

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of TRIANGLE GENERAL)
CONTRACTORS, INC.) Docket No. MSBCA 1840
Under DGS Contract)
No. M-000-922-024)

January 17, 1995

Responsibility-- Prior Performance on State Contract.

When an agency provides by regulation or internal policy certain procedures for determining and recording unsatisfactory performance by a contractor which can result in disqualification on future contracts, fairness requires that the procedures are followed before the finding of unsatisfactory performance can be recorded or relied upon.

APPEARANCES BY APPELLANT: William M. Huddles, Esq.
Kenneth K. Sorteberg, Esq.
Columbia, MD

APPEARANCES BY RESPONDENT: Allan B. Blumberg
John H. Thornton
Assistant Attorneys General
Baltimore, MD

OPINION BY BOARD MEMBER STEEL

Appellant timely appeals the final decision of the Department of General Services (DGS) Procurement Officer denying its protest of a finding of non-responsibility for the above-captioned contract to construct the Cheltenham Armory and Organizational Maintenance Shop. Asserting COMAR 04.04.02 as authority, the procurement officer based his finding of non-responsibility on an outstanding interim unsatisfactory report of Appellant's performance on another contract, the construction of the University of Baltimore Merrick School of Business.

Findings of Fact

1. Appellant is a construction company which has served as general contractor for at least 20 Maryland State contracts over the past 16 years, with in excess of \$300 million dollars of public building construction performed since 1979. Appellant has never previously been assessed liquidated damages, terminated for default, or found to be non-

responsible. (Transcript¹ 2/5-6, AX 87).

2. On December 11, 1991, Appellant entered into a Construction Agreement with the Department of General Services (DGS) to construct for the use of the University of Baltimore the Robert G. Merrick School of Business, Project No. TU-892, an approximately \$12,000,000 project. (AR-6).
3. The Merrick project entails the construction of a "monumental" 115,657 square feet, six-story concrete, masonry and granite structure with a six-story atrium, high-technology electrical and information cabling systems, and auditorium and approximately 300 spaces including 6 computer labs, 15 caserooms, 8 seminar rooms, classrooms, offices and other rooms. (Tr. at 2/20-25; AX 109). The exterior veneer alone calls for four different elements: brick, pre-cast, and two types of granite. (Tr. at 3/9).
4. The Notice to Proceed authorized a starting date of January 6, 1992. Completion was anticipated for January 5, 1994. A unilateral² change order, No. 69, was issued by DGS extending the contract time by 115 days to approximately May 1, 1994, pursuant to agreement on some, but not all, claims for extension. (Exhibit AR-9). Change Order 69 did not cover all requests for delay and/or extension. This change order was unilaterally rescinded by DGS on the first day of hearing in the above-captioned appeal.
5. This project encountered numerous problems during its first two years. The parties have asserted that many participants and factors have had a hand in the problems encountered in the course of this project, including Appellant, Respondent, the Architect, subcontractors, suppliers and materialmen, third party providers, differing site conditions, and the weather. However, it is not necessary to the decision in the instant bid protest appeal to determine in detail how such responsibilities should be apportioned.³

¹ The transcript of the hearing in this matter is recorded in five volumes, with page numbering designated therein as, e.g., 1-33 for volume 1, page 33. For ease in this opinion, references to the transcript will be as follows: a reference at pages 33 through 45 of volume 1, will be cited as Tr. at 1/33-45. Appellant's exhibits will be referred to as AX ____, exhibits submitted with the Agency Report will be referred to as AR ____, and Respondent's exhibits introduced during the hearing will be referred to as RX ____.

² The change order required no response or acceptance by Appellant.

³ The Board is aware that Appellant has or will submit a substantial claim on the Merrick project. This bid protest appeal is an inappropriate mechanism to weigh the merits of such a potential claim. The Board does not intend to prejudge the merits of such a dispute, notwithstanding that certain evidence that

6. Prior to April 1994, Appellant received one negative written communication from DGS, an evaluation placed in the record two weeks after the start date. (RX 1).
7. On December 23, 1993, without prior consultation with contracting community, DGS published in the Maryland Register proposed regulations "to permit formal evaluation of contractor performance to assist the procurement officer in enforcing contract compliance and determining contractor responsibility in accordance with the application of State Finance and Procurement Article [hereinafter Article] §16-203(c)(3)(i) and (ii), and COMAR 21.06.01.01."
8. Proposed COMAR §04.04.01, relating to evaluation of Architectural and Engineering Services, and proposed COMAR §04.04.02, relating to evaluation of Construction Contracts, follow:

04.04.01 Architect/Engineer Services
.01 General.

In evaluating architect/engineer firms for selection for contract award, the procurement officer shall consider, in addition to COMAR 21.06.01.01 and other criteria, past performance on contracts with the Department of General Services or other government agencies or private industry in terms of cost control,

may have relevance to such dispute was introduced in connection with the bid protest appeal.

quality of work, and compliance with performance standards.

.02 Evaluation of Architect/Engineer Performance.

A. Preparation of Performance Reports.

* * *

(4) In addition to the reports in §A(1) and (2) of this regulation, interim reports may be prepared at anytime.

