BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of JAMES JULIAN, INC.	)	
	)	Docket No. MSBCA 1222
Under State Highway	)	
Administration Contract No.	)	
Wi-395-502-170	)	

May 14, 1985

Jurisdiction - The Legislature in enacting Section 25 of Chapter 775 of the Acts of 1980 effective July 1, 1981 conferred on a contractor who had a contract with the Department of Transportation the right to elect de novo review by the Board where the contract was entered into prior to the creation of the Board's predecessor (the MDOT Board) and the contract was still in force on July 1, 1981.

Jurisdiction - Review of Arbitration Decisions - Under Maryland law, only the courts have the inherent power to review an arbitration decision for fraud or gross error. If the parties to a State contract clearly agree to binding arbitration, the Board has no power of review.

Jurisdiction - Legislative Substitution of Remedy - The Legislature may retroactively alter or enlarge remedies on State contracts by conferring an election upon a contractor to have a dispute resolved de novo by the Board where its contract provides for binding arbitration without impairing the obligation of contract.

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MEMORANDUM OPINION
BY CHAIRMAN HARRISON ON SHA'S MOTION TO DISMISS

Findings of Fact

Appellant entered into the captioned contract with the Maryland Department of Transportation, State Highway Administration (SHA) on April 6, 1978 for the construction of a portion of the Salisbury By-Pass (relocated U.S. Route 13). The contract incorporated the March 1968 Specifications of the State Roads Commission (the predecessor agency of SHA) as supplemented

by the May 1975 SHA Supplement to Specifications. Subsequent to its work being accepted as complete in early July 1981, Appellant filed a delay claim with SHA seeking an equitable adjustment to the contract in the amount of $1,108,188.74. The SHA Chief Engineer, Gordon E. Dailey, issued SHA's final decision[1] on October 31, 1984 finding that Appellant was entitled to $32,236.48. Appellant filed a timely appeal with this Board on November 5, 1984 seeking review pursuant to the provisions of Section 25 of Chapter 775, Acts of 1980 (uncodified) which provides:

> "although a presently existing obligation or contract right may not be impaired in any way by this act, the procedural provisions of this act, including those requiring review by the Maryland State Board of Contract Appeals, may, at the option of the contractor, apply to contracts in force on the effective date of such provisions."

SHA has filed a Motion To Dismiss the appeal contending that Section 10.05-1 of the contract specifications provides for the Chief Engineer to be the final arbiter of Appellant's claim and that the appropriate appeal should be to the Circuit Court. Appellant argues on the other hand that Section 25 of Chapter 775, Acts of 1980, gives it the election of utilizing this Board for its appeal and that Section 10.05-1 of the specifications does not constitute a final binding agreement to arbitrate.[2] The parties never entered into a formal

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[1]The parties have not questioned whether the issuance of Mr. Dailey's decision complies with the provisions of Section 7-201(c) of Article 21 concerning final agency action. In the absence of comment by the parties and based upon our review of the record before us, we conclude that Mr. Dailey's decision is concurred in by the appropriate officials of the SHA and the Department of Transportation and thus constitutes final agency action.

[2]Section 10.05-1 provides:

"Authority of the Engineer"

> " 1. To prevent misunderstandings and litigation, the Engineer shall decide any and all questions which may arise as to the quality and acceptability of materials furnished and work performed and as to the manner of performance and rate of progress of said work, and shall decide all questions which may arise as to the interpretation of any or all plans relating to the work and of the Specifications, and all questions as to the acceptable fulfillment of the Contract on the part of the Contractor; and the Engineer shall determine the amount and quantity of the several kinds of work performed and materials which are to be paid for under the Contract, and such decision and estimate shall be final and conclusive, and such estimate, in case any question shall arise, shall be a condition precedent to the right of the Contractor to receive any money due under the Contract. Any doubt as to the meaning of or any obscurity as to the wording of these Specifications and Contract, and all directions and explanations requisite or necessary to complete, explain or make definite any of the provisions of the Specifications or Contract and to give them due effect, will be interpreted or given by the Engineer.
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> 2. The decision of the Engineer shall be final and he shall have executive authority to enforce and make effective such

contract amendment subsequent to award of the contract to provide for review by this Board or its predecessor, the Maryland Department of Transportation Board of Contract Appeals (MDOT Board).

