BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of EAGLE INTERNATIONAL, INC.	)	
	)	Docket No. MSBCA 1121
Under State Aviation Administration Purchase Order No. 3-0340 Intercity Coaches for BWI Airport	)	

March 2, 1983

Bid Protest - By waiting approximately one month to raise issues of favoritism, collusion and fraud and by raising those issues with the Board in the first instance, Appellant waived its right to protest since COMAR 21.10.02.03B requires a bidder to file a protest with the procurement officer within seven days after the basis for protest is known or should have been known.

Bid Bonds - Although COMAR 21.06.07.01B describes acceptable forms of security for bid, performance and payment bonds, the regulation is not construed to limit or restrict the discretionary authority given to procurement officers under Article 21, § 3-504 (a) to approve other forms of security.

Pre-Bid Oral Explanation and Clarifications - A procurement officer's pre-bid oral clarification provided to a single prospective bidder over the telephone was found to be binding upon the State Aviation Administration since the RFQ encouraged telephone inquiry and did not mandate the issuance of written addendum to provide any clarifications or answers to all bidders.

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OPINION BY MR. LEVY

This appeal is from a State Aviation Administration (SAA) procurement officer's final determination declaring Appellant's bid non-responsive because it included bid security in an unacceptable form. Appellant concedes that it submitted an uncertified corporate check as its bid security but contends that the SAA procurement officer approved the form of security prior to bid. Appellant further maintains that the procedures followed by SAA were collusive and discriminatory and that SAA behaved fraudulently in its dealings with the bidders. SAA denies these allegations and submits that Maryland law does not authorize the use of an uncertified corporate check as adequate bid security.

Findings of Fact

1. On August 20, 1982, SAA published in the Maryland Register a Request for Quotations (RFQ) for 6 intercity coaches to be used to carry passengers to and from Baltimore-Washington International Airport (BWI). Bids were to be submitted by September 22, 1982.

2. The RFQ included both performance and technical (design) specifications[1] and established the following on page 2 with regard to contract award:

> C. Evaluation Procedure
>
> Award shall be made on the basis of lowest evaluated bid price. Criteria to be used in determination of award are set forth below:
>
> 1. The SAA is interested in obtaining intercity coaches which most closely meet or exceed both the performance and technical specifications indicated at the lowest possible cost. While cost is a major consideration, award will not be based solely on cost.
>
> 2. The equipment offered clearly must meet all applicable Federal Department of Transportation specifications and requirements for intercity coaches, all applicable safety standards for commercial buses of the Maryland Motor Vehicle Administration, as well as the needs of the SAA as set forth in Paragraph I.A. above and as set forth in both the performance and technical specifications.
>
> 3. The procurement officer of SAA may accept a limited number of nonsubstantive variations to the technical specifications if it is in the best interests of the SAA to do so.

[1] Attachment 3C, Agency Report

4. The procurement officer shall be entitled to determine whether or not a bidder is responsible and responsive. A numerical rating system may be used at the option of the procurement officer.

5. The procurement officer reserves the right to reject any and all bids and/or waive minor irregularities or technical defects, if, in his judgement (sic), it is in the best interest of the SAA to do so. (Underscoring added.)

Also, on page 1, SAA stated that "... in its evaluation process leading to final bid award ... [it] will consider delivery of vehicles as an important factor."[2]

3. The RFQ Instruction to Bidders[3] provided the following with regard to bid bonds:

15. Bid Bond

In the event that the proposal exceeds $25,000 bidders must submit, on a form provided by the State, a bid bond in an amount equal to, or greater than, 5% of the total bid price. Bid bonds must be issued by a surety licensed to do business in the State of Maryland, although the bidder may submit cash, a certified check, or other security set forth in COMAR 21.06.07.01 in lieu of the bond. Failure to return the contract acceptance form properly executed within the prescribed period will be cause for the State to forfeit bid security. (Underscoring added.)

