

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeals of)	
)	
APCOA, INC.)	
)	
and)	MSBCA Docket Nos.
)	1993 and 1995
AMPCO PARKING SYSTEMS, INC.)	
)	
Under Maryland Aviation)	
Administration Contract)	
No. MAA-IFB-96-003)	

February 7, 1997

Bid Protest - Jurisdiction - Procurements which meet the requirements of COMAR 21.01.03.03B(1)(d)(i) are exempt from the General Procurement Law.

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Appearances for Respondent

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OPINION BY BOARD MEMBER STEEL

These consolidated appeals of APCOA, Inc. (APCOA) and AMPCO Parking Systems, Inc. (AMPCO) were filed following a Procurement Officer's final decision denying their bid protests regarding the solicitation to operate and manage the public automobile parking facilities at Baltimore/Washington International Airport (BWI).

Findings of Fact

1. The Maryland Aviation Administration (MAA) issued invitation for bids No. MAA-IFB-96-003 (IFB) on April 3, 1996, asking for technical and financial submittals from entities interested in operating and managing parking facilities at the Baltimore Washington Airport and Rail Station, including garages, surface lots and shuttle services.¹
2. The five-year contract contemplated by this IFB is similar to the contract awarded pursuant to a Request for Proposals (RFP) in 1991 to Appellant APCOA. That contract was found to be exempt from the procurement law in Hill's Capitol Security, Inc., 3 MSBCA ¶294 (No. 1615, Feb. 5, 1992), aff'd sub nom. Hill's Capitol Security, Inc. v. MSBCA Civil No. 87430, bench decision (Cir. Ct. Mont. County, July 17, 1992).
3. Like the contract in Hill's Capitol Security, this contract is substantially a revenue-producing contract, although the contractor will be reimbursed through deductions from gross revenues for certain expenditures. Further, this contract is substantially performed at a State transportation facility (BWI) under permission granted by the State and provides services for the public.
4. Similarities between the two contracts include, inter alia, that the contractor is required to use specified State-owned equipment, the contractor must pay an operating fee to the MAA based upon percentage of gross revenues, or a minimum guarantee (which may be reduced for no-charge parking and allowable shuttle bus charges); utilities are paid by the MAA; and MAA is responsible for receiving, holding and dispensing parking facility tickets. The MAA sets the rates charged to users of the parking facilities operated by the parking concessionaire. The MAA retains the right to change these rates at any time. The MAA is responsible for payment of all utilities.
5. At issue in both contracts is the following COMAR provision:
 - B. Specifically subject to these regulations are:
 - (1) Procurements by the State agency, even if a resulting procurement contract will involve no expenditure by the State and will produce revenue for the State for services that are to be provided for the benefit of...

(d) The public at a State transportation facility, unless a revenue-producing contract involves:

¹ This IFB contemplated a "multi-step sealed bidding" process under COMAR 21.05.02.17.

(1) A license, permit, or similar permission to use State facilities for activities related to the movement of passengers or goods, for providing goods or services to passengers, patrons, or tenants at a transportation facility, or for advertising or promotional purposes.

COMAR 21.01.03.03B(1)(d)(i).

Decision

The Board here considers the motions to dismiss the appeals filed by Respondent Maryland Aviation Administration (MAA), and the Interested Party, Maryland Parking Limited Partnership (MPLP). Both Respondent and the Interested Party move to dismiss these appeals on the grounds that this Board does not have jurisdiction to hear these appeals because the underlying solicitation is exempt from the general procurement laws of Maryland as set out in COMAR 21.01.03.03B(1)(d)(i).² MAA and MPLP rely on the ruling issued by this Board in Hill's Capitol Security, Inc., *supra*, regarding the prior contract for the parking services at issue in the instant appeal.

In that case, APCOA, Inc. was the beneficiary of the Board's ruling that the Contract was exempt from application of the General Procurement law, and as the interested party in that case, was awarded the prior contract. APCOA, Inc., having failed to submit the lowest bid for the next contract term, now argues that the General Procurement Law should apply to this type of contract, that this Board should evaluate the awarding of the current contract pursuant to the General Procurement Law, and issue an opinion in APCOA's favor. Respondent and the Interested party, MPLP, have both filed motions to dismiss these appeals on the grounds that the state of the law is clear; this parking contract was, and, continues to be, exempted from application of the General Procurement Law.