(5) If the evaluating official concludes that a contractor's overall performance was unsatisfactory, the contractor shall be advised in writing that a report of unsatisfactory performance is being prepared and the basis for the report. If the contractor submits any written comments to the contracting authority, the evaluating official shall:

(a) Include them in the report,

(b) Resolve any alleged factual discrepancies, and

(c) Make appropriate changes in the report.

(6) The head of the contracting authority shall establish procedures which ensure that fully qualified personnel prepare and review performance reports.

B. Review of Performance Reports. Each performance report shall be reviewed to ensure that it is accurate and fair. The reviewing official shall have knowledge of the contractor's performance and shall normally be at an organizational level above that of the evaluating official.

C. Distribution and Use of Performance Reports. Each performance report shall be distributed in accordance with agency procedures. The report shall be included in the contract file, and copies shall be sent to offices or boards for filing with the firm's qualifications data. The contracting authority shall retain the report for at least 1 year after the date of the report.

D. An architect/engineer having an outstanding interim unsatisfactory report or final unsatisfactory report is not eligible for contract award.

E. An interim unsatisfactory report will become a final unsatisfactory report unless the architect/engineer remedies the deficiencies so noted within the time period determined by the evaluating official.

04.04.02 Construction Contracts

.01 General.

If the procurement officer determines that a contractor is not a responsible bidder or offeror, in accordance with COMAR 21.06.01.01 and Regulation .02D of this chapter, the contractor's bid or offer shall be rejected.

.02 Evaluation of Contractor Performance

A. In addition to the requirements of this

regulation, the requirements in COMAR 04.04.01.02A(5) and (6) and B, C, and E also apply.

B. Preparation of Performance Evaluation Reports.

(1) The contracting authority shall evaluate contractor performance and prepare a performance report using Department of General Services Form 1420, Performance Evaluation (Construction Contracts), for each construction contract of.

(a) \$50,000 or more; or

(b) \$10,000 or more, if the contract was terminated for default.

(2) The report shall be prepared at the time of final acceptance of the work, at the time of contract termination, or at interim times, as appropriate, in accordance with agency procedures. The evaluating official who prepares the report, or the official's designee, is responsible for monitoring contract performance.

C. a contractor having an outstanding interim unsatisfactory report or final unsatisfactory report is considered nonresponsible in accordance with COMAR 21.06.01.01.

9. Numerous letters objecting to the proposed regulations were received⁴, and DGS agreed to extend the comment period until

⁴For example, Paul S. Brody, President of H.A. Harris Co., Inc. by letter of January 21, 1994 stated:

The H.A. Harris Company is opposed to the present legislation regarding "contractor performance evaluation."

* * *

When a project is built there can be a hundred to a thousand items that have to be satisfactorily completed. When building an \$8,000,000 school, for instance, it may take in excess of a hundred subcontractors who need to perform correctly and efficiently. A project can start as an open field and end up as a beautiful, useful school. Due to design, weather and inadequate subcontractors and/or vendors, it is inherent in the industry that problems will arise.

By creating a performance evaluation process the contractor is left open to unfair criticism by people who are not familiar with the ongoing project. A "Public Works Project Manager" may have a "grudge" relating to a minor problem on a project, yet that occurrence can be blown out of proportion and disqualify a contractor on future projects.

We maintain that a contractor's performance could be subjective, and incorrect information would certainly be damaging to future work. We can visualize a multitude of protests that would increase litigation and cost to the government, as well as the Contractor.

January 28, 1994 so as to receive comment from the AIA/CED/DGS Liaison Committee scheduled to meet on January 25, 1994.

10. On February 8, 1994 a meeting of the Contractor Industry Employer's Advisory Council (CIEAC) was held, attended by numerous representatives of the Construction Industry as well as Secretary Walsh, Assistant Secretary Cullen, Construction Division Manager Tom Abraham and other representatives of DGS. The industry representatives were informed that Secretary Walsh would make the final decisions on use of the "unsatisfactory performance" regulations and that Mr. Abraham would send out policies and procedures that would be followed by the Department in implementing the regulations. According to Counsel for DGS, in addition to CIEAC, DGS obtained substantial input from: Associated Builders and Contractors, Inc.; Associated General Contractors, Inc.; American Sub-contractors Association; Maryland Asphalt Association, Inc.; Maryland Highway Contractors Association; AIA Maryland; AIA Baltimore; the Consulting Engineers Council of Maryland; and at least twenty individuals engaged in the construction field.
11. Those policies and procedures drafted pursuant to proposed COMAR 04.04.02 were sent by the Construction Division Manager on February 15, 1994 to the interested industry representatives as well as to the DGS Regional Construction Managers in the form of a memorandum:

Construction Division Policy and Procedure

1. PURPOSE

The purpose of the regulation on contractor performance evaluation is to give the Department of General Services the tools necessary to bring projects in on schedule, with a minimum amount of change orders and with the quality our customers deserve.