Appellant's contract was still in effect on July 1, 1981.

Discussion

This Board previously construed the effect of Section 25 of Chapter 775, Acts of 1980, on an SHA contract containing Section 10.05-1 in Kasmer Electrical Contracting, Inc., MSBCA 1065 (January 12, 1983). In rejecting the argument that Section 10.05-1 precluded the contractor from electing to proceed de novo before this Board pursuant to Section 25 of Chapter 775, Acts of 1980, we said at pp. 10-11:

> Under SHA's interpretation, Specification Section 10.05-1 conflicts with this statutory language in that it deprives the MDOT Board, and ultimately this Board, of jurisdiction to resolve disputes de novo and purports to give this Board appellate jurisdiction to review the SHA Chief Engineer's decision.
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> At the outset we conclude that the parties cannot by private compact abridge or enlarge the jurisdiction of an administrative agency. Compare Md. Nat'l Cap. P. & P. Comm'n v. Washington Nat'l Arena, 282 Md. 588, 608, 386 A.2d 1216, 1230 (1978). This may be accomplished solely by statute. Accordingly, this Board by law has jurisdiction only to hear and resolve contract disputes de novo. If the parties clearly agreed to settle their disputes by using the SHA Engineer as a final arbiter, only the Courts may review the resulting decision for fraud or gross error.
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> For the following reasons, however, we conclude that the parties did not clearly agree to submit disputes to the SHA Engineer for purposes of binding arbitration. In this regard, we note the general rule in Maryland that subsisting laws enter into and form part of a contract as if expressly referred to or incorporated in its terms. See Downing Development Corporation v. Brazelton, 253 Md. 390, 398, 252 A.2d 849, 854 (1969). Accordingly, the disputes procedure prescribed by the Legislature was incorporated into the contract and must be read together with Specification Section 10.05-1. These two provisions may be read harmoniously as requiring disputes to be submitted initially to the SHA Engineer whose decision will be final unless appealed to the Board of Contract Appeals. Although SHA contends that Specification

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decisions and orders as the Contractor fails to carry out promptly."

> Section 10.05-1 constituted a waiver of Appellant's statutory right to appeal to the Board of Contract Appeals, we disagree. There is nothing in Specification Section 10.05-1 which indicated that it constitutes a waiver or relinquishment of the statutory disputes procedure. In the absence of clear language expressing a voluntary, informed waiver of this statutory procedure, we reject the SHA's interpretation of the contract and assume jurisdiction to resolve the present dispute de novo.

Thus it would seem that Kasmer would be dispositive of the issue before us. However, the contract in Kasmer was awarded on November 30, 1978 after the enactment of Chapter 418, Acts of 1978 (effective July 1, 1978) creating the predecessor of this Board, while the instant contract was awarded on April 6, 1978, before the effective date of Chapter 418. Chapter 418 gave this Board's predecessor (the MDOT Board) the following jurisdiction:

> (A) The Board shall hear and determine all disputes within its jurisdiction.
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> (B) The Board shall have jurisdiction over all disputes other than labor disputes arising under a contract with the Department, or as a result of a breach of a contract with the Department. . . ."

Section 3 of Chapter 418 provided that the act shall take effect July 1, 1978, "and shall be construed only prospectively and may not be applied or interpreted to have any effect upon or application to any contract entered into prior to the effective date of this act." Therefore, had this dispute arisen between July 1, 1978 and June 30, 1981 we have little doubt that the MDOT Board would have concluded that it did not have jurisdiction to entertain an appeal.[3]

Appellant, however, contends that Section 25 of Chapter 775 of the Acts of 1980,[4] effective July 1, 1981, entitles it to a de novo review by this Board since the agreement of the parties to submit disputes to the engineer for decision was a procedural remedy. As such, the Legislature could modify or change it as to contracts still in effect on July 1, 1981 by providing an option to the contractor to elect a different remedy without impairing an existing contractual obligation. Appellant further contends that Section 10.05-1 does not constitute a final binding agreement to arbitrate, since other sections of the contract, particularly Section 10.05-16 dealing with resolution of claims by the District Engineer, evidence an intent to provide administrative determinations at various levels within the SHA with a final decision by the Chief Engineer constituting only the threshold step to a lawsuit or MSBCA appeal. Conversely, SHA equates Section 10.05-1 to an agreement to arbitrate and contends that such agreement is valid and enforceable creating

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[3]As noted in the findings of fact, supra, the instant contract, awarded on April 6, 1978, was never amended to provide for review by this Board or its predecessor.

[4]Chapter 775 (codified as Article 21 of the Annotated Code) created the Maryland State Board of Contract Appeals (MSBCA) effective July 1, 1981. Section 22 provided that all appeals pending before the MDOT Board on July 1, 1981 were transferred to the MSBCA.

"a presently existing obligation or contract right" which may not be impaired by the provisions of Chapter 775. In SHA's view, Section 10.05-1 constitutes a so-called "Nelley" clause as construed by the Court of Appeals in Nelley v. Mayor of Baltimore, 224 Md. 1, 166 A.2d 234 (1960), whereby the parties agreed to and actually engaged in binding arbitration, whose result may only be reviewed by a court for fraud or such gross mistakes as to imply bad faith or failure to exercise an honest judgment.[5]

Assuming that Section 10.05-1 constitutes a bargained for contractual agreement by the parties to arbitrate and that such provision is a "presently existing obligation or contract right" accruing to the benefit of SHA under Section 25 we determine that resort to de novo review by this Board does not impair such obligation or right. Arbitration is a method of resolving disputes and SHA is not disadvantaged by a substitution of this Board for the Chief Engineer as the arbiter of Appellant's dispute. The procedures employed by this Board are designed to ensure fairness to both the government and the contractor and its decisions are subject to judicial review, albeit under the Administrative Procedure Act's standard of substantial evidence as distinct from a bad faith standard. The two remedies, which are essentially administrative in nature, are on a parity despite the distinction between the respective standards of review applied to their decisions. Therefore, we do not find that election to utilize de novo board review constitutes an actual impairment.

We further note that in the context of agreements between private parties (as distinct from a contract between the State and a private party) a legislative change in remedy if reasonably adequate and effective and subject to judicial review does not impair an existing contractual obligation. Compare Burke v. Fidelity Trust Co., 202 Md. 178, 96 A.2d 254 (1953); Nagel v. Gingher, 166 Md. 231, 240-241, 171 A. 65 (1934); Miners & Merchants Bank v. Snyder, 100 Md. 57, 66, 59 A. 707 (1904). We believe that the General Assembly may, as they have done here, retroactively alter or enlarge remedies on State contracts as well without impairing the obligation of contract. See Janda v. General Motors Corp., 237 Md. 161, 205 A.2d 228 (1964); Beechwood Coal Co. v. Lucas, 215 Md. 248, 137 A.2d 680 (1958). Compare Maryland Port Administration v. I.T.O. Corporation of Baltimore, 40 Md. App. 697, 395 A.2d 145 (1978), cert. denied, 284 Md. 745 (1979); The Budd Company, MDOT 1034 (November 9, 1981). Therefore, had this contract been awarded subsequent to July 1, 1978, the effective date of Chapter 418, Acts of 1978, creating the MDOT Board, we would have no hesitancy in following our decision in Kasmer, supra, and assuming jurisdiction for the reasons set forth therein.

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[5] Appellant disputes that the parties actually engaged in binding arbitration, contending that even if Section 10.05-1 constitutes an agreement to arbitrate it was denied an opportunity to be adequately heard. In view of our decision herein, we need not address this contention. For a discussion of what constitutes an agreement to arbitrate and the prerequisites thereof, see: Nelley v. Mayor of Baltimore, supra; Jos. Trionfo & Sons v. E. LaRosa & Sons, 38 Md. App. 598, 381 A.2d 727 (1978), cert. denied, 282 Md. 734 (1978); Mayor and City Council v. Ohio Casualty Ins. Co., 50 Md. App. 455, 438 A.2d 933 (1982).

