

**STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
6 St. Paul Street
Suite 601
Baltimore, Maryland 21202-1608
Telephone: (410) 767-8228
Toll Free Telephone: 1-800-827-1135**

**SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

Docket Nos. 2315 & 2316	Date of Decision: 03/05/03
Appeal Type: [] Bid Protest	[X] Contract Claim
Procurement Identification: Under University of Maryland College Park Energy and Utility Infrastructure Program Contract No. 80103-F	
Appellant/Respondent: Trigen-Cinergy Solutions of College Park LLC University of Maryland	

Decision Summary:

Board of Contract Appeals - Jurisdiction - As one of a series of related agreements to secure long-term energy services for the University with financing provided by the Maryland Economic Development Corporation (MEDCO), MEDCO entered into a design and construction agreement (DCA) with Trigen-Cinergy Solutions of College Park LLC (Trigen-Cinergy) to provide construction services on behalf of the University. The Board, however, lacked jurisdiction over disputes arising out of the DCA because, when MEDCO is engaged in the financing of transactions through the issuance of bonds, the provisions of the General Procurement Law do not apply as the result of an exemption for MEDCO from the provisions of the General Procurement Law under Section 5-214(a) of Article 83A (MEDCO's enabling legislation). This exemption from the General Procurement Law exists even though the University is the intended beneficiary of the DCA between MEDCO and Trigen-Cinergy.

THESE HEADNOTES ARE PRODUCED FOR ADMINISTRATIVE REFERENCE AND OPERATIONAL USE ONLY AND SHOULD NOT BE CONSIDERED "OFFICIAL TEXT" OF THE DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS, NOR SHOULD IT BE REFERENCED OR GIVEN ANY LEGAL STATUS. A COPY OF THE FULL AND COMPLETE DECISION SHOULD BE CONSULTED AND REFERENCED. FOR FURTHER INFORMATION, CONTACT THE BOARD OF CONTRACT APPEALS.

existing utility systems, as well as the construction of a centralized chilled water generation and distribution system.

2. The RFP did not specify a particular transactional structure for the Energy Program. Instead, it established certain general requirements for such structure and allowed the offerors to propose transactional structures that would meet those requirements. With regard to financing, the RFP required that the State retain ownership of all real property, existing utility infrastructure, and any capital improvements. In addition, the RFP required the University's obligations under the Energy Program be funded from its annual appropriations for utility operations in such a way that it would not constitute debt on the University's balance sheet for accounting purposes. The RFP allowed offerors to submit proposals based on tax-exempt financing through an agency of the State or based on private financing.
3. The RFP provided that "[t]his RFP and any resulting contract shall be governed by the State Procurement Law, Division II of the State Finance and Procurement Article of Maryland, and by COMAR." The RFP also stated that under the procurement law, certain mandatory provisions set forth in COMAR would be included in the contract documents. Those provisions, including the disputes provision, were recited in Appendix I to the RFP.
4. Award of the RFP was not to be embodied in a single contract document. Rather, the transaction contemplated by the RFP consisted of multiple agreements addressing, at a minimum, the following:
 - a. Payment structure under which the University would pay for energy services.
 - b. Energy production and delivery systems, which could include existing University-owned systems.
 - c. Management, operation, and maintenance of the energy systems.

- d. Construction of capital improvements to the energy systems.
 - e. Fuel and electricity procurement and supply.
 - f. Assumption of management responsibilities for certain University employees and development of a transition plan for transferring energy system responsibilities from the University to the offeror.
5. On or about December 4, 1997, Appellant and two (2) other offerors submitted technical and financial proposals in response to the RFP. Appellant's proposal included a structure for the Energy Program that was based upon tax-exempt financing through a State entity. The University subsequently identified the Maryland Economic Development Corporation (MEDCO), the State's quasi-governmental economic development agency, as the State entity that would issue bonds to finance any capital improvements.
6. The University completed initial evaluation of the proposals in early 1998, but determined that further discussions with each offeror were necessary to clarify the proposed programs and financing.
7. The discussions between the University and the offerors, held in 1998 and early 1999, resulted in the development of the following agreements for each offeror:
- a. Energy Services Agreement (ESA or Energy Agreement) between MEDCO and the University, which specified the payment structure under which the University would purchase energy services;
 - b. Ground and Equipment Lease (Lease) under which the State would lease the University's existing energy systems to MEDCO;
 - c. Management, Operation, and Maintenance Agreement (MOMA or Management Agreement) between MEDCO and the offeror, under which the offeror would manage the energy systems

