

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of
JORGE COMPANY, INC.

Under MTA Contract No. NW-07-12

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Docket No. MSBCA 1047

July 7, 1982

Jurisdiction of MSBCA — Maryland Annotated Code (1957, 1981 Repl. Vol., 1981 Supp.), Art. 21, §§ 1-101(h), 7-201(d) permit an appeal of an adverse procurement officer's decision to the MSBCA only by a person having a contract with a State agency. Under appropriate circumstances, however, an appeal may be brought by a subcontractor in the name of the prime contractor.

Jurisdiction of MSBCA — The Board may not consider an untimely appeal since the 30 day period prescribed by Md. Ann. Code (1957, 1981 Repl. Vol., 1981 Supp.), Art. 21, § 7-201(d)(2) is a mandatory requirement which must be satisfied in order to perfect the Board's jurisdiction.

OPINION BY MR. KETCHEN ON MTA's MOTION TO DISMISS

This appeal has been taken by a second-tier subcontractor from the August 13, 1981 final decision of the Mass Transit Administrator denying a claim for \$20,936.97 in additional labor costs and equipment rental fees incurred while awaiting the clarification of a contract requirement for the use of "dielectric filler" to field coat mechanical joints. The Mass Transit Administration (MTA or Respondent) moves that we dismiss Appellant's appeal on the grounds that this Board lacks jurisdiction over a direct appeal brought by a subcontractor and that the appeal was untimely.

Findings of Fact

On January 23, 1980, the MTA entered into Contract No. NW-07-12 with Sessinghaus and Ostergaard, Inc. for the construction of the Northwest Shop for the Baltimore Region Rapid Transit System. The work included construction of a three-floor main shop building, a maintenance-of-way or blowdown building, parking lots, access roads, and installation of utilities and fencing. Installation of MTA-furnished equipment and trackwork also was required contractually.

Sessinghaus and Ostergaard subcontracted part of this work to the T. A. Gorman Company, a mechanical contractor. Appellant was a second-tier utility subcontractor engaged by the T. A. Gorman Company.

By letter dated October 15, 1980, Appellant filed a claim with the MTA Engineer alleging that its work had been delayed while awaiting clarification of an MTA

contract requirement for "dielectric filler"¹ material. In this regard, Appellant contended that it was entitled to \$20,936.97 in standby costs. By letter dated November 20, 1980 however, the MTA Resident Engineer informed Appellant that claims relating to the contract could be submitted only by the prime contractor. Accordingly, on February 17, 1981, the prime contractor resubmitted the dielectric filler claim to the MTA Administrator on behalf of Appellant.

On August 13, 1981, the MTA Administrator mailed a final decision to the prime contractor denying its subcontractor's claim. The decision was received on August 17, 1981. Appellant's notice of appeal, dated September 16, 1981, was hand delivered to the Board on September 17, 1981, thirty-one days after receipt of the decision by the prime contractor. The appeal thus was filed with the Board beyond the 30 day time period for appeal provided by the Maryland procurement statute and its implementing regulations. Further, the prime contractor did not sponsor Appellant's appeal or otherwise authorize Appellant to prosecute the appeal in its name.

DECISION

The MTA's motion to dismiss initially challenges this Board's jurisdiction to resolve a direct appeal taken by a second-tier subcontractor from an agency final decision. In this regard, the MTA alleges that the Board lacks jurisdiction since there is no privity of contract between the MTA and Appellant. However, notwithstanding the fact that the contract between the MTA and its prime contractor did contain a "Disputes" clause which outlined the administrative remedy being provided, the Board's jurisdiction is not governed thereby. Instead, it is Maryland law which determines Appellant's right to take this appeal. Accordingly, we must examine Maryland's procurement statute to determine whether jurisdiction was intended under these facts.

Pursuant to Ch. 775, Acts 1980, the Maryland State Board of Contract Appeals was created as an independent agency within the Executive Branch.² The Board expressly was given jurisdiction to hear and decide all appeals arising under the provisions of Md. Ann. Code (1957, 1981 Repl. Vol., 1981 Supp.), Art. 21, §7-201(d).³ With regard to contract disputes, the Legislature provided that a "contractor" may bring an appeal within 30 days of receipt of notice of a final action by the procurement officer of the using agency disapproving a settlement or approving a decision not to settle a dispute relating to a contract entered into by the State.⁴ The issue here, therefore, concerns whether the term "contractor" was intended by the Legislature to refer only to a prime contractor.

¹Art. 3.05 B.1., Section 02555 of the contract Special Provisions required mechanical joints used with ductible iron pipe to be enclosed by a pre-formed shell which was to be packed with a "dielectric filler."

