IN THE

COURT OF APPEALS OF MARYLAND

September Term, 2004
No. 15

HEERY INTERNATIONAL, INC., et al.,

Appellants

v.

MONTGOMERY COUNTY, MARYLAND, et al.

Appellees

On Appeal from the Circuit Court for Montgomery County, Maryland
(Durke G. Thompson, Judge)

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

This case arises from the construction of a new detention center in Montgomery County. The County engaged a variety of contractors to perform various construction tasks, among which were Heery International, Inc. (Heery), for construction management services, and Hellmuth, Obata & Kassabaum, P.C. (HOK), for architectural services. When the County received claims from several of its trade contractors for expenses caused by delays and lost productivity, the County requested that Heery and HOK defend and indemnify it in the administrative proceeding triggered by those claims. The County also submitted claims against Heery and HOK to recover monies already paid to the contractors based on Heery's and HOK's erroneous recommendations. Instead of participating in the administrative process, Heery and HOK filed a complaint in the Circuit Court for Montgomery County seeking a declaration of their rights under their contracts with the County. (E. 1-91) Heery and HOK also requested an injunction preventing the County from pursuing its administrative claims against them for reimbursement and relieving them from defending and indemnifying the County in the pending contract claims filed by the trade contractors.

The County filed a motion to dismiss the complaint, arguing that Heery and HOK must submit the preliminary issue of jurisdiction to the hearing officer authorized by County law, the procurement regulations, and the parties' contracts to decide contract claims and disputes before seeking relief in court. (E. 92-118) In addition, the County contended that Heery and HOK had not established the required elements for an injunction and that mandamus did not apply. Heery and HOK opposed the motion, asserting that they should

not have to participate in the administrative process if the agency does not have jurisdiction. The circuit court considered the arguments and concluded that the hearing officer had the authority to make the first determination of whether Heery and HOK properly belonged in that proceeding. (E. 346-368) The court denied the injunction request and dismissed the case, recognizing that Heery and HOK could seek judicial review once the agency issued a final decision. (E. 369-370) This appeal ensued.

QUESTIONS PRESENTED

I. Does Maryland law authorize an administrative agency to decide what claims are within its jurisdiction?

II. Were Heery and HOK entitled to an injunction or mandamus?

STATUTES, ORDINANCES AND CONSTITUTIONAL PROVISIONS

The full text of all relevant statutes, ordinances and constitutional provisions appears in the appendix to the Appellants' brief or in the appendix to this brief.

STATEMENT OF ADDITIONAL FACTS

This case requires the Court to interpret contracts for the design and construction of the Montgomery County Correctional Facility in Clarksburg, Maryland. Heery contracted to provide project and construction management services to the County, while HOK contracted to perform design work and to provide architectural services, including certain construction management services for the project. Using a "multi-prime" contracting arrangement recommended by Heery, the County awarded separate contracts to various trade

contractors (electrical, plumbing, masonry, mechanical, concrete, etc.) to construct the $90 million facility under the supervision of Heery and HOK.

Heery held the primary responsibility for coordinating and scheduling the tasks of the project. (E. 62-64) The contract specifically required Heery to coordinate all construction activities, prepare detailed schedules, determine the causes of delays (as well as the parties responsible for those delays), analyze claims, and provide monthly certifications of the proper payments due to the various trade contractors with which the County had separately contracted. (E. 63) Meanwhile, HOK served as the architect and primary design consultant, with responsibility for all matters relating to the proper design of the facility. (E. 64) As part of its work, HOK contracted to supervise the schedule, payments, and claims arising during the project, and to provide monthly certifications of payments due to the contractors. Before becoming aware of Heery's and HOK's failures to perform their contractual duties properly, the County paid Heery in excess of $5,680,000 under its contract and paid HOK more than $5,370,000 for its services. (E. 62, 79)

The contracts awarded to Heery and HOK require each company to indemnify the County for any loss due to their "negligence or failure to perform any of [their] contractual obligations." (E. 124-158) In addition, both Heery and HOK must defend the County against any claims brought by the individual trade contractors that arise out of their "negligence, errors, acts or omissions under [their] contract[s]." (E. 126, 148) Each company also agreed in its contract to resolve any disputes through the County's statutory

and regulatory administrative dispute resolution process. *See* Montg. Co. Code §11B-1, §11B-8, and § 11B-35 (1994, as amended); Montg. Co. Proc. Regs. § 14.2; Contract ¶ 8. (E. 125, 147)

After having paid Heery and HOK most of their contract sums, several trade contractors submitted claims totaling $13,842,638, based on delays and lost productivity during the project. (E. 76) No claim directly blamed the County for any act or omission, but described scheduling problems, coordination problems, delays of other contractors (deriving from scheduling and coordination problems), and design problems—all of which seamlessly flowed from Heery's and HOK's breaches of their contractual responsibilities. (E. 82-85) Some of the trade contractors also disclosed that Heery and HOK did not require them to comply with the contract requirements for giving notice and filing claims, which may prejudice the County's ability to assert defenses to those claims.[1] (E. 82-85)

Under their contracts, Heery and HOK were required to review and analyze trade contractor claims and make recommendations to the County regarding which claims the County should pay. Heery transmitted claims totaling $1,765,791 for alleged delays, which

[1]The County received claims from the following trade contractors: Mona Electrical Construction, Inc.; Pierce Associates; Ballard Construction Company; ESI Companies, Inc.; George Moehrle Masonry, Inc.; and Old Castle Precast, Inc. (E. 120-121) The contract administrator recommended denial of all claims because they were not filed timely and they did not supply the information and supporting documentation required by the contracts for filing claims. (E. 121) As of August 2003, the County had incurred $915,168 in defending against these claims. (E. 86) To date, the County has incurred defense costs in excess of $1,602,308.

