

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of JAMES T. LEWIS            )  
ENTERPRISES, LTD.                    )     Docket No. MSBCA 1732  
  )  
Under SHA Contract No. P-878-     )  
503-372                                 )

October 29, 1993

Jurisdiction - Procurement Contract - A promise to indemnify for delay damages that may occur in the course of public construction as a result of extra work in aid of private development does not constitute a procurement or procurement contract as defined by the General Procurement Law.

APPEARANCES FOR APPELLANT:

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APPEARANCES FOR RESPONDENT:

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MEMORANDUM OPINION BY MR. PRESS & CHAIRMAN HARRISON

This dispute arises out of an agreement between James T. Lewis Enterprises, et al., (Lewis), and State Highway Administration (SHA) and Prince George's County referred to herein as the "Lewis/SHA Agreement." The issue is whether the Lewis/SHA Agreement constitutes under the General Procurement Law a procurement contract standing alone and on its own; or whether together with Extra Work Order No. 8, it constitutes a four party contract under the General procurement Law which works a modification to SHA contract P-878-503-372 between SHA and Driggs Corporation (Driggs), the "SHA/Driggs Contract".

After receiving briefs and hearing argument of counsel we find for the reasons discussed below, the Lewis/SHA Agreement and Extra Work Order No. 8 do not constitute a single contract which modified the SHA/Driggs Contract nor, standing alone, does the Lewis/SHA Agreement constitute a procurement contract. Accordingly, the Board has no jurisdiction to entertain the

instant dispute arising under it.

Findings of Fact<sup>1</sup>

1. In the fall of 1986, SHA entered into a contract with Driggs for the construction of several bridges and new and reconstructed highways at the intersection of Interstates I-295 and I-95, Md. State Road No. 210 and Oxon Hill Road, adjacent to Woodrow Wilson Bridge on the east side of the Potomac River in Prince George's County.
2. Sometime in 1988, the developers of a proposed commercial center in this same geographic region, to be known as Port America, approached State and County transportation authorities about reconfiguring roads in order to better improve the flow of traffic and create better access around and to the proposed Port America development. As a result of that request, three written agreements were entered into between SHA, the County, Lewis, and Driggs. Although all of these parties were not signatories to all of the agreements, the three agreements acknowledge and cross reference each other.
3. The first of these agreements is known as Extra Work Order No. 8 ("E.W.O. 8")... This extra work order adds \$3,402,358 worth of construction work to Driggs' contract with SHA, including the construction of new ramps and bridges to provide for access into Port America and widening of Oxon Hill Road, according to the terms of the Lewis/SHA Agreement. It further provides that SHA is responsible for the first \$2,100,000 to be paid to Driggs in progress payments; the balance is to be paid by Lewis according to the terms of a separate agreement between Lewis and Driggs. E.W.O. 8 further provides that any claims by the contractor for any impact relating to the work added under E.W.O. 8 are ultimately the responsibility of Lewis according to the

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<sup>1</sup>The Findings of Fact to include footnotes 2, 3 and 4 below are taken from Respondent's Memorandum in Support of Jurisdiction.

terms of the Lewis/SHA Agreement.

4. The second of these agreements is the Lewis/SHA Agreement... which provides, in pertinent part, that:

- Lewis will pay for all Port America related work.
- Lewis will indemnify SHA from any claims by Driggs arising from the scope of work set forth in E.W.O. 8.
- Lewis will further indemnify SHA for any other claims by Driggs insofar as they arise from the "anticipated development or the development of Port America," "irrespective of whether such claim or request arose prior to the executive of this Agreement or the E.W.O."
- Lewis will indemnify SHA to the extent that Driggs makes any claim that it was unable to proceed with original contract work because of Port America modifications to that contract.
- Lewis will secure an irrevocable letter of credit in the amount of \$2,500,000 to insure Lewis' indemnification obligations to SHA.<sup>2</sup>

5. Driggs performed the Port America related work under its agreements with SHA and Lewis. In August 1991, Driggs submitted a claim for over seven million dollars to SHA, allegedly for extra work and 22 months of delay. By this time, Driggs had been paid \$2,100,000 by SHA for its work under E.W.O. 8, but had not been able to collect from the developer for the \$1,302,538 balance remaining for work contemplated in E.W.O. 8 to be paid directly by Lewis to Driggs.<sup>3</sup>

6. Driggs appealed its claim against SHA to this Board in September, 1992 in MSBCA 1678. Part of SHA's defense in

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<sup>2</sup>A third agreement, between Lewis and Driggs governs other Port America construction work to be performed by Driggs and, although referenced in the two documents discussed, contains no facts relevant to this discussion.