2. INTRODUCTION

a. The construction contractor evaluation system is a valuable management tool which can, if effectively used, influence contractor performance during the course of any project. In addition, every Contracting Officer has an obligation to document those few contractors whose overall performance has been judged unsatisfactory in order to prevent their participation in future programs. Since the potential consequence of a final unsatisfactory

rating is serious, care must be taken to ensure that established procedure have been followed and that the basis for the overall rating has been accurately documented and based on fact. The following instructions are for information and guidance in preparing and submitting the Construction Contractor Performance Evaluation Report.

b. Effective upon receipt of this policy, DGS 1420 will be used for documenting contractor performance.

3. GENERAL

a. Construction Contractor Performance Ratings are normally prepared upon final acceptance of a contract. However, if performance during the life of the contract becomes unsatisfactory, a SPECIAL EVALUATION, rating the contractor interim unsatisfactory, may be in order. Such a rating may be removed if the contractor subsequently improves performance and completes work in a satisfactory manner. Final ratings shall be prepared and submitted to the Construction Division Manager immediately following final acceptance of the work as physically complete.

b. Contractor performance evaluations and matters pertaining thereto are "For Official Use Only" and will be protected accordingly. The Construction Division Manager will advise Regional Managers when an unsatisfactory rating has been fully processed and that the contractor has been advised in writing.

* * *

d. Signature requirements. All ratings will be signed by the Regional Manager as the evaluating official. Reports shall be prepared for reviewing official signatures as follows:

<u>Overall Rating</u>	<u>Reviewer/Approval</u>
Satisfactory or Outstanding	Construction Division Manager
Unsatisfactory	1. Construction Division Manager 2. Assistant Secretary 3. Secretary, DGS

f. Distribution. Upon completion of signatures and processing, Construction will distribute rating as follows:

- (1) Original - Construction Division files
- (2) Copy - Procurement Officer
- (3) Copy - Engineering Division
- (4) Copy - Project Management

* * *

5. UNSATISFACTORY PERFORMANCE RATINGS

a. At the first indication of a contractor's unsatisfactory performance, the site inspector shall verbally notify the contractor of his shortcoming and tell him/her what needs to be accomplished to correct the

situation and that if the situation is not corrected it could lead to an unsatisfactory evaluation report. The inspector shall prepare a memorandum for the record of this conversation noting time, date, name of person notified and a brief synopsis of the conversation. A copy of the memorandum will be sent to the contractor, the Regional Construction Manager and the Construction Division Manager.

b. After 30 days, or sooner as appropriate, if the situation shows no sign of improvement or the effort to improve is minimal, the contractor will receive an official notice from the site inspector listing the unsatisfactory areas and informing him that an interim unsatisfactory rating may be placed in his record if the situation is not corrected. The contractor will be given a reasonable amount of time, normally 10-14 days, to respond. A copy of the official notification and the contractor response will be forwarded to the Regional Construction Manager and the Construction Division Manager.

c. When such unsatisfactory performance is reported, the Regional Construction Manager will meet with the contractor to discuss the problem areas and their resolution after he has reviewed the contractor evaluation and his response to the official notification. If the Regional Construction Manager does not concur with the contractor's response, the contractor will be given a 30 day period to correct the problem or demonstrate concern and intent to correct the unsatisfactory situation. Proper use of special (interim) unsatisfactory ratings can alert the contractor to his/her shortcomings and serve as a valuable tool to energize him/her to better his/her performance to avoid a final unsatisfactory rating. The contractor will be given a copy of the Regional Construction Manager's statement which will include a warning that if the situation is not corrected it may lead to an interim unsatisfactory rating. A copy of this correspondence will be sent to the Construction Division Manager.

d. During the probationary period, the Regional Construction Manager will closely monitor the problem areas for any indications of improvement. If after 30 days the unsatisfactory condition remains, the Regional Construction Manager will notify the Construction Division Manager who will notify the contractor of his intent to recommend to the Secretary of General Services that an interim unsatisfactory rating be placed in his file. The recommendation of an unsatisfactory performance rating will be held in abeyance pending response from the contractor, normally 10-14 days. If after review of the contractor's response, the Construction Division Manager does not concur with the

contractor, the recommendation of unsatisfactory performance will be forwarded through the Assistant Secretary, Facilities Planning, Engineering and Construction, for comment and recommendation to the Secretary of General Services for decision. If the contractor does not respond, a comment noting the contractor's lack of response will be included in the evaluation.

e. The Secretary of General Services will review all materials, including all correspondence received from the contractor, and will notify the contractor in writing of his intent and allow him the opportunity to appeal if appropriate.

f. DGS Form 1420 should contain comments in sufficient detail, based on back-up material and using specific instances of deficiencies, as required, for emphasis.

g. Final unsatisfactory ratings will be processed in the same manner as described in paragraphs 5d through 5f, except the (30) day period stipulated for noting improvement is not applicable for final evaluations.

h. The time constraints noted above for notification, response and "cure" are not to be construed as precluding issuance of an unsatisfactory rating on small contracts of short duration.