the County paid, only to discover later that the delays prompting the trade contractor claims resulted from Heery's and HOK's own defaults. The County discovered additional breaches by other trade contractors that Heery and HOK failed to bring to the County's attention. (E. 76-85) Furthermore, the County made erroneous payments for change orders during the construction that directly resulted from the deficient performance of Heery and HOK.[2] (E. 85-86)

Upon discovery of these failures of performance, the County directed that Heery and HOK each reimburse the County for the payments made to the trade contractors as a result of their respective breaches and deficiencies. (E. 9-19) Heery and HOK refused to make the demanded payments, or any payments whatsoever.[3] Because the trade contractor claims resulted from Heery's and HOK's breaches, errors, and omissions in the performance of their contract duties, the County also directed Heery and HOK to fulfill their contractual obligations to defend the County against these claims and to indemnify the County for any claims on which the trade contractors succeeded. Both companies steadfastly refuse to comply. (E. 9-43)

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[2]HOK recommended that the County pay $2,038,372 in change orders that resulted from errors, omissions, ambiguities, or conflicts in the drawings and specifications that HOK prepared. (E. 85) Similarly, Heery generated $685,168 in change orders that resulted from gaps, conflicts, or duplications in the scope of work that Heery's contract obligated it to prevent. (E. 86)

[3]Heery even initiated its own claim for services in the administrative dispute resolution process against the County in the amount of $138,833. (E. 121) In doing so, Heery submitted itself to the jurisdiction of the administrative process it challenges in this case.

ARGUMENT

Through this lawsuit, Heery and HOK improperly seek to avoid the administrative dispute resolution process that both the law and the parties' contracts require. The County Code and the procurement regulations require that any dispute between the contractor and the contract administrator be decided in an administrative dispute resolution proceeding. Montg. Co. Code § 11B-35(a); Montg. Co. Proc. Regs. § 14.2.2.1. This administrative proceeding includes an opportunity for a full hearing on all claims and defenses and a thorough review by the courts. Montg. Co. Code § 11B-35(c) and (d); Montg. Co. Proc. Regs. § 14.2.2.3(b)-(c) and § 14.2.2.9(c). The disputes clause of their contracts requires the parties to use this administrative dispute resolution process to resolve any disagreements. (E. 120, 125, 147) Doing so diverts complex, highly technical, and often very time-consuming litigation to a forum designed to handle the disputes expertly and efficiently. The administrative dispute resolution process carries with it the safeguard that the courts can review the proceedings if a party believes its rights have been abridged or that the law has been misinterpreted or misapplied.

Despite the express prohibition in the statute against filing a separate action for declaratory judgment, Heery and HOK have tried to circumvent the administrative dispute resolution process in an apparent attempt to avoid defending the claims of the trade contractors in a single proceeding. Moreover, the evidence submitted into the record before the circuit court did not support the grant of injunctive relief or mandamus to prevent Heery

and HOK from participating in the administrative proceeding. The circuit court properly denied the relief requested.

I. Maryland law authorizes an administrative agency to decide what claims are within its jurisdiction.

All of the claims that Heery and HOK have asserted in this case must be resolved in the available administrative dispute resolution process that exists precisely for resolving these types of disputes. Heery's and HOK's characterization that the case involves only a claim by the County, and that the County's claim remains outside the scope of the Code and regulations, ignores both the facts and the law. This case involves not just a claim by the County for reimbursement, but also contains numerous claims that were initiated against the County by several of the trade contractors. The Code, the regulations, and the disputes clause in each contract specifically allow the parties to a claim to join all other contractors that may bear responsibility in the dispute. The County directed Heery and HOK to participate in the trade contractors' claims, because all of them blamed Heery and HOK; this, in turn, triggered the defense and indemnification provisions of the Heery and HOK contracts. When Heery and HOK refused to participate, or to defend and indemnify, the task of determining what forum had jurisdiction over Heery and HOK fell to the hearing officer charged with resolving the disputes under the law and the contracts.

Heery and HOK must exhaust the administrative remedies provided by County law.

In Maryland, "a litigant must first pursue the applicable administrative process; other remedies cannot be pursued prematurely." *See, e.g., Maryland Commission on Human Relations v. Downey Communications, Inc.*, 110 Md. App. 493, 527, 678 A.2d 55, 72 (1996). Even when a party complains that the administrative body acted ultra vires or illegally, the courts consistently adhere to the requirement that the parties exhaust their administrative remedies. *Id.* at 529-32, 678 A.2d at 73-75. Claims that the agency lacks authority or jurisdiction over the matter in dispute do not relieve the parties of their obligation to pursue administrative relief first. *See Soley v. Maryland Commission on Human Relations*, 277 Md. 521, 528, 356 A.2d 254, 258 (1976). The availability of judicial review of the administrative process will further prevent a party from obtaining declaratory or other equitable relief too soon. *Id.* at 526, 356 A.2d at 257.

This Court has not altered the exhaustion requirement for a situation in which "a disputed issue in an administrative proceeding might legitimately relate to the agency's subject matter jurisdiction . . . ." *Maryland Commission on Human Relations v. Freedom Express/Domegold, Inc.*, 375 Md. 2, 19, 825 A.2d 354, 364 (2003). The sole exception to the exhaustion requirement applies where "the agency is palpably without jurisdiction," but the lack of jurisdiction must be so obvious that it is entirely beyond debate. *Id*. The example given by this Court of a tribunal acting "palpably without jurisdiction" was "a probate court, invested only with authority over wills and the estates of deceased persons, attempting to try someone for a criminal offense." 375 Md. at 19-20, 825 A.2d at 364. *See also State v.*

Board of Contract Appeals, 364 Md. 446, 457-458, 773 A.2d 504, 511 (2001). In situations that require interpretation of an agreement to determine jurisdiction, the agency has the authority to make the initial decision as to its own jurisdiction. *See, e.g., Contract Construction, Inc. v. Power Technology Center Limited Partnership*, 100 Md. App. 173, 178, 640 A.2d 251, 254, *cert. denied*, 336 Md. 301, 648 A.2d 203 (1994) (arbitrator construes whether an agreement to arbitrate exists).

A litigant must exhaust a primary or exclusive administrative remedy before pursuing a declaratory judgment.[4] *See Furnitureland South, Inc. v. Comptroller of the Treasury*, 364 Md. 126, 132-133, 771 A.2d 1061, 1065 (2001); *Young v. Anne Arundel County*, 146 Md. App. 526, 560, 807 A.2d 651, 671 (2002). And State law gives preference to a statutory remedy over other remedies "[i]f a statute provides a special form of remedy for a specific type of case . . . ." Md. Code Ann., Cts. & Jud. Proc. § 3-409(b)(2002). The administrative dispute resolution process constitutes a special form of remedy, and no exception exists to allow Heery and HOK to avoid exhausting this administrative remedy by pursuing claims for declaratory judgment, mandamus, and injunctive relief. *See Josephson v. City of Annapolis*, 353 Md. 667, 681, 728 A.2d 690, 696 (1998).

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[4]Even in the context of a simple contract dispute, an actual controversy must exist and cannot be too speculative to afford relief. *See* Cts. & Jud. Proc. § 3-402 and § 3-407. This Court has declined to "decide future rights in anticipation of an event which may never happen, but will wait until the event actually takes place, unless special circumstances appear which warrant an immediate decision." *Tanner v. McKeldin*, 202 Md. 569, 579, 97 A.2d 449, 454 (1953). Heery and HOK have not developed sufficient facts to take this matter outside the administrative process.

At a minimum, the administrative remedy in the present case serves as a primary remedy that must be exhausted before the parties may access the courts. *See Bell Atlantic, Inc. v. Intercom Systems Corp.*, 366 Md. 1, 11-12, 782 A.2d 791, 797 (2001). The County Code and the procurement regulations provide a comprehensive remedy that contemplates participation in an administrative dispute resolution process before obtaining judicial review.[5] And the contracts require the parties to use the administrative process created by law to resolve their disputes. (E. 125, 147) Nothing in the statutory language or in the contracts suggests that the Council intended this remedy to run concurrently with any judicial causes of action. *See Bell Atlantic, Inc.*, 366 Md. at 12-13, 782 A.2d at 797-798 (court will review statutory language and legislative intent to ascertain whether the administrative remedy is exclusive, primary, or concurrent).

The County Code and the procurement regulations provide a mechanism for resolving contract disputes.

The County Code and the procurement regulations require all claims and disputes involving the County's contractors to proceed through the administrative dispute resolution process. And when a dispute involves the performance of another contractor, the regulations allow the other contractor to be made a party to the proceeding:

> The CAO or the Director may order a contractor that is not a party to the appeal or the contract under which the dispute has been filed to become a

[5]The procurement regulations govern the entire procurement process, from the preparation of the request for proposals and the bid process, through the administration of a contract and the disputes process. *See* Montg. Co. Code § 11B-1(m).

> party to the proceeding if the dispute on appeal may be based, in whole or in part, on the performance of the other contractor.

Montg. Co. Proc. Regs. § 14.2.2.8. This section of the procurement regulations acts as a joinder provision that permits the County to bring into the proceeding a contractor who ultimately may be responsible for a claim asserted by another contractor. The substance of this provision allows the County to assert a third-party claim against the responsible contractor.[6]

Even when a contractor does not believe that a particular task or obligation falls within the terms of the contract, the contractor must proceed as recommended by the County's contract administrator. The procurement regulations direct that "[p]ending final resolution of a dispute, the contractor must proceed diligently with contract performance unless the County has terminated the Contract." Montg. Co. Proc. Regs. § 14.2.2.6. The contract reflects this requirement in the disputes clause, which provides that "[p]ending final resolution of a dispute, the Contractor must proceed diligently with contract performance."[7] (E. 120, 125, 147)

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[6]The disputes clause of the contracts awarded to Heery and HOK further confirms that the County may bring Heery and HOK into the pending case with the trade contractors: "The Contractor may, at the County's option, be made a party to any related dispute involving another contractor." (E. 120, 125, 147)

[7]A similar provision in the contract addresses the effect of change requests during the performance of the contract: "[t]he contractor must proceed with the prosecution of the work as changed even if there is an unresolved claim" and "[a]ny failure to agree upon the time or money adjustment must be reviewed under the 'Disputes clause' of this contract." (E. 124, 146)

Together these provisions of the law and the contract prevent the contractor from withholding its performance of any duty—including defending and indemnifying the County—pending the resolution of disputes over contract interpretation. Instead, the contractor must perform as instructed and file a claim under the disputes clause, so that the administrative process established by the County Code and the procurement regulations can resolve the matter. Montg. Co. Proc. Regs. 14.2.2.6. The contractor's refusal to proceed as directed effectively becomes a breach of the contract, even if based on a legitimate disagreement with the County as to the proper contract interpretation. *See Valley View Enterprises, Inc. v. United States*, 35 Fed. Cl. 378, 383-384 (Fed. Cl. 1996)