<sup>3</sup>Also by this time, it had become clear that the Port America development was a bust. Litigation between Driggs and the Port America developers ensued.

that appeal was that much of the project delay was attributable to Port America related work and Driggs was obligated under E.W.O. 8 to look to Lewis, not SHA, for payment of those claims. On April 30, 1993, SHA settled the Driggs claim for \$2.5 million.<sup>4</sup> On May 10, 1993, pursuant to the provisions of E.W.O. 8 and the [Lewis/SHA] Agreement, SHA made demand on Lewis for indemnification in the amount of \$1.34 million which SHA had assessed, based on expert analysis, was the reasonable value of Driggs' claim that was attributable to Port America work. On May 14, 1993, Lewis responded to this letter and stated that because it was not involved in the SHA/Driggs litigation and settlement, it had no liability. On June 1, 1993, the SHA Chief Engineer asked Lewis to reconsider its position. On June 23, 1993, Lewis reaffirmed its position, and simultaneously filed the instant appeal.

#### Decision

A threshold issue in this appeal raised preliminarily by the Board is whether SHA (and Prince George's County) should be seeking to enforce its indemnity agreement with Appellant before this Board or in some other forum relative to payments for delay damages to Driggs Corporation by SHA pursuant to Extra Work Order No. 8 under SHA Contract P-878-503-372 between Driggs and SHA.

After work had commenced under SHA Contract P-878-503-372, Appellant approached SHA and requested a reconfiguration of roads to create better access to its proposed private development called Port America. As a result of that request three written agreements were entered into between SHA, Prince George's County, Appellant and Driggs. The agreements acknowledge and cross reference one another although all parties were not signatories to all of the agreements. SHA and Appellant contend that the agreements should be read together and constitute a modification to the SHA/Driggs

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<sup>4</sup> This settlement agreement expressly acknowledges and reserves SHA's rights to pursue its claims for indemnity against Lewis.

Contract where the developer received the benefit of road construction for access to Port America and the State received a potential economic development benefit with the item procured from Lewis being an indemnity relative to the cost of any delay which would occur to the work under Contract No. P-878-503-372 work.

The argument of SHA and Appellant that the agreements should be read together is based on Harmans Associates Limited Partnership, MSBCA 1517, 1518 and 1519, 3 MSBCA ¶301 (1992) presently pending decision in the Court of Special Appeals. Harmans involved a procurement initiated by the Department of General Services seeking proposals to creatively finance the construction of buildings for the State without using normal funding mechanisms and involved ultimately in response to the request for proposals the creation of several related documents to accomplish such purpose. The Board analyzed the related documents (to include the request for proposals) collectively since they all arose out of the initial request for proposals for off balance sheet financing for construction of a building for State use. In the appeal herein, after construction had commenced under a public highway contract between Driggs and SHA financed by federal and State funds, a private developer persuaded SHA on economic development grounds to use SHA's general contractor to perform work to provide access to the development. In anticipation of delay damages under the SHA/Driggs Contract that might result from this enterprise the developer agreed to indemnify SHA for such damages. The Board is thus faced with a transaction unlike Harmans where it was contemplated from the beginning that a building was to be constructed. In this appeal it was not contemplated when the SHA/Driggs Contract was entered into that private development of Port America was one of the purposes of the SHA/Driggs Contract.

