

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of JOHN DISNEY)
) Docket No. MSBCA 1698
Under (DGS) - Proposed Trade of)
Three Helicopters and an Airplane)
for Used King Air C-90)
Airplane for the Md State Police)
Aviation Division)

January 18, 1993

Board of Contract Appeals - Jurisdiction

The Board of Contract Appeals lacks jurisdiction over procurement effected by exchanges of personal property conducted pursuant to the disposition of excess and surplus property statute, Title 4, Subtitle 5 of the State Finance and Procurement Article where the record does not reflect that the transaction was undertaken to evade the General Procurement Law.

APPEARANCE FOR APPELLANT: Edward J. Birrane, Jr., Esq.
Birrane, Harlan, Brattan
& Bendos
Baltimore, MD

APPEARANCE FOR RESPONDENT: John H. Thornton
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: George A. Nilson, Esq.
Piper & Marbury
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant appeals the denial of its protest over award of a contract involving the trade of three helicopters and an airplane owned by the Maryland State Police ("MSP") for an airplane acquired by Edwards & Associates, Inc. ("Edwards"). The contract was awarded on October 19, 1992 and the transaction was completed on November 25, 1992 when the aircraft were physically exchanged.

Findings of Fact

1. Commencing in early 1992 MSP began to explore the marketplace for an upgraded aircraft to replace the piper Navajo for use in prisoner extraditions and received proposals from and negotiated with (among others) Edwards and Appellant.
2. On October 19, 1992, the Department of General Services

("DGS"), purportedly acting pursuant to the authority granted under Title 4, Subtitle 5 of the State Finance and Procurement Article (SF) of the annotated Code of Maryland and COMAR 04.03.01, awarded a contract on a sole source basis to Edwards, for the trade of three Bell Jet Ranger helicopters and a Piper Navajo airplane of the MSP for a 1980 King Air C-90 airplane acquired by Edwards. The award was accomplished by the issuance of a requisition form DGS 910-7 containing an excess property certification executed by a DGS procurement officer on October 19, 1992 and issuance on October 19, 1992 of a DGS form 950-9 certifying the MSP helicopters and airplane as excess of MSP needs and executed by the Superintendent of the MSP.

3. These actions followed issuance of a memorandum dated September 16, 1992 from the Secretary of the Department of Public Safety and Correctional Services to the MSP Superintendent instructing him to proceed with an aircraft acquisition by trade pursuant to Gubernatorial approval.

4. The DGS form 950-9 contains a written determination by the DGS Purchasing Bureau Procurement Officer, Paul T. Harris, Sr., pursuant to COMAR 21.05.05.02B, that the trade accomplished as a sole source and a brief explanation for the determination. Mr. Harris is the designee of the Secretary of DGS for the purpose of approving under COMAR 21.05.05.02B the use of sole source procurement.

5. By letters dated (1) October 22, 1992 to an official of MSP, (2) October 23, 1992 to the Secretary of DGS and (3) November 10, 1992 to the office of the Attorney General at DGS, Appellant complained of misconduct by State personnel, unfairness and violation of the procurement law and the disposition of excess property law arising out of the transaction with Edwards.

6. On November 10, 1992, the Procurement Officer, Mr. Harris, sent Appellant a letter requesting specific written documentation or information to support the "protest." On November 13, 1992, Appellant delivered to Mr. Harris a letter of the same date further arguing the grounds for the protest.

7. The MSP conducted an investigation into the allegations contained in Appellant's letter of October 22, 1992. The method and results of this investigation were set forth in a report dated November 23, 1992 from Major Sheridan of the MSP to the Superintendent of the MSP. Major Sheridan concluded that there was no truth to Appellant's allegation of misconduct on the part of State personnel.

8. On November 24, 1992, after receiving a copy of Major Sheridan's report, Mr. Harris issued a Procurement Officer's final decision denying the protest as embodied in the October 23, November 10 and November 13 correspondence referenced above.¹

9. On November 25, 1992, the MSP and Edwards completed the transaction by physically exchanging the aircraft.

10. Appellant appealed to this Board on December 1, 1992.

Decision

DGS initially asserts that whatever the merits of the matter may be, and assuming the Board has jurisdiction thereover, the appeal should be denied because the case is moot. Respondent notes that the contract had been awarded prior to the Appellant's filing of the "protest" and that it has since been fully performed by both sides. In such a case DGS argues, citing Kennedy Temporaries, MSBCA 1061, 1 MSBCA ¶ 21 (1982), vacated on other grounds 57 Md. App. 22, 468 A.2d 1026 (1984), that no relief may be obtained and therefore, the appeal should be denied. Such a situation, however, does not relieve the Board of its statutory responsibility to hear and decide all appeals arising from the final action of a unit. See § 15-211, division II, State Finance and Procurement Article. COMAR 21.10.02.11 permits contract execution under certain circumstances pending decision on protests and appeals and should this Board sustain an appeal by issuance of a final decision and