12. The record is not clear as to whether the policies and procedures set forth in Finding of Fact No. 11 above have been formally promulgated. Some witnesses believed that they were in effect and substantially followed, and other witnesses testified that they were not in effect and need not be followed. Respondent presented no written documentary evidence that the policies had been promulgated. The Board finds that the policies and procedures were never formally adopted by the Department of General Services as required by COMAR 04.04.02 for its implementation. However, the Board also finds that, whether or not the policies were formally adopted, the Construction Industry believed that they had been promulgated as quid pro quo for the industry's withdrawal of opposition to the proposed regulation. The Board further finds that the policies and procedures, whether promulgated or not, were clearly not followed in the instant case.

13. COMAR 04.04.02 became final, effective March 14, 1994, as published in the Maryland Register on March 4, 1994, with a modification changing the "is" in §04.04.02.02(C) to "may be" such that the section reads a "contractor having an outstanding interim unsatisfactory report . . . may be considered nonresponsible in accordance with COMAR 21.06.01.01."
14. Appellant received a second written communication of complaint from Ira Cortez, DGS Construction Division, Area Supervisor for the Central District, dated April 24, 1994, regarding Appellant's failure to "pre-punch" spaces before DGS "walked" the project preparing punch lists. In that letter, there was no mention of the possibility of receiving an interim satisfactory report. (AR 14). After receipt of the letter, Appellant's performance improved. (Tr. 3/22).
15. On April 20, 1994 James Graziano of DGS sent a letter to Ronald Bond, Director, Plant Operations, University of Baltimore, noting that there have been numerous construction and user changes implemented on the Merrick project, and that any additional requests for changes would serve to extend the contract and delay occupancy.
16. There were change orders amounting to at least \$120,000 issued and/or performed by Appellant between April 24, 1994 and July 15, 1994.
17. On June 23, 1994 Mr. Graziano of DGS sent a letter to Mr. Bond of the University stating that the DGS Assistant Secretary, Deputy Secretary and Senior Project Manager had visited the building and that they believed that the school would be proud of the building. A status report of the same date indicated that the building was 99% complete, with substantial completion of the project expected by July 15, 1994. (AR 17).
18. On the morning of June 24, 1994, a walk-through of the building was conducted by DGS Secretary Walsh, Assistant Secretary Coleen Cullen, Procurement Officer William E. Cullen, Construction Division Manager Mr. Abraham, Regional

Construction Manager James Graziano, along with Dr. Mebane Turner, President, and Ronald Bond, Director, Plant Operations, of the University of Baltimore. Immediately following this meeting, Secretary Walsh (apparently believing that all necessary notice pursuant to the COMAR 04.04.02 draft policies and procedures set forth in Finding of Fact No. 11, above, had been followed) ordered that an interim unsatisfactory report be issued to Appellant on that very day, and ordered that the Appellant be contacted for a plan for completion of the interior of the building by July 15, 1994.

19. Procurement Officer William E. Culen prepared and signed a letter to Mr. Jack Leone, Appellant's President, informing him that an interim unsatisfactory report was being issued. This notice letter (AR 20) provided:

This is to advise you that the Department of General Services is issuing an Interim Unsatisfactory Performance Evaluation report on Triangle General Contractors, Inc., for its performance on the above referenced State project at the University of Baltimore. The reason for this performance evaluation is consistently poor workmanship and consistently tardy performance.

Time is of the essence. Use and Occupancy of this facility is long overdue. If the University is unable to accept the facility on July 15, 1994, there will be continued serious financial impact.

You have the opportunity to respond to this evaluation in writing and to take immediate corrective action. Your response, if any, will become a part of the record in this action.

In accordance with COMAR 04.04.02, a contractor having an outstanding interim report or final unsatisfactory report may be considered nonresponsible in accordance with COMAR 21.06.01.01.

If this situation is corrected so that the project can be satisfactorily occupied by July 15, 1994, this Interim Unsatisfactory Performance Evaluation may be removed from the record. (AR 20).

This notice letter from Mr. Culen was hand-delivered to Mr. Leone by Deputy Secretary Pecora on the afternoon of June 24, 1994. The report, which was not included with the notice letter, indicates that the Contractor was unsatisfactory in quality of work, timeliness of performance, and effectiveness

of management.⁵ Entries regarding the quality of work referred to external masonry, caulking and precast. Mr. Leone testified that he did not see a copy of the report until it was received in discovery.

20. Mr. Abraham testified that he did not believe that the procedures and policies for issuance of interim unsatisfactory reports sent to contractors concomitant with the adoption of COMAR 04.04.02 were followed in this instance. (Tr. 1/91).
21. Following the delivery of the interim unsatisfactory notice letter of June 24, DGS informed Appellant that if he completed the interior of the building by July 15, 1994, the Interim Unsatisfactory Report would be lifted. Mr. Leone submitted, and DGS accepted⁶, an interior completion schedule on June 27, 1994 excepting student consoles in the auditorium and caseroom 038. The schedule specifically noted that no exterior portions of the building were included therein.
22. Thereafter, Triangle made a concerted effort to complete the agreed upon schedule. A status report of June 28, 1994, stated "[c]ontractor using manpower better and focusing on critical areas."
23. On June 29, 1994, by counsel, Appellant protested the issuance of the Interim Unsatisfactory Performance Evaluation Report.
24. Over the July Fourth weekend, between 15 and 22 men worked each day, including the President of Appellant, Mr. Leone. Appellant's crews continued to operate at that level up to July 15, 1994.
25. Late on the afternoon of July 13, 1994 Mr. Leone was informed by DGS that the lightning protection on the roof must be completed by July 15 in order for DGS to accept the work and

⁵ The interim unsatisfactory report also notes that as of June 24, 1994, 58 change orders amounting to \$521,251 had been approved.

