

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of THE DRIGGS CORPORATION)
) Docket No. MSBCA 1262
Under SHA Contract No. B-698-514-472)

January 17, 1986

Jurisdiction - Section 17-201(c), Division II, State Finance and Procurement Article, effective July 1, 1985, requires a final agency decision in construction contract disputes within 180 days of receipt of a claim and documentation thereon unless such time be extended by mutual agreement of the parties. The statute further provides that failure to issue a decision within 180 days or such longer period as mutually agreed upon is considered a denial of the claim permitting an appeal to the Board of Contract Appeals. This statute applies to claims filed prior to July 1, 1985 if the statutory requirements pertaining to claim submission and documentation have been satisfied and the contractor elects to proceed under the statute.

MEMORANDUM OPINION AND ORDER ON SHA'S MOTION TO DISMISS

After Appellant filed its complaint, the State Highway Administration (SHA) moved to dismiss the instant appeal on grounds that the absence of a procurement officer's final decision precludes this Board from asserting jurisdiction over the appeal. Appellant has responded to SHA's Motion and the Board has heard oral argument on the matter. While we conclude that the appeal was prematurely filed, we shall direct its reinstatement effective upon Appellant's advising the Board in writing of its continued intention to pursue its appeal.¹

The captioned contract in the amount of \$10,494,562 was awarded to Appellant on May 13, 1982. The work involved construction of 1.09 miles of the Northwest Expressway (I-795), including bridge construction over railroad tracks and embankment. Notice to proceed was issued on June 1, 1982. On November 24, 1982, as a result of alleged delays and increased costs involved in relocation of overhead utility lines and redesign of a 16" sewer line, Appellant submitted a claim for an equitable adjustment and time extension to Mr. Charles Olsen the SHA District Engineer. This claim was revised on December 6, 1982 and again on February 10, 1983. By letter dated August 22, 1984 addressed to Mr. Olsen's attention, Appellant submitted the claim as finally revised seeking an equitable adjustment of \$739,938.04 and a time extension of 70 calendar days and requested a final decision from the procurement officer pursuant to the disputes clause of the contract.

¹Factual matter contained or asserted in this Memorandum Opinion is deemed admitted only for purposes of SHA's Motion to Dismiss and the Board's decision thereon.

The disputes clause of the contract, GP-5.15 Disputes, provides in relevant part:

A. This contract is subject to the provisions of Title 7, Article 21 (Administrative and Civil Remedies) of the Code and COMAR 21.10.

* * *

D. When a controversy cannot be resolved by mutual agreement, the Contractor shall submit a written request for final decision to the procurement officer. The written request shall set forth all the facts surrounding the controversy.

* * *

F. The procurement officer shall render a written decision on all claims within 180 days of receipt of the Contractor's written claim, unless the procurement officer determines that a longer period is necessary to resolve the claim. This decision shall be furnished to the Contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt. The procurement officer's decision shall be deemed the final action of the State. If a decision is not issued within 180 days, the procurement officer shall notify the Contractor of the time within which a decision shall be rendered and the reasons for such time extension.

At all times relevant to this motion neither Article 21 nor COMAR mandated issuance of a procurement officer or agency head decision within a particular period of time.²

By letter dated September 20, 1984, Mr. Olsen responded to Appellant's August 22, 1984 submittal (claim) as follows:

This is to confirm that your claim in the amount of \$739,938.04 for "Changes and Suspension of Work" on the subject contract, received in this office on September 5, 1984 will be reviewed and answered in an appropriate time. Based on the size and complexity of this matter, our review will not be completed until January or February of 1985 at the earliest.

Copied on this letter was Mr. Gordon Dailey, the SHA Chief Engineer, who was identified at oral argument as the individual who functions as the SHA procurement officer on SHA contract disputes.

²As discussed later in this opinion, effective July 1, 1985, claims in construction contracts are required to be decided within 180 days of receipt unless such period be extended by mutual agreement of the parties. Failure to render a decision in a construction contract dispute in the required time frame is regarded as a denial of the claim and constitutes final action respecting an appeal to this Board. See State Finance and Procurement Article, Division II, Section 17-201(c).

On June 13, 1985, Appellant wrote Mr. Olsen and after referencing the time frame for a decision as set forth in Mr. Olsen's September 20, 1984 correspondence stated:

On March 13, 1985 you advised our claim "is currently being reviewed and analyzed." Three months has passed and we have yet to receive your decision. SHA's review time clearly exceeds the time frame set forth in General Provision 5.15 Disputes, and further delay seems unjustified. As you know, this project was finally accepted on May 2, 1985.

We would appreciate your prompt attention to this matter.

On June 24, 1985, Mr. Olsen wrote Appellant advising as follows:

Please refer to your correspondence dated June 13, 1985 concerning your claim on the subject Contract for \$739,938.04. This Office continues to review your claim as time allows. Although in our earlier correspondence we said our review would be completed in January or February of 1985 and in our March 13, 1985 correspondence, we stated it was currently being reviewed and analyzed, our investigation is still not complete.

We can tell you now, however, that sometime within the next 30 days, we will be notifying you to come to the District Office to answer questions concerning your claim. We are very much aware of your anxiety in resolving this matter but with the current volume of work being handled by this Office, we consider our review to be as timely as possible.

Mr. Dailey was also copied on this correspondence.

