

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of

*

**RED COATS, Inc. d/b/a
ADMIRAL SECURITY SERVICES**

*

*

Docket No. MSBCA 3132

Under

*

**Department of General Services
BPO No. 001B8400240**

*

Appearance for Appellant

*

**Alex J. Brown, Esq.
Jessica L. Swadow, Esq.
Shapiro Sher Guinot & Sandler, P.A.
Baltimore, MD**

*

*

Appearance for Respondent

*

**Craig H. DeRan, Esq.
Assistant Attorney General
Contract Litigation Unit
Baltimore, MD**

*

*

* * * * *

OPINION AND ORDER BY MEMBER STEWART

On January 15, 2020, the Board held a hearing on cross motions for summary decision filed by the parties pursuant to COMAR 21.10.05.06D. Respondent, Maryland Department of General Services (“DGS”), filed its Motion on November 22, 2019. Appellant, Red Coats, Inc. d/b/a Admiral Security Services (“Admiral”), filed an Opposition on December 13, 2019, and Respondent filed a Reply on January 3, 2020. Appellant filed its Motion on November 22, 2019. Respondent filed an Opposition on December 13, 2019, and Appellant filed a Reply on January 7, 2020. Appellant’s Motion asserts that based upon the undisputed facts that it is entitled to an equitable adjustment under its Contract with Respondent. Respondent’s Motion also alleges the facts are undisputed, but contends the Appellant is not entitled to an equitable adjustment.

Upon consideration of the filings of the parties and arguments of counsel at the hearing, the Board concludes there are no genuine issues of any material facts, and Respondent is entitled to prevail as a matter of law. As the scope of work did not change, Appellant is not entitled to an equitable adjustment for increased labor costs incurred due to its compliance with legislation, passed after the execution of the Contract, mandating that Maryland employers having 15 or more employees, provide them sick and safe leave.¹

UNDISPUTED MATERIAL FACTS

On August 22, 2017, Respondent issued an Invitation for Bids, Solicitation No. 0011T820678/MDDGS31034083 (the “IFB”) to procure, at a fixed price, uniformed, armed and unarmed security guard services for 15 facilities operated by the Maryland Department of Human Services, Baltimore City Department of Social Services. The term of the resulting contract was to be from January 1, 2018 to December 31, 2022.

Both the IFB and the Contract contain provisions directly relevant to the arguments set forth in the parties’ dispositive Motions. IFB Section 1.13 states that a Blanket Purchase Order (“BPO”) will be issued and that “any subsequent amendments, modifications or options issued relevant to the IFB or BPO, shall comply with all of the terms, conditions and specifications issued with the IFB and are incorporated in and made a part of the BPO.” IFB Section 1.24 informs a bidder that if it is selected for an award, then it “shall be deemed to have accepted the terms and conditions of this IFB and the Contract, attached herein as **Attachment A.**”(emphasis in original)

¹ In their motions and at the hearing the parties each made several other arguments regarding Appellant’s entitlement to an equitable adjustment. Given the Board’s conclusion that Appellant is not entitled to an equitable adjustment based on the terms of its Contract, the Board need not address these arguments.

Additionally, IFB Section 1.27 states, in pertinent part:

By submitting a Bid in response to this IFB, the Bidder, if selected for award, agrees it will comply with all Federal, State, and local laws applicable to its activities and obligations under the Contract.²

The General Requirements concerning the Scope of Work to be performed are set forth in IFB Section 3.2.1. The relevant subsections are as follows:

3.2.1.1:

The Contractor shall provide the necessary uniformed armed and unarmed security guards along with training, equipment, insurance, and expertise to cover the security guard assignments as required by the Baltimore City Department of Social Services ("BCDSS").

3.2.1.3:

During the term of this security guard contract, there is an imminent possibility that two or more of the current individuals [sic] listed facility locations will be consolidated and/or relocated into one large complex. BCDSS reserves the right to make any adjustments to the number or [sic] unarmed and armed security guards. The Contractor will be provided with thirty (30) days [sic] notice of any decision to increase or decrease the number of guards. The State will pay for any additional guards required at the same unit cost established in the Contract.

IFB Section 3.2.2 describes the scope of work in more detail. It sets forth the number of guard assignments and their scheduling requirements. It specifically identifies the locations where guards are to be assigned, the number of guards to be assigned, the type of guards to be assigned, and the hours required for each type of guard to be assigned.

