

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of RELIABLE JANITOR)
SERVICE)
Under MPA Contract No. 12488-S) Docket No. MSBCA 1247

March 21, 1986

Motion for Reconsideration - Appellant failed to demonstrate by a change in conditions or other different factors that an error was caused by fraud, mistake, surprise or inadvertence.

APPEARANCES FOR APPELLANT:

Jonathan A. Azrael, Esq.
Paul J. Schwab, Esq.
Azrael, Gann and Franz
Towson, MD

APPEARANCE FOR RESPONDENT:

J. Marks Moore, III
Assistant Attorney General
Baltimore, MD

MEMORANDUM OPINION

On February 3, 1986, following an evidentiary hearing on November 19 and 20, 1985 and receipt of Appellant's brief on a collateral issue that arose during the hearing, the Board issued a decision in the captioned matter sustaining the appeal. The essence of the decision was that Appellant's failure to provide the requisite number of hours of labor called for by a contract for janitorial services for the World Trade Center was excused due to the Maryland Port Administration's institution of a pre-hiring security check requiring clearance of Appellant's employees before they could begin to work. MPA's withholding of the Appellant's final two months of payment related to the shortfall in hours thus was not authorized. A copy of this decision is attached hereto as Appendix A and incorporated herein as if fully set forth.¹ This decision was received by MPA on February 4, 1986. On March 6, 1986, MPA filed a Motion for Reconsideration (Motion) pursuant to COMAR 21.10.06.30 which provides:

¹The amount in controversy was less than \$50,000, and Appellant elected the "Accelerated" procedure provided for in COMAR 21.10.06.12. Pursuant to the provisions of COMAR 21.10.06.12D(3) the opinion is relatively short and contains only summary findings of fact and conclusions of law.

A motion for reconsideration, if filed by either party, shall set forth specifically the ground or grounds relied upon to sustain the motion, and shall be filed within 30 days from the date of receipt of a copy of the decision of the Appeals Board by the party filing the motion.

The Motion urged three grounds for reconsideration and requested that Chairman Harrison who authored the decision² recuse himself from consideration of the Motion. The Motion was devoid of legal citation or authority and contained no specific references to the transcript of the hearing or the exhibits.

The three grounds for reconsideration were (1) that the findings of fact were in conflict with the record and generally reflect rejection of the testimony of MPA's witnesses where that testimony was favorable to MPA; (2) that the Board erred in allowing testimony regarding a janitorial contract entered into between MPA and another janitorial service immediately subsequent to the subject contract, and that the Board should reconsider its decision without regard to that testimony; and (3) that Chairman Harrison did not impartially decide the appeal because of his prior representation of MPA and acquaintanceship with one of its witnesses.

This Board has observed that a motion for reconsideration of its decision, to be considered favorably, should demonstrate that the Board's decision was in error through fraud, surprise, mistake or inadvertence. See: Memorandum Opinion (Published) in 11 Firstfield Road Limited Partnership, MSBCA 1232 (November 5, 1985) and cases cited therein at p. 6. MPA's first contention that the findings of fact were in conflict with the record and generally reflect rejection of the testimony of MPA's witnesses where that testimony was favorable to MPA mischaracterizes the findings contained in the Board's decision. More significantly, MPA's argument in this regard does no more than express dissatisfaction with the Board's decision. MPA has proffered no new evidence and has not demonstrated that a change in conditions or other different factors warrant reconsideration. Accordingly, MPA's Motion on this ground is denied.

MPA next contends that the Board erred in receiving over objection testimony regarding a janitorial contract entered into between MPA and a janitorial service company immediately subsequent to the contract at issue in this appeal and that the Board should reconsider its decision without regard to that testimony. MPA's objections to testimony regarding this document and the testimony concerning it are set forth in the November 19th transcript at pp. 29-35. MPA's concern appears to be that the Board was improperly influenced by (1) the absence of mention of a pre-hiring security check in Appellant's contract and the mention thereof in the follow-on contract, (2) inclusion of a penalty provision for failure to provide the requisite hours of labor in the follow-on contract, and (3) the testimony of Appellant's President regarding these differences and its increased bid on the follow-on contract. We believe such evidence to have been admissible in the discretion

²Chairman Harrison was the only member of the Board to hear the appeal. However, pursuant to COMAR 21.10.06.12D(3) an accelerated appeal may be heard by only one member. Accordingly, the decision of February 3, 1986 authored by Chairman Harrison and concurred in by Mr. Ketchen is a final decision of the Board even though the appeal was only heard by one member. See: COMAR 21.10.06.12D(4); COMAR 21.10.06.28; COMAR 21.10.06.29.

of the presiding member (Chairman Harrison). See: COMAR 21.10.06.20. The Board's decision of February 3, 1986 makes no mention of the follow-on contract or testimony concerning it. Thus little or no weight appears to have been accorded such evidence. In any event, consideration of the record either with or without regard to the provisions of the follow-on contract and the testimony of Appellant's President based on the follow-on contract or concerning differences between the contracts does not require the Board to reach a different result.

The third point raised by MPA is that Chairman Harrison should have recused himself since he had formerly represented MPA whose employee personnel at that time included some of the witnesses who testified at the hearing, particularly Mr. Stein. Mr. Harrison's former representation as an Assistant Attorney General of MPA and its parent, the Maryland Department of Transportation, and the fact that he knew Mr. Stein was the subject of discussion at the hearing as a preliminary matter. (See November 19 Tr. pp. 3-8). MPA's counsel did not then object to Mr. Harrison hearing the appeal. Assuming *arguendo* that MPA has not waived the matter by failure to object at the hearing or otherwise prior to receipt of the Board's decision, see McCall v. Warden, Maryland House of Correction, 3 Md. App. 188, 191 (1968), independent review of the record by the other members of the Board leads to the appeal being sustained for the reasons and on the basis of the findings of fact set forth in the decision. See: Board of Medical Examiners v. Steward, 203 Md. 574, 581-584 (1954).

Accordingly, MPA's Motion for Reconsideration is denied.