4. The SAA procurement officer for this acquisition was Mr. Charles Plantholt, Director of Finance and Administration. However, the RFQ designated Mr. John Stempel, SAA Chief of Purchasing and Supply as the buyer and gave his phone number. Bidders were expected to direct their questions concerning the RFQ to Mr. Stempel who was authorized to answer them. [Tr. 42]

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[2]An invitation for bids or request for quotations is used to initiate a competitive sealed bid procurement. COMAR 21.05.02.01A., 21.01.02.58. Under a competitive sealed bid procurement, award is made to the responsive and responsible bidder who submits the lowest bid price or lowest evaluated bid price. COMAR 21.05.02.13A, Hanover Uniform Co., MSBCA 1059, (April 13, 1982). Only objectively measurable criteria which are set forth in the invitation for bids or request for quotations shall be applied in determining the lowest bidder. COMAR 21.05.02.13B. Here SAA was indicating in a competitive sealed bid procedure that it would consider factors other than those which could be objectively utilized to evaluate price. While this is impermissible, the evaluation criteria here had no effect on the ultimate award and were not protested.

[3]Attachment 3b, Agency Report

5. On September 3, 1982, Mr. R.S. Matthews, Vice President-Controller of Motor Coach Industries (MCI), sent a letter[4] to Mr. Theodore E. Mathison, Director of Airports for the SAA, requesting approval of 63 proposed equals to the RFQ technical specification. Mr. Mathison replied by letters dated September 15, 1982[5] and September 17, 1982[6] that SAA would accept the proposed equals. These three letters were submitted as a part of MCI's bid package on September 20, 1982.

6. On September 8, 1982, Mr. Vernon Tull, Manager of Operations for Appellant, phoned Mr. Stempel and inquired if a corporate check was permissible as bid security in lieu of the bid bond. Mr. Stempel replied that it was permissible. Both Mr. Tull and Mr. Stempel testified that neither one used the phrase "certified corporate check" during this conversation. [Tr. 23, 46]

7. When bids were opened on September 22, 1982, Appellant was identified as the apparent low bidder. Accompanying Appellant's bid was a four page document entitled Request For Approved Equals and Clarifications. The first paragraph of this document read as follows:

> Eagle International, Inc.'s Quotation is accompanied with a corporate check in an amount equal to 5% of the total bid price. This corporate check is equal to the bid bond requested and has been given prior approval. Therefore, the Section L Bid Bond Form on Page L-01 and L-02 is not executed.

Appellant's uncertified corporation check was in the amount of $44,664.00.

8. All bids were referred to an evaluation committee which later issued its report to T. James Truby, SAA Administrator, on October 6, 1982. The committee recommended that Appellant's bid be rejected as non-responsive because the corporate check it submitted as bid security was not certified.[7] The committee further recommended that the award be made to MCI, the second low bidder.

9. On October 8, 1982, the procurement officer issued a Notice of Award to MCI and advised Appellant by letter that it had not been selected for award because it had not complied with the requirements of COMAR 21.06.07.01B concerning bid security.

10. Appellant's Mr. Tull testified that he sent a letter to SAA's Mr. Stempel on October 8, 1982 requesting copies of the other bids received. Mr. Tull received the requested materials within a week. [Tr. 76]

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[4]Attachment 2(4), Agency Report
[5]Attachment 2(5), Agency Report
[6]Attachment 2(7), Agency Report
[7]The report also concluded that Appellant did not acknowledge receipt of an amendment and the bid was therefore non-responsive under COMAR 21.06.02.02B.

11. On October 14, 1982, Appellant sent a telegram to SAA acknowledging receipt of the procurement officer's October 8, 1982 letter and advising SAA of the September 8, 1982 phone conversation between Vernon Tull and John Stempel. On this basis, Appellant requested that its bid security be deemed acceptable and that it be awarded the contract.

12. The procurement officer denied Appellant's protest in a final decision issued October 26, 1982. A timely appeal was filed with this Board on November 9, 1982.

13. The Board of Public Works approved the award of this contract at its meeting on November 10, 1982 and a purchase order and notice to proceed was issued to MCI on November 18, 1982.

14. Appellant filed a Supplement To Notice Of Appeal with this Board on November 15, 1982. In addition to re-asserting its position with regard to its bid security, Appellant alleged that "the procedures followed by the purchasing office were collusive and discriminatory in that the successful bidder was accorded more favorable treatment." Appellant also asserted "that the purchasing office has behaved fraudulently in its dealings with the bidders in this case." A hearing was conducted by the Board on January 4, 1983.

