BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of TITAN GROUP, INC.	)	
	)	Docket No. MSBCA 1135
Under DGS Project No. KJA-731-2	)	

November 8, 1983

Jurisdiction - Counterclaims - A motion to dismiss a State "counterclaim" on the ground that the Board has no jurisdiction over counterclaims was denied. While the Board concurred that it had no jurisdiction over counterclaims as that term commonly is used in the courts, the subject claim had not been raised initially before the Board. Instead, the so-called counterclaim had been the subject of the same final decision which denied the Appellant's claims. Thereafter, the unqualified appeal taken from this decision brought both Appellant's claim and the State's affirmative claim properly before the Board.

Jurisdiction - Affirmative State Claims - Chapter 775 of the Laws of 1980 (Act), at a minimum, permits a contractor to seek resolution of affirmative State contract claims through the administrative process established by the Act. Construction of the Act in this manner does not abridge the constitutional right to a trial by jury or violate the Doctrine of Separation of Powers.

Procurement Officer - Procedure for Resolving Claims - The Act gave the State's procuring authorities responsibility to establish procedures governing resolution of claims at the Procurement Officer's level. Nothing in the Act precludes the Procurement Officer from issuing a single final decision grouping one or more claims, including a State affirmative claim.

Procurement Officer - Procedures for Resolving Claims - The Act and the procurement regulations both contemplate that the Procurement Officer attempt to resolve disputes through discussion and negotiation prior to issuing a final decision. A final decision, if issued prior to this effort being made, does not constitute final agency action and is not sufficient to serve as the basis for a subsequent appeal to this Board.

Construction of Statutes - The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. Here the procurement regulations implementing the Act provide a procedure for the resolution of State affirmative claims thus indicating a construction of the statute which permits administrative resolution of such claims.

Construction of Statutes - Statutes relating to remedies and procedures should be liberally construed with a view towards the effective administration of justice.

MEMORANDUM OPINION AND ORDER

On February 8, 1983, the Department of General Services' (DGS) procurement officer for the captioned project issued a written final decision denying contract claims submitted by Appellant in the amount of $6,258,420. Additionally, the procurement officer stated as follows:

> The State asserts that it has been caused added construction costs and will incur additional future construction costs due to Titan/Heeds' negligence and failure to construct the Work [sic] in accordance with the Contract Documents and Heeds' failure to correct certain defective work all as enumerated in Exhibit S-5 attached hereto.

Exhibit S-5 to the final decision set out what was described as a counterclaim in the approximate amount of $1,192,270. From this final decision, Appellant took an unqualified appeal on March 7, 1983.

On June 13, 1983, Appellant, pursuant to this Board's rules, filed a complaint alleging various grounds for equitable adjustment in the aggregate amount of $5,085,244.83. Appellant also alleged entitlement to interest costs and/or recompense for the loss of use of its capital and a 407 calendar day extension to the contract performance period. Respondent answered on July 22, 1983, denying liability for Appellant's increased costs and performance time and further asserting a counterclaim in the aggregate amount of $928,032.52. This counterclaim specified the same bases for recovery as were outlined in the procurement officer's final decision.

During an August 8, 1983 prehearing conference, Appellant stated that it planned to challenge the Board's jurisdiction to hear the counterclaim raised by DGS. Pursuant to a time schedule established by the Board for resolution of this jurisdictional issue, Appellant formally filed a written motion to dismiss the counterclaim on September 2, 1983. DGS responded to this motion on October 5, 1983, and oral argument thereafter was presented by the parties on October 14, 1983. In further response to the Board's statement at oral argument that it considered certain cases, as yet undiscussed by the parties, to be relevant to the jurisdictional question, each party filed a supplemental memorandum on October 21, 1983. From the foregoing record, therefore, we make the following findings and ruling.

Findings of Fact

1. Appellant and DGS entered into the captioned contract on January 3, 1979. Although it is unclear from the record as to when the Maryland Board of Public Works approved the award of this contract, it is undisputed that a valid contract was entered into on or around this date.

2. Chapter 775 of the Laws of Maryland of 1980 (Act) established, among other things, a two tiered administrative procedure for resolving contract disputes. The first tier involved consideration by the using agency's procurement officer and agency head as follows:

§7-201.

(A) Upon timely demand, as defined in regulations promulgated by the Department, by a prospective bidder or offeror, bidder or offeror, or contractor, the responsible procurement officer of the using agency may, consistent with the budget and all applicable laws and regulations, negotiate and resolve disputes relating to the formation of a contract with the State or a contract which has been entered into by the State. Disputes relating to the formation of a contract include but are not limited to those concerning the qualification of bidders or offerors and the determination of the successful bidder or offeror. Disputes relating to a contract which has been entered into by the State include but are not limited to those concerning the performance, breach, modification, and termination of the contract.

(B) The resolution of these disputes shall be in accordance with regulations established by the respective departments, and the procurement officer's decision shall be in writing. Except in the adoption of regulations, the Administrative Procedure Act shall not apply to proceedings under this section.

(C) The decision of the procurement officer to resolve or not to resolve a dispute shall be reviewed by the agency head unless otherwise provided by regulation. If the agency is part of one of the principal departments or an equivalent unit of government, the decision shall be reviewed by the Secretary or his equivalent unless delegated to the agency head by regulation. The reviewing authority may approve or disapprove the procurement officer's decision. In disapproving a decision not to resolve the dispute, the reviewing authority may order the procurement officer to effect a resolution. The decision of the reviewing authority is deemed final action by the agency, department, or its equivalent, as the case may be.[1]

The second tier involved an appeal of the approved procurement officer's decision to this Board in accordance with the following:

§7-201.

(D)(2) Within 30 days of receipt of notice of a final action disapproving a settlement or approving a decision not to settle a dispute relating to a contract entered into by the State, the contractor may appeal to the Maryland State Board of Contract Appeals.[2]

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[1]This language has been codified under Md. Ann. Code, Art. 21, §7-201.

[2]Md. Ann. Code, Art. 21, §7-201(d)(2).

3. The jurisdiction of this Board is set forth in §7-202 of the Act as follows:

> (C) (1) The Appeals Board shall have jurisdiction to hear and decide all appeals arising under the provisions of §7-201(D) of this article.
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> (2) Proceedings before the Appeals Board shall be conducted in accordance with the provisions of the Administrative Procedure Act as they relate to contested cases before agencies. The Appeals Board shall, in accordance with the provisions of the Administrative Procedure Act, adopt regulations which are not inconsistent with that act to provide for informal, expeditious, and inexpensive resolution of appeals before the Appeals Board.[3]

4. The effective date of the foregoing portions of the Act was July 1, 1981.

5. This Board adopted procedural regulations on the effective date of the Act. See COMAR 21.10.05 and 21.10.06. A regulation was not promulgated pertaining to counterclaims.

6. Section 25 of the Act addressed the retroactive applicability of the law as follows:

> AND BE IT FURTHER ENACTED, that although a presently existing obligation or contract right may not be impaired in any way by this Act, the procedural provisions of this Act, including those requiring review by the Maryland State Board of Contract Appeals, may, at the option of the contractor, apply to contracts in force on the effective date of such provisions.

Discussion

Pursuant to §25 of the Act, Appellant was given the option to have any dispute arising under or relating to its pre-July 1, 1981 contract with DGS resolved under the procedural provisions established by the Act or otherwise proceed directly with its judicial remedy. The choice of forum was entirely that of the Appellant and DGS was required to submit to Appellant's election in this regard.

Appellant here elected to pursue its contract claims administratively and requested a procurement officer's final decision thereon. In denying Appellant's claim in a written final decision, however, the procurement officer further set forth an affirmative claim on behalf of DGS. The issues raised by such an action involve whether the Act contemplated administrative resolution of the State's affirmative contract claims, whether an affirmative State claim can be addressed in the same decision which denies a contractor's claim, and, if so, what procedures must be followed prior to issuing a final decision concerning a State claim against a contractor.

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[3] Md. Ann. Code, Art. 21, §7-202(c).

It has long been recognized that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. Hart & Miller Islands v Corps of Engineers, et al., 621 F.2d 1281 (1980). Here the procuring agencies statutorily were charged with responsibility to promulgate procedural regulations implementing the Act. Md. Ann. Code, Art. 21, §7-201(b). The regulations ultimately adopted on July 1, 1981 provided, in pertinent part, that "[a]ll controversies involving claims asserted by the State against a contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the procurement officer."[4] The procuring agencies thus concluded that the Act permitted administrative resolution of State claims and we find this construction both to be reasonable and controlling.

The administrative procedure provided for under the Act expressly authorized the using agency's procurement officer to negotiate and resolve disputes relating to the performance, breach, modification and termination of the contract. In each of these potential areas for dispute, either party may be liable for damages and/or entitled to an equitable adjustment in contract price. Section 7-201(A) of the Act, therefore, cannot be read to limit the procurement officer's authority to negotiation and settlement of contractor claims only. Where the State is entitled to a credit for work not performed, a downward equitable adjustment under a remedy granting clause, excess reprocurement costs, liquidated damages, or damages for breach of contract, the Act reasonably provides that the State procurement officer be able to finally resolve such matters in an expeditious and inexpensive manner.

