

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

Docket No. 2478	Date of Decision: 06/20/05
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under MTA Invitation to Bid No. 02015-Z	
Appellant/Respondent: Union County Seating Maryland Transit Administration	

Decision Summary:

Board of Contract Appeals - Jurisdiction - The Board of Contract Appeals lacks jurisdiction to hear an appeal involving the procurement by a unit of State government from another unit of State government because the General Procurement Law from which the Board derives its jurisdiction does not apply to a procurement by a State unit from a State unit.

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.

**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of Union County)
 Seating)
) Docket No. MSBCA 2478
Under MTA Invitation to Bid)
 No. 02015-Z)

APPEARANCE FOR APPELLANT: None

**APPEARANCE FOR RESPONDENT: Douglas G. Carrey-Beaver
 Assistant Attorney General
 Baltimore, MD**

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its protest that it, rather than a private sector competitor, should be awarded the Contract under the captioned solicitation. However, the Board was advised in the State's Agency Report that the Contract was awarded to a unit of State government. Consequently, the appeal concerns a transaction between State agencies that is excluded from Maryland's Procurement Law and thus beyond the Board's authority to review.

Findings of Fact

1. On or about January 6, 2005, the Maryland Transit Administration (MTA) issued the above captioned Invitation to Bid (ITB) for a two-year contract, with one two-year option, for the re-covering with cloth of plastic seat shells in MTA's bus fleet.
2. Under the Contract, the successful contractor is to pick up old bus seat shells, discard any that are unsuitable

for reuse, clean the remaining shells, and re-cover them by gluing specified cloth material to those shells. Bidders were to propose a per seat price for re-covering and a per seat price for the disposal of unacceptable seat shells.

3. On or about February 23, 2005, MTA received seven bids for the Contract. Bergen Auto Upholstery (Bergen) submitted the lowest bid of \$10 per re-covered seat; Appellant's bid was second lowest at \$15 per re-covered seat. State Use Industries (State Use), one of the seven bidders, and the only bidder not from the private sector, submitted a bid of \$17 per re-covered seat.¹
4. State Use is the prison industry arm of, and is in, the State of Maryland's Division of Correction in the Department of Public Safety and Correctional Services. See *Md. Code Ann., Corr. Servs. (CS) §§ 1-101(g) and 3-501 to 3-528 (1999 & Supp. 2004)*. A financially self-supporting entity, State Use generates revenues for its operations through structured employment of trained prison inmates.
5. COMAR 21.11.05.07.A. provides that, except under certain circumstances, each State procurement agency, such as MTA, "shall procure available supplies and services" from a "selling entity²." State Use is a selling entity.
6. By letter dated March 7, 2005, Appellant protested the prospective award of the Contract to Bergen. In its protest, Appellant alleged that, because of the cost of material, Bergen would either be receiving no profit by

¹ The prices bid for the disposal of unacceptable shells ranged from no charge to \$1.00 per seat. Appellant, Bergen and State Use proposed no charge for disposal.

² COMAR 21.11.05.01B(7) - "'Selling entity' means State Use Industries, Blind Industries and Services of Maryland, or certified sheltered workshops."

- providing its services at it's quoted price or would be providing a less expensive cloth for its covers.
7. In its final agency decision, MTA denied Appellant's protest, noting that the Contract would not be awarded to Bergen, but, instead, pursuant to COMAR 21.11.05.07, it would be awarded to State Use.
 8. On March 29, 2005, MTA issued the Contract to State Use by Blanket Purchase Order No. TT14423.
 9. In its appeal to the Board, received on May 9, 2005, Appellant asserted for the first time that State Use's \$17 bid price for re-covered seats was high given its use of low-wage employees. Appellant also questioned why the Contract was put out to bid if the State intended to issue it to State Use, and asked why State Use was being considered for the Contract because State Use allegedly had not been able to perform such work in the past.
 10. Appellant did file Comment on the Agency Report; however, such comment did not address issues of the jurisdiction of this Board to determine its appeal. Neither party requested a hearing.

Decision

In its protest, Appellant made three assertions pertinent to the above captioned ITB. Appellant asserted that (1) Bergen's price was unreasonable; (2) it was not in the State's interest to accept that price; and (3) given Bergen's price, Bergen would not be providing the cloth required by the Contract. Given that MTA has awarded the Contract to State Use, however, Appellant's protest, which complained only about the Bergen bid, is moot.

The Contract has been issued to State Use. In its appeal and Comment on the Agency Report, Appellant challenges the

issuance of the Contract to State Use. The Board has no authority to hear that challenge. The transaction between MTA and State Use is between two State units, and, therefore, it is exempt from Maryland's General Procurement Law and is not subject to Board review.

Maryland's General Procurement Law applies to "each expenditure by a unit under a procurement contract," except, where as here, a contract involves a procurement by one State "unit" from another State "unit." *Md. Code Ann., State Fin. & Proc. (SF&P) §§ 11-202(1) and 11-203(a)(2)(i)*. *SF&P § 11-203(a)(2)(i)* provides, in relevant part, that Division II (Maryland's General Procurement Law) "does not apply to ... procurement by a unit from ... another unit." *SF&P § 11-101(x)* defines a unit as "an officer or other entity that is in the Executive Branch of the State government and is authorized by law to enter into a procurement contract."³ MTA is a modal agency of the Maryland Department of Transportation, and it is part of the Executive Branch of the Maryland State government. *Md. Code Ann., Transp. §§ 2-102, 7-201 and 7-202(2001)*. Similarly, the Division of Corrections is a modal agency of the Department of Public Safety and Correctional Services, and it is also part of the State's Executive Branch of government. *CS §§ 2-101, 2-102 and 2-201*. State Use, in turn, is "a unit of the Division of Correction of the Department of Public Safety and Correctional Services." *COMAR 21.11.05.01.B(8)*; see also *CS § 3-503* ("[t]here is a State Use Industries organization in the Division [of Correction].")

³ *SF&P § 11-101(n)* defines a procurement contract as "an agreement in any form entered into by a unit for procurement", and *SF&P § 11-101(m)(ii)* defines procurement as "buying or otherwise obtaining supplies, services, construction, construction related services, architectural services, engineering services, or services provided under an energy performance contract."

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 2478, appeal of Union County Seating under MTA Invitation to Bid No. 02015-Z.

Dated:

Michael L. Carnahan
Deputy Recorder