. Focusing on the Lewis/SHA Agreement standing alone we note the definitions provided for "procurement" and "procurement contract" by the General Procurement Law, and observe that this Board's jurisdiction depends upon the Lewis/SHA Agreement falling within

such definitions.<sup>5</sup>

- (1) Procurement. -- (1) "Procurement" means the process of  
    (i) leasing real or personal property as lessee; or  
    (ii) buying or otherwise obtaining supplies, services,  
construction, construction related services, architectural  
services, or engineering services.  
(2) "Procurement" includes the solicitation and award of  
procurement contracts and all phases of procurement contract  
administration.  
    (m) Procurement contract. -- (1) "Procurement contract"  
means an agreement in any form entered into by a unit for  
procurement....

Section 11-101, State Finance and Procurement Article.<sup>6</sup>

The promise to indemnify for delay damages that may occur in  
the course of public construction as a result of extra work in aid  
of private development does not constitute a procurement or  
procurement contract under the above definitions. Therefore, the  
Board lacks jurisdiction and the appeal must be dismissed.

It is ORDERED this *29th* day of *OCTOBER*, 1993 that the  
appeal is dismissed with prejudice.

Dated: *October 29, 1993*

*Robert B. Harrison III*  
Robert B. Harrison III  
Chairman

*Sheldon H. Press*  
Sheldon H. Press  
Board Member

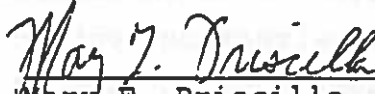
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<sup>5</sup> The Board has many times observed that it only has  
jurisdiction over contracts as specifically defined by the General  
Procurement Law. See Ackerley - BWI Airport Advertisers, MSBCA  
1318, 2 MSBCA ¶142 (1987) and cases cited therein at P. 2. See  
also Eastern Shore Associates L.P./Harmans Associates L.P., MSBCA  
1517, 1518 and 1519, 3 MSBCA ¶259 (1990).

<sup>6</sup> The Lewis/SHA Agreement was executed on July 8, 1988.  
The 1988 Code Revision language as set forth above was not  
effective until October 1, 1988. No substantive change was brought  
about by the revision, and such language is used for convenience of  
reference.

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1732, appeal of James T. Lewis Enterprises, LTD. under SHA Contract No. P-878-503-372.

Dated:

  
Mary F. Priscilla  
Recorder

NEAL E. MALONE

DISSENTING IN PART

The majority on its own motion has declined to find subject matter jurisdiction over the contract standing alone, in this appeal between James T. Lewis Enterprises, Ltd. (Lewis) and State Highway Administration (SHA) and Prince George's County (P.G.)<sup>7</sup>. It is to this conclusion by the majority that my dissent is directed.

This Board has decided previously the form which a procurement contract must take. Shirley Novatney, MSBCA 1554, 3 MICPEL ¶279 (1991). Clearly, this contract is a writing, signed by an official for the State or one of its units which the official was acting within the scope of the authority with the unambiguous intention to be bound. The contract standing alone in format meets the minimum test for a procurement contract.<sup>8</sup> I agree with the majority in rejecting the argument that based on reasoning in Harmans, supra all of the agreements read together as a whole constitute the procurement contract. Lewis' reasoning is flawed relying on Harmans, supra based on the facts. In Harmans, supra, the RFP resulted in

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<sup>7</sup> There is no express exclusion under subject matter jurisdiction for this Appeals Board where another non-State governmental unit is also a signatory in addition to a State official on a procurement contract.

<sup>8</sup> The method of procurement was not an issue during the hearing and it is reasonably inferred that sole source was actually used.

numerous subsequent agreements. All of the parties knew from the inception what variety of agreements would result and did intend to be bound by them as a procurement contract. Here, an interloper, Lewis, solicited to be considered as additional work to an ongoing procurement construction contract. In Harmans, supra no contiguous landowner sought construction of roadways from SHA. The relationship that this appeal has to the other contract between SHA and Driggs Corporation (Driggs) #P-878-503-372 is in indemnity. Consequently, the majority correctly did not read all of these agreements together under the reasoning given in Harmans, supra as constituting the procurement contract since the factual basis for that reasoning is not present here.

The majority however, concludes that the indemnity agreement, standing alone, does not constitute a procurement contract or procurement contract under the statutory definition. The majority makes this conclusion without offering any rationale. The majority makes an apparent policy distinction based upon the contract being "in aid of private development." I disagree. The roadways being constructed were public improvements open to public use to insure public access. Nothing in the record supports a contrary factual finding.