- in order to meet the University's energy requirements;
- d. Design and Construction Agreement (DCA or Construction Agreement) between MEDCO and the offeror for the design and construction of capital improvements to the energy systems;
 - e. Fuel Supply and Services Agreement between the University and the offeror under which the offeror would act as the University's manager for the procurement of fuel and electricity; and,
 - f. Transition Agreement between the University and the offeror which provided, *inter alia*, for the offeror's assumption of management responsibility for certain University employees and for the transition of responsibility for the energy systems to the offeror.
8. On or about February 13, 1999, the University requested a Best and Final Offer (BAFO) from each offeror.
 9. On or about March 1, 1999, Appellant submitted its BAFO, which proposed to finance the entire program utilizing tax-exempt financing available through MEDCO. On or about March 12, 1999, after consideration of the BAFOs submitted by all of the offerors, the University's Procurement Officer recommended that award be made to Appellant. The recommended award was presented on the University's agenda and approved by the Board of Public Works on April 21, 1999. The various agreements described above, along with others, were concurrently executed by the University, MEDCO and Appellant on or about August 31, 1999.
 10. Each of these agreements specifically states that it is subject to the State's General Procurement Law and COMAR. In addition, these agreements contain mandatory COMAR provisions, including the disputes clause which provides that appeals from the Procurement Officer's final decision shall be filed with the Board of Contract Appeals.

11. Appellant's election to utilize tax-exempt financing through MEDCO merely changed the form, but not the substance of the Energy Program. More specifically, instead of the University and Appellant entering into the Lease and Energy Services Agreement, the University and MEDCO entered into those agreements. In turn, MEDCO and Appellant then entered into the Construction Agreement and the Management Agreement¹ to complete all work contemplated by the Energy Program. The Fuel Supply and Services Agreement and the Transition Agreement remain as agreements between the University and Appellant.
12. The essential features of the transaction and the procurement was to provide long-term energy services for the University and improve its energy and utility infrastructure.
13. Each of the separate principal agreements were created as part of the University's procurement, and are related in their origin to the RFP, the other agreements or both. Each agreement recognizes the overall purpose of the RFP to provide long-term energy services for the University and improve its energy and utility infrastructure. The Energy Agreement, Construction Agreement and Management Agreement each contain the following provision:

"The parties recognize that this Agreement [DCA], the Management Agreement, the Energy Services Agreement, the Fuel Supply and Service Agreement, the Transition Agreement, and Ground Lease constitute an integrated, comprehensive set of agreements that are intended to secure efficient, reliable, and economical long-term energy services available to the University. All of these agreements should be read together to accomplish that objective."

All of these agreements are related and interdependent.

¹ Because MEDCO's involvement in the transaction was for financing, the MEDCO agreements with Appellant contain provisions in addition to those found in State procurement contracts which address and limit how an award by this Board might be paid.

14. Section 7.9.1 "Disputes" of the DCA provides, among other things, that the DCA "shall be subject to the provisions of State Finance and Procurement Article, Title 15, Subtitle 2 Annotated Code of Maryland and COMAR 21.10 (Administrative and Civil Remedies)."
15. Section 7.9.8 of the DCA provides "[t]he Procurement Officer's decision shall be final and conclusive unless Contractor files a written appeal to the State Board of Contract Appeals within thirty (30) Days of receipt of said decision."
16. Disputes have arisen under the DCA between Appellant and MEDCO concerning certain rights and obligations of the parties.
17. Appellant filed claims for an upwards equitable adjustment for extra time and money allegedly incurred as a result of MEDCO requiring work beyond the scope of the original Contract requirements and for alleged delay costs relating to the notice to proceed.
18. MEDCO's Procurement Officer issued final decisions dated November 6, 2002 and November 13, 2002 denying the claims.
19. In both final decisions, the Procurement Officer states that "[Appellant] may appeal this decision to the Maryland State Board of Contract Appeals ... in accordance with DCA §7.9.8 and COMAR 21.10.04.06A."
20. Appellant appealed from both final decisions on December 4, 2002, and the instant jurisdictional dispute followed.
21. MEDCO was established pursuant to Article 83A of the Annotated Code of Maryland, titled Department of Business and Economic Development. Md. Ann. Code Art. 83A (Repl. Vol. 1998, Supp. 2002).
22. Pursuant to §5-214(a) of Article 83A, MEDCO "except as otherwise provided in this section ... is exempt from the provisions of ... Division II of the State Finance and Procurement Article, and may carry out its corporate purposes without obtaining the consent of any department, board, or agency of the State." Pursuant to §5-

214(d) of Article 83A, MEDCO is subject to any State and local authority requirements to which a private corporation would be subject.