Decision

We initially must determine what grounds for protest are properly before this Board for resolution. The only ground for protest raised with the SAA procurement officer and addressed in his final determination was the adequacy of Appellant's bid security. Appellant did not allege fraud or collusive and discriminatory procedures until well after the Board appeal had been docketed. SAA contends that these latter contentions thus are untimely and should be dismissed.

On October 8, 1982, Appellant requested a copy of the MCI bid documents. This was provided to Appellant by the SAA's Mr. Stempel within a week. As testified to by Appellant's Mr. Tull, it was after a review of MCI's bid that Appellant recognized that favorable treatment had been accorded to MCI. Nevertheless, Appellant waited until November 15, 1982, approximately one month after receiving MCI's bid, to raise the issues of fraud, collusion and favoritism as grounds for protest.

COMAR 21.10.02.03B requires a disappointed bidder to file a protest with the appropriate procurement officer within 7 days after the basis for protest is known or should have been known. By waiting approximately one month, Appellant waived its right to protest on these grounds. See The CTC Machine and Supply Corporation, MSBCA 1049, Mot. for Rec. Den., (April 20, 1982).

We now consider the adequacy of Appellant's bid security. In this regard, Art. 21 § 3-504(a), Md. Ann. Code provides that:

> (a) Each bidder or offeror for a construction contract shall give a bid bond if the bid or offer exceeds $25,000. Bid bonds may be required for any other procurement over $25,000, as determined by the procurement officer. The bid bond shall be provided by a surety company authorized to do

> business in this State, or the equivalent in cash, or in a form satisfactory to the procurement officer. (Underscoring added.)

The regulations promulgated to implement this statute appear at COMAR 21.06.07. Of particular significance is COMAR 21.06.07.01B as follows:

> B. Acceptable security for bid, performance, and payment bonds shall be limited to:
>
> (1) A bond in a form satisfactory to the State underwritten by a company licensed to issue bonds in this State;
>
> (2) A bank certified check, bank cashier's check, bank Treasurer's check, cash, or trust account; or
>
> (3) Pledge of securities backed by the full faith and credit of the United States government or bonds issued by the State of Maryland.

In contrast to the statute, therefore, the foregoing regulation does not afford the procurement officer any discretion to determine whether other forms of bid security may be acceptable.

We previously have recognized in Kennedy Temporaries, MSBCA 1061 (July 20, 1982) that a power granted to an administrative agency to make rules and regulations extends no further than the authority given by the relevant statutory delegation. In that opinion we further cited the Maryland Court of Appeals decision in Mayor and City Council of Baltimore v. William E. Koons, Inc., 270 Md. 231, 236 (1973) for the following principle:

> A legislatively delegated power to make rules and regulations is administrative in nature, and it is not and cannot be the power to make laws; it is only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute. Legislation may not be enacted by an administrative agency under the guise of its exercise of the power to make rules and regulations by issuing a rule or regulation which is inconsistent or out of harmony with, or which alters, adds to, extends or enlarges, subverts, or impairs, limits, or restricts the act being administered. (Underscoring added.)

In accordance with these decisions, we thus conclude that COMAR 21.06.07.01B cannot be construed to limit and restrict the discretionary authority given to the State's procurement officers under Article 21, § 3-504(a). Accordingly, we find that the acceptable forms of security listed in COMAR 21.06.07.01B are simply illustrations and were not intended to preclude a State procurement officer from accepting security in other forms.

Since an uncertified corporate check is not expressly authorized for use as bid security by law or regulation, we next must determine whether the procurement officer, or his authorized representative,[8] approved the use of

[8]COMAR 21.01.02.50 defines the term procurement officer to mean "...any person

Appellant's check prior to the instant bid. In this regard, the record indicates that Appellant's Mr. Tull was instructed by the SAA's Mr. Stempel, prior to bid, that a corporate check would be acceptable for submission as bid security. During this conversation, no mention was made of the further requirement that the corporate check be certified.