⁶ Mr. Leone Tr. 5/252; Deputy Secretary Pecora Tr. 5/124-127; Assistant Secretary Cullen Tr. 4/60; Construction Division Manager Abraham Tr. 1/95; Regional Construction Manager Graziano Tr. 5/54.

lift the unsatisfactory report. As of July 13, grounding wires from the roof ran through the perimeter walls to the ground, and their extensions on the roof were coiled. However, the lightning rods themselves were not yet installed. Mr. Leone informed DGS that with such short notice he was unable to complete the work by July 15th, but agreed to keep in force Appellant's Builder's Risk policy until such time as the system was completed. In fact, the lightning protection was completed by July 18, 1994.

26. The Board finds that as of July 15, 1994, the interior of the building was substantially completed. The agreement reached on June 27 regarding the lifting of the interim unsatisfactory report was also sufficiently satisfied to trigger lifting of the report (if not application in Appellant's favor of the "may be" considered language of 04.04.02.02c).
27. Mr. Leone for Appellant, Mr. Abraham for DGS, and Mr. Schwartz for the Architect Ayers/Saint/Gross were all proceeding on July 15, 1994 with the assumption that the interior was acceptable and would be turned over. See testimony of Mr. Abraham⁷, Mr. Schwartz (Tr.1-231), as well as Mr. Abraham's preliminary report to Assistant Secretary Cullen (AX 41), and correspondence from Mr. Leone (AX 42). Locks on at least 295 of 300 rooms had already been changed by the University, precluding access by the Appellant.

⁷ It is normally the responsibility of the architect and the Procurement Officer to determine whether or not a project is "substantially complete". See general conditions, ¶7.14B. Mr. Abraham testified that in his two years as Construction Division Manager, there were 90 - 110 projects in progress at any one time. Mr. Abraham was apparently delegated the Procurement Officer's authority and during his tenure, made all the determinations for the Department that a project under construction was substantially complete, save one, the Merrick School. (Tr. 1-112). He further testified that if he had made the decision whether to accept the interior of the building on July 15, 1994, he would have accepted it. (Tr. 1-113).

28. Mr. Abraham testified that in his view as of July 15, 1994, 1) the project was substantially complete, and 2) the interim unsatisfactory report should be lifted per agreement because there remained only one or two items on the June 27 list to be completed.

29. His superiors disagreed with him, however, and required that he decline to accept the project as of July 15. Therefore, Mr. Abraham wrote to Mr. Leone on July 15, 1994 stating:

. . . While you have met most of the commitments that you made for completion of work by July 15, we are not at 100% of the commitment made. We acknowledge that you are very close but feel that there are still several days of work remaining before we can accept the project for beneficial use and occupancy.

The reasons for this determination are as follows:

* Lightning protection is not complete. We have considered your commitment to keep the builder's risk insurance in your name until it is complete. This is not the only item of concern however.

* The stairwells are not complete. Epoxy has been put on the floors of the stairwells, but stains have not been removed. The epoxy will have to be done over. We cannot occupy the building while this work is yet to be done. The stairwells have not been finish painted. We could anticipate many disagreements about repairs and finish work if we were to move in without the stair towers being finished.

* The roof is not complete. The flood coat and gravel is only 30% complete on the main roof. We acknowledge the work could have been done today had it not rained yesterday.

* The Dean's office is not complete. This was a major issue and was specifically identified on your schedule of items to complete by July 15. It looks like there might be as many as two or three day's work remaining in the deans'[sic] area.

Based on the above, we do not feel that it would be prudent for the State to grant a substantial completion for use and occupancy at this date. Utilities should remain functional and in your name until the building is turned over. We appreciate your efforts in the past two weeks and look forward to these items being complete within the next two to three working days so that we can grant the use and occupancy for the building.

30. Four items were thus listed in the above letter: 1) lightning

protection, 2) three⁸ stairwells remained to be painted, 3) the roof was not complete, and 4) the Dean's office was not complete. The Board concurs with Appellant's view that these items should not have prevented the lifting of the interim unsatisfactory report. The Board also agrees that the interior was substantially complete. First, according to expert witness and architect Philip Worrall, completion of the lightning protection was not a life-safety issue, and lightning protection is not a BOCA code requirement. Further, as an exterior item, lightning protection was not listed on the 6/27 agreement, and was completed in three days. Likewise, the exterior roof was not listed on the 6/27 agreement, and, in any event, was watertight. The Dean's conference room was awaiting 20% of the paneling, which was completed on July 20th. However, it was noted in testimony that the conference room, although turned over to the user, was not yet occupied as of the date of the hearing of this appeal. Finally, the painting of three stairwells could easily be accomplished at night or on the weekends with no interference with the University's operation.

