

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

W.M. SCHLOSSER COMPANY, INC.)	
)	CAB No. D-1254
Under Contract No. 99-0040)	

For the Appellant W.M. Schlosser Company: Charlie C.H. Lee, Esq., Kristen A. Bennett, Esq., Moore & Lee, LLP. For the District of Columbia Water and Sewer Authority: Frederick A. Douglas, Esq., .Monica E. Monroe, Esq., Douglas & Boykin, PLLC.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judges Matthew S. Watson and Warren J. Nash, concurring.

OPINION

LexisNexis Filing ID 5742822

Appellant, W.M. Schlosser Company, Inc., filed this appeal on behalf of its subcontractor, Tate Fabricating Company, Inc., from an August 25, 2004 final decision of the General Manager of the District of Columbia Water and Sewer Authority (“WASA”). WASA has moved to dismiss the appeal on the ground that the Board lacks jurisdiction over WASA procurements. We agree with WASA that D.C. Code §§ 2-309.03, 2-301.04, and 2-303.20 specifically exempt WASA procurements from the Procurement Practices Act (“PPA”) and the Board’s jurisdiction, and accordingly we dismiss the appeal.

BACKGROUND

In 2001, WASA awarded Schlosser Contract No. 99-0040 for the construction of additional dewatering facilities at the Blue Plains Wastewater Treatment Plant located in the District of Columbia. Schlosser, as prime contractor, issued a subcontract to Tate Fabricating to furnish and install certain structural steel and steel deck as well as other miscellaneous metals pursuant to the contract. Tate claims that it incurred increased costs as a result of WASA directed changes and modifications to the structural steel portion of the project. WASA has promulgated procurement regulations at 21 DCMR Chapter 53. Those regulations provide for submitting claims to a contracting officer and a second level review of claims by the WASA General Manager. WASA’s procurement regulations also contain the following disputes provision:

21-5361. CONTRACT DISPUTE RESOLUTION

5361.1 WASA shall attempt to resolve all contract disputes arising under, or relating to, contracts by mutual agreement after informal discussions have taken place between the contractor and WASA.

5361.2 The Contracting Officer shall consider the advisability of including a disputes resolutions clause in all contracts. Dispute resolution clauses may require alternate dispute resolution.

Tate Fabricating submitted a claim to Schlosser, who in turn submitted the claim to WASA's contracting officer. On June 1, 2004, WASA's contracting officer denied the claim. Schlosser sought review of the claim and the contracting officer's decision by petitioning WASA's General Manager. On August 25, 2004, the General Manager issued a decision denying the claim. On November 30, 2004, Schlosser appealed the General Manager's decision to the Board. Noting that there might be a question as to whether we have jurisdiction over the appeal, Schlosser states that it also filed simultaneously a complaint in the United States District Court for the District of Columbia based on diversity jurisdiction. On December 30, 2004, WASA moved to dismiss the appeal on the ground that the Board lacks jurisdiction over WASA procurements. Schlosser filed a motion to stay or extend the time to respond to WASA's motion pending resolution of jurisdiction in the United States District Court.

DISCUSSION

D.C. Code § 2-309.03(b) provides in relevant part:

Jurisdiction of the Board shall be consistent with the coverage of this chapter [the Procurement Practices Act] as defined in §§ 2-301.04 and 2-303.20, except that the Board shall have the authority to enter into fee-for-service agreements with agencies, departments, boards, commissions, and instrumentalities of the District or other public entities that are not subject to the Board's jurisdiction.

Section 2-301.04 provides that the PPA shall apply to all departments, agencies, instrumentalities, and employees of the District government except as provided in section 3-303.20. Section 3-303.20(j) provides:

Nothing in this chapter [the Procurement Practices Act] shall affect the District of Columbia Water and Sewer Authority's powers to establish and operate its procurement system and to execute contracts pursuant to Chapter 22 of Title 34. . . .

Chapter 22 of Title 34 contains D.C. Code § 34-2202.14 which provides that "Except as provided in § 2202.17(b) [transition provisions not relevant here], [D.C. Code] § 2-301.01 et seq. [the Procurement Practices Act], shall not apply to the [Water and Sewer] Authority."

Taken together, these provisions make clear that the Board does not exercise jurisdiction over WASA procurements conducted pursuant to WASA's own procurement system under the authority of Chapter 22 of Title 34 of the D.C. Code. Because the procurement at issue here was conducted pursuant to WASA's procurement authority, we lack jurisdiction to consider any appeal from the General Manager's decision on Schlosser's sponsored claim on behalf of Tate Fabricating. *See Dixon's Termite and Pest Control, Inc.*, CAB No. P-0659, Aug. 7, 2002, 50 D.C. Reg. 7453,

7454. Schlosser and Tate Fabricating are not without recourse because, as WASA observes in its pleadings, there is at least one forum where Schlosser can seek judicial review of the decision of WASA's General Manager.

Accordingly, we dismiss the appeal.

SO ORDERED.

DATED: May 3, 2005

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge