BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of SHIRLEY NOVATNEY	)	
	)	Docket No.
Under Contract with Commission on Indian Affairs	)	MSBCA 1554
	)	

September 20, 1991

Procurement Contract - For an agreement to be a procurement contract there must be a sufficient writing consistent with the waiver of sovereign immunity to show the intent of the State to be bound.

APPEARANCE FOR APPELLANT: Bruce R. Krain, Esq.
Annapolis, MD

APPEARANCE FOR RESPONDENT: Roger Lee Fink
Assistant Attorney General
Annapolis, MD

OPINION BY MR. MALONE

Appellant filed a timely appeal[1] from a Department of Housing and Community Development, Division of Historical and Cultural Programs, Commission on Indian Affairs (the "Department"), Procurement Officer's final decision not to pay a contract claim of Shirley Novatney (Appellant).

Findings of Fact

1. Appellant is a photographer interested in American Indian Culture. This interest resulted in her contacting Patricia King in March of 1987 at which time they discussed their mutual interest in Indian Culture. Patricia King is the Executive Director of the Maryland State Commission on Indian Affairs. These general

[1]Prior to hearing the Department filed a Motion to Dismiss arguing that there was no written contract and therefore this Board had no jurisdiction. At a hearing on this motion Appellant produced several writings executed allegedly by an official acting within the scope of authority to procure the services. In light of this apparent factual dispute, the Board held the motion in abeyance pending further hearing.

conversations ultimately resulted in the Appellant being listed as the Freelance Documentary Photographer in a grant proposal entitled "An Oral History of Maryland Piscataway Indians". The general idea of the grant was to interview Piscataway Indians to identify aspects of their culture and values. An exhibit was to be displayed of older existing photographs and 10 new color photographs to be taken by the Documentary Photographer reflecting the Indian Culture and values. The grant proposal under its Budget Breakdown planned for 200 hours at $10.00 per hour for preparation of the slides and new photographs. An additional $2,166.00 was budgeted for copying the photographs of the exhibit including the 10 color photographs. Appellant, Patricia King, and others working with an Advisory Counsel developed this grant proposal and the budget for the proposal.

2. The parties, in preparing the grant proposal, were in fact making an application for funding this project to the Maryland Humanities Council. The grant proposal was signed by Pamela Johnson, Administrative Officer, as the authorized official on March 24, 1988.

3. Appellant, during the development of the proposal, complained that the 200 hour budget for photographs was inadequate. She was informed by Patricia King that the number of hours of compensation was not flexible but that if money was left over within the grant after payment for other budgeted items she would attempt to move that additional grant money to the photographic costs.

4. The Appellant and Patricia King were both unfamiliar with the

legal requirements of State procurement contracts. This in fact was the first experience either had had with State procurement. Patricia King was acting under the belief that she did in fact have the authority to hire and contract with others to fulfill the work outlined in the grant proposal. Patricia King was unaware that a formal written contract was required under State procurement law until the end of 1989. The record clearly reflects that it was the intention of Patricia King to contract with Appellant for photographic services outlined in the grant proposal to provide 10 color pictures of Piscataway Indians reflective of their culture and values. Appellant was to be paid at $10.00 per hour up to but not to exceed 200 hours. Appellant's copying costs for the 10 photographs was to be paid out of the above mentioned budget item of $2,166.00 in the grant proposal.

5. Following these budget discussions with Patricia King, Appellant performed work for the oral history project photographic exhibition and was paid for mileage pursuant to Appellant's request for mileage reimbursement upon State of Maryland Expense Account forms for periods of October 1-7, 8-14, 15-21 and 29-31 of 1989. These four payments were authorized by Patricia King, Executive Director, Maryland Commission on Indian Affairs, on the standard form for reimbursement for travel to State employees. Appellant was not a State employee.

6. Appellant continued providing work on this project submitting additional requests for payments on Maryland Expense Account forms provided by Patricia King who had instructed Appellant to fill them

out for reimbursement.