The SAA contends that all Mr. Stempel approved was the use of a certified corporate check. However, the RFQ Instructions to Bidders, paragraph 15, expressly provided that certified checks would be accepted as bid security. Accordingly, there was no reason for Mr. Tull to make inquiry unless Appellant intended to submit an uncertified corporate check. For this reason, we believe that Appellant was justified in concluding both that Mr. Stempel understood its inquiry and that an uncertified corporate check was acceptable to the SAA as bid security.

Finally, we address the authority of Mr. Stempel to act on behalf of the procurement officer. Here Mr. Stempel was identified in the RFQ as the buyer for the SAA. His phone number also was included in the RFQ presumably to permit those with questions to contact him. There was nothing in the RFQ to alert bidders that Mr. Stempel's oral clarifications or answers in response to telephone questions would not be binding on the SAA. Further, the RFQ did not mandate the issuance of written addendum to provide any clarifications or answers to all bidders. For these reasons, we conclude that Mr. Stempel was authorized by the procurement officer to administer the bidding process and prescribe the forms of bid security acceptable to the SAA. See Department of General Services v. Cherry Hill Sand & Gravel Company, Inc., Ct. of Special Appeals of Md., No. 593, Sept. term, 1981 (filed April 7, 1982).[9]

For the foregoing reasons, we conclude that the SAA procurement officer improperly rejected Appellant's low bid as non-responsive. The contract awarded to MCI thus should be terminated for the convenience of the State and awarded to Appellant.

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authorized by a State agency in accordance with law or regulations to formulate, enter into, or administer contracts or make written determinations with respect to them. The term also includes an authorized representative acting within the limits of authority." (Underscoring added.)

[9]Compare Cherry Hill Sand & Gravel to our earlier decision in Granite Construction Company, MDOT 1011 (July 29, 1981) where that contract expressly stated that oral explanations or clarifications would not be binding. In view of that statement and the requirement that only written addendum were to be relied upon, the Board concluded in Granite that the person identified in the IFB to field telephone questions had no authority to provide oral responses.

Appellant's check prior to the instant bid. In this regard, the record indicates that Appellant's Mr. [illegible] was instructed by the SAA [illegible] prior to bid, that a cashier's check would be acceptable as bid [illegible] security. During the conversation, no mention was made of the requirement that the cashier's check be certified.

The SAA [illegible] certified check. [illegible] security. Accordingly, there was no reason for [illegible] unless Appellant intended to submit an uncertified [illegible] we assume that Appellant was [illegible] to the SAA as bid security.

[illegible]

[illegible]

On [illegible] the [illegible] appeal. [illegible] Maryland State Board of [illegible] Appeals of the Department of Transportation [illegible] transferred to the Maryland State Board of Contract Appeals [illegible]

[illegible]

IN THE MATTER OF	*	IN THE
EAGLE INTERNATIONAL, INC.	*	CIRCUIT COURT
Appeal from the Maryland State Board of Contract Appeals	*	FOR
Opinion of March 2, 1983	*	ANNE ARUNDEL COUNTY
* * * * * * * * * *	*	Law No. 1105753
MOTOR COACH INDUSTRIES, INC.	*	
Appellant and Cross-Appellant	*	APPEAL FROM THE
VS.	*	MARYLAND STATE
EAGLE INTERNATIONAL	*	BOARD OF
AND	*	CONTRACT APPEALS
STATE AVIATION ADMINISTRATION	*	
Appellees and Cross-Appellees	*	Docket No. 1121
* * * * * * * * * *	*	
IN RE: BID OF	*	
EAGLE INTERNATIONAL, INC.	*	
UNDER SAA PURCHASE	*	
ORDER NO. 3-0340	*	
* * * * * * * * * *	*	* * * * * * * * * * * *

OPINION AND ORDER

Sir Richard Burton (the 19th century explorer, not the actor), while preparing for an 1863 exploration of the lower Congo, stated:

"Starting in a hollowed log of wood, some thousand miles up a river, with an infinitesimal prospect of returning! I ask myself why?, and the only echo is, 'damned fool... the Devil drives.'"

We experience Sir Richard's trepidation as we begin the treacherous and uncharted path through Maryland's Procurement Statute, Article 21 §1-101 et seq.