Accordingly, Heery and HOK must proceed as directed and assert their reticence through the "Disputes" provision of their contracts. Should they be successful, the County would be required to approve a change order for their additional expenses and costs under the terms of the contract. Because Heery and HOK neither proceeded as directed nor initiated a dispute in the administrative process, the County pursued administrative relief against them and invoked the defense and indemnity obligations in their contracts regarding the trade contractors' claims. Heery and HOK cannot parlay their purposeful failure to perform under the contract, exacerbated by their refusal to initiate a dispute in the administrative process, into a barrier to prevent the County from using the administrative process as the proper forum to address their contractual obligations to defend, indemnify, and reimburse the County. *See Adams v. Manown*, 328 Md. 463, 474-476, 615 A.2d 611,

616-617 (1992) (the doctrine of unclean hands applies when a plaintiff "dirties [its hands] in acquiring the right [it] now asserts"). Neither the failure to perform nor the resulting breach allow Heery and HOK to escape the mandated administrative process.

The distinctions between the* University of Maryland *case and the present dispute require a different result.

Although Heery and HOK consider the County Code and procurement regulations to be just like the State law and regulations reviewed in *University of Maryland v. MFE Inc./NCP Architects, Inc.*, 345 Md. 86, 691 A.2d 676 (1997), closer scrutiny reveals key distinctions. These differences cause the outcome in this case to be different from that in *University of Maryland*.

The timing of the cases differ significantly. In *University of Maryland*, the State filed its claim 12 years after the completion of the construction. 345 Md. at 89, 691 A.2d at 677. That case did not involve an attempt by a contractor to halt its joinder in an administrative proceeding based on an assertion that the government had initiated the proceeding improperly. Instead, the jurisdictional issue arose only after completion of the administrative process, when the parties proceeded to court. 345 Md. at 91-92, 691 A.2d at 678-679. Here, the County is actively defending against claims filed by the trade contractors, making the case timely.

More importantly, the legislative intent differs starkly in the two cases. The legislative history analyzed in *University of Maryland* confirmed the General Assembly's intent that the State government had no right to initiate contract disputes. *Id.* at 102, 691

A.2d at 684. This interpretation found support in the General Assembly's failure to include authority to join a contractor who might bear responsibility for a claim in the law as finally adopted, despite an opinion from an Assistant Attorney General pointing out the omission of a joinder provision while the law was being drafted. Thus, regulations promulgated by the implementing agency could provide no more authority than the enabling law allowed. *Id.* at 104, 691 A.2d at 685. Because State regulations do not return to the General Assembly for approval, the subsequently adopted regulations could not help to frame the General Assembly's intent as it enacted the law.[8]

By contrast, the Montgomery County Council approves both the legislation and the regulations before they take effect.[9] Montg. Co. Code § 2A-15. Using this procedure, the Council enacted the procurement law and approved the regulations on the same day.[10] (E. 182-194) Unlike the State system, where one must resort to following an oblique trail of

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[8]The regulations go to a legislative committee formally titled the Joint Committee on Administrative, Executive, and Legislative Review. State Gov't § 2-501 (1999). The Committee does not adopt the regulations, but only reviews them. By law, the absence of comment or objection by the Committee creates no inference of approval, statutory authority, or conformity with the General Assembly's intent. State Gov't § 2-506.

[9]The County Charter enables the Executive to enact regulations to the extent that the Council has delegated that authority to the Executive in legislation. Montg. Co. Charter § 201. That authority appears in the County Code, which delineates three methods of adopting regulations. Montg. Co. Code § 2A-15. The procurement law specifies that regulations will be adopted using Method 1, which mandates Council approval before the regulation becomes effective. Montg. Co. Code § 11B-1(o).

[10]In Montgomery County, the Council frequently defers voting on legislation until the proposed regulations relating to a particular bill satisfy the Council's intent, and then both are approved on the same day, as happened here.

administrative interpretation of the legislative intent rendered subsequent to the enactment of a law, the County system allows the Council to marry the regulations and the law by approving regulations that effectuate its intent. There can be no clearer reflection of legislative intent than the County Council's simultaneous adoption of the law and the accompanying regulations.

When enacting the procurement law, the Council articulated its clear intent that "procurement" included "all functions that pertain to the obtaining of any goods, service, or construction, including description of requirements, selection and solicitation of sources, evaluation of offers, preparation and award of contract, dispute and claim resolution, and all phases of contract administration." Montg. Co. Code § 11B-1(m). And the Council authorized regulations to "promote the efficient and orderly operation of the procurement system." Montg. Co. Code § 11B-8(b). The plain language of the procurement regulations approved by the Council demonstrates that the Council contemplated the joinder of additional contractors in the administrative proceeding when their conduct forms an issue in the dispute. Montg. Co. Proc. Regs. § 14.2.2.8. Combining any and all disputes between the County and a contractor in the administrative process promotes the efficient and orderly operation of the procurement system.

