

2. Upon advise from CSX Transportation, Inc. (CSX) that it required the ICTF to be operational for its use by October 1, 1988, as opposed to the originally projected date of December 1, 1988, the MPA embarked upon an expedited procurement to provide lift services at the facility.

3. Meehan Seaway Services, Ltd. (Meehan) was awarded the contract to perform the services sought on or about September 26, 1988.¹

4. Appellants' protested the award. The grounds of protest, all of which were denied by the procurement officer, were that:

- (1) use of the expedited procurement procedures was not warranted under COMAR 21.05.06.03;²
- (2) MPA attempted to exclude Appellants from competition by use of the expedited procurement method with unrealistically short time frames for offerors to respond and deliberate failure to timely advise Appellants of the existence of the procurement;
- (3) MPA erred in not scheduling a pre-bid conference even when requested;
- (4) the RFP was vague in certain respects and required clarification not obtainable given the short time frame for submission of offers;
- (5) the RFP was purposefully designed to exclude Appellants from being awarded a contract; and
- (6) the MPA added services to the Meehan contract specifically excluded under the Board of Public Works approval of an expedited

¹ MPA disputes that Meehan was ever awarded a contract claiming that "award of a contract under the RFP would occur when and if the chosen respondent could demonstrate the ability to provide an efficient low cost lift services operation acceptable to the MPA" and that Meehan had failed to provide such. While MPA apparently took steps to cancel the arrangement however labelled, in view of the determination we make herein it does not matter whether Meehan was technically awarded a contract or not.

² References to COMAR are to those in effect at the time of protest.

procurement.

5. The protest was denied by MPA by letter dated November 10, 1988. While addressing the merits of the protest, this letter reiterated MPA's belief (first conveyed to Appellants by letter dated October 28, 1988) that the protest was moot because of the decision by MPA on October 21, 1988 to terminate its arrangement with Meehan (however labelled) and perform the required services with State employees.

6. MPA terminated its arrangement with Meehan and cancelled the RFP on November 19, 1988 notifying the Board of Public Works on November 19, 1988 that such action was being taken as being in the best interest of the State.

7. MPA employees have been operating the ICTF and providing the services called for by the RFP since October 6, 1988.

8. On December 12, 1988, MPA filed a motion to dismiss this appeal on the grounds that it was moot since the RFP had been cancelled, the contract with Meehan terminated and the services called for by the RFP were being and would continue to be performed by State employees. During argument on this motion at the hearing of the appeal counsel advised that the ICTF was still being operated by MPA employees.

Decision

The Board shall grant MPA's Motion to Dismiss. MPA has been providing and continues to provide the requisite services with State personnel. There no longer is a contract existing or proposed for award. This Board only decides disputes in contract formation and disputes arising from contracts that have been awarded. Section 15-211, Division II, State Finance and Procurement Article. There must be an awarded contract or a contract proposed to be awarded for

jurisdiction to exist. See Boland Trane Associates, Inc., MSBCA 1084, 1 MSBCA ¶101 (1985). Appellants seem to acknowledge the limits of the Board's jurisdiction. However, Appellants direct the Board's attention to its decision in Solon Automated Services, Inc., MSBCA 1046, 1 MSBCA ¶10 (1982), rev'd. Misc. Law Nos. 82-M-38 and 82-M-42 (Circ. Ct. Balto. Co. Oct. 13, 1982), for the proposition that the Board may issue an advisory opinion and in the instant appeal declare that the procurement was not conducted properly and that to remedy the situation a new RFP should be issued that would allow Appellants to fairly compete. Specifically Appellants point to language in Solon in which the Board stated that:

We agree that the Board is not empowered to compel a State agency to act or refrain from acting in a particular manner. However, bid protests still may be resolved effectively by the Board through the issuance of declaratory rulings concerning the applicability of the procurement law and regulations. [Citation omitted.] These rulings will be binding upon State procurement agencies and their officers unless judicial review is sought in the State Courts. Where the State procurement officer disregards the Board's ruling, an interested party may request a cognizant court to order whatever enforcement action is deemed necessary and appropriate under the circumstances. Accordingly, while the Board may not grant the relief requested, it can determine whether the State procurement law and regulations permit UMBC's procurement officer to reject Solon's bid and readvertise the contract for laundry services.

While the Board's decision in Solon was reversed by the Circuit Court (essentially on factual grounds) the Board in the context of a bid protest may and does decide in appropriate cases that a determination of a procurement officer (as concurred in by the agency head)³ was arbitrary or not in accord with the General Procurement Law or COMAR. The decision of the procurement officer (and MPA) in this case to cancel the RFP was premised on the provisions of

³ In the case of MPA, the Maryland Port Commission functions as the agency head. See Section 6-201 et. seq., Transportation Article, Annotated Code of Maryland (1988 Cumulative Supplement).

Section 13-206(b), Division II, State Finance and Procurement Article which provides:

If, with the approval of the Board [of Public Works], a unit determines that it is fiscally advantageous or otherwise is the best interest of the State, the unit may: (1) cancel an invitation for bids, a request for proposals, or other solicitation....

The specific reason asserted by MPA for cancelling the RFP was that the State had determined to provide the requisite services at the ICTF with State personnel. In Solon the focus was on the alleged damage to the integrity of the procurement system as measured against the alleged financial benefit to the procuring agency presented by the decision of that procurement officer to reject all bids and resolicit the services from the private sector. This case, however, involves a decision to abandon the procurement altogether in favor of providing the services with State employees. In Solon the issue was whether the agency should have been required to award to company X rather than rebid the work. Here, no one Appellant or group of Appellants (and Appellants all compete against one another) is asking that it be awarded a contract. Appellants are asking this Board to find that the original solicitation was so flawed that it must be cancelled and a new RFP issued under circumstances which would permit them to more effectively compete. This Board is empowered in disputes involving contract formation, (under Solon or any other of its decisions) to decide whether the State procurement laws were followed and whether actions of procurement officials were reasonable. We have no authority to command a State agency to take any particular corrective action although the Board may decide in the course of its decision that certain actions may be improper. On a more fundamental basis,

however, no justiciable controversy in the procurement sense exists for this Board to decide since the services are no longer to be sought from the private sector. The concept that there must be a live or potentially live controversy in existence for the Board to decide was implicitly recognized in Solon. See Hatt v. Anderson, 297 Md. 42 (1983) and cases cited therein at pp. 45-46. Here the decision is to provide the services in-house such that no award in the procurement controversy is contemplated to anyone. Thus the controversy is abstract at best and we conclude that the matter is moot. The appeal is therefore dismissed.