



2. On February 22, 1991 the Board issued its opinion which found that Dashiell was entitled to a time extension from October 1, 1986 to July 7, 1987. Further, the Board calculated Dashiell's extended performance costs for this 271 day period of delay and determined Dashiell was entitled to an equitable adjustment of \$860,097.00.

3. Following the noting of an appeal DGS on April 6, 1991 filed a petition pursuant to Rule B2(e) of the Maryland Rules with the Circuit Court for Baltimore City in Case No. 91084035/CL128308. DGS' Petition asserted that the Board's decision was erroneous as a matter of law, was unsupported by competent material and substantial evidence, and was arbitrary and capricious.

4. DGS cited a number of alleged errors in the Board's opinion requesting reversal by the Circuit Court. The pertinent error was the assertion that this Board did not acknowledge any delay attributable to Appellant relating to masonry work. DGS alleged that the Board should have reduced the amount of delay damages attributable to masonry work by two months. DGS contended that the Board failed to address DGS' argument that at some point after July 7, 1986 the masonry subcontractor had increased its crew size to the initial planned amount, i.e., 24, but failed to maintain that level. DGS concluded its argument by asserting that the "Board's decision, therefore, must be reversed and the Board directed to reduce the damages accordingly."

5. Following oral argument on September 4, 1991, the Circuit Court entered an Order finding, inter alia:

...the Board erred in not finding that the two months of

masonry delay that occurred after July of 1986 were attributable to Dashiell and its masonry subcontractor. Because of these errors \$215,397.00 must be subtracted from the Board's award of \$860,097.00.

6. On January 24, 1992<sup>1</sup> DGS wrote to Dashiell, claiming that DGS was entitled to \$60,000 in liquidated damages based on the Circuit Court's finding that 60 days of masonry delay should be attributed to Dashiell<sup>2</sup>. Dashiell disagreed with DGS and a meeting was held on February 3, 1992 with the Procurement Officer allowing Dashiell to present its position. On April 23, 1992 the Procurement Officer issued a final decision which states in part:

...it is apparent to me that Judge Joseph H. Kaplan of the Circuit Court for Baltimore City was correct in ruling that two months of the masonry delay were attributable to your client, J. Roland Dashiell & Sons, Inc. The State was entitled to a reduction in the amount of damages awarded by the Board of Contract Appeals given that two months of the masonry delay was attributable to Dashiell. Judge Kaplan's ruling effectuated this reduction.<sup>3</sup> Obviously the masonry delays were critical

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<sup>1</sup> Neither party sought clarification or remand to the Board and the Circuit Court's Order was a final non-appealable Judgment by this date.

<sup>2</sup> The contract herein provides that liquidated damages will be assessed at \$1,000 per day.

<sup>3</sup> The record is unclear how the Procurement Officer came to this conclusion since Judge Kaplan's Order does not discuss liquidated damages.

ones otherwise Dashiell would not have been entitled to any damages for that period of time to begin with. Consequently, the necessary logical extension of Judge Kaplan's decision is that Dashiell, via its mason, was responsible for two months of the project delay. This obviously entitles the State to two months of liquidated damages...

#### Decision

The parties have submitted Motions for Summary Judgment<sup>4</sup> with supporting memorandum of law filed both before and after oral argument on the motions.

Upon reviewing the record and having heard argument, this Board finds that DGS did not file a claim for liquidated damages prior to this Board's issuance of a decision in MSBCA 1324 or thereafter until a final judgment was enrolled by the Circuit Court for Baltimore City. The record reflects DGS was aware of its legal right to file an affirmative claim for liquidated damages. The Circuit Court judgment is a bar to further litigation pursuant to the doctrine of res judicata as the Court of Appeals has clearly stated:

"The doctrine of res judicata is that a judgment between the same parties and their privies is a final bar to any other suit

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<sup>4</sup> DGS in its Motion for Summary Judgment raised an additional claim for \$7,000.00 for a total of \$67,000.00 erroneously concluding Dashiell was also responsible for 7 days of delay "due to its failure to timely schedule fabrication and delivery of hollow metal frames..." DGS dismissed this portion of its claim during the hearing.

upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but to all matters which with propriety could have been litigated in the first suit...." Shum v. Gaudreau, 317 Md. 49, 54, 562A.2d 707 (1989).

The Court of Appeals has further stated in Higgins v. Barnes, 310 Md. at 549, 530A.2d 724... "a plaintiff must assert all claims arising out of a particular transaction against a particular defendant or be barred from asserting them later." We note that DGS asserts it can file a claim at any time against a contractor for liquidated damages. We acknowledge that the State's waiver of sovereign immunity protection from a claim by a contractor, as promulgated in Section 12-202 of the State Government Article of the Annotated Code, does not appear to apply to the State. We believe, however, that pursuant to the General Procurement Law the State must assert a claim in a reasonable period or is thereafter, barred. The DGS failure to pursue its claim for liquidated damages until after final judgment of the Circuit Court this Board finds is unreasonable. DGS is thus barred from pursuing the claim.

The final judgment of the Circuit Court of Baltimore City on the merits does not allow DGS to continue litigation based upon a second Procurement Officer's decision. The doctrine of res judicata prohibits DGS to continue litigation when neither the Procurement Officer nor this Board has the authority to disregard the final judgment of the Circuit Court.

"It is fundamental to the doctrine of res judicata that there must have been some final adjudication." Surrey Inn, Inc. v.

Jennings, 215 Md. 446, 454, 138 A.2d 658 (1958). The judgment of the Circuit Court of Baltimore City modified this Board's decision pertaining to two months of delay damages this Board allowed for extended overhead, but it is clear that DGS did not establish before the Board or the Circuit Court whether Appellant was responsible and obligated to pay liquidated damages prior to the final judgment of the Circuit Court.

Therefore, Appellant's Motion for Summary Judgment is granted.

Dated:

September 23, 1992

Sheldon H. Press

Sheldon H. Press  
Board Member

I concur:

Robert B. Harrison III

Robert B. Harrison III  
Chairman

Neal E. Malone

Neal E. Malone  
Board Member

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1649, appeal of J. Roland Dashiell & Sons, Inc. under DGS Contract No. KO-004-821-001.

Dated:

September 24, 1992

Mary F. Priscilla

Mary F. Priscilla  
Recorder