

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of EAGLE INTERNATIONAL, INC.	)	
	)	Docket No. MSBCA 1121
Under SAA Purchase Order No. 3-0340	)	

March 31, 1983

Motion For Reconsideration - Board has inherent authority to reopen and reconsider an appeal so long as it is done within a reasonable time and before an appeal is taken in the courts. A reasonable time for reconsideration is to be measured by the 30 day period following receipt of Board decision by the parties before it and before an appeal is required to be filed under Maryland Rules of Procedure, Rule B4a.

Contracts - In Violation of Law - Where the State enters into a contract and there has not been substantial compliance with the provisions of Code Article 21 or the procurement regulations, the contract is void.

Termination For Convenience - Although a void contract technically cannot be terminated for convenience, Maryland law permits a contractor to receive termination for convenience type costs where it entered into a contract with the State in good faith and without contributing to a violation, and without knowledge of any violation of Article 21 or the procurement regulations.

Remedies - Bid Protest - In the event that a contract improperly is entered into by the State, Maryland law does not automatically require that a new contract be entered into with the next lowest responsive and responsible bidder unless the State desires to award a contract for the identical goods, services or construction originally solicited.

MEMORANDUM OPINION AND ORDER  
ON RESPONDENT'S MOTION TO REOPEN RECORD  
AND FOR RECONSIDERATION AND MODIFICATION OF DECISION

On March 17, 1983, the State Aviation Administration (SAA) filed a motion to reopen the administrative record and for reconsideration and modification of the Board's March 2, 1983 decision in the captioned appeal. For purposes of this motion, the SAA does not take issue with the Board's substantive findings and conclusion that the low bid submitted by Appellant improperly was rejected. Instead, the SAA contends that the remedy prescribed by the Board, termination for convenience of the SAA contract with Motor Coach Industries (MCI) and award to Appellant, no longer is feasible in view of the events which have transpired during the period following the evidentiary hearing. Appellant, on the other hand, contends that the Board has no revisory jurisdiction over its bid protest decisions and, thus, cannot either reopen the record or otherwise reconsider its decision.

Turning first to the jurisdiction question, Appellant correctly points out that the Board has no statutory authority to reopen or reconsider its bid protest decisions. Maryland Annotated Code, Art. 21, § 7-201(d)(1) states that the decision of the Board ". . . is final only subject to judicial review." Nevertheless, this Board has inherent authority to reopen and reconsider an appeal so long as it is done within a reasonable time and before an appeal is taken in the courts. Brandt v. Montgomery County Commission on Landlord - Tenant Affairs, 39 Md. App. 147, 160-161 (1978). A reasonable time for reconsideration, we believe, is to be measured by the 30 day period following receipt of our decision by the parties and before an appeal is required to be filed under Maryland Rules of Procedure, Rule B4a.

In the absence of a statute giving an administrative agency authority to reopen or reconsider a decision, Maryland common law rules require, as a prerequisite to reopening or reconsidering an administrative decision, a showing that an error has been caused by fraud, surprise, mistake or inadvertence. Zoning Appeals Board v. McKinney, 174 Md. 551, 564-566, 199 A. 540, 546-547 (1938). A mere change of mind by an agency, without any intervening change in conditions or other different factors, does not amount to fraud, mistake, surprise or inadvertence justifying a rehearing or reconsideration. Redding v. Bd. of County Comm's, 263 Md. 94, 111 (1971).

Under the facts presented here, Appellant contends that the foregoing principles limit this Board's ability to reopen or reconsider a decision and require the SAA to pursue any perceived error in court. We disagree. The role of the court in reviewing an administrative decision is set forth in Md. Ann. Code, Art. 41, § 255(f) as follows:

The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

In view of the time and expense involved in this review process and the burden imposed on crowded court dockets, it is inconceivable that the standard for reconsideration and reopening could be so narrowly construed as to preclude this Board from reviewing its own decision to correct an error of law or mistake in fact. Certainly, a decision should not be revised at the whim of the Board's members or after the rights of the parties have vested. However, where the Board's decision is still subject to revision on judicial review, the concept of finality should not be permitted to override the public interest in reaching what ultimately appears to be the right result. Compare Bookman v. United States, 453 F.2d 1263, 1265 (Ct. Cl., 1972). As stated by the Maryland Court of Appeals in Zoning Appeals Board v. McKinney, supra at p. 566, ". . . the power to reopen should not be interpreted with

too much refinement nor should it be hedged about with technicalities if, in the meantime, no rights have arisen which would be injured." Accordingly, we believe the standards for reopening or reconsideration of an administrative record are broad enough to encompass our review here.

The SAA contends that the Board erred in declaring that MCI's contract should be terminated for convenience without considering the extent of performance under that contract as of the date of the decision. In this regard, the SAA seeks to submit additional evidence as to the present completion status of the MCI busses. For the following reasons, however, we conclude that information bearing on the status of completion is irrelevant to a determination as to whether a contract is void under Maryland law.

Maryland Annotated Code, Article 21, § 2-201(b) provides as follows:

Contracts in violation of Article void.—Except as otherwise provided in this article a contract which is entered into in violation of this article or the regulations promulgated under it is void, unless it is determined in a proceeding under this article or subsequent judicial review that good faith has been shown by all parties, and there has been substantial compliance with the provisions of the article and regulations. However, if a contract is void, a contractor who has entered into the contract in good faith without directly contributing to a violation, and without knowledge of any violation of the article or regulations prior to the award of the contract shall be compensated for costs actually incurred.

See also, COMAR 21.03.01.01B. When the SAA failed to award a contract for its busses to the lowest responsive and responsible bidder, it substantially violated the provisions of Article 21. Accordingly, the resultant contract with MCI was void ab initio.