Our trip begins with the Statute itself. The Statute, enacted in 1980, provides a long list of underlying purposes and policies, namely:

> (1) Provide for increased public confidence in the procedures followed in public procurement;
>
> (2) Insure the fair and equitable treatment of all persons who deal with the procurement system of this State;
>
> (3) Simplify, clarify, and modernize the law governing procurement by this State;
>
> (4) Permit the continued development of procurement regulations, policies, and practices;
>
> (5) Provide increased economy in State procurement activities and to maximize to the fullest extent the purchasing power of the State;
>
> (6) Provide safeguards for the maintenance of a procurement system of quality and integrity;
>
> (7) Foster effective broad-based competition through support of the free enterprise system; and
>
> (8) Promote development of uniform procurement procedures to the extent possible.

It is doubtful that many of these purposes will be fulfilled by the record before us.

The facts in this case are relatively simple. The State Aviation Agency (SAA) issued a solicitation for bids on six intercity buses. A formal Request for Quotations (RFQ) was sent to six vendors, including the Plaintiff herein, Eagle

International, Inc. (Eagle) and the Intervenor, Motor Coach Industries (MCI). All bidders were required to furnish security in the form of a bond, certified check, "or other security set forth in COMAR (Code of Maryland Regulations) 21.06.07.01."

On September 8, 1982, the infamous telephone call herein was made. Vernon Tull, an official of Eagle, telephoned John Stempel, SAA's Chief of Purchasing and the person whose telephone number was given on the RFQ to receive inquiries. Tull asked whether a corporate check was sufficient for the bid bond. Stempel said yes.

Both parties admit the conversation took place and there is no substantial dispute about the language. However, Tull indicated he was talking about a "corporate" check as opposed to a "certified" check; Stemple thought otherwise. The Board of Contract Appeals found that the only logical explanation was that the parties were talking about a non-certified corporate check, since a certified corporate check was clearly permitted.

Eagle accordingly submitted its bid, including a $44,000.00 uncertified check, along with the notation, "this corporate check is equal to the bid bond requested and has been given prior approval." Although its bid was the lowest bid (by a small amount), Eagle was rejected because it had an improper form of bid security.

Eagle protested loudly, but to no avail at the agency level. It attempted to block award of the contract to MCI, but the Board of Public Works declined to do so. Eagle then appealed to the Board of Contract Appeals, which decided: (a) that the Regulation, COMAR 21.06.07.01 B either does not limit the authority given to the Procurement Officer to accept other forms

of security under Article 21 §3-504(a), or the regulation is an improper limitation on the Article; (b) the Procurement Officer, through Mr. Stempel, therefore had authority to accept a regular check and did so; and (c) the contract to MCI should be terminated and the contract awarded to Eagle.

Less than a month thereafter the Board decided it erred by requiring the contract be awarded to Eagle, since the State could totally reject the entire solicitation. It held that Eagle was entitled to an award "only if the SAA still wishes to purchase six new buses under the same specifications."

The SAA appealed, as did Eagle, both finding deficiencies in the decree.

With this view of the landscape, we are ready for the first stop on our journey:

1. Are the Regulations (COMAR 21.06.07.01 B) merely illustrative of the forms in which a Procurement Officer may accept a bid bond, or, in the alternative, is the Regulation inconsistent with the Statute [Md. Code Ann. §21-3-504(a)], and therefore invalid?

The language of §21-3-504(a) is as follows:

> "(a) Contracts exceeding $25,000; surety.-Each bidder or offeror for a construction contract shall give a bid bond if the bid or offer exceeds $25,000. Bid bonds may be required for any other procurement over $25,000, as determined by the procurement officer. The bid bond shall be provided by a surety company authorized to do business in this State, or the equivalent in cash, or in a form satisfactory to the procurement officer."

The Regulation sets forth:

> "B. Acceptable security for bid, performance, and payment bonds shall be limited to:
>
> (1) A bond in a form satisfactory to the State underwritten by a company licensed to issue bonds in this State;

"(2) A bank certified check, bank cashier's check, bank treasurer's check, cash, or trust account; or

(3) Pledge of securities backed by the full faith and credit of the United States Government or bonds issued by the State of Maryland."

We do not see the Regulation using words of illustration only. It is very specific with regard to the types of security which may be acceptable. No regulation can cover every possible situation, but there is no intimation in the Regulations that a non-certified check would be acceptable. We need not remain longer here.

The other prong of the decision will detain us longer. A legislature has the power to delegate to an administrative agency the right to promulgate such reasonable rules and regulations as may be necessary to accomplish purposes for which the agency was created, Vicker v. Starkey, 265 Minn. 464, 122 N.W.2d 169. These rules must be reasonable and consistent with the letter and policy of the statute under which the agency acts, Comptroller v. Rockhill, Inc., 205 Md. 226, 107 A.2d 93. If reasonable, the construction placed on a statute by agency officials soon after its enactment should not be disregarded, except for cogent reasons, Comptroller v. Rockhill, Inc., supra, Montgomery County, Maryland v. Califano, 449 F.Supp. 1230, aff'd 599 F.2d 1048. A regulation which is contrary to statute is invalid; however, regulations are not invalid merely because they amplify or explain statutes. Here the Legislature permitted two separate kinds of security. It then gave a more liberal clause "in a form satisfactory to the procurement officer." An agency has a right to define, reasonably, what may be satisfactory to the procurement officer. This could include more

than cash or a surety, such as a certified or cashier's check, escrow agreements, or the like. We think the agency was entirely proper to permit its Procurement Officer to accept something which was not within the control of the presenting party to remove from the control of the agency. Certified checks may be stopped, sureties may go bankrupt, banks may default, cash may be counterfeit, but all are more desirable than a mere personal check which can (a) bounce or (b) be stopped by the drawer, leaving no more recourse than a suit and a judgment which may not be collected.[1/] The Regulation is reasonable, is not repugnant to the Statute, and is valid.

We have now steered away from the validity of the Regulation, leaving it intact. Now we find ourselves in the world of governmental estoppel. Our question is:

1. Are there any circumstances under which an agent can bind the Government contrary to regulation, and if so, are they met here.[2/]

A normal party is subject to estoppel when his own conduct creates irreversible confusion. Put in its legal terms:

(1) The party to be estopped must be apprised of the facts;

(2) He must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended;

(3) The other party must be ignorant of the true state of facts;

1/ There is nothing wrong with a statute and regulation which permit non-certified checks, Board of Education of Carroll County v. Allender, 206 Md. 466, 112 A.2d 455, but if certified checks are required they are mandatory, Harris v. City of Phila., 283 Pa. 496, 129 A. 460.

2/ We would note that Eagle has argued only the Regulation and the remedy, not governmental estoppel. However, if the Regulation is proper, this is the next question.

(4) He must rely on the conduct to his detriment.

Such is obviously a well-recognized and salutary provision of law. However, it is frequently not applied to governmental officials. The reason for this exception, somewhat astounding in the abstract, is that governmental estoppel is an offshoot of a larger theory known as sovereign immunity.

Sovereign immunity is rooted in the notion that "the king can do no wrong."[3/] Better stated, this would be "the king, having more power than most, does more wrong than most, but we will ignore it." The rationale behind this rule has been variously given as a protection of the public purse, or the principle that public officers have no power to bind the people except that given them by specific provision, Brown v. Craig, 350 Mo. 836, 168 S.W.2d 1080.

Devolving from the case of Russell v. Men of Devon, 100 Eng.Rep. 359, 2 T.R. 667 in 1788, the rule has been long criticized as an anachronism without rational basis. Many States have, by judicial decision, abolished it. Stone v. Arizona Highway Commission, 381 P.2d 107, 93 Arz. 384. No one today defends total governmental immunity, which has become riddled with exceptions. Muskopf v. Corning Hospital District, 55 Cal.2d 211, 11 Cal.Rptr 89, 359 P.2d 457.[4/]

While it has been said in Maryland that the State cannot be estopped at all for acts done in a governmental, public or sovereign capacity, as opposed to a proprietary one, Salisbury Beauty Schools v. State Board of Cosmetologists, 268 Md. 32, 300 A.2d 367, the cases show this is really dicta. In Liller v. State Highway Admin., 25 Md.App. 276, 333 A.2d 644, a case