Despite the representation in the June 24, 1985 letter, Appellant was never notified to come to the District Office to answer questions concerning its claim. Instead, on July 17, 1985, Mr. Olsen wrote Appellant with a copy to Mr. Dailey, and advised that the claim was denied in its entirety. The concluding paragraph of this letter stated:

Therefore, your claim is denied. This is a final decision of this Office. If you wish to appeal the claim to higher authority, the next level is the Office of the Chief Engineer.

Appellant received the July 17, 1985 letter on July 23, 1985 and noted its appeal to this Board on August 21, 1985³ alleging that the July 17, 1985 letter constituted the final decision of the procurement officer. Alternatively, Appellant requested this Board to assert jurisdiction by finding that SHA had failed and refused to issue a final decision for an unreasonable period following Driggs' final revision of its claim and request for such a decision on August 22, 1984.

³Appellant copied Messrs. Olsen and Dailey and Hal Kassoff, the SHA agency head, on its appeal, Certified Mail, Return Receipt Requested.

We do not conclude as urged by Appellant that Mr. Olsen's July 17, 1985 letter denying the claim constitutes the final decision of the procurement officer. Mr. Olsen is not the SHA procurement officer for the subject contract and his letter clearly indicates that a decision of his office (the District Office) does not constitute final agency action on the claim, Appellant being directed to the Office of the Chief Engineer for further appeal.

We also decline to exercise jurisdiction on the alternate ground of unreasonable delay urged by Appellant. While we share Appellant's concern about the failure of SHA to issue an appealable decision on its claim since its final submission on August 22, 1984, we decline to intrude on the workings of the administrative process even if intolerable delay be involved since the Legislature has not authorized us to do so. [This Board has only such jurisdiction as is specifically conferred upon it by the Legislature. See: Boland Trane Associates, Inc., MSBCA 1084 (May 22, 1985); James Julian, Inc., MSBCA 1222 (May 14, 1985); William E. McRae, MSBCA 1229 (April 22, 1985); Jorge Company, Inc., MSBCA 1047 (July 7, 1982). See also: Titan Group, Inc., MSBCA 1135 (November 8, 1983). It is empowered solely to hear and decide an appeal arising under the provision of the State Finance and Procurement Article and predecessor provisions of Article 21 which involve a dispute that has been finally determined by the State procurement agency involved. While established as an independent agency within the executive branch, it has not been given jurisdiction to determine compliance with and command obedience to the legislative directive to other executive branch agencies to issue procurement determinations. Only the courts are empowered to take such actions.]

However, the Legislature has moved to address the problem facing Appellant. In the 1985 session of the General Assembly the following was enacted, effective July 1, 1985.

Same — Exception for construction contracts. — (1) This subsection applies to the resolution of disputes relating to construction contracts that have been entered into.

(2) Within 30 days of the filing of a notice of a claim, the contractor shall submit to the procurement agency a written explanation of the claim containing:

- (i) The amount of the claim;
- (ii) The facts upon which the claim is based; and
- (iii) All pertinent data and correspondence that may substantiate the claim.

(3) The claim shall be reviewed by the procurement agency head or, if the agency is a part of a principal department or an equivalent unit of State government, by the Secretary or the equivalent official unless review has been delegated to the agency head by regulation.

(4) Within 180 days after receipt of the claim, the agency head, Secretary, or equivalent official shall investigate the claim and notify the contractor, in writing, of a decision regarding resolution of the claim. The 180 day time limit may be extended by mutual agreement of the parties.

(5) (i) A decision not to pay a claim is a final action for the purposes of appeal to the Board of Contract Appeals.

(ii) Failure to reach a decision within the time limits under paragraph (4) of this subsection shall be deemed to be a decision not to pay the claim. . . .

State Finance and Procurement Article, Md. Ann. Code, Section 17-201(c).

Had Appellant's claim been first submitted following the July 1, 1985 effective date of Section 17-201(c) supra, a final agency decision thereon would have been required in either 180 days or such longer period as mutually agreed to by the parties or, failing the issuance of such decision, the claim would be deemed to be denied permitting appeal to this Board. However, since the statute is essentially remedial, we believe the Legislature intended its provisions to apply to a claim that in accordance with subsection (c)(2) thereof was pending before an agency on July 1, 1985 and where the contractor affirmatively elected to proceed under the provisions of this statute. See: James Julian, Inc., supra. We believe the record demonstrates that Appellant's claim was pending before SHA on July 1, 1985 in accordance with the provisions of subsection (c)(2) and that Appellant by its actions had affirmatively elected to proceed under the provisions of the new statute. Therefore, an agency decision would have been required within 180 days or such longer period as mutually agreed to from July 1, 1985. The record before us clearly demonstrates that Appellant would not have agreed to an extension of the 180 day period. Therefore, failing a decision by the agency within such 180 day period (ending December 31, 1985) Appellant's claim would have been deemed denied and an appeal could then have been taken to the Board.

Accordingly, Appellant's claim is deemed denied as of December 31, 1985 no decision having been rendered within 180 days of its submission and while the appeal filed in August was premature, Appellant's right to appeal has now ripened. In view of the delay already occasioned in this matter, we will not require Appellant to formally refile its appeal and complaint; it sufficing for Appellant to advise the Board in writing within 30 days of receipt of this decision that it adopts these documents as previously filed. Respondent's answer and the appeal (Rule 4) file shall be filed with the Board 30 days after Respondent receives its copy of Appellant's notice of adoption. SO ORDERED.

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