¹ Although a procurement officer's decision was rendered on Appellant's protest none of the parties involved in this transaction treated the transaction as one being subject to the General Procurement Law, i.e., Division II, State Finance and Procurement Article.

thereby find the contract to have been awarded in violation of the General Procurement Law, the Board of Public works may or may not ratify the contract under authority conferred by SF § 11-204 and COMAR 21.03.01.03. In this appeal should this Board determine with finality that the contract was awarded in violation of the General Procurement Law, the contract would be deemed void pursuant to SF § 11-204. Should the Board of Public Works let such determination stand presumably MSP would be instructed to attempt to cancel the exchange and retrieve the helicopters and Piper Navajo. Accordingly, the appeal is not moot.

DGS next argues that this Board lacks jurisdiction over the appeal.² This Board in exercise of its responsibility to hear and decide disputes has authority to determine whether it has jurisdiction over the particular dispute at hand.³

Counsel for DGS observes that the General Assembly in Title 4, Subtitle 5, of the State Finance and Procurement Article has granted DGS authority independent of the General Procurement Law (SF, Division II) to dispose of excess and surplus personal property by various methods including trade-in of surplus property. In recognition of this empowerment to act outside the General Procurement Law, the Board of Public works has provided that disposal of surplus or excess personal property is exempt from applicability of the procurement regulations. COMAR 21.01.03.01A(8). Counsel

² The procurement officer's final decision on Appellant's protest stated that the transaction involved was not subject to the General Procurement Law and thus this Board would lack jurisdiction over an appeal. At the hearing on January 13, 1993, DGS and Edwards moved for summary disposition of the appeal on grounds this Board lacks jurisdiction over the transaction. At the conclusion of Appellant's case and following receipt of argument of counsel the Board advised the parties that the appeal would be dismissed for lack of jurisdiction and that a written decision would be issued as soon as possible.

³ See e.g. R&E Consolidated Services, Inc., MSBCA 1375, 2 MSBCA ¶ 187(1988); Flomax Enterprise, MSBCA 1425, 3 MSBCA ¶ 203(1989).

agree and we find that SF Title 4, Subtitle 5 dealing with excess and surplus property disposition is separate and distinct from SF, Division II, the General Procurement Law. While we further find that the transaction at issue in this appeal constitutes a procurement in the generic sense (i.e. the State sought to acquire or procure an upgraded aircraft for use in extradition of prisoners) this Board only has jurisdiction over procurements to which the General Procurement Law applies. See R&E Consolidated Services, Inc., MSBCA 1375, 2 MSBCA ¶ 187 (1988). The Board does not have jurisdiction over transactions undertaken pursuant to SF Title 4, Subtitle 5. The record reflects that this procurement was conducted pursuant to SF Title 4, Subtitle 5 and not the General Procurement Law. The record does not support Appellant's allegation that DGS and MSP resorted to accomplishing the transaction under the guise of a surplus property trade in an attempt to circumvent the General Procurement Law. Appellant's counsel at the hearing stated that he was not accusing the MSP or DGS of improper conduct or wrongdoing. There is nothing in the record which supports Appellant's speculation that the exchanged aircraft were only deemed excess as a means to accomplish the acquisition of the King Air C-90 aircraft.⁴

⁴ The determination that the MSP helicopters and Piper Navajo were excess of MSP's needs was not required by SF Title 4, Sub-title 5 to have occurred by any specific period of time prior to the acquisition of the replacement aircraft. However, we question whether an agency may accumulate excess property over a period of time with the intention of someday using such excess property to acquire other property or service outside of the General Procurement Law.

Dated: January 18, 1993

Robert B. Harrison III
Robert B. Harrison III
Chairman

I concur:

Neal E. Malone
Neal E. Malone
Board Member

DISSENTING OPINION BY MR. PRESS

From the written record and testimony presented at the hearing I am unable to concur with the decision of the Board to grant the Motion for Summary Disposition.

Dated: January 18, 1993

Sheldon H. Press
Sheldon H. Press
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 MSECA 1698, appeal of John Disney under (DGS) - Proposed Trade of Three Helicopters and an Airplane for Used King Air C-90 Airplane for the Md State Police Aviation Division.

Dated: January 18, 1993

Mary J. Priscilla
Mary J. Priscilla
Recorder