The jurisdiction of this Board coincides with the settlement authority of the using agency procurement officer. Compare The Budd Company, MDOT 1034, Nov. 9, 1982, at p. 3. Any notice of final action " . . . disapproving a settlement or approving a decision not to settle a dispute relating to a contract entered into by the State . . ." is appealable to this Board. Accordingly, the Act provides that this Board may consider affirmative State contract claims when an appeal properly is brought from a procurement officer's final decision.

Notwithstanding the foregoing, Appellant contends that the Act is not susceptible of the construction given it by DGS. In this regard, Appellant initially argues that §7-201(A) of the Act limits the procurement officer's authority to negotiate and settle disputes to situations where the contractor demands resolution. Consistent therewith, §7-201(D) of the Act permits only the contractor to take an appeal to this Board. Accordingly, Appellant maintains that the statutory administrative remedy was provided to resolve contractor, and not State, claims.

Where the State believes that it contractually is entitled to a credit, a downward equitable adjustment, or damages for breach of contract, it is not uncommon for it to withhold payments due under the contract involved and/or set-off the amount believed due against funds owing the contractor under other contractual agreements. In order to free these funds and facilitate cash flow, the contractor then is faced with negotiating a settlement or pursuing its legal and administrative remedies. Under §7-201(A) of the Act, where the contractor believes that the actual or threatened retainage of

[4]See COMAR 21.10.04.03.

funds is contrary to law or to the terms of the contract or otherwise is unreasonable in amount, it is provided a mechanism to resolve the dispute expeditiously and inexpensively. The contractor does this by requesting a final decision of the procurement officer and, if necessary, appealing the final decision asserting an affirmative claim to this Board. Similarly, even where the State does not force the issue by withholding funds, a contractor may prefer an administrative procedure to the courts. The language of §7-201(A) of the Act, therefore, reasonably may be read to permit the administrative consideration of affirmative State claims where such consideration is desired by the contractor.

With regard to §7-201(D)(2) of the Act which permits only the contractor to file an appeal with this Board, we likewise do not read it as depriving this Board of jurisdiction over affirmative State claims or otherwise requiring the State to pursue its affirmative claims in the courts. As previously stated, the Legislature provided a procedure whereby the appropriate State procurement officer would attempt to negotiate and settle all contractual disputes. Where amicable settlement is not attained, a final decision is issued by the procurement officer. The foregoing statutory provision simply gives the contractor the option of accepting the final decision of the agency as to the proper resolution of a dispute or continuing to exhaust its administrative remedy before this Board. As previously concluded, the dispute may involve either a contractor claim or an affirmative State claim.

Although Appellant further argues that the Board's jurisdiction should be strictly construed, we note the general rule in Maryland which liberally construes statutes relating to remedies and procedures with a view toward the effective administration of justice. Criminal Injuries Compensation Board v Gould, 273 Md 486, 494, 331 A.2d 55, 61 (1975). While this rule of construction may not be applied so as to defeat or frustrate legislative intent, we conclude, for the foregoing reasons, that the Legislature intended the administrative procedure to be available to resolve all State contract disputes.

In concluding that the Act permits this Board to hear and resolve State claims against contractors, we have not considered whether our jurisdiction is exclusive over such claims. For purposes of this motion, we find only that the Legislature, at a minimum, has afforded contractors the right to utilize the administrative procedure created by the Act in challenging affirmative contractual claims raised by the State. Operating on this limited premise, we address the remainder of Appellant's arguments.

Appellant next contends that any construction of the Act which would permit the Board to hear and resolve affirmative claims brought by the State would deprive Appellant of its constitutional right to a jury trial and further would violate the separation of powers requirement contained in Article 8 of the Maryland Declaration of Rights and Article IV of the Maryland Constitution. Because Acts of the Legislature are presumed to be constitutional,[5] it is argued that DGS' construction of the Act is to be avoided.

[5] Department of Natural Resources v Linchester Sand and Gravel Corporation, 274 Md. 211, 218 (1975).

Paragraph 2 of Article 23 of the Maryland Declaration of Rights provides that:

> The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five hundred dollars, shall be inviolably preserved. (Underscoring added).

However, it is axiomatic that as long as the Act is not construed as mandating that affirmative State claims be resolved administratively, with no alternate right to judicial resolution, the constitutional right to a jury trial is not abridged. Compare Branch v. Indemnity Insurance Co., 156 Md. 482, 488 (1928); Knee v. The Baltimore City Passenger Ry Co., 87 Md. 623, 625 (1898).