7. In addition to mileage requests Appellant also requested payment for a consultant fee at $10.00 per hour on State of Maryland Expense Account forms signed by Patricia King over the title, Chief Fiscal Officer for the following dates: May 26, 1989 2 hours, June 10, 1989 2 hours, June 20, 1989 2 hours, June 20, 1989 2 hours, September 10, 1989 5 hours. September 11, 1989 5 hours, September 9, 1989 5 hours. The amounts sought in these requests were also paid to Appellant.

8. Appellant continued to work on the project and had almost daily contact with Patricia King. Appellant was never told to stop work. Eventually Patricia King told Appellant to submit State of Maryland Expense Account revised form X-S (Rev. 4/82) and to separate her $10.00 per hour fee from expenses. Appellant did this beginning December 1, 1989 up to March 2, 1990 on 15 separate weekly revised Expense Account forms. The total amount of hours listed on these forms was 439.5 hours. However, these forms were not given to the State until Appellant's claim was filed in 1990, and Appellant has not been paid for the expenses and hours claimed on the revised forms.[2]

9. Appellant made some periodic inquiries as to payment but was put off and was led to believe by Patricia King she would be paid later. Appellant relied on these representations because of the

[2]Appellant submitted a list of services at the hearing showing 516.88 hours together with hours shown on Expense Account forms of December '89 - March of '90 which showed 439.5 hours for a total of 956.38 hours. The State paid Appellant for 19 of these hours.

understanding with Patricia King reached during development of the grant proposal that she would be paid $10.00 per hour for her work on the project from the amount specifically budgeted in the grant and any leftover amounts that could be moved to support photographic costs. Appellant testified she would not be limited to the 200 hours as set forth in the grant proposal since the scope of her work was enlarged. Appellant ultimately claimed 956.38 hours of photographic work. The State was apparently unaware of the number of hours being accumulated by Appellant on this project until the claim was filed.

10. Appellant took an artistic view to the number of hours allowable and testified that she used only the number of hours necessary to complete the project. Expert witnesses in photography presented evidence that the 956.38 hours claimed by Appellant would not be unusual to obtain the professional quality photographs which Appellant ultimately completed.

11. By cover letter dated January 30, 1990, Patricia King sent Appellant an unexecuted "Contract Agreement" with instructions for it to be signed and returned, "as soon as possible". The contract recited that the Executive Director of the Maryland Commission on Indian Affairs (Director) was to sign the Contract Agreement for the Oral History of the Piscataways (the "Project") and *was in "addition to the State's formal contract."* (emphasis added) The Contract Agreement set forth a fixed fee of $2,000.00 and the services to be rendered for the project. Part of the fixed fee was stated to be for payment of mileage.

12. The Contract Agreement was never signed by either party. The January 30, 1990 cover letter was signed by a secretary for Patricia King in the normal course of her employment. Appellant refused to sign the agreement since it did not conform to her understanding of earlier oral representations made by the State as to compensation, and Appellant also wanted to retain ownership of the negatives of the photographs she had taken for the project.

13. The Department had a set of rules and procedures governing Purchasing and Procurement issued pursuant to Maryland Law. Small procurements under $10,000.00 must be cleared through the Department's contract's office and then through the appropriate Department approval process before work can commence. As of January 30, 1990 the Contract Agreement sent to Appellant by Mrs. King was never approved by the contract office nor reviewed by Rodney Little, Director of Historical and Cultural Programs,[3] who had contract review authority nor Ardath M. Cade, Deputy Secretary of the Department who had actual authority to contract.

14. At the direction of Patricia King, the Contract Agreement was prepared and sent to Appellant for signature. The Preamble of Exhibit A of the Contract states "The provisions herein do not constitute a complete agreement, and must be appended to a document, executed by all parties, which identifies the specific work to be performed, compensation, term of the Agreement, incorporate attachments, and special conditions if any ("Basic

[3]Mr. Little as Director of Historical and Cultural Programs had oversight authority over Mrs. King's activity as Director of the Maryland State commission on Indian Affairs.

