BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF HMSHOST, INC.	)	
	)	
	)	Docket No. MSBCA 2377
Under Maryland Aviation	)	
Administration RFP No. MAA- RFP-03-001	)	
	)	

January 27, 2004

Jurisdiction - The Board of Contract Appeals did not have jurisdiction over Appellant's protest because the contract that is the subject-matter of Appellant's protest was excluded from this Board's jurisdiction by the Board of Public Works pursuant to the application of both COMAR 21.01.03.03.B(1)(d)(i) and (d)(ii) to the contract at issue.

APPEARANCE FOR APPELLANT: Thomas J. Madden, Esq.
Venable LLP
Washington, D.C.

APPEARANCE FOR RESPONDENT: Louisa H. Goldstein
William A. Kahn
Assistant Attorneys General
Baltimore, Maryland

OPINION BY BOARD MEMBER BURNS ON MOTION TO DISMISS

This Protest by Appellant HMSHost, Inc. arises out of a Request for Proposals (RFP), designated MAA-RFP-03-001 and dated June 27, 2003, issued by the Maryland Aviation Administration (MAA), an agency of the Maryland Department of Transportation, for a contractor to lease, develop and manage the food service, retail, and services concession program at Baltimore/Washington International Airport (BWI).

Appellant, a prospective offeror under the RFP and the incumbent operator of food and retail concession activities at BWI, filed an initial protest to the terms of this RFP with the MAA on October, 16, 2003, supplementing its protest on October 23, 2003. The MAA issued a decision denying Appellant's protest on October 29, 2003. Appellant filed an appeal of the denial of its protest on October 31, 2003 with this Board.

On November 14, 2003, the MAA filed a Motion to Dismiss Appellant's appeal, alleging that the Maryland General Procurement Law does not apply to the RFP and that, therefore, the Board is without jurisdiction to hear Appellant's appeal. Appellant responded with a Reply in Opposition to MAA's Motion to Dismiss filed on December 12, 2003.

A hearing on MAA's Motion to Dismiss was held on December 19, 2003.

Decision

Respondent Maryland Aviation Administration (MAA) contends that the Maryland General Procurement Law does not apply to the Request for Proposals (RFP) which is the subject of Appellant's appeal because the RFP is covered by COMAR 21.01.03.03B.(1)(d)(i) and (d)(ii). Consequently, argues the Respondent, the Board lacks jurisdiction over this dispute, and the appeal should be dismissed. For the reasons set forth, the Board finds that this RFP is covered by COMAR 21.01.03.03B.(1)(d)(i) and (d)(ii); that the Board consequently lacks jurisdiction over this dispute; and, that the Appeal will be dismissed.

A summary of relevant law and regulations is appropriate. Except as otherwise provided by law, Maryland's General Procurement Law applies to each expenditure by a unit under a procurement contract. State Finance and Procurement Article, §11-202, Annotated Code of Maryland. "[T]he legislature in passing Maryland's omnibus procurement law in 1981 intended Maryland procurement law to be broad in scope as to its coverage." Hill's Capitol Security, Inc., MSBCA 1615, 3 MSBCA &294, (1992) at p. 7; *aff'd* Hill's Capitol Security, Inc. v. MSBCA, (Civ. No. 87430) (Cir. Ct. Mont. County, July 17, 1992); R & E Consolidation Services, Inc., MSBCA 1375, 2 MSBCA ¶187 (1988) at p. 285.

Any exception from coverage under the procurement law must be an express exception and will be strictly construed. Hill's Capitol Security, Inc., *supra*, at p. 7.

This legislative mandate for broad applicability of the General Procurement Law is mirrored in Maryland State Procurement Regulations (COMAR Title 21). As with the General Procurement Law, State procurement regulations are generally applicable to all State procurements, and exceptions are to be strictly construed in accordance with Maryland law. Hill's Capitol Security, Inc., *supra*, at p. 8.