The underlying administrative dispute resolution proceeding began with the claims filed by several trade contractors against the County, which led to the County's claim against Heery and HOK. (E. 9-19, 76-87) When it became apparent that the claims asserted by the

trade contractors derived from the performance of Heery and HOK, the County sought to exercise the right to require their participation in accordance with the law and the contracts. *See* Montg. Co. Proc. Regs. § 14.2.2.8; Disputes Clause (E. 120, 125, 147). Unlike the situation reviewed in *University of Maryland*, County law, the procurement regulations, and the contracts themselves permit the County to bring Heery and HOK into the pending disputes to defend and indemnify the County in the actions initiated by other contractors. The County did not initiate these claims, but each of them flows directly from the acts and omissions of Heery and HOK. The duty to defend and the duty to indemnify the County are ongoing executory obligations imposed on Heery and HOK under their contracts. (E. 126, 148) To date, the trade contractors' claims against the County, for which the County seeks to hold Heery and HOK responsible, have not been set for hearing. If the County cannot invoke the plain authority of the procurement regulations and the disputes clause of the contracts to make Heery and HOK parties to those other contractors' claims, then the regulations become meaningless and the duty to defend and indemnify the County in those actions is frustrated. The same is no less true regarding Heery's and HOK's duty to reimburse the County for monies it paid to the trade contractors based on the erroneous recommendations of Heery and HOK.[11]

[11]As the dispute with Heery and HOK has unfolded before the hearing officer in the pending administrative dispute resolution proceeding, it has become a matter of contract interpretation, rather than a claim. Under the contracts, the contract administrator cannot make binding determinations regarding the parties' rights and obligations, but can make only recommendations. *See* General Conditions ¶ 6. (E. 125, 146) By agreement of the parties in their contracts, the Director has the sole authority to make binding contract interpretations,

The ruling that Heery and HOK seek from this Court would prevent the County from protecting itself in the very manner that the Council knowingly approved in express regulations and that the contracts specify in their terms and conditions. While Heery and HOK may raise the issue of jurisdiction in court, they must do so first in the administrative proceeding and cannot proceed directly to court to avoid participation.[12] The procurement regulations clearly permit the County to bring Heery and HOK into the administrative process to defend it against the trade contractors' claims and to indemnify it in the event the trade contractors prevail. The defense and indemnity clauses in the contracts are broadly written to require Heery and HOK to defend the County in "any action or suit brought against the County" and to indemnify the County against "any loss, cost, damage and other expenses" that are attributable to their negligence or contract breaches. (E. 126, 148) The County's rights to defense and indemnity should be determined in the same proceeding in

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subject to review by the CAO. General Conditions ¶ 8. (E. 125, 147) In fact, while the Director considered the contract administrator's recommended interpretation of the contracts requiring Heery and HOK to defend, indemnify, and reimburse the County, Heery and HOK filed a dispute with the Director to contest the contract administrator's recommended interpretation, after which they appealed to the CAO.

[12]In fact, Heery and HOK have raised the issue of jurisdiction as a preliminary matter in the pending administrative proceeding. The hearing officer has set the jurisdictional issue for determination as a threshold issue to the County's right to proceed on the merits against Heery and HOK in the administrative proceeding. The parties expect a decision from the hearing officer shortly.

which the indemnitors' liability is determined—the pending administrative process initiated by the trade contractors.[13]

The contract language requires Heery and HOK to participate in the administrative process before seeking judicial remedies.

Not only do the Code and regulations encompass the disputes between Heery and HOK and the County, along with the judicial remedies that are available to them following the administrative process, but the plain language of the contracts also requires each of them to submit any dispute to the administrative dispute resolution process:

> 8. DISPUTES
> Any dispute arising under this contract which is not disposed of by agreement must be decided under The Montgomery County Code and The Montgomery County Procurement Regulations.

(E. 120, 125, 147) The disputes clause also specifies that Heery and HOK may "be made a party to any related dispute involving another contractor." (E. 120, 125, 147) Similar to the interpretation of arbitration agreements, once Heery and HOK agreed to this process, they could not pick and choose when to meet their obligations:

> An agreement to arbitrate either future or existing disputes involves more than just the waiver of a right to jury trial, although that is certainly implicit in such an agreement. It constitutes an election to use an alternative dispute resolution mechanism that the law not only recognizes but encourages.

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[13]Had the County not followed Heery's and HOK's recommendations that the County pay the trade contractors' delay and change order claims, the trade contractors presumably would have initiated administrative claims against the County for those amounts, at which point the County could have passed those claims through to Heery and HOK. Montg. Co. Proc. Regs. § 14.2.2.8; General Conditions ¶ 8. (E. 125, 147) The County's reliance on Heery's and HOK's recommendations must not be permitted to create a bar to the County's right to seek reimbursement in the administrative dispute resolution process.

Meyer v. State Farm Fire and Casualty Co., 85 Md. App. 83, 91, 582 A.2d 275, 278 (1990). These provisions are favored and enforced for the same kinds of public policy reasons that support the exhaustion doctrine and are routinely upheld as valid and enforceable. And "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 626 (1985) (citation omitted). Even the issue of arbitrability often will be decided by the arbitrator before review by the court. *Contract Construction, Inc. v. Power Technology Center Limited Partnership*, 100 Md. App. at 178, 640 A.2d at 254.

The same logic applies to the scope of the administrative dispute resolution process in this case. The contract effectively incorporates what the law and the regulations provide. Even if the law and the regulations did not create the administrative dispute resolution mechanism applicable here, the parties agreed to the process in their contracts and became bound to the process by virtue of those contracts. *See Wells v. Chevy Chase Bank, FSB*, 377 Md. 197, 832 A.2d 812 (2003). Heery and HOK must proceed with the existing administrative dispute resolution process established by the County Code and the procurement regulations, and ratified in their contracts. The hearing officer can hear and decide the jurisdictional issue, and Heery and HOK retain the right to seek judicial review. This premature attempt to obtain judicial intervention was properly thwarted, and this Court should affirm the dismissal of the case.