Agreement")".

15. When the Contract Agreement was forwarded to Appellant by Mrs. King in January 1990, Mrs. King was still, despite concern over delay in Appellant's completion of the work, trying to work with Appellant to have her photographs used in the exhibit. Patricia King and others had selected 15 color photographs to be copied. To expedite the matters Mrs. Stupski, a Department employee familiar with the project took the Appellant and her negatives to a photographic developer to have the copying performed. However, Appellant subsequently retrieved her negatives from the developer and refused to sign the Contract Agreement.

17. In March of 1990 Rodney Little made attempts through his staff to have the Contract Agreement signed by Appellant. Appellant again refused to sign the agreement. Appellant remained unwilling to give up her rights to the negatives and was not satisfied with the $2,000.00 compensation.

18. Appellant submitted her claim for $14,452.16 by letter dated 9/12/90. The Department denied payment of Appellant's claim on the basis that there was no written agreement and that the Appellant's work was an unauthorized undertaking from which the State received no benefit. The photographs originally provided by Appellant to the Department were not used by the Department in the exhibit.

19. The Agency attempted on several occasions to have the Appellant sign the contract forwarded to Appellant by Patricia King in January of 1990. The Appellant continued to refuse to sign the contract and in March, 1990 the agency entered into a contract with

another photographer in order to permit the exhibit to be completed for the opening of the exhibition on Maryland Day, March 26, 1990.[4]

20. The State's witnesses testified that Patricia King did not have contractual authority and had acted outside of her scope of employment. The record clearly reflects that none of the proper required procurement processes were at work in the State's dealings with Appellant. The State of Maryland Expense Account forms are to be used only for limited purposes by State employees. Thus there is no written contract agreement signed by the parties in this appeal.

Decision

The Board of Contract Appeals has jurisdiction over disputes arising under a contract with a State agency. COMAR 21.02.02.02. The word contract is defined as "an agreement entered into by a procurement agency for the lease as lessee of real or personal property or the acquisition of supplies, services, construction, construction-related services, architectural services or engineering services." COMAR 21.01.02.01 (25)(a). The definition of contract[5] is also given in State Finance and Procurement Article § 11-101(m) "Procurement contract means an agreement in *any form* entered into by a unit for procurement." (emphasis added)

Nowhere in either of these definitions is there the requirement for a writing specifically. However, this is not the first time the Appeals Board has been faced with a jurisdictional

---

[4]At this point everything was ready but the photos.

[5]The work contract as formerly appearing in State Finance and Procurement Article § 11-101(R) was changed to procurement contract for purposes of clarity.

questions arising in an appeal where there was no writing. In *Boland Trane Associates, Inc.*, MSBCA 1084, 1 MSBCA ¶ 101 (1985) the Appeals Board discussed the definition of the word contract as then appearing in the General Procurement Law[6]; "We find that the Legislature intended this definition to be satisfied only upon the execution of a written document by an authorized representative of the State evidencing its intention to be bound". However, in *Boland Trane, supra*, there was no writing whatsoever. Here we have several written, executed and approved expense accounts along with a cover letter to Appellant signed on behalf of Mrs. King attaching a "Contract Agreement". Since a procurement contract can be in "any form" the question remains to what degree must "any form" reach to become a viable procurement contract. Legal mandates for writings have historically been used to demonstrate (with clarity) the intention to be bound to specific terms. Prior to 1984, Md. Ann. Code, Art. 21 § 7-101 provided specifically that the State has waived the defense of sovereign immunity only with respect to those contract claims which were "based upon a written contract executed on behalf of the State, ... by an official or employee acting within the scope of his authority." This language was strictly construed by the Court of Special Appeals of Maryland in determining that a claim based on an implied contract was barred. *Mass Transit Administration v. Granite Construction*, 57 Md. App. 766 (1984). However, effective October 1, 1984 Md. Ann. Code Article 21 § 7-101 was repealed and transferred without substantive

[6]Former Md. Ann. Code Article 21, § 7-201(d).

change to § 12-202, State Government Article, Md. Annotated Code.[7] On first glance this would appear to be a change in position by the Maryland Legislature. However, it must be noted that § 12-201 Md. Ann. Code, State Government Article states:

> (a) *In general.* - Except as otherwise expressly provided by a law of the State, the State, its officers, and its units may not raise the defense of sovereign immunity in a contract action, in a court of the State, based on a written contract that an official or employee executed for the State or one of its units while the official or employee was acting within the scope of the authority of the official or employee.
>
> (b) *Exclusions.* - In an action under this subtitle, the State and its officers and units shall have immunity from liability described under § 5-399.2(d) of the Courts and Judicial Proceedings Article. (Ann. Code 1957, Art. 21, §§ 7-101, 7-102; 1984, ch. 284 § 1; 1986, ch. 265; 1990, ch. 546 § 3.)

This statute and its predecessor were in effect before, during and after the enactment of Md. Ann. Code Article 21 § 7-101.

In light of this legislative history it is clear a procurement contract (the existence of which is essential for purposes of conferring jurisdiction upon the Appeals Board) must be a sufficient writing to show the intent of the State to be bound. The intent to be bound is best shown by a writing signed by a State official[8] acting within the scope of authority. However, while a writing may be of sufficient form for one to conclude that it is a procurement contract for purposes of conferring jurisdiction upon

---

[7]While the work repealed is used, the substance of this code section was transferred without substantive change to Ann. Code of Md. State Government Article § 12-202 which was renumbered in 1986 to 12-201.

[8]The lack of a State official's signature and its impact on MSBCA jurisdiction was discussed at length in *James Julian, Inc. v. State Hwy. Admin.* 63 Md. App. 74 (1985).

this Appeals Board, it would not survive the defense of sovereign immunity unless it be (1) a writing, (2) executed (3) by an official acting within the scope of his authority. The analysis of a writing for jurisdictional purposes before the Appeals Board must be made in harmony with meeting the test of sovereign immunity even if the statutory language for each differ. This distinction was discussed by the Appeals Board previously in *Boland Trane, supra* at page 6 as follows.

> The total absence of any written instrument in this instance also precludes the Board from considering Appellant's appeal under an implied in fact contract based on the theory that a contract can be constructed through circumstantial evidence rather than in an explicit set of words. *Mass Transit Administration v. Granite Construction Company, supra*, at 773-776. For this Board to have jurisdiction over an appeal arising from a dispute concerning a contract, the parties must have memorialized their conduct at least in some gross fashion in writing.

The Appeals Board thus left room to consider "gross writings" which may contain sufficient evidence of an intent to be bound to create jurisdiction for the Appeals Board to hear the dispute.

There are thousands of contracts and contract modifications ongoing at all times under State procurement. Contractors routinely perform work and have the proper "paper work" executed after the fact. Examples of this are numerous, i.e. work that exceeds estimated quantities, extra work, and change orders. The definition of a procurement contract as being an agreement "in any form" thus allows for the flexibility necessary to get the work completed while protecting the parties from violations of State procurement law. In those types of cases however, a procurement contract

already exists between the parties upon which further action can be based. Here, the Appellant argues, writings non-sufficient in themselves to be procurement contracts can be used to result in an enforceable procurement contract.

The State is protected form contracts which may be sufficient for Board of Contract Appeals jurisdiction but not sufficient to survive the defense of sovereign immunity since if a contractor acts without a sufficient writing he cannot enforce the contract in a court. His only remedy would be to plead "good faith" and ask the Board of Public Works for relief under COMAR 21.03.01.02.(b). A contractor proceeding without sufficient writings acts at his own peril. COMAR 21.03.01.01.

We now turn to examination of the evidence of record to determine if there is a "gross writing" which would show sufficient intent for the State to be bound.

