA BCA No. 570-7, 71-1 BCA ¶8868; Inforex, Inc., GSBCA No. 3859, 3972, 79-1 BCA ¶13,772. Whether we also may consider these motions however must depend, in part, upon the constraints imposed by Maryland law on administrative practice.

In creating this Board, the Legislature intended that it operate in a quasi-judicial manner consistent with the provisions of the Maryland Administrative Procedure Act (APA) as it relates to contested cases before agencies. Art. 21, Md. Ann. Code, § 7-202B(2), C(2) (1981 Repl. Vol.). The APA, in pertinent part, expressly requires that:

¹The term disposition is used since the Board does not enter judgments.

"In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice...." Art. 41, § 251(a) (1978 Repl. Vol., 1981 Cum. Supp.).

This statutory language has been applied strictly where an administrative body is acting in a quasi-judicial capacity to decide a contested case.² Dunkel v. Elkins, 325 F. Supp. 1235 (D. Md. 1971); Albert v. Public Service Commission, 209 Md. 27, 120 A.2d 346 (1956). The issue before us therefore is whether a formal evidentiary hearing is mandated by the APA. We conclude that the Legislature did not intend so narrow an application of the law. As long as a party is permitted a hearing on a motion for summary disposition to show that material facts are in dispute, or that he is entitled to a decision as a matter of law, the due process provisions of the APA are satisfied. Accordingly, in those appeals where one party clearly is entitled to a decision as a matter of law, we find no reason to require a formal evidentiary proceeding.

In the instant appeal, both parties recognize that all work was to be performed in accordance with the Maryland Department of Transportation General Provisions dated 1976, the Mass Transit Administration Supplementary General Provisions, and those sections of the Mass Transit Administration Standard Specifications dated June 1976, cited in the contract Special Provisions, except as modified, amended, or supplemented in those Special Provisions. Of particular significance, Standard Specification section 02200, paragraph 4.01G addresses measurement and payment for excavation and backfill as follows:

"G. Quantities of structure excavation and backfill and cut and cover excavation and backfill will be determined from limits shown on the Contract Drawings or specified herein or in the Special Provisions, plus any additional excavation and backfill authorized or required by the Engineer not due to the Contractor's negligence. In the absence of Contract Drawings showing limits for excavation and backfill, the quantities will be computed within the following limits:

1. The horizontal limits for computing pay quantities shall be vertical planes one foot outside the neat lines of footings, structures without footings, culverts, and the outside surfaces of subway structures.

²A contested case involves the legal rights, duties, statutory entitlements, or privileges of specific parties. Art. 41, Md. Ann. Code, § 244(c) (1978 Repl. Vol., 1981 Cum. Supp.).

³See Gellhorn and Robinson, "Summary Judgment In Administrative Adjudication," 84 Harvard Law Review 612 at pp. 616-617, 619-620 wherein the authors ultimately conclude that "...statutory or contractual rights to a hearing should not be interpreted as prohibiting the use of summary judgment by an agency to eliminate futile evidentiary hearings."

2. The upper limit for payment for excavation shall be the ground surface as it existed prior to the start of construction operations, except, where excavation is performed within trackway or pavement excavation areas, the upper limit shall be the planes of the bottom and side slopes of said excavated areas. Where it is required that the excavation be made in new embankment, the upper limit shall be the planes of the new embankment at the elevation indicated or directed for construction in advance of performing the required excavation, but in no case shall the upper limit be above the planes of the new embankment.
3. The upper limit for pavement of backfill, when not indicated, shall be the ground line at the time the excavation is made; except, when backfill is ordered to a higher limit by the Engineer, limit for payment shall be the higher limit ordered.
4. The lower limits for computing pay quantities of excavation and backfill shall be a plane at the bottom of the completed footings or structures or the lower outside surface of pipes, rods, or deadmen."
(Underscoring added.)

Contract Special Provision section 02200, paragraph 4.01G, however, states that:

- "G.
1. In lieu of the requirements specified, The horizontal limits for computing pay quantities shall be vertical planes along the outside surfaces of subway structure including bulkheads.
 3. In lieu of the requirements specified, The upper limit for payment of backfill shall be the bottom of the aggregate sub-base of sidewalk as dimensioned on the drawings.
 4. In lieu of the requirements specified, The lower limits for computing pay quantities of excavation shall be planes at the bottom of the concrete slab.
 5. The lower limits for computing pay quantities of backfill shall be planes at the top of the concrete structure."

The dispute between the parties thus centers initially around the extent to which the contract Special Provisions modify or take precedence over the Standard Specifications. Appellant argues that contract Special Provision section 02200, paragraph 4.01G(1) contains the sole criteria for determining the horizontal limits of excavation and backfill pay quantities. Under this interpretation, the horizontal pay limits would be the vertical planes along the outside surfaces of the subway structure including bulkheads. Appellant further maintains that the term bulkheads reasonably was interpreted by it to mean the support of excavation systems required under the contract. Payment is thus requested, at the unit price quoted, for the common excavation associated with the installation of support of excavation. The MTA contends that section 02200, paragraph 4.01G of the Standard Specifications, except as specifically modified by the contract Special Provisions, contains the applicable criteria for measuring excavation quantities for payment. It further is argued that these Standard Specifications require the parties to look initially to the contract drawings to determine pay limits for excavation. The MTA maintains that the applicable contract drawings clearly provide for measurement of excavation quantities to the outside limits of both the permanent and temporary concrete structures to be constructed under the contract. Accordingly, any excavation associated with the support of excavation systems was not to be measured for payment under the unit price item for common excavation.

Regardless of how we resolve the legal issue concerning the juxtaposition of the contract Standard Specifications and Special Provisions, two material factual disputes exist. First, the parties are not in agreement as to whether the contract drawings clearly specify the payment limits for excavation. In the absence of an uncontroverted affidavit from an engineer familiar with the contract drawings, we find it inappropriate to interpret these drawings without an evidentiary hearing. Second, the parties also disagree on the meaning of the term "bulkhead." Although the MTA alleges that this term is defined in the contract drawings to mean a temporary concrete wall, Appellant argues that, at best, the word bulkhead is ambiguous. In support of this position, Appellant states that the Resident Engineer concurred in its interpretation during performance and actually paid for excavation to the outer limits of the support of excavation system. Since the post award conduct of the parties may be a significant aid in interpreting a contract, an inference must be drawn in favor of Appellant's position for purposes of this motion for summary disposition.⁴ See Mazur v. Scavone, 37 Md. App. 695, 704 (1977).

In ruling on a motion for summary disposition, the function of the Board is not to decide disputed facts, but rather to determine whether any dispute as to material facts exists. Compare Washington Homes, Inc. v. Interstate Land Dev. Co., 281 Md. 712, 382 A.2d 555 (1978). Here we are satisfied that genuine disputes as to material facts are present and, accordingly, we deny the MTA's motion.

⁴As we have stated in Granite Construction Company, MDOT 1011 (July 29, 1981) at pp. 19-20, the ultimate decision as to the proper interpretation will depend upon whether a reasonable person would have attached the same meaning to the contract, when read as a whole, as did the parties.