Finally, Paragraph 2.2 of the Contract contains what is referred to in Maryland procurement contracts as the "Changes" clause:

The Procurement Officer may, at any time, by written order, make changes in the work within the general scope of the Contract or the IFB. No other order, statement, or conduct of the Procurement Officer or any other person shall be treated as a change or entitle the Contractor to an equitable adjustment under

² Similarly, Paragraph 25.3 of the Contract states that the Contractor "shall comply with all federal, State and local laws, regulations, and ordinances applicable to its activities and obligations under the Contract."

this section. Except as otherwise provided in this Contract, if any change under this section causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work, whether or not changed by the order, an equitable adjustment in the Contract price shall be made and the Contract modified in writing accordingly. The Contractor must assert in writing its right to an adjustment under this section within thirty (30) days of receipt of written change order and shall include a written statement setting forth the nature and cost of such claim. No claim by this Contractor shall be allowed if asserted after final payment under this Contract. Failure to agree to an adjustment under this section shall be a dispute under the Disputes clause. Nothing in this section shall excuse the Contractor from proceeding with the Contract as changed. (emphasis added).

Upon bid opening, Admiral was determined to be the lowest responsive and responsible bidder with a price of \$15,551,628.60. Admiral executed the Contract on December 8, 2017. Respondent executed the Contract on December 12, 2017. The Board of Public Works approved the Contract on December 20, 2017. The BPO was issued on December 22, 2017.

On February 11, 2018, the Maryland Healthy Working Families Act (“MHWFA” or the “Act”), MD CODE ANN., LAB. & EMPL., TITLE 3, SUBTITLE 13, became Maryland law.³ The Act required Maryland employers who employ 15 or more employees to provide paid sick and safe leave. Employers were required to provide paid leave to all full-time, part-time, temporary, and seasonal employees, over the age of 18, who regularly work 12 hours or more per week. Under the Act, employees are eligible to accrue one hour of sick and safe leave for each 30 hours worked, up to 40 hours per calendar year.

On February 22, 2018, Wayne King, Division Vice President of Admiral (“King”) sent a letter to Gwendolyn Hudson, the Procurement Officer (“PO”), requesting to pass on a price increase to Respondent because of the increased labor costs incurred as a result of having to comply

³ The Act was introduced as House Bill 1 in the 2017 Session of the General Assembly. It was passed by both the House of Delegates and the Senate, but was vetoed by Governor Hogan. The Governor’s veto was overridden on January 12, 2018, per Md. Const. Art. 2, § 17(d), and the Act became law 30 days after the veto override. 2018 Md. Laws, Chap. 1. In reaching this decision, it is not relevant whether or not Admiral knew or should have known that the veto would be overridden.

with the Act. In its request, Admiral listed four types of guards, along with new hourly rates it needed to pay to comply with the Act, and requested the price increase be retroactive to February 11, 2018. On August 14, 2018, Danny Mays, Program Manager for Respondent's Procurement & Logistics Division ("Mays"), sent King an email denying the price increase request.

On September 14, 2018, King sent a letter to the PO asking her to "accept this claim, pursuant to COMAR [Section] 21.10.04.02, of the denial by [Respondent], of a rate increase requested by Admiral Security Services under the above-referenced BPO." Attached to the letter was a copy of King's February 22nd letter. On March 8, 2019, King again wrote Mays requesting a price increase of \$422,244. Eric T. Lomboy, DGS's Assistant Secretary of Procurement & Logistics denied Admiral's Claim on May 20, 2019. The final decision denied Appellant's claim, for among other reasons, that "there are no provisions within either the initial Invitation for Bids, nor the resulting contract, that would allow for the increase requested," and that "there has been no change to the scope of work within the contract. On the contrary, the Act requires Admiral Security to implement leave procedures to all employees across any and all of its contracts, not just the specific contract in question." The Appellant appealed the denial of its claim to this Board on June 14, 2019.

STANDARD FOR SUMMARY DECISION

In deciding whether to grant a Motion for Summary Decision the Board must follow COMAR 21.10.05.06D(2):

The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor of the party against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law.

The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See, Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726

(1993). To defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *Id.* at 737-738. While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Clea v. City of Baltimore*, 312 Md. 662, 678 (1988).