II. Heery and HOK were not entitled to an injunction or mandamus.

For a court to grant injunctive relief, the applicant must show the inadequacy of existing legal remedies. Md. Rule 15-502. Similarly, the situations in which mandamus will apply remain quite limited. Md. Rule 15-701. The record in this case supports neither injunctive relief nor mandamus.

Heery and HOK failed to show a need for injunctive relief.

Once the circuit court decided the merits of the case, and concluded that the administrative body was not "palpably without jurisdiction," no basis for an injunction existed. The circuit court concluded that the issue of jurisdiction had to be determined first in the administrative dispute resolution process—any decision made there would include a *de novo* hearing before the CAO, judicial review in the circuit court, and appeal rights if Heery and HOK disagreed with the decision. *See American Cyanamid Co. v. Roudebush*, 411 F. Supp. 1220, 1223 (S.D.N.Y. 1976). The exercise of jurisdiction by the Director remains subject to *de novo* review by the CAO and subsequent judicial process, in which both the CAO and the court have the opportunity to determine whether the decision exceeded the Director's authority and had no force or effect.

In this case, Heery and HOK have adequate legal remedies through the administrative dispute resolution process that they agreed to use. If the administrative process yields a decision in favor of Heery and HOK, the purportedly exigent need for a resolution of the jurisdictional issue vanishes. Even if Heery and HOK do not persuade the Director to exclude them from the administrative process, Heery and HOK have an adequate remedy

available—they may appeal to the CAO and obtain a full adjudication of the matter.[14] Once the CAO rules, Heery and HOK may petition for judicial review in the circuit court followed by an appeal to the Court of Special Appeals. To the extent they are successful, they may apply for a change order under the terms of their contracts for their increased costs and expenses in performing under their contracts.

Meanwhile, Heery and HOK must defend the County as they have been instructed by the contract administrator. Neither the contract nor the law permit Heery and HOK to refuse to perform, decline to submit the dispute to the Director, but then seek injunctive relief from the circuit court in lieu of participating in the administrative dispute resolution process.

Mandamus does not apply in this case.

When no statutory provision for judicial review of an administrative decision exists, the circuit court may exercise its common law power of mandamus to review the administrative decision. *Murrell v. Mayor and City Council of Baltimore*, 376 Md. 170, 193-194, 829 A.2d 548, 562 (2003). In doing so, the court usually considers whether the agency failed to perform a non-discretionary duty, but sometimes has reviewed the agency's decision using the arbitrary and capricious standard. *Murrell,* 376 Md. at 201, 829 A.2d at 566; *Heaps v. Cobb*, 185 Md. 372, 379, 45 A.2d 73, 76 (1945). Mandamus remains an extraordinary writ that must be exercised with great caution. *Goodwich v. Nolan*, 343 Md.

[14]Heery and HOK have pursued these remedies and continue to use the administrative process.

130, 145-146, 680 A.2d 1040, 1047-1048 (1996). In no event does mandamus apply when a statutory right of review exists. *Homes Oil Co. v. Department of the Environment*, 135 Md. App. 442, 457, 762 A.2d 1012, 1020 (2000), *cert. denied*, 363 Md. 660, 770 A.2d 168 (2001).

Where no statutory hearing or judicial review exists, the court uses an abuse of discretion standard to review the agency's decision. *See Homes Oil Co.*, 135 Md. App. at 457, 762 A.2d at 1020. And a party's preference for a particular standard does not address whether the review provided is adequate:

> It is well established that a claimant ordinarily must seek to redress the wrong of which he complains by using the statutory procedure the legislature has established for that kind of case, if it is adequate and available, and that if he is unsuccessful and wishes aid from the courts, he must take judicial appeals in the manner the legislature has specified rather than by seeking to invoke the ordinary general jurisdiction of the courts.

Board of Education v. Secretary of Personnel, 317 Md. 34, 41, 562 A.2d 700, 703 (1989) (quoting *Agrarian, Inc. v. Zoning Inspector of Harford County*, 262 Md. 329, 332, 277 A.2d 591, 592 (1971)).

In the present case, Heery and HOK have the opportunity to obtain judicial review and appellate review if they do not like the outcome of the administrative process. Because the County Code, the procurement regulations, and the contract terms provide adequate judicial review, mandamus is not available in this case.

CONCLUSION

A valid administrative dispute resolution process exists to address the claims and disputes between the County, its trade contractors, Heery, and HOK. In addition to the County law creating the process, and the procurement regulations governing the process, Heery and HOK agreed in their contracts to submit any disputes to the administrative dispute resolution process. This case does not present a situation in which the agency is "palpably without jurisdiction." Instead, the circuit court properly denied declaratory judgment, injunctive relief, and mandamus, because Heery and HOK have adequate remedies through the administrative process that they must pursue before seeking judicial intervention. This

Court should affirm the circuit court's decision and let the administrative body decide whether it has jurisdiction over these disputes, subject to review by the courts.

Respectfully submitted,

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Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13pt type size.

APPENDIX

Excerpts from Maryland Annotated Code

Cts. & Jud. Proc. (2002)

§ 3-402. Purpose and construction of subtitle.
This subtitle is remedial. Its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. It shall be liberally construed and administered.

§ 3-407. Construction of contracts before or after breach.
A contract may be construed before or after a breach of the contract.