If a contractor is found to have directly contributed to a violation of Article 21, or had knowledge of an impropriety at the time of award, its contract will be cancelled and it will be limited, at best, to a quantum meruit recovery.<sup>1</sup> Compare John Reiner & Co. v. United States, 163 Ct.Cl. 381, 325 F.2d 438 (1963). However, where that contractor acted in good faith, the law permits it to recover the costs actually incurred. This remedy, in essence, is the same as that prescribed under the termination for convenience clause.<sup>2</sup> See COMAR 21.07.02.08.

In the instant appeal, it was not contended or established that MCI had knowledge of SAA's error or otherwise contributed to it. Accordingly, it properly is entitled to recover its costs incurred in the manner prescribed in the termination for convenience clause.

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<sup>1</sup>Although we do not make a finding in this regard, the doctrine of sovereign immunity may preclude recovery under this theory.

<sup>2</sup>We recognize that a void contract can no longer be terminated under the termination for convenience clause. Nevertheless, the clause provides a useful guide as to what costs are recoverable.

The SAA cites a number of decisions issued by the Comptroller General of the United States wherein contracts were terminated for convenience only after consideration of the extent of performance on the existing contract and the government's needs. See Dyneteria, Inc., Comp. Gen. Dec. B-178701, 74-1 CPD ¶90 (1974); T & H Co., 74-2 CPD ¶148 (1974); Unidynamics/St. Louis, Inc., 74-2 CPD ¶107 (1974); Science Management Corp., 74-2 CPD ¶6 (1974); Linolex Systems, Inc., 54 Comp. Gen. 483, 74-2 CPD ¶344 (1974). However, the actions of the Comptroller General, as an arm of the Congress, are distinguishable from the function served by a court or a quasi-judicial body. As stated by the U.S. Court of Claims in John Reiner & Co. v. United States, supra at p. 386:

Because of his [the Comptroller General's] general concern with the proper operation of competitive bidding in government procurement, he can make recommendations and render decisions that, as a matter of procurement policy, awards on contracts should be cancelled or withdrawn even though they would not be held invalid in court. He is not confined to the minimal measure of legality but can sponsor and encourage the observance of higher standards by the procuring agencies. Courts, on the other hand, are restricted, when an invitation or award is challenged, to deciding the rock-bottom issue of whether the contract purported to be made by the Government was invalid and therefore no contract at all—not whether another procedure would have been preferable or better attuned to the aims of the competitive bidding legislation.

Thus, where the Comptroller General has recommended a termination for convenience in his decisions, he has done so only for policy reasons in situations where the contract otherwise was valid. 52 Comp. Gen. 215, 218 (1972). These decisions, therefore, do not apply to the instant situation where the contract is invalid.<sup>3</sup>

For the foregoing reasons, we decline to revise our decision of March 2, 1983 as regards the invalidity of MCI's contract with SAA. We did err, however, in deciding that a contract for the busses should be awarded to Appellant. While it is true that the only valid contract that SAA could enter into for the purchase of busses under the captioned solicitation was with Appellant, there is no requirement that the SAA award any contract pursuant to that solicitation. The competitive bid process is not a contest wherein the low responsive and responsible bidder automatically wins a contract award. The State, by law and regulation, retains the right to reject all bids, even after they have been opened. Md. Ann. Code, Art. 21, § 3-301; COMAR 21.06.02.01C. Thus, if the State finds that it either no longer requires the busses, can no longer fund them, or that a proposed amendment to the

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<sup>3</sup>In Richard F. Kline, Inc., MSBCA 1116, February 24, 1983, we held that an improperly awarded contract should be terminated for convenience if practicable. To the extent this is inconsistent with our present holding, it is not to be considered as precedent.

solicitation would be of such magnitude as to warrant a new solicitation,<sup>4</sup> all bids could be rejected without award. For this reason, therefore, we must revise our decision by striking that portion wherein it was concluded that Appellant should be issued a contract award for the delivery of six busses. Appellant is entitled to an award only if the SAA still wishes to purchase six new busses under the same specifications.

We acknowledge that the foregoing result represents a hollow victory for Appellant. Unfortunately, the nature of a bid protest is such that once a contract award has been made, the process rarely can be remedial. While this may seem unfair to those who find themselves in Appellant's position, it must be remembered that there also is a strong public interest in assuring that the critical procurement needs of the State are met expeditiously. This public interest in expediting procurements has been permitted, in the exercise of sound judicial scrutiny, to override the right of a bidder to obtain meaningful relief under a procedure provided to resolve bid protests. Compare M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir., 1971); Pace v. Resor, 453 F.2d 890 (6th Cir., 1971); cert. den. 92 S. Ct. 1192 (1972); Curtiss - Wright Corporation v. McLucas, 364 F.Supp. 750 (D.N.J., 1973). Maryland law, in fact, does not preclude the award of a contract during the pendency of a protest, presumably for this same reason. See COMAR 21.10.02.09B.

The fact that Appellant is left without a remedy does not mean that the bid protest procedures here are a nullity. What it means is that in this instance the public interest in expeditiously obtaining busses for use at BWI was held to outweigh Appellant's right to have its bid properly considered in accordance with Maryland's procurement law and regulations. In other appeals, this strong public interest may not exist and aggrieved bidders will be more fortunate.

For the foregoing reasons, the Board revises its March 2, 1983 decision in the captioned appeal so as to strike the requirement that a contract be awarded to Appellant. The SAA's motion for reconsideration thus is granted to this extent.

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<sup>4</sup>When performance under the MCI contract is terminated, the State will obtain title to any materials, partially completed and completed busses. Obviously, what it would need to procure, if anything, is the completion of the busses. This is a far different project than originally contemplated.