OPINION

Appellant's claim is for an equitable adjustment. An equitable adjustment is a corrective measure used to keep a contractor whole when the State modifies a contract. The intent is to restore a contractor to the economic position it was in prior to the modification. See, *C.J. Langenfelder & Sons, Inc.*, MSBCA Nos. 1000, 1003 & 1006 (1980) at 16. The limited waiver of sovereign immunity by the State in contract actions requires claims be based on a written procurement contract. See, MD CODE ANN., STATE GOV'T. § 12-201(a); *Davidsonville Diversified Services*, MSBCA No. 1339 (1988); *Jorge Company, Inc.*, MSBCA No. 1047 (1982). In *Prison Health Services, Inc.*, MSBCA No. 1776 (1995), the Board denied a claim for an equitable adjustment on the bases of equitable estoppel, unjust enrichment and *quantum meruit* explaining:

When the State enacted the General Procurement Law in 1980 it set the parameters relative to the relief available to a contractor following the waiver of its sovereignty in 1976. Accordingly, Appellant may only be awarded an equitable adjustment if such is authorized by the General Procurement Law or COMAR Title 21. Appellant has no remedy under common law legal or equitable principles that are not embodied directly or by necessary implication in the remedial provisions of the General Procurement Law as set presently forth in Division II, State Finance and Procurement Article. In order for any recovery to be considered a procurement contract must exist. 11-202, 15-217, State Finance and Procurement Article (footnotes omitted). *Id.* at 3.

The IFB in Section 1.27, and the Contract in Paragraph 25.3, both mandate that Appellant comply with all federal, State and local laws, regulations, and ordinances applicable to its activities and obligations under the Contract, and that necessarily includes the provisions of the MHWFA.

The right to receive a payment for an equitable adjustment and, concomitantly the State's obligation to make a payment, is governed by the remedy granting language contained in the "Changes" clause. *C.J. Langenfelder & Sons, Inc.*, MSBCA No. 1001 at 25. The "Changes" clause contained in Paragraph 2.2 of the Contract allows for equitable adjustments when there are "changes in the work within the general scope of the Contract or the IFB." It further states:

No other order, statement, or conduct of the Procurement Officer or any other person shall be treated as a change or entitle the Contractor to an equitable adjustment under this section.

It is undisputed that the Act increases labor costs for all employers in Maryland who employ 15 or more employees. The question the Board must answer is simple – does the Act change the scope of work under Appellant's Contract, and therefore entitle Appellant to an equitable adjustment? The answer is no. The general scope of work is outlined in Section 3.2.1.1 of the IFB, which mandates that Appellant provide all the necessary uniformed armed and unarmed security guards to cover the security guard assignments as required by BCDSS. Section 3.2.2 of the IFB sets forth the number of guard assignments and their scheduling requirements by identifying the locations where guards are to be assigned, the number of guards to be assigned, the type of guards to be assigned, and the hours required for each type of guard to be assigned.

Appellant's claim for an equitable adjustment is clearly based on the increased MHWFA costs that it now has to pay to staff the Contract in accordance with the scope of work in the IFB. It is undisputed that since the Act became law that the number of sites to be guarded, the number of guards assigned to each site, and the number of hours assigned to each guard at each site have remained the same.

Appellant attempts to argue that compliance with the Act changes the scope of work by increasing the number of guards required to staff the shift assignments. It further claims IFB

Section 3.2.1.3 supports its argument. It does not. It only requires the State to pay for additional guards, at the contract rate, if the State adjusts the actual number of guards it needs due to a consolidation or relocation of the facilities. The mere fact that the requirements of the Act may require the Appellant to hire more employees to staff the same security guard assignments or to pay its existing employees more to staff the same security guard assignments as set forth in the IFB does not constitute a change in the scope of work. As counsel for DGS stated at the hearing, employees got sick and missed work before passage of the Act, the only change after passage is Admiral must pay them for sick and safe time off.

Accordingly, Appellant has not demonstrated a change to the scope of work and is not entitled to an equitable adjustment. There being no genuine issues of any material facts, this Board finds that the Respondent is entitled to prevail as matter of law, and therefore grants DGS' Motion for Summary Decision.

ORDER

Accordingly, it is this 24th day of January 2020, hereby:

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

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

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

/s/
Michael J. Stewart Jr., Esq., Member

I concur:

/s/
Bethamy N. Beam, Esq., Chairman

/s/
Lawrence F. Kreis, Jr., Esq, Member

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.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Order in MSBCA No. 3132, the Appeal of Red Coats, Inc., d/b/a Admiral Security Services under Department of General Services BPO No. 001B8400240.

Dated: January 24, 2020

/s/
Ruth W. Foy
Deputy Clerk