Appellant's concern as to the Doctrine of Separation of Powers stems from its belief that the determination of damages assessable against a private party is a judicial function which cannot be delegated constitutionally to an Executive branch agency.[6] In this regard, Article 8 of the Maryland Declaration of Rights provides:

> That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

Since this Board is not vested with judicial power,[7] it is said that the Act should not be construed as permitting us to consider affirmative State claims.

It is well settled that parties to a contract may agree to submit disputes arising under or relating to their contract to nonjudicial modes of resolution. Maryland-National Capital Park and Planning Commission v Washington National Arena, 282 Md. 588, 609 (1978). Thus, assuming arguendo, that the power to determine the damages assessable against a private citizen exclusively is a judicial one and that said power constitutionally may not be delegated to an administrative agency even subject to judicial review,[8] there is no prohibition against the parties agreeing to use a nonjudicial forum for this purpose. The fact that the Legislature has created this alternate forum does not matter. As long as the Legislature has not taken jurisdiction over such

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[6]The Appeals Board is an independent agency under the Executive branch. Md. Ann. Code, Art. 21, §7-202(a)(2).

[7]See also Article IV, Section 1 of the Maryland Constitution which provides, in pertinent part, that "[t]he Judicial power of this State is vested in a Court of Appeals, such immediate courts of appeal as the General Assembly may create by law, Circuit Courts, Orphans Courts, and a District Court."

[8]See Judge Barnes' dissent in County Council v Investors Funding Corporation, 270 Md. 403, 447-468 (1973).

disputes away from the courts and exclusively granted it to an administrative agency, there is no constitutional violation.[9] See Commission On Medical Discipline v Stillman, 291 Md. 390, 401 (1981).

We next turn briefly to a subsidiary argument raised by Appellant as follows:

> Further indicia of the lack of jurisdiction can be found in Article 21 of the Code of Maryland Regulations, including the Board's own rules of procedure. For instance, although the Board's Rules [sic] contain detailed procedures concerning the filing of a complaint and an answer thereto, there is no mention of the procedure to be followed for the filing of a counterclaim . . .

This Board, therefore, is said to have recognized that the Act did not permit it to hear and resolve State counterclaims and, for this reason, Appellant's motion seeking dismissal of the State's counterclaim should be granted.

Appellant correctly has concluded that this Board has no jurisdiction over counterclaims. A counterclaim as we use the term, however, is a claim raised by the State in the first instance before the Board whether or not related to the contract dispute appealed by the contractor. As is apparent from the language of the Act, this Board may take jurisdiction only over claims wherein the contractor has entered a timely appeal from a procurement officer's final decision. See Md. Ann. Code, Art. 21, §§7-202(c)(1); 7-201(d). The appeal from a final decision, therefore, is the sine qua non to this Board's jurisdiction. Compare Holly Corporation, ASBCA No. 24975, 80-2 BCA ¶ 14,675; Jackson Lumber Company, AGBCA No. 80-160-1, 81-1 BCA ¶ 14,998. A claim not previously considered by the procurement officer is not subject to our jurisdiction and may not be raised as a counterclaim before the Board even if it arises out of the transaction or occurrence that is the subject matter of a contractor claim. However, notwithstanding the terminology employed by DGS, we are not faced with a counterclaim here. The State's affirmative claim was addressed by the DGS procurement officer in a final decision which in turn was appealed by Appellant. Assuming no other jurisdictional bar, this affirmative State claim thus properly is before us.

We next consider whether the Act permits a State procurement officer to raise an affirmative claim in the same final decision which denies a contractor claim and thereby link the two claims for appeal purposes. As long as the State's affirmative claim arises out of or relates to the contract which is the subject matter of the contractor's dispute, however, we do not see a statutory prohibition to this approach. Compare Holly Corporation, supra., at p. 72,381. As we previously have concluded, the Act created a two tiered administrative process for the resolution of contract disputes. Procedures for resolving disputes at the procurement officer's tier were left to the

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[9] Although DGS has argued that even the exclusive grant of authority to this Board to resolve State claims against contractors is constitutional, we need not reach this issue.

discretion of the procuring agencies who were to promulgate regulations. Md. Ann. Code, Art. 21, §7-201(b). These regulations, appearing at COMAR 21.10.04, require a final decision on all claims whether brought by the contractor or by the State. There is no regulation expressly prescribing that such decisions be separate.