3/ Stone v. State Highway Comm., 93 Arz. 384, 381 P.2d 107.
4/ A superb discussion of the question by Justice Traynor.

involving a public nuisance, the State had no duty to speak out, and there was no more than mere silence on the part of the State. Selinger v. Governor of Maryland, 266 Md. 431, 293 A.2d 817, concerns the signing of a bill, the most governmental of functions. Agnew v. State, 51 Md.App. 614, 446 A.2d 425, really involves a form of laches in the State's declining to take any earlier action against former Vice President Agnew or in its acceptance of back taxes. Salisbury Beauty Schools v. State Board of Cosmetologists, supra, involves laxity in law enforcement, without affirmative action by the State.

Besides citing the above cases (and we have found no better ones), SAA relies principally on Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 68 S.Ct. 1, 92 L.ed 10. That case certainly says everything that SAA wants it to say; however, its force has been much lessened by subsequent Supreme Court cases. SAA is referred to the scholarly discussion by Judge Harold Greene[5/] in Hoeber v. District of Columbia Redevelopment Land, 483 F.Supp. 1356. It is worth quoting at length:

> "It is generally agreed that, to the extent that Merrill had been thought to have established a ban on the use of estoppel against the government, that concept was undermined by the later case of Moser v. United States, 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729 (1951). There, a Swiss national had applied for exemption from military service after he had been advised by the State Department that by doing so he would not forfeit any right to citizenship in the future. The Court held that the government could not deny the plaintiff his right to apply for citizenship because it had misled him and he had not knowingly waived his rights to citizenship. Although the Court did not expressly mention Merrill or label its decision as being based on estoppel, it effectively relied on estoppel principles in its holding that the government could not disavow its previous actions.
>
> Both the textwriters and the lower courts have so construed Moser. See 2K. Davis, Administrative Law Text, §17.02, pp. 345-46; United States v.

5/ An extremely able Jurist in legal matters, whom your writer has been privileged to appear before.

"Lazy F.C. Ranch, 481 F.2d 985 (9th Cir. 1973) (erroneous advice by agent of the Department of Agriculture concerning payment limitations under soil bank program); United States v. Wharton, 514 F.2d 406 (10th Cir. 1975) (family protected from loss of home resulting from erroneous advice given by government agency); cf. Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970) (government estopped from disavowing its advice to applicants for oil and gas leases that they would not lose their priority upon refiling corrected applications); Schuster v. C.I.R., 321 F.2d 311 (9th Cir. 1962) (tax commissioner estopped from holding trustee liable on tax deficiency after advising him that certain assets of estate were not taxable)."

Having so stated, Judge Greene goes on to state the additional factors required to convert estoppel into an ordinary party into estoppel against the Government:

"Estoppel against the government requires, in addition to traditional factors, a showing of an injustice to the party asserting the estoppel and lack of undue damage to the public interest."

To put it another way, ordinarily estoppel should not be involved when to do so would be harmful to some specific public policy or public interest, or when it would enlarge the power of a governmental agency or expand the authority of a public official, and otherwise only "when justice and right require it." Shoban v. Board of Trustees of Desert Center, 81 Cal.Reptr. 112, 276 Cal.App.2d 546. Or again, the Government is responsible the same as a private party where "injunction would result from a failure to uphold or estoppel is of sufficient dimension to justify any affect upon public interest or policy which would result from the raising of an estoppel. Chaplis v. County of Monterey, 158 Cal.Rptr. 395, 97 Cal.App.3d 260. Cf. also City of Long Beach v. Mansell, 476 P.2d 423, 91 Cal.Rptr. 23. There must be exceptional circumstances, Goodwill Industries v. Los Angeles County, 117 Cal.App.2d 19, 254 P.2d 877.

