

**BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

**Appeal of Maryland Bio Energy, LLC**

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**Under Maryland DGS Solicitation  
No. 001IT818620**

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**MSBCA Docket No. 3061**

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**OPINION AND ORDER BY CHAIRMAN BEAM**

Having read and considered Respondent’s Motion for Partial Summary Decision, Appellant’s Opposition thereto, Respondent’s Reply to Appellant’s Opposition, and after a hearing thereon, the Board hereby denies Respondent’s Motion for the reasons that follow and for the reasons set forth at the hearing.

Respondent contends that this Board lacks jurisdiction to hear and render a decision on Appellant’s claim as it relates to damages arising from the alleged breach of the purported contract entered into between the parties hereto because Appellant failed to exhaust its administrative remedies. Respondent argues that Appellant should be required to submit its claim for damages arising out of the alleged breach of the purported contract to the Procurement Officer (“PO”) before this Board is authorized to render any decision on Appellant’s claim. Ordinarily, we would agree. However, given the facts in this case, we conclude that Appellant has, in effect, exhausted its administrative remedies and that all claims arising out of the PO’s Final Decision are subject to review by this Board.

It is undisputed that Respondent initially terminated the purported contract for convenience and that Appellant submitted a claim for costs and lost profits arising therefrom in the amount of \$5,678,090. It is also undisputed that the PO rendered a “Final Decision” on Appellant’s claim denying any entitlement to any expenses or lost profits. The PO went further,

however, and, for the first time in its Final Decision, determined that “the termination for convenience is a nullity because the [contract] is void.” The PO’s five-page Final Decision included an analysis explaining in detail the basis for its determination that the contract was void, as well as the reasons why Appellant was not entitled to “recover any expenses or lost profit related to the void [contract].” The PO’s analysis was based, in part, on the application of MD CODE ANN., STATE FIN. & PROC. §11-204(b)(2), which prescribes the conditions under which a contractor is entitled to “compensation for actual expenses reasonably incurred...plus a reasonable profit” when a contract has been declared void.

In response to the PO’s Final Decision that Appellant was not entitled to any expenses or lost profits arising from the contract that the PO determined was now void, Appellant filed a timely Notice of Appeal and later a Complaint (which was amended with leave of the Board) contending that the PO’s Final Decision declaring the contract void was a breach of the contract and seeking damages for said breach in the amount of \$70 million.

The issue before the Board pursuant to this Motion is whether Appellant should be required to submit a “new” claim for damages arising from Respondent’s alleged breach back to the PO for further consideration, a claim that would now be untimely filed (pursuant to COMAR 21.10.04.02). Respondent contends that Appellant should have filed a new claim with the PO for damages arising from the Respondent’s alleged breach (a breach that is alleged to have occurred with the issuance of the PO’s Final Decision declaring the contract void), rather than including this “new” claim in its Complaint (as amended).

We disagree. The practical effect of submitting this “new” claim to the PO (assuming it had been timely filed) would be to ask the PO to reconsider its “Final Decision” that the contract was void in favor of finding that this “void” contract was instead a valid contract that was

breached by Respondent when the PO determined that it was void. In other words, Appellant would be asking the PO to change its position and declare that its Final Decision (that the contract was void) was not final at all, and that the void contract was, in fact, a valid contract that was breached by Respondent when the PO declared that it was void. The Board agrees with Appellant that this would be an exercise in futility and that the PO's Final Decision—that the contract was void and that Appellant was not entitled to any damages arising from a void contract—was just that—final. As such, Appellant is entitled to seek review of that Final Decision with this Board and was not required to submit a claim for damages arising out of the PO's Final Decision, which allegedly constituted a breach of contract, back to the PO for further consideration.

Accordingly, Respondent's Motion for Partial Summary Decision is denied.

**ORDER**

For the foregoing reasons and for the reasons stated at the hearing, it is this 15<sup>th</sup> day of March 2019 hereby:

ORDERED that Respondent's Motion for Partial Summary Decision is DENIED; and it is further

ORDERED that a copy of any papers filed by any party in any subsequent action for judicial review shall be provided to the Board, together with a copy of any court orders issued by the reviewing court.

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/s/  
Bethamy N. Beam, Esq.  
Chairman

I concur:

                  /s/                    
Ann Marie Doory, Esq.

                  /s/                    
Michael J. Stewart, Esq.

**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 contested cases.

**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 ten 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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA No. 3061, Appeal of Maryland Bio Energy, LLC under Maryland DGS Solicitation No. 001IT818620.

Dated: 3/15/19

15/  
Ruth Foy  
Deputy Clerk