²Md. Ann. Code (1957, 1981 Repl. Vol., 1981 Supp.), Art. 21, §7-202(a).

³See Md. Ann. Code (1957, 1981 Repl. Vol., 1981 Supp.), Art. 21, §7-202(c)(1).

⁴Md. Ann. Code (1957, 1981 Repl. Vol., 1981 Supp.), Art. 21, §7-201(d)(2).

Md. Ann. Code (1957, 1981 Repl. Vol., 1981 Supp.), Art. 21, §1-101(h) is dispositive of the MTA's initial ground for dismissal. This statutory language expressly defines a "contractor" as "...any person having a contract with a State agency. Contractor does not include employees with labor contracts." Since Appellant therefore does not have a contract with the MTA, it clearly was not entitled to bring a direct appeal to this Board.⁵

While the preceding conclusion is sufficient to grant the MTA's motion to dismiss, such a dismissal ordinarily would be without prejudice to the right of the subcontractor to refile its appeal in the name of the prime contractor.⁶ For this reason, it further is necessary to address the MTA's second ground for dismissal pertaining to the timeliness of Appellant's claim. This ground, if sustained, would result in a dismissal with prejudice.

Appellant's appeal was received 31 days after receipt of the agency final decision by the prime contractor. The only issue to be resolved, therefore, is whether the Board may waive the statutory 30 day filing period under appropriate circumstances. Compare Ervin D. Judkins dba Emperor Carpet & Janitorial Service, GSBCA No. 6164, 81-2 BCA ¶15,350, at p. 76,043.

Maryland courts steadfastly have enforced the doctrine of sovereign immunity absent legislative waiver. Katz v. Washington Suburban Sanitary Commission, 284 Md. 503, 507, 397 A.2d 1027, 1030 (1979); Board v. John K. Ruff, Inc., 278 Md. 580, 584, 366 A.2d 360, 362 (1976); University of Maryland v. Maas, 173 Md. 554, 559, 197 A. 123, 125 (1938). The extent to which a party may obtain redress from the State and the procedures under which they must abide thus are solely within the purview of the Legislature to prescribe. Dunne v. State, 162 Md. 274, 289-90, 159 A. 751, 757 (1932), cert. denied, 287 U.S. 564 (1937). Cf. Lohr v. Upper Potomac River Commission, 180 Md. 584, 26 A.2d 547 (1942). Further, where the Legislature waives the defense of sovereign immunity, the conditions of the State's consent to judicial or quasi-judicial action are to be strictly construed. Dunne v. State of Maryland, supra; compare United States v. Mitchell, 445 U.S. 535, 538 (1980); compare Western Pacific Enterprises, ASBCA No. 25822, 81-2 BCA ¶15,217.

Here the Legislature created a two-tiered administrative disputes procedure which affords a contractor the opportunity to appeal a procurement officer's adverse decision to this Board. Such an appeal, however, is required to be taken within 30 days of receipt by the contractor of the procurement officer's decision. Md. Ann. Code (1957,

⁵This statute follows the common law in Maryland which generally provides that a subcontractor may not bring an action against an owner due to the subcontractor's lack of privity with the owner. McNulty v. Keyser Office Building Company, 112 Md. 638, 644, 76 A. 1113, 1116 (1910).

⁶Depending upon the subcontract language, or other agreement, a subcontractor may bring an appeal in the name of the prime contractor. Under such circumstances, the Board would have jurisdiction. Consequently, we ordinarily would dismiss without prejudice in order to permit the appeal to be properly filed. Compare Hamilton and Voeller, AGBCA No. 79-137, 79-2 BCA ¶13,992; Owens-Corning Fiberglass Corp. v. United States, 190 Ct. Cl. 211, 419 F.2d 439 (1969); Corway, Inc., ASBCA No. 20794, 76-1 BCA ¶11,685; M. W. Agnew Construction Co., GSBCA No. 4178, 75-1 BCA ¶111,086.

1981 Repl. Vol., 1981 Supp.), Art. 21, §§7-201(d)(2) and 7-202(c)(1). In relinquishing sovereign immunity to this extent, the Legislature did not grant any discretion to this Board to waive the 30 day appeal period upon good cause shown. In the absence of discretion and, concomitantly, in view of the need to strictly construe this statutory time period, we accordingly find the 30 day period to be a mandatory requirement which must be satisfied to perfect jurisdiction. Compare Policy Research, Inc., ASBCA No. 26144, 82-1 BCA ¶15,618; Capt. Joe's Surplus Stores, Inc., ASBCA No. 26315, 82-1 BCA ¶15,523. Accordingly, Appellant's untimely appeal is dismissed with prejudice.