The first writings to be considered are the expense accounts. Several of these were approved and executed by Patricia King, a State official, and paid. These were followed by others not signed by a State official and unpaid. Appellant argues that Patricia King had apparent authority and therefore the pattern of conduct was sufficient in light of the signed and paid expense accounts to constitute a procurement contract. This argument is expanded to include the unexecuted contract documents sent to Appellant under cover letter dated January 30, 1990. These writings are offered to support Appellant's underlying belief that her oral agreement in March of 1988 was enforceable.

The Appeals Board finds that the signed and paid expense accounts considered either singly or in combination do not convey jurisdiction upon the Appeals Board. These writings although signed by a person in apparent authority were not of sufficient detail and scope to constitute a procurement contract. These writings represented Appellant's request for mileage and consultant's fees reimbursement on a State form designed for State employee use only. Writings and conduct for limited periodic work cannot be a "boot strap" for finding that a procurement contract exists for similar work allegedly performed.[9] The "Contract Agreement" forwarded on January 30, 1990 states on page one that it is intended to be "complimentary and shall be construed accordingly". It would be unreasonable to interpret mere delivery of this document to constitute a procurement contract. Appellant's argument is further weakened since the Contract Agreement "limits recovery to $2,000.00" while her claim is for over $14,000.00.

The Board further discussed the meaning of contract "in any form" in *Davidsonville Diversified Services*, MSBCA 1339, 2 MSBCA ¶771 (1988) at page 7 as follows: "the addition of the words `in whatever form entered' takes the place of the enumeration of the separate types of contract forms included in the prior Article 21, § 1-101(f) definition of "contract". It does not mean that the requirements for a writing is (sic) are removed since the Legislature has not changed the application of the waiver of the

[9]The State was never informed of the magnitude of Appellant's claim until the claim itself was filed.

defense of sovereign immunity. It can still be waived only in actions against the State based on written contracts."

This Board has repeatedly held that it has no jurisdiction over an implied in law contract created under an unjust enrichment theory or an implied in fact contract not evidenced by a writing. *Davidsonville Diversified Services*, supra. In this appeal the Appeals Board holds that the totality of the expense accounts (approved and unapproved[10]) and the cover letter of January 30, 1990 and attached Contract Agreement do not constitute a sufficient gross writing to convey jurisdiction upon this Appeals Board as no procurement contract was formed. Appellant's argument that a writing sufficient to constitute a procurement contract could arise here is not a reasonable reading of the law.

If the parties have an existing procurement contract and a dispute over their respective obligations arising out of some related subsequent "gross writing", the Board has jurisdiction to consider such dispute. However, in this appeal there are no "gross writings" which can give rise to a procurement contract since there is no writing sufficient to demonstrate the State's intention to be bound.

Appellant's intention not to form a binding written contract is further evidenced by her refusal to sign the Contract Agreement sent to her by letter dated January 30, 1990. Appellant herself never accepted the term recited in that writing.

---

[10]The form expense accounts which were paid each constitute an approved agreement to reimburse Appellant for the mileage and fees requested.

The Appellant and Patricia King both were inexperienced in State procurement. It was this inexperience which led to the failure to follow State procurement law. Patricia King acting under her good faith belief she could conduct business in an informal manner led Appellant to believe that she would be compensated at least to the extent that additional money within the grant might be available for Appellant's part of the project.

This Board, however, has no power to grant relief in an action in quasi-contract. *Mass Transit Administration v. Granite construction*, supra.

Therefore the appeal is dismissed for lack of jurisdiction.

Dated: 9/19/91

Neal E. Malone
Board Member

I concur:

Robert B. Harrison, III
Chairman

Sheldon H. Press
Board Member

* * *

I certify that the foregoing is a true copy of the Maryland state Board of Contract Appeals decision in MSBCA 1554, appeal of SHIRLEY NOVATNEY, under Contract with Commission on Indian Affairs.

Dated: September 20, 1991