§ 3-409. Discretionary relief.

* * *

(b) *Special form of remedy provided by statute.* If a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed in lieu of a proceeding under this subtitle.

State Gov't (1999)

§ 2-501. "Committee" defined.
In this subtitle, "Committee" means the Joint Committee on Administrative, Executive, and Legislative Review.

§ 2-506. General functions.
(a) *Powers.* In addition to any powers set forth elsewhere, the Committee may:

(1) review proposed or adopted regulations of a unit of the Executive Branch of the State government;

(2) consider requests for emergency adoption of regulations;

(3) inquire into an alleged failure of an officer or employee of any branch of the State government to comply with the laws of the State; and

(4) review the operations of any unit of the Executive Branch of the State government.

(b) Reports.

(1) At least once a year, the Committee shall submit a report to the Legislative Policy Committee and, subject to §§ 2-1246 of this title, to the General Assembly.

(2) The report shall:

(i) describe the studies and other work of the Committee; and

(ii) include any recommendations of the Committee on:

1. more effective operation of the branches of the State government, in accordance with the laws of the State; and

2. legislative action that is needed to change or reverse a regulation of a unit of the Executive Branch of the State government.

(c) *Failure to comment on regulations.* The failure of the Committee to comment on or to object to a proposed or adopted regulation is not an indication that:

(1) the Committee approves the regulation;

(2) the statute under which the regulation is adopted authorizes the adoption; or

(3) the regulation conforms to the legislative intent of the statute.

Maryland Rules

Rule 15-502. Injunctions - General provisions.

(a) *Exception to applicability - Labor disputes.* Rules 15-501 through 15-505 do not modify or supersede Code, Labor and Employment Article, Title 4, Subtitle 3 or affect the prerequisites for obtaining, or the jurisdiction to grant, injunctions under those Code sections.

(b) *Issuance at any stage.* Subject to the rules in this Chapter, the court, at any stage of an action and at the instance of any party or on its own initiative, may grant an injunction upon the terms and conditions justice may require.

(c) *Adequate remedy at law.* The court may not deny an injunction solely because the party seeking it has an adequate remedy in damages unless the adverse party has filed a bond with security that the court finds adequate to provide for the payment of all damages and costs that the adverse party might be adjudged to pay by reason of the alleged wrong.

(d) *Not binding without notice.* An injunction is not binding on a person until that person has been personally served with it or has received actual notice of it by any means.

(e) *Form and scope.* The reasons for issuance or denial of an injunction shall be stated in writing or on the record. An order granting an injunction shall (1) be in writing (2) be specific in terms, and (3) describe in reasonable detail, and not by reference to the complaint or other document, the act sought to be mandated or prohibited.

(f) *Modification or dissolution.* A party or any person affected by a preliminary or a final injunction may move for modification or dissolution of an injunction.

Rule 15-701. Mandamus.

(a) *Commencement of action.* An action for a writ of mandamus shall be commenced by the filing of a verified complaint, the form and contents of which shall comply with Rules 2-303 through 2-305. The plaintiff shall have the right to claim and prove damages, but a demand for general relief shall not be permitted.

(b) *Defendant's response.* The defendant may respond to the complaint as provided in Rule 2-322 or Rule 2-323. An answer shall be verified and shall fully and specifically set forth all defenses upon which the defendant intends to rely, but the defendant shall not assert any defense that the defendant might have relied upon in an answer to a previous complaint for mandamus by the same plaintiff for the same relief.

(c) *Amendment.* Amendment of pleadings shall be in accordance with Rule 2-341.

(d) *Ex parte action on complaint.*

(1) *Upon default by defendant.* If the defendant is in default for failure to appear, the court, on motion of the plaintiff, shall hear the complaint ex parte. The plaintiff shall be required to introduce evidence in support of the complaint. If the court finds that the facts and law authorize the granting of the writ, it shall order the writ to issue without delay. Otherwise, the court shall dismiss the complaint.

(2) *Upon striking of defendant's answer.* If the court grants a motion to strike an answer filed pursuant to Rule 2-322 (e) and the court does not permit the filing of an amended answer, the court may enter an order authorizing the writ to issue without requiring the plaintiff to introduce evidence in support of the complaint.

(e) *Writ of mandamus.*

(1) *Contents and time for compliance.* The writ shall be peremptory in form and shall require the defendant to perform immediately the duty sought to be enforced. For good cause shown, however, the court may extend the time for compliance. It shall not be necessary for the writ to recite the reasons for its issuance.

(2) *Certificate of compliance.* Immediately after compliance, the defendant shall file a certificate stating that all the acts commanded by the writ have been fully performed.

(3) *Enforcement.* Upon application by the plaintiff, the court may proceed under Rule 2-648 against a party who disobeys the writ.

(f) *Adequate remedy at law.* The existence of an adequate remedy in damages does not preclude the issuance of the writ unless the defendant establishes that property exists from which damages can be recovered or files a sufficient bond to cover all damages and costs.

Montgomery County Charter

§ 201. Executive Power.

The executive power vested in Montgomery County by the Constitution and laws of Maryland and by this Charter shall be vested in a County Executive who shall be the chief executive officer of Montgomery County and who shall faithfully execute the laws. In such capacity, the County Executive shall be the elected executive officer mentioned in Article XI-A, Section 3, of the Constitution of Maryland. The County Executive shall have no legislative power except the power to make rules and regulations expressly delegated by a law enacted by the Council or by this Charter.

Montgomery County Code (1994, as amended)

Chapter 2. Administrative Procedures Act.