31. On July 21, 1994, DGS opened bids, including that of Appellant, for the construction of the Cheltenham Armory and Organizational Maintenance Shop, Project No. M-000-922-024. The following bids were received:

	<u>Base Bid</u>	<u>Alt. 1</u>	<u>Alt. 2</u>	<u>Total</u>
Appellant	\$3,543,108	\$41,000	\$51,500	\$3,635,608
Ronald Hsu	\$3,667,000	\$33,300	\$54,800	\$3,755,100
Dennis Anderson	\$3,852,000	\$31,000	\$54,500	\$3,937,500
Jowett, Inc.	\$3,799,000	\$28,000	\$66,000	\$3,893,000
R.R. Gregory Corp.	\$3,693,000	\$33,100	\$45,400	\$3,771,500

Appellant was the apparent low bidder on this project.

⁸The record reflects that there were other stairwells as well as elevators available for ingress and egress.

32. The Cheltenham project involves construction of two buildings for the National Guard which would constitute one armory complex. The Armory calls for a brick veneer, concrete block cavity wall construction, concrete slabs, and structural steel members. Cheltenham is a single story building of approximately 23,000 square feet with of approximately 20 spaces. The specifications anticipate completion within one year.
33. On July 26, 1994 Secretary Walsh, the University's Ronald Bond, Assistant Secretary Cullen and the Construction Division's Abraham, Graziano, Cortez and Inspector Lewis again conducted a walk-through of Merrick. During the walk-through, the Secretary, apparently still unhappy with the project, indicated language to be used by the Construction Division Manager Abraham in a memorandum to Assistant Secretary Cullen. The purpose of the memorandum is to inform Procurement Officer Cullen through the Assistant Secretary that Abraham finds there is no reason to change the interim unsatisfactory evaluation, and recommending that Procurement Officer Cullen deem Appellant nonresponsible for the Cheltenham contract. (AX 50). Mr. Abraham testified at the hearing, however, that the recommendation was not his own (Tr. 1/188), and that he personally had no concern that if awarded the Cheltenham contract, Appellant would not perform satisfactorily. (Tr. 1/194).
34. On August 2, 1994 Mr. Abraham accepted the interior portion of the Merrick School for use and occupancy by the University of Baltimore effective August 1, 1994. (AR 4).
35. Procurement Officer Cullen on August 8, 1994 sent to Appellant the following letter regarding the construction of the Cheltenham Armory:

Your Firm is the apparent low bidder on Project No. M-000-922-0242-024 Cheltenham Armory. At this time Triangle is under notice of its continuing Interim Unsatisfactory Performance, under COMAR 04.04.02, for project workmanship and tardy performance at the University of Baltimore Merrick School of Business.

Under COMAR 04.04.02 and COMAR 21.06.01.01 Triangle General Contractors, Inc. is now found ineligible for award of the above referenced contract based on Triangle's unsatisfactory performance of the Merrick Contract.⁹ Therefore, Triangle General Contractors is hereby deemed non-responsible at this time.

It is apparent to the Board that DGS made a conscious decision not to base the award to the next lowest bidder on a finding regarding the reliability and integrity of Appellant, factors set forth in COMAR 21.06.01.01, despite the reference to reliability in the previous draft. See AX 64. The Board finds that there is no suggestion in the record that Appellant was unreliable or lacking in integrity.

36. The Board finds that the procurement officer determined that the appellant was not responsible on the sole grounds that an interim unsatisfactory report regarding the appellant's performance on the Merrick Business School Project had been issued to the appellant which had not been lifted by DGS at the time of the submission of bids on the Cheltenham project.¹⁰
37. Appellant timely protested the Procurement Officer's decision on August 10, 1994.

⁹Removed from a previous draft at this point in the letter was the following sentence: "Triangle's performance of the Merrick contract indicates that Triangle lacks the reliability and capability in all respects to perform fully the contract requirements." (AX 64).

¹⁰ A responsible contractor as defined in COMAR is one who has the capability in all respects to perform fully the contract requirements and the integrity and reliability that shall insure good faith performance. 21.01.02.01.(77). As noted above, there is no indication in the record that the finding that appellant was not a responsible contractor was based on a finding that it was not reliable or lacked the integrity or reliability that would insure good faith performance. The determination appears to be based solely on workmanship and timeliness issues rather than questions of integrity or reliability.

38. The Procurement Officer's final decision was issued on August 22, 1994 denying Appellant's protest.¹¹
39. Timely appeal to this Board was filed August 26, 1994.
40. The Board of Public Works awarded the Cheltenham Armory Contract to the second lowest bidder, Ronald Hsu Construction, on September 28, 1994.