The implementing regulations given in COMAR are remedial in nature. The definitions for construction, construction related services, and procurement are broad and relate to the overall administration and management that pertain to the process of construction and procurement.<sup>9</sup>

COMAR 21.02.02.02 defines the Appeals Board jurisdiction as,

**"Jurisdiction.**

*The Appeals Board shall have jurisdiction to hear and decide all disputes arising under a contract with any State agency, or as a result of a breach of contract with any State agency, or as a result of a protest relating to the award of a contract with any State agency, except for architectural services or engineering services contracts entered into pursuant to Subtitle 12 of this title. The Appeals Board has*

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(See COMAR 21.01.02.01 (24), (25) and (65)).



no jurisdiction over labor disputes or a contract claim relating to a lease of real property."

The subject matter jurisdiction of this Board is given in State Finance and Procurement Article §15-211, over procurement contracts; which is a term defined also in State Finance and Procurement Article §11-101 (l) and (m), which includes "construction related services" and "all phases of procurement contract administration". The term construction related services is also defined in State Finance and Procurement Article §11-101 (f) as;

Construction related services. -- "Construction related services" means feasibility studies, surveys, construction management, construction inspection, and similar efforts associated with construction or the acquisition of public improvements as defined in § 4-401 (d) of this article."

State Finance and Procurement Article §4-401 is given below:

"Subtitle 4. Public Improvements and Land Acquisition.

Part I. Definitions; General Provisions.

§ 4-401. Definitions.

(a) In general. -- In this subtitle the following words have the meanings indicated.

(b) Chief. -- "Chief" means the Chief of the Division.

(c) Division. -- "Division" means the Land Acquisition Division of the Department.

(d) Public improvement. -- "Public improvement" includes any construction, maintenance, or repair of any building, structure, or other public work:

(1) owned or constructed by the State or any other unit of the State Government, including the University of Maryland System; or

(2) acquired or constructed in whole or in part with State funds. (An. Code 1957, art. 78A, § 20; 1985, ch. 11, § 2; 1988, ch 246, § 2.)"

The statutory definitions are broad and foresee efforts associated with the construction or acquisition of public improvements. The indemnity agreement in this appeal was an effort associated with the acquisition of a public improvement.

The majority cites Ackerley - BWI Airport Advertisers, MSBCA

1318, 2 MSBCA §142 (1987) in its statement that subject matter jurisdiction depends upon falling within the procurement definition. While I agree as a general statement that subject matter jurisdiction must be a procurement, Ackerley - BWI Airport Advertisers, supra does not support the majority in its finding factually. The Appeals Board denied finding jurisdiction in Ackerley, supra based on a factual determination that the contract arose out of a lease where the State was the landlord and therefore, was squarely outside of Appeals Board jurisdiction. There is no suggestion here that the indemnity contract is a lease.

The majority correctly finds that SHA received a "potential economic development benefit", but should additionally note that SHA also acquired part of the property of Lewis upon which the Extra Work Order No. 8 was performed. Since this indemnity was an effort associated with the acquisition of the public improvement under P 878-503-372 it correctly falls within the definition of a construction related service and/or a phase of procurement contract administration and is therefore appropriate subject matter under the Appeal's Board jurisdiction under the facts of this appeal.

Dated: 10/29/93

  
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Neal E. Malone  
Board Member

#### Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

\* \* \*

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1732, appeal of James T. Lewis Enterprises, LTD. under SHA Contract No. P-878-503-372.

Dated: 10/29/93

*Mary F. Priscilla*

Mary F. Priscilla  
Recorder

1. The first part of the document is a letter from the Secretary of the State to the Governor, dated 18th March 1877. It contains a report on the progress of the work done during the year, and a list of the names of the persons who have been appointed to various offices.

2. The second part of the document is a list of the names of the persons who have been appointed to various offices, and the names of the persons who have been re-elected to the same offices.

3. The third part of the document is a list of the names of the persons who have been appointed to various offices, and the names of the persons who have been re-elected to the same offices.

*[Handwritten signature]*  
Secretary of the State