§ 2A-15. Procedure for adoption of regulations.

(a) Requirement. Before a regulation takes effect, the regulation must meet:

(1) The requirements of this Article; and

(2) Any other requirement imposed by law.

(b) Single subject requirement. A proposed regulation must not contain more than one subject matter.

(c) Publication. An issuer must publish in the Register:

(1) A summary of the proposed regulation;

(2) The place where a copy of the proposed regulation may be obtained;

(3) The date, time, and place of any public hearing;

(4) The name and address of a person to whom comments may be directed;

(5) The deadline for submitting comments;

(6) A citation of the Section of the County Code that authorizes the adoption of the regulation; and

(7) A reference to the procedural method used to adopt the regulation.

(d) Disclosure of amendments. The text of any proposed or adopted regulation sent to the County Council must show by brackets and underlines (or any other notation system approved by the Council) all amendments to any existing regulation.

(e) Hearing record and comments. The issuer must attach to any proposed or adopted regulation sent to the County Council a copy of each written comment received after publication in the Register and a transcript or detailed summary of any public hearing.

(f) Procedures for approval.

(1) Each regulation must be adopted under one of the 3 methods in this subsection. To amend or repeal an adopted regulation, an issuer must use the procedure under which the regulation was adopted.

(2) A law authorizing a regulation may specify that one of the 3 methods must be used.

(3) If the law does not specify that one of the 3 methods must be used, method (2) must be used.

Method (1)

(A) A regulation proposed under this method is not adopted until the County Council approves it.

(B) The issuer must send a copy of the proposed regulation to the Council after the deadline for comments published in the Register.

(C) The Council by resolution may approve or disapprove the proposed regulation.

(D) If the Council approves the regulation, the regulation takes effect upon adoption of the resolution approving it or on a later date specified in the regulation.

Method (2)

(A) The issuer must send a copy of the proposed regulation to the County Council after the deadline for comments published in the Register.

(B) The Council by resolution may approve or disapprove the proposed regulation within 60 days after receiving it.

(C) If necessary to assure complete review, the Council by resolution may extend the deadline set under subparagraph (B).

(D) If the Council approves the regulation, the regulation takes effect upon adoption of the resolution approving it or on a later date specified in the regulation.

(E) If the Council does not approve or disapprove the proposed regulation within 60 days after receiving it, or by any later deadline set by resolution, the regulation is automatically approved.

(F) If a regulation is automatically approved under this method, the regulation takes effect the day after the deadline for approval or on a later date specified in the regulation.

Method (3)

(A) A regulation adopted under this method is not subject to County Council approval or disapproval.

(B) The issuer must send a copy of the adopted regulation to the Council after the deadline for comments published in the Register.

(C) The regulation takes effect when the Council receives it or on a later date specified in the regulation.

(g) Amendment of proposed regulation. The issuer may amend a proposed regulation after sending it to the County Council if:

(1) The Council has not taken final action on the proposed regulation; and

(2) The amendment is within the advertised scope of the proposed regulation.

(h) Withdrawal of proposed regulation. At any time before the County Council takes final action on a proposed regulation, the issuer may withdraw it.

(i) Publication of final action. Within 45 days after final action is taken on a regulation, the issuer must:

(1) Publish the final action taken on the regulation; and

(2) Summarize any substantive changes made since the regulation was first published.

(j) Temporary regulations.

(1) An issuer may adopt a temporary regulation under this subsection if:

(A) A public or fiscal emergency requires its adoption; or

(B) The public interest will be materially harmed if the regulation does not take effect immediately.

(2) A temporary regulation does not have to meet the publication and approval requirements of subsections (c) and (f), but the issuer must publish notice of the regulation's adoption in the next available issue of the Register.

(3) A temporary regulation is effective:

(A) (i) When the County Council receives from the issuer a copy of the temporary regulation and an explanation why its immediate adoption without public comment or Council review is necessary; or

(ii) On a later date specified in the regulation and justified in the explanation; and

(B) For not more than 90 days, as specified in the regulation. During this time, an adopted permanent regulation may immediately supersede a temporary regulation.

(4) (A) The issuer may ask the Council once to extend the effective period of a temporary regulation for up to 90 more days.

(B) The issuer must provide a compelling reason for an extension.

(C) The Council must not extend a temporary regulation more than once.

(5) (A) The Council by resolution may revoke a temporary regulation, effective when the resolution is adopted.

(B) If the Council revokes a temporary regulation, the resolution must explain the reason.

(6) If the Council revokes or does not extend a temporary regulation, the issuer or any other person authorized to issue regulations must not adopt a substantially similar temporary regulation within one year after the Council's action. However, within that year an issuer may propose a substantially similar temporary regulation to the Council, and the regulation will take effect only if the Council approves it by resolution.

Chapter 11B. Contracts and Procurement.

§ 11B-1. Definitions.

Unless the context indicates otherwise, the following terms have the following meanings:

* * *

(m) Procurement means buying, purchasing, leasing or otherwise acquiring any goods, services, or construction. It also includes all functions that pertain to the obtaining of any goods, service, or construction, including description of requirements, selection and solicitation of sources, evaluation of offers, preparation and award of contract, dispute and claim resolution, and all phases of contract administration.

* * *

(o) Regulation means a regulation adopted by the Executive under method (1).

* * *

§ 11B-8. Regulations.

Regulations may be adopted by the County Executive to:

(a) implement this Chapter;

(b) promote the efficient and orderly operation of the procurement system; and

(c) impose fees for services or products related to procurement.