As this Board analyzed the same issue in Hill's Capitol Security, Inc., *supra*,

The MAA alleges that the Board lacks subject matter jurisdiction over this appeal because the State procurement law [State Finance and Procurement Article, §11-202(3)(iv)] and the State procurement regulations [COMAR 21.01.03.03(B)(1)(d)(I)] exclude this contract from being covered by the procurement law. If this Contract is properly excluded, the procurement standards enacted by the General Assembly controlling the award of State contracts such as requiring competitive sealed bidding, award to the lowest bidder, contractual provisions to fairly allocate risks, and those legislative enactments which provide for this Board as a forum for resolution of State contract disputes, are all inapplicable. The MAA argues that the Contract fits within the cited procurement law exclusion.

² MPLP also moved to dismiss on timeliness grounds. Since the Board herein finds that it has no jurisdiction to hear this appeal, the merits of the timeliness claim need not be addressed.

The State General Procurement Law applies to each expenditure by a unit under a procurement contract. The State Finance and Procurement Article, §11-202(1), Annotated Code of Maryland. It applies generally to all procurement except as otherwise expressly provided by law. State Finance and Procurement Article, §11-202, Annotated Code of Maryland. As previously stated by the MSBCA, "...the legislature in passing Maryland's omnibus procurement law in 1981 intended Maryland procurement law to be broad in scope as to its coverage." R&E Consolidated Services, Inc., MSBCA 1375, 2 MSBCA ¶187(1988), p. 25. Indeed, the General Assembly defines "Procurement" in a very broad sense, as follows:

- (1) "Procurement" means the process of:
 - I. leasing real or personal property as lessee; or
 - ii. buying or otherwise obtaining supplies, services, construction, construction related services, architectural services, or engineering services.

State Finance and Procurement Article, §11-101 Annotated Code of Maryland. This broad definition of applicability is consistent with the General Assembly's goal of attracting vigorous competitors to State procurements.

The procurement statute provides that any exception from coverage of the law must be an express exception and will be strictly construed. As stated by the legislature, "Division II shall be construed liberally and applied to promote the purposes and policies enumerated in subsection (a) of this section." State Finance and Procurement Article, §11-201(b), Annotated Code of Maryland. The legislative mandate thus is for the law to apply generally with only limited and specific exemptions. Therefore, exemptions must be carefully scrutinized. "Where a statute expressly provides for certain exclusions, others should not be lightly read therein by implication, for if the legislature intends other exclusions it is so easy to add them to the already-named explicit ones". State Insurance Commissioner v. Nationwide, 241 Md. 108 (1965); R&E Consolidation Services, Inc., *supra*, p. 30. As stated by the Court of Appeals in Maryland:

The general purpose of competitive bid requirements is to "obtain unrestricted competitive bidding for contracts . . . and thereby to safeguard public funds by preventing favoritism, collusion and extravagance" . . . They are enacted for the benefit of property holders and taxpayers, and not for the benefit of enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest." Hylton v. Mayor and City Counsel of Baltimore, 300 A.2d 656, 661 (Md. 1972).

The legislative mandate towards general, wholesale applicability of the State General Procurement Law is carried over to the State Procurement Regulations, COMAR Title 21. As stated by the State Procurement Regulations promulgating authorities, the "regulations apply to every expenditure by a State Agency for the acquisition, rental, purchase, or lease of supplies, services, maintenance, construction, construction-related services, architectural services, engineering services, and the lease of real property by the State as lessee." COMAR 21.01.03.02. Moreover, every State agency is subject to the provisions of the State Procurement Regulations

“unless expressly exempted by this title [COMAR Title 21] or by statute.” COMAR 21.01.03.03(A). Thus, just like the State General Procurement Law, the Procurement Regulations are generally applicable to all State procurements and any exceptions are to be narrowly and strictly construed, in accordance with Maryland law. COMAR 21.01.01.04; COMAR 21.01.03.02.

* * *

The Board of Public Works has enacted regulatory provisions mandating that revenue-producing contracts are general covered by the regulations COMAR 21.01.03.03. The Board of Public Works has directed that procurements are “specifically subject to these regulations” even if a resulting contract will involve no expenditure by the State and will produce revenue for the State for services that are to be provided for the benefit of the public at a State transportation facility. COMAR 21.01.03.03(B)(1) (d). Thus, public service contracts at State transportation facilities are generally and specifically subject to the State General Procurement Law and State Procurement Regulations even if they involve no expenditure by the State and will produce revenue for the State. State Finance and Procurement Article §11-202(3)(iv); COMAR 21.01.03.02(A); COMAR 21.01.03.03(B) (1)(d).

The State Procurement Regulations do contain an exclusion, for certain revenue producing contracts divesting the MSBCA of subject matter jurisdiction. The entire provisional language is as follows:

B. Specifically subject to these regulations are:

(1) Procurements by the State agency, even if a resulting procurement contract will involve no expenditure by the State will produce revenue for the State for services that are to be provided for the benefit of...