Rules and regulations adopted by an administrative agency must be reasonable and consistent with the letter and policy of the statute under which the agency acts. Farber's Inc. v Comptroller, 266 Md. 44, 291 A.2d 658 (1972); Baltimore v Koons, Inc., 270 Md. 231, 237 (1973). The administrative process created by the Act was intended to provide for the informal, expeditious and inexpensive resolution of disputes. Md. Ann. Code, Art. 21, §7-202(c)(2). A procedure instituted by the procuring agencies which permits all questions involving mutual obligations between the State and a contractor to be considered as an entity cannot be said to be unreasonable or contrary to the intent of the Legislature in establishing an administrative disputes mechanism.

The final issue to be addressed concerns the manner in which the State's affirmative claims were raised and the effect thereof on the validity of the procurement officer's final decision. Specifically, the State's affirmative claims were raised for the first time in the final decision and Appellant previously was not given an opportunity to present facts or argument pertaining thereto. This we believe to be contrary to the requirements of the Act.

Section 7-201 of the Act contemplates that the appropriate State procurement officer shall attempt to resolve all disputes through negotiation and settlement. When this process is unsuccessful, a final decision is necessitated thereby providing the contractor with an avenue to this Board. COMAR 21.10.04.03 is consistent with this construction as follows:

> All controversies involving claims asserted by the State against a contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the procurement officer. (Underscoring added).

Accordingly, some effort must be made to apprise the contractor of an affirmative State claim so as to permit discussions and encourage settlement. A final decision, if issued prior to this effort being made, does not constitute

final agency action and is not sufficient to serve as the basis for a subsequent appeal to this Board. Compare Keystone Coat & Apron Mfg. Corporation v United States, 150 Ct.Cl. 277, 281-282 (1960)[10], Space Age Engineering, Inc., ASBCA No. 26028, 82-1 BCA ¶ 15,766.[11]

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[10]In Keystone the Court of Claims ruled that a purported final decision was no more than a demand for payment. In particularly colorful language the Court stated as follows:

> This can hardly be classed as a dispute. We have always thought it takes two to make a dispute. But this was unilateral. Months after settlement under the contract the contracting officer decided the Government was due some money and on May 25, 1955, sent plaintiff a statement that it owed the Government $6,203.67, and demanded payment. Plaintiff was not asked to explain. It was told to pay. The contracting officer did not ask for plaintiff's position so that a dispute might arise. He merely took a shillalah and struck him down.
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> Then, when plaintiff said he did not understand, the contracting officer on July 15, 1955, deigned to disclose his formula, but still demanded payment. He did give plaintiff an extension of time to look over its own books. But nowhere did he indicate that he would listen, or that it was open to dispute. As they say in the range country, he did not give plaintiff a chance to establish his brand...

[11]In Space Age Engineering, Inc., the Armed Services Board (ASBCA) quoted heavily from the decision of the United States Court of Appeals for the First Circuit in Woods Hole Oceanographic Institution v United States, Nos. 80-1780, 81-1239, (1st Cir. 14 December 1981). This decision later was vacated on grounds unrelated to the issue discussed here. Woods Hole Oceanographic Institution v United States, 677 F.2d 149 (1982). Although DGS questions the efficacy of Space Age Engineering, Inc. in light of the First Circuit's actions, it is evident that the ASBCA decision was based on its construction of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.) and its conclusion that §6(a) of the Act was intended to promote administrative settlement of disputes. See Chandler Manufacturing and Supply, ASBCA Nos. 27030, 27031, 82-2 BCA ¶ 15,997 issued after Woods Hole II. The language of the Contract Disputes Act and the Act are comparable in this regard.

This leaves for consideration whether the entire procurement officer's decision is rendered invalid by the inclusion of the State's affirmative claim, thereby necessitating dismissal of the appeal as a whole. We conclude that it is not. The final decision of the DGS procurement officer as to Appellant's claim properly was issued in accordance with COMAR 21.10.04. It represents final action as to the claims raised by Appellant. A timely appeal was taken therefrom and the jurisdiction of this Board over Appellant's claims was perfected. The portion of the decision dealing with the so-called counter-claims is a demand for payment and no more. While this demand was appended to the final decision, it did not constitute a viable part of the decision which was capable of being appealed and further did not affect the conclusory nature of the remainder of the decision.

Order

For the foregoing reasons, we grant Appellant's motion and dismiss the State's affirmative claims without prejudice. We recognize that in taking this action, the State's position as to its affirmative claims may not change even after the benefit of discussions with Appellant. It further is evident that Appellant ultimately may not choose to elect the administrative remedy with regard to these claims. If so, the use of dual forums will result in a less efficient and more costly resolution of the claims which have arisen under the captioned contract. Nevertheless, the Legislature has afforded Appellant both the right to certain administrative procedures and the exclusive right to choose a forum for the resolution of claims related to its pre-July 1, 1981 contract with the State. Neither the Board nor DGS can interfere with these rights.