Decision

State Finance and Procurement Article §11-201, Purposes and construction of Division, sets forth the purposes and policies of the General Procurement Law to include:

- (1) providing for increased confidence in State procurement;
- (2) insuring fair and equitable treatment of all persons who deal with the State procurement system; [and]
- (3) providing safeguards for maintaining a State procurement system of quality and integrity

Absent fair treatment of all contractors, confidence in State procurement cannot be maintained, and the carefully crafted and balanced procurement system established by the General Procurement Law and reaffirmed by the Board of Public Works in COMAR 21.01.01.03 is jeopardized. The Board believes that this direction from the General Assembly and the Board of Public Works can only be read to mean that contractors are entitled to receive due process in their dealings with the State of Maryland. Thus, contractors are entitled to rely on the representations of the government that they will receive warning, time to cure and/or respond before entry of an interim or final unsatisfactory report. This is particularly true when the State intends that such a report may be used as the grounds for a finding of non-responsibility on subsequent contracts.

The Construction community's strong response to the promulgation of COMAR 04.04.02 is evidence of that community's interest in defending the rights inherent in State Finance and

¹¹In this letter Mr. Culen notes "the Interim Unsatisfactory Performance Report was properly issued on June 24, 1994"

Procurement Article §11-201(a). We find that the Construction community (to include Appellant) is entitled to assume that the policies and procedures that it endorsed as responsive to its stated concerns about proposed regulation 04.04.02 would in fact be implemented and followed by DGS as they promised.

Within the parameters of the General Procurement Law, the State, through its procurement officers, is given broad discretion regarding determinations of non-responsibility.¹² DGS argues that Mr. Culen's determination here falls within the protection of that broad discretion. This Board has held that the procurement officer's determination of responsibility will not be disturbed unless clearly unreasonable, an abuse of discretion, or contrary to law or regulations. Allied Contractors, Inc., MSBCA 1191, 1 MSBCA ¶79 (1984); Charles Center Properties, MSBCA 1629, 3 MSBCA ¶297 (1992).

Thus, Appellant's burden of proof is to overcome this presumption of regularity by showing that the non-responsibility finding is the result of "unfairness, arbitrariness or capriciousness of the State", Calso Communications, Inc., MSBCA 1377, 2 MSBCA ¶185, p. 13 (1988), and/or is contrary to law or regulations. The contractor must therefore come forward with evidence that the determination of its non-responsibility lacks a basis in fact, or is contrary to law. Here, Appellant has met its burden of proof by showing that the non-responsibility finding is the result of "unfairness", id., or a denial of due process. Under COMAR 04.04.02, it is presumed that the issuance of an interim unsatisfactory report rests upon a chain of events having occurred that will document in some demonstrable fashion that 1) work has been performed in an unsatisfactory manner; 2) that the contractor was warned of shortcomings, informed of the fact that failure to correct could lead to an interim unsatisfactory report; and 3) upon

¹² State Finance and Procurement Article §13-206(a), as implemented by COMAR 21.06.01.01, requires that a procurement officer shall reject a bid if a procurement officer determines that the bidder is not responsible.

failure to correct, was issued the interim unsatisfactory report with an opportunity to respond and to correct the problem or demonstrate concern and an intent to correct.¹³ In this case, Appellant was provided no written warnings that his performance might lead to an unsatisfactory report in the months before the June 24 issuance of the notice of unsatisfactory performance, was given no opportunity to improve before its issuance, and when thereafter his performance clearly improved, he was denied relief on the basis of new claims.

DGS, however, also argues that an interim unsatisfactory report may be issued without regard to whether agency procedures have been promulgated as specifically required by COMAR 04.04.02. Accordingly, it is of no consequence to DGS that the interim unsatisfactory report was issued as described above, with no advance warning, notice to the contractor, or opportunity to cure. While the record reflects that the contracting community and DGS agreed that the regulation as promulgated would include provision

¹³The Board recognizes that on June 24th, the day the Secretariat directed the interim unsatisfactory report to be issued, the project was advanced to such an extent that the timeframes for notice, internal review and cure in the draft policies may have been difficult to apply because the project was nearing "substantial completion". The Board declines to speculate on this matter. Nonetheless, the regulations require that activity be conducted in accordance with promulgated procedures envisioning action by the agency in a time frame that precedes final completion of the project. In fact, the proposed policies allow for modification of the timeframes so as to accomplish the spirit of notice, response and cure. (Finding of Fact No. 11). Nonetheless, the Board does note that after the issuance of the interim unsatisfactory report the contractor was advised that the report would be expunged if it completed certain work on the interior of the building by July 15. The record reflects that the Appellant did substantially complete such specific tasks as were indicated in his schedule of work as approved by DGS. (AX 29). However, the interim unsatisfactory report was not lifted, in contravention of the spirit of the policies' provision that the demonstration of concern and intent to cure was sufficient to trigger expungement of the report. (Finding of Fact No. 11).

for agency procedures that would afford the contracting community notice, comment, internal review and opportunity to cure, DGS argues that no due process concerns attach to the issuance of an unsatisfactory report.