Estoppel has been applied against the State, even in its governmental capacity, Stahelin v. Bd. of Ed., 230 N.E.2d 465,

87 Ill.App.2d 28. The proprietary-governmental dichotomy is an artificial one. Contracting for the building of a firehouse is really no different from contracting for the building of a swimming pool.[6/] On the other hand, legislative, judicial, taxing and similar aspects of Government clearly require the application of governmental immunity or estoppel. Estoppel may arise out of County's transaction in governmental capacity, if estoppel is necessary to prevent loss to another, and if estoppel will not impair the exercise of governmental powers, Washington v. McLawhorn, 237 N.C. 449, 75 S.E.2d 402. Conduct is prohibited if tantamount to perpetration of fraud, Florida Livestock Board v. Gladden, 76 So.2d 291.[7/] Libby, McNeill & Libby v. Wisconsin Dept. of Taxation, 260 Wis. 551, 51 N.W.2d 796. We really ought to look, not at the pigeon hole that we place the function in, but whether the function is so bound up with a purely governmental function as to require immunity.

However, estoppel is not applied as freely against governmental agencies, Libby, McNeill & Libby v. Wisconsin Dept. of Taxation, supra.

This is a proper recognition of the diversity of government, the necessity of curbing officials whose loyalty may be

6/ Or injuries in a community theater as opposed to a children's playground, Muskopf v. Corning Hosp. Dist., supra.

7/ "From what has been written, it is not necessary to belabor the estoppel theory in order to dispose of this appeal. Suffice it to say that we agree with the lower court in invoking the doctrine of estoppel against the Board in this case. To allow the Board through its own regulations to advertise to the hog farmers of the state that they had until August 15 to start cooking garbage in order to comply with the said act, and for the Board to thereafter take the position that it was without authority to extend the effective date of the act from the fourth to the fifteenth, would be tantamount to the perpetration of a fraud by an administrative agency of the State against one of its citizens. This the courts should not countenance."

more suspect than those in a small organization, and the necessity to protect the public purse from undue incursion. An ordinary citizen will recognize that more care is required when dealing with the Government. To quote Pogo, "We have met the enemy, and they is us."

The key point of all these cases is that there must be, in addition to the normal requirements: (1) no expanse of the power of any governmental agency; (2) lack of damage to the public interest; and (3) substantial injustice.

We cannot find items one or two. There is obviously no expanse of power of any governmental agency. The public would not be damaged in a way we can consider by having Eagle get the bid, although the SAA avers it would. The damage claimed is the fact that the buses are built and ready for use, and that the public treasury would now have to pay for the buses twice. This is a bootstrap argument. The State went ahead with the MCI contract instead of letting this be decided by the Courts. Having taken the risk of the cast of the die, it now cries that it is damaged. If the buses needed to be replaced so quickly, that should have been done earlier.

On the point of extreme injustice, however, we cannot walk the last mile with petitioner. Except for its counsel fees, Eagle is not out of pocket. Its loss is a loss of profits, and we can find no case where estoppel has been applied to the Government for loss of profits. This case is contrasted with Louisiana v. McIlhenny, 201 La. 78, 9 So.2d 465, a case involving competitive bidding (or lack thereof), there was or would have been an out of pocket loss since the contract, having been completed, was to be null and void ab initio.

The circumstances here are not flagrant. It is not tantamount to perpetration of a fraud. The conversation was certainly ambiguous. Eagle was not unfamiliar with bidding and bid bond requirements. It knew that this information had not been disseminated to all bidders. It was aware that these matters are usually handled in writing. It is far from an innocent dealing with the Board. None of this should be construed as applauding the poor handling of the matter by the SAA.

Under all the circumstances, although we have gone as far as we can go in limiting the exception of governmental estoppel and immunity,[8/] we can go no further. We do not find the injustice required to estop the State. One the State is not estopped, Eagle's bid is not proper, and must fall.

Because of our findings, it is unnecessary to decide the scope of the Board's authority (we do think it is more than declaratory only). Our journey has ended.

It is, accordingly, this 4 day of May 1983,

ORDERED, that the decision of the Maryland State Board of Contract Appeals, dated March 2, 1983, be and the same is hereby reversed, the decision of March 31, 1983 is thereby moot.

We will stay the payment to MCI for twenty days to permit Eagle to seek such other relief as it can, recognizing that we are but one of many tribunals who will be asked to rule on this matter.

JAMES C. CAWOOD, JR., JUDGE

8/ And further than the Court of Appeals has gone, to our knowledge.