However, SHA also argues that the Legislature never intended this Board to have jurisdiction over contract disputes arising out of Department of Transportation contracts where the contract was entered into prior to the creation of the MDOT Board and not subsequently amended to provide for review of disputes by either Board.[6] In SHA's view, the remedy for a party who entered into a written contract with an agency of the Department of Transportation after June 30, 1976, when the Legislature waived the defense of sovereign immunity in actions arising from written contracts,[7] and before July 1, 1978, when the Legislature created the MDOT Board, was whatever administrative remedy the contract provided for subject to judicial review by the courts and not review by this Board absent a post July 1, 1978 amendment of the contract to provide for Board review.

The language of Section 25 of Chapter 775, Acts of 1980, supra, refers to application of procedural provisions of the Act, including review by this Board at the option of the contractor, to contracts in force on the effective date of such provisions. We conclude that the words "such provisions" in Section 25 was intended by the Legislature to refer to the procedural provisions contained in Chapter 775, Acts of 1980, including Board review, which became effective on July 1, 1981. Since Appellant's contract was in force on July 1, 1981, arguably the Legislature intended to confer on Appellant the option to avail itself of the procedural provisions of the Act including Board review regardless of his ability to have appealed to the MDOT Board. Another interpretation of what was intended by the Legislature is that it was only extending the option to a contractor to avail itself of the procedural provisions of the Act respecting Board review where, as to contracts with the Department of Transportation, the contractor would have been entitled to bring an appeal to the MDOT Board by virtue of its contract having been awarded after July 1, 1978 when the MDOT Board was created or as a result of subsequent amendment to provide for Board review.

Recognizing that the issue before the Board is one involving the scope of its jurisdiction regarding contracts entered into with the Department of Transportation prior to July 1, 1978, and faced with different interpretations of the effect of Section 25, the Board may look for guidance from the courts of this state concerning determination of the scope of jurisdiction of an executive branch agency. As enunciated by the Maryland Courts, an administrative agency, such as the Board of Contract Appeals, is a creation of the Legislature, derives all of its authority from the legislative branch, and only possesses that authority which it is expressly given. See Dal Maso v. County Commissioners, 182 Md. 200, 205, 34 A.2d 464 (1942); Mayor & Alderman of

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[6]We do not consider the absence of an amendment to provide for Board review to affect this Board's jurisdiction over the appeal because, as we indicated in Kasmer, we view Section 25 as forming a part of Appellant's contract as if expressly referred to or incorporated in its terms. Cf. Maryland Port Administration v. C. J. Langenfelder & Son, 50 Md. App. 525, 528-31, 438 A.2d 1374 (1982).

[7]Chapter 450, Acts of 1976.

the City of Annapolis v. Annapolis Waterfront Company, 284 Md. 383, 394, 396 A.2d 1080 (1979). Consistent with these principles, this Board has strictly construed the extent of its jurisdictional grant. See Jorge Company, Inc., MSBCA 1047 (July 7, 1982); William E. McRae, MSBCA 1229 (April 22, 1985). Despite the Board's awareness that it must narrowly construe its jurisdiction it does not hesitate to conclude that it has jurisdiction when it is fairly apparent that the Legislature has conferred it.

When the Legislature enacted Chapter 775, Acts of 1980, it repealed Chapter 418, Acts of 1978. Accordingly, we may consider the prior law only if it patently has bearing on the latter. In 1978 the Legislature in enacting Chapter 418 specifically provided in Section 3 that the Act was inapplicable to any contract entered into prior to its effective date, July 1, 1978. However, no such language forbidding retroactive application appears in Chapter 775, and this Board will not assume the inferential existence of such a bar to Appellant's instant appeal merely because it would not have been able to appeal to our predecessor, the MDOT Board.