The Board disagrees. Here, the interim unsatisfactory report was issued within hours of a determination by the Secretariat of DGS to issue the same. Except for the notice letter of 6/24/94, not one of the procedural fairness guarantees embodied in the draft policies and procedures called for by the interim unsatisfactory regulations in COMAR 04.04.02 were honored.¹⁴ COMAR 04.04.02 requires promulgation of policies and procedures.¹⁵ The Department's draft policies (apparently borrowed from those promulgated by the US Army Corps of Engineers) call for, at a minimum, warnings, opportunity to cure, and redress in a multi-level mode commencing with the project inspector.

Therefore, not only was the spirit of the unpromulgated policy not followed, but the letter of the law in COMAR 04.04.02 was not followed. Further, since the Procurement Officer's determination was based solely on the interim unsatisfactory report, and the issuance of the report was not proper since no policies had been implemented for issuance, and draft procedures for written warnings, review, and opportunity to cure were not even followed, the issuance of an interim unsatisfactory report under COMAR 04.04.02 fails as the basis for a finding of non-responsibility.

In the alternative, DGS argues that without regard to COMAR 04.04.02, under COMAR 21.06.01.01, the procurement officer has the

¹⁴ Even the proposed procedures themselves require that care be taken to ensure that established procedures have been followed.

¹⁵ COMAR 04.04.02.02.B(2) provides that the report "shall be prepared in accordance with agency procedures."

broadest discretion to determine that a bidder is non-responsible¹⁶, and argues that Procurement Officer Culen reached his non-responsibility determination on the basis of his own observations of the Merrick project. The Board finds, however, as evidenced by (1) Mr. Culen's testimony,

I think really the bottom line on this issue of nonresponsibility was the -- for me, was the exterior of the building. . . . Just about everything else that I think that occurred throughout the life of the contract could be corrected in time by Triangle General Contractors."

(Tr. 5/166-171), (2) the language of the letter of August 8, 1994 (AX65), and (3) the draft thereof (AX64), that the basis of his finding was the interim unsatisfactory report.

This determination by the Board we believe is reinforced by a comparison of the two projects. The Armory is a much smaller, much less complex, and less "monumental" construction. It is a one story building costing \$3.5 million with 20 spaces, while Merrick at a value of at least \$12 million, is a state of the art school with six floors and 300 spaces.

The Board finds that this independent basis for the non-responsibility determination simply is not supported by the record, and the sole reason for the non-responsibility determination was the existence of the defective interim unsatisfactory report. The Board heard five days of testimony from DGS personnel with on-hands experience with the Merrick project as well as the testimony of a disinterested third party expert, architect Philip Worrall, that the project was at least satisfactory and/or average. Indeed, Construction Division Manager Abraham testified that at the time the construction was on-going he felt that the project was

¹⁶DGS cites N.B.R., Incorporated, MSBCA 1830, MSBCA ¶ (1994), in support of its position that a procurement officer's discretion is nearly unfettered. The Board notes that the facts in N.B.R., Incorporated are distinguishable from this case in that the issue therein was a procurement officer's determination that the appellant had failed to satisfy definitive responsibility requirements, not his determination regarding workmanship and timeliness on other DGS or State projects.

substantially complete and that he had no concern that Appellant would be unable to successfully manage the Cheltenham project.

The mere fact that a contractor is stated to be not responsible by the agency head and procurement officer will not carry the State's resulting burden once the contractor has come forward as in this case and presented evidence that the finding of non-responsibility lacks a proper foundation. Here, the Appellant contractor has shown that even several of Respondent's employees or witnesses, including Mr. Abraham, Mr. Schwartz, and Mr. Cortez, believe that the Merrick project was at worst "average" or "satisfactory". DGS is then required to go forward and present evidence that there are facts which support the discretionary decision of the procurement officer and agency head. This we find it did not do sufficiently to overcome Appellant's showing.

In the face of Appellant's successful challenge to the presumption that the Procurement Officer's discretion is not to be disturbed unless the record reflects that it had no basis in fact, DGS has failed to carry its burden of establishing a factual basis for its action.

Finally, it is noted that even under general contract law, as distinct from notions of fair dealing as embodied in the General Procurement Law, the language of COMAR 04.04.02 that implementing policies be promulgated and followed must be applied to this contract. COMAR requires that certain provisions be incorporated in construction contracts, including a termination for default clause, which states that the remedies set forth in the clause are in addition to any other rights and remedies provided by law. The interim unsatisfactory provision set forth in COMAR 04.04.02 are such other remedial provisions. If utilized as a contractual remedy by one party to the contract, the spirit and intent of the specific language must be followed when applied to the other party.

For the foregoing reasons, the appeal is sustained.

Wherefore, it is Ordered, this 13th day of January, 1995 that the appeal is sustained, and remanded to DGS for appropriate action.

Dated: 1/13/95

Candida Steel
Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
Robert B. Harrison III
Chairman

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1840, appeal of Triangle General Contractors, Inc. under DGS Contract No. M-000-922-024.

Dated: *January 17, 1995*

Mary F. Priscilla

Mary F. Priscilla
Recorder

for... the... of...
... the... of...
... the... of...
... the... of...

... the... of...
... the... of...
... the... of...
... the... of...

... the... of...
... the... of...
... the... of...

... the... of...
... the... of...