Decision

There is no question that the disputes that are the subject of the appeals herein arise out of a procurement to provide energy systems for the University. The issue is whether the procurement is one covered by the State's General Procurement Law. We are of the opinion that the procurement is not covered by the General Procurement Law. We reach this conclusion based on our belief that MEDCO is not a unit for purposes of the application of the General Procurement Law under the particulars of this procurement.

We interpret the provisions of Section 5-214 of Article 83A² to exempt MEDCO from the General Procurement Law except when procuring services for itself. When MEDCO is engaged in the financing of

²(a) *Exemptions.*- Except as otherwise provided in this section, in exercising its corporate powers, the Corporation is exempt from the provisions of Articles 41 and 78A of the Code; § 10-507 of the State Government Article; and Title 2, Subtitles 2, 4, and 5, Titles 3 and 4, Title 6, Subtitle 1, Title 7, Subtitles 1, 2, and 3, §§ 8-127, 8-128, and 8-129, Part V of Title 8, Subtitle 1, and Title 10, and Division II of the State Finance and Procurement Article, and may carry out its corporate purposes without obtaining the consent of any department, board, or agency of the State.

(b) *Laws to which Corporation subject.*- The Corporation and its officers and employees are subject to the Public Ethics Law and the Public Information Act.

(c) *When Corporation is public body or political subdivision.*- For purposes of applying for, receiving, and entering into agreements in connection with loans, grants, insurance, or other forms of financial assistance, the Corporation is a public body within the meaning of the Maryland Industrial Development Financing Authority Act.

(d) *Regulations.*- Notwithstanding the provisions of subsection (a), the Corporation is subject to any State or local regulatory requirements to which a private corporation would be subject. In addition, the projects of the Corporation shall be subject to all zoning and subdivision regulations of the jurisdiction in which the project is located.

The Respondent argues that the language of subsection (d) makes MEDCO subject to the State Procurement Regulations (COMAR, Title 21) when MEDCO is functioning as a lender or as it is in this series of related transactions. We believe the language of subsection (d) does not reach the State Procurement Regulations which only apply when the State General Procurement Law applies and from which COMAR, Title 21 derives its authority.

transactions through the issuance of bonds, the provisions of the General Procurement Law do not apply. In none of the multiple agreements entered into to achieve the goals of the Energy Program is MEDCO procuring something for itself; it is procuring something for the University and paying for the design and construction of the capital improvements to the energy systems with the proceeds from the sale of bonds. Notwithstanding that the beneficiary of the related transactions herein is the University and that the University will repay MEDCO over the twenty (20) year life of the bonds, the Design and Construction Agreement (DCA), under which the claims giving rise to the appeals herein arose, is between Appellant and MEDCO. The DCA references the other agreements, and its language leaves no doubt that the University is the intended beneficiary of the construction of the capital improvements to the energy systems. However, MEDCO is exempt in its financial and construction management role herein from the provisions of the General Procurement Law, and we believe such exemption defeats this Board's jurisdiction, which must derive from a dispute in which the parties are subject to the General Procurement Law. Because MEDCO is exempt from the General Procurement Law, engaging as it is in its transactional role (rather than procuring services for itself) the Board lacks jurisdiction. Therefore, the good faith attempt by the parties to confer jurisdiction on the Board through provisions in the agreements is a nullity. We make this determination with awareness of Department of General Services v. Harmons, 98 Md. App. 535(1993) in which the cost of construction was financed through a private sale of certificates of participation and the Court of Special Appeals held that this Board had jurisdiction because the State was involved in a procurement contract for construction even though the project was financed by certificates of participation rather than through the sale of State general obligation bonds that would implicate the faith and credit of the State. In Harmons, the parties were not exempt. The financing structure still

left the Department of General Services procuring construction (a building) for the State Highway Administration from Harmons.³ In these appeals, MEDCO, one of the parties, is exempt.

For the foregoing reasons the Board concludes that it lacks jurisdiction over the appeals.

Wherefore, it is Ordered this _____ day of March, 2003 that the appeals are dismissed for lack of jurisdiction.

Dated:

Robert B. Harrison III
Board Member

I Concur:

Michael J. Collins
Board Member

³The Board originally dismissed the Harmon's appeal on the erroneous grounds that the Board concluded that the transaction from which the claims arose was a lease of real property rather than a construction contract, and the General Procurment Law excepts from the Board's jurisdiction contract claims relating to a lease of real property.

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2315 and 2316, appeals of Trigen-Cinergy Solutions of College Park LLC under University of Maryland College Park Energy and Utility Infrastructure Program Contract No. 80103-F.

Dated:

Loni Howe
Recorder