A cardinal rule of statutory construction is that a statute should be construed according to the ordinary and natural import of its language unless a different meaning is clearly indicated by the context, without resorting to subtle or forced interpretation for the purpose of extending or limiting its operation. Smelzer v. Criterion Ins. Co., 293 Md. 384, 388-389, 444 A.2d 1024 (1982); Harbor Island Marina v. Calvert Co., 286 Md. 303, 311, 407 A.2d 738 (1979). This Board, therefore, is not justified in disregarding the ordinary meaning of the language of Section 25 of Chapter 775, Acts of 1980, stating that a contractor may elect to follow procedural provisions of the Act to include the remedy of de novo Board review. The only argument advanced that such a reading is erroneous is that a presently existing obligation or contract right, i.e., bargained for binding arbitration, is being impaired or abridged by such a reading; an argument we have rejected.

Notwithstanding, the fact that Appellant could not have taken an appeal to the MDOT Board, this cannot diminish the procedural remedies afforded contractors under Section 25 of Chapter 775, Acts of 1980. When the Legislature created the MSBCA, it provided that disputes could be appealed to this Board from agencies other than those in the Department of Transportation. Chapter 775 was enacted in the 1980 Session of the General Assembly with a delay in effectiveness for one year, excepting provisions requiring development of regulations by the procurement departments and the Board of Public Works. We believe that one reason for this delay in effective date was to allow the Executive branch sufficient time to develop policies and procedures to comply with the new omnibus procurement law created by Chapter 775 including the development of procedures respecting appeals to this Board from agencies other than Transportation who had no experience with this type of remedial forum. The major procurement departments besides Transportation and the parties with whom they would contract were given a period of time to develop, absorb and become cognizant of the procedural mechanisms to handle disputes. The Department of Transportation was already familiar with Board type de novo review having had three years of experience with it under the MDOT Board. The Legislature in enacting Section 25 of Chapter 775 left it up to the contractor to determine if it would elect de novo review before this Board. There is no reason why Appellant should be treated any differently regarding this election than a contractor who entered into a contract with a State agency other than the

Department of Transportation prior to July 1, 1978 and whose contract with such agency was still in force on July 1, 1981. Since de novo review by this Board under Section 25 of Chapter 775 relates merely to remedies and forms of procedure, Section 25 applies to all proceedings instituted after its effective date whether the circumstances giving rise to the dispute arose before or after such date. Janda v. General Motors Corp., supra. Accordingly, this contractor could properly elect to take an appeal to this Board.

The Board of Contract Appeals was established in response to the waiver of sovereign immunity to permit resolution of disputes involving State contracts as defined by and under the procedures set forth in Chapter 775. Prior to July 1, 1976 a contract action against the State would have been barred by the doctrine of sovereign immunity. Calvert Associates v. Department of Employment & Social Services, 277 Md. 372, 357 A.2d 839 (1976); Chas. E. Brohawn & Bros. v. Board of Trustees of Chesapeake College, 269 Md. 164, 304 A.2d 819 (1973); University of Maryland v. Maas., 173 Md. 554, 197 A. 123 (1938); Chapter 450, Acts of 1976. When the State waives its right of sovereign immunity, it may dictate the terms under which it waives that immunity and it may clearly enlarge with retroactive effect procedural remedies fashioned in response to such waiver. See Dunne v. State, 162 Md. 274, 159 A. 751 (1932), cert. denied and appeal dismissed, 287 U.S. 564 (1932); Lohr v. Potomac River Commission, 180 Md. 584, 26 A.2d 547 (1942); Maryland Port Administration v. I.T.O. Corporation of Baltimore, supra; Janda v. General Motors Corp., supra; Beechwood Coal Co. v. Lucas, supra. Consistent with these principles, we conclude that Section 25 of Chapter 775 embraces contracts such as the one before us entered into prior to the effective date of Chapter 775 and still in force on such date.

For the foregoing reasons, Respondent's Motion to Dismiss is denied.