(d) The public at a State transportation facility, unless a revenue-producing contract involves:

(i) A license, permit, or similar permission to use State facilities for activities related to the movement of passengers or goods, for providing goods or services to passengers, patrons, or tenants at a transportation facility, or for advertising or promotional purposes.

COMAR 21.01.03.03(B)(1)(d)(i)(emphasis supplied). The procurement contract must precisely meet these requirements, or the exemption does not apply.

Appellants argue now that the instant contract does not encompass the license, permit or other permission necessary for this exception to apply. According to APCOA in its Opposition to the Motions to Dismiss, “the exemption invoked by the MAA does not apply unless this Board expressly finds that the Contract is in fact a ‘license, permit, or similar permission’ to use state facilities for the transportation of passengers.” APCOA argues that such language should be all encompassing, i.e., that the exception should apply only where the sole issue is “a license, permit, or similar permission”, not where there is a multimillion dollar contract including a license, permit

or similar permission.³ The Board has carefully reviewed the definitions of “license, permit or similar permission” as set forth by the parties here and in the Hill's Capitol Security case. See footnote 2 therein. The Board finds that the State does grant “similar permission” to the contractor which brings the contract within the terms of the exception at COMAR 21.01.03.03(B)(1)(d)(i). For example, the IFB incorporated MAA General Provisions, including the following:

ARTICLE XIX
INGRESS AND EGRESS

Administration grants to Contractor the right of ingress to and egress from the Airport premises by Contractor, its employees, contractors, suppliers, servicemen, licensees, guests, patrons and invitees; provided that such rights of ingress and egress shall at all times be exercised in compliance with any and all regulations promulgated by lawful authority for the care, operation, maintenance, and protection of the Airport and applicable to all users of the Airport; and provided, further, that such rights of ingress and egress shall not be construed to prohibit Administration from establishing and assessing a fee or charge for the privilege of entry upon the Airport when such fee or charge is levied upon all users of the Airport, nor to prohibit Administration from assessing a fee or charge on Contractor's employees for parking their personal vehicles in the employee parking areas nor on persons conducting a business at the Airport. For purposes of this provision, a person shall be deemed to conduct a business at the Airport if he occupies any space on the Airport, or if he provides any services at the Airport, other than utilities, on a regular or continuing basis.

The Board is unpersuaded that this contract is any different on these essential terms from that contract which the Board previously found was exempted from the General Procurement law. What was said in Hill's Capitol Security, Inc., can be as accurately said about the current IFB:

The RFP itself bestows upon the contract special permission to use the State facilities required to meet the exemption. There is no other license or permit necessary from MAA other than permission to begin work. The RFP and resulting contract itself give the contractor the special rights and privileges to use the State facilities.

The instant contract is a revenue producing contract. It is for services and those services are for the benefit of the public, and substantial performance is to occur at a State transportation facility.

To perform the contract, the contractor must (and does) have permission to use State facilities, i.e., the Parking Lots and Garage and associated buildings and structures and the Airport roadways (including the Terminal ramps). The

³ In fact AMPCO argued that this contract is more in the form of a lease of the parking areas in question. The Board notes that if this contract is in fact a lease, the Board still cannot take jurisdiction, since a lease where the State is the lessor is also exempt from the General Procurement Law. See §11-101(l)(1): “Procurement” means the process of (i) leasing real or personal property as lessee; . . .”

contractor will provide for the movement of passengers and will provide parking and Airport transportation services to passengers, patrons, and tenants at the Airport.

In analyzing the previous Hill's Capitol Security contract, the Board found that it

satisfies each and every requirement of the regulatory exclusion. It is, therefore, not subject to the Procurement Law and beyond this Board's jurisdiction.

The current Board, in reviewing the most recent Invitation for Bids, finds that the same circumstances apply to the new contract as existed when the Board reviewed the question in Hill's Capitol Security. Based on the language of the exclusion in COMAR 21.01.03.03B(1)(d)(i), it makes no difference to the issue of Board jurisdiction whether the procurement is solicited via RFP or IFB. Thus this Board finds that it has no jurisdiction to review the procurement procedures utilized by the MAA to secure the contract at issue, and grants the Motions to Dismiss.

Wherefore, it is Ordered this 7th day of February 1997, that the appeals are hereby dismissed.

Dated: February 7, 1997

Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
Chairman

Randolph B. Rosencrantz
Board Member

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 1993 and MSBCA 1995, appeals of APCOA, Inc. and AMPCO Parking System under MAA IFB No. MAA-IFB-96-003.

Dated: February 7, 1997

Mary F. Priscilla
Recorder