Pursuant to statutory authority, the Board of Public Works (BPW) may set policy and adopt regulations to implement the General Procurement Law. State Finance and Procurement Article, §12-101 (b), Annotated Code of Maryland. The BPW has mandated that every State agency is subject to State procurement regulations unless expressly exempted by COMAR Title 21 or by State law. COMAR 21.01.03.03A.

Except as otherwise expressly provided by law, the General Procurement Law applies to procurements for services that are provided for the benefit of the public at a State transportation facility. State Finance and Procurement Article, §11-202 (3) (iv), Annotated Code of Maryland. This section, however, also states that this application will apply "as required by the Board [of Public Works]." *Id.*

The BPW has directed that procurements are specifically subject to State procurement 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 21.01.03.03B.(1)(d).

Contracts for services to the public at State transportation facilities are, therefore, subject to the General Procurement Law and State procurement regulations B even when they involve no expenditure by the State and will produce revenue for the State. Hill's Capitol Security, Inc., *supra*, at pp. 8-9.

State procurement regulations do, however, contain exclusions for certain revenue-producing contracts. For example:

> B. Specifically subject to these regulations are:
>
> (1) Procurements by a 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:
>
> (i) A license, permit, or similar permission to use State facilities for activities related to the movement of passengers or goods, or for providing goods or services to passengers, patrons, or tenants at a transportation facility, or for advertising or promotional purposes,
>
> (ii) A lease of State property under State Finance and Procurement Article, Title 10, Subtitle 3, Annotated Code of Maryland;

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

Respondent argues that exclusions (d)(i) and (d)(ii) above both apply to this contract. Appellant disagrees.

Respondent alleges that State Finance and Procurement Article §11-202 (3)(iv), Annotated Code of Maryland, and COMAR 21.03.03B.(1)(d)(i) and (d)(ii) cover the RFP at issue. Appellant argues that the RFP is not for providing goods or services at a transportation facility and does not involve a lease of State property.

Under State Finance and Procurement Article §11-202, Annotated Code of Maryland, the General Procurement Law applies to:

1. a procurement;
2. by a State "unit";
3. for services;
4. provided for the benefit of the public;
5. at a State transportation facility.

This RFP is clearly: a procurement, seeking services involving the food service, retail, and services concession at Baltimore/Washington International Airport (BWI), *See*, State Finance and Procurement Article §11-101(m), Annotated Code of Maryland (definition of "procurement"); by a State "unit" B the Maryland Aviation Administration. *See*, State Finance and Procurement Article §11-101(x), Annotated Code of Maryland (definition of "unit"); for food and retail "services". *See*, State Finance and Procurement Article §11-101(t), Annotated Code of Maryland (definition of "services"); provided for the benefit of the public B those persons using the airline services provided by, or otherwise in attendance at, BWI; at a State transportation facility B Baltimore/Washington International Airport is an airport owned by the State of Maryland.

This RFP, therefore, is covered by State Finance and Procurement Article §11-202(3)(iv), Annotated Code of Maryland.

As previously noted, however, State Finance and Procurement Article §11-202(3)(iv), Annotated Code of Maryland, gives specific authority to the BPW to regulate this coverage. In COMAR 21.01.03.03 the BPW exercises this authority. In COMAR 21.01.03.03 the BPW states that every State agency is subject to the provisions of COMAR Title 21 unless expressly exempted by COMAR Title 21 or by statute. COMAR 21.01.03.03A.

The BPW then sets out in COMAR 21.01.03.03B.(1)(d)(i) and (d)(ii) exceptions relevant to the case at hand. To be exempt from the General Procurement Law under COMAR 21.01.03.03B.(1)(d)(i) a procurement must:

(1) be a procurement;
(2) by a State agency (whether or not the resulting procurement contract will involve the expenditures by the State and will provide revenue for the State);
(3) for services;
(4) provided for the benefit of the public;
(5) at a State transportation facility;
(6) unless a revenue-producing contract involves;
(7) a license, permit, or similar permission;
(8) to use State facilities;
(9) for activities related to:
    (a) the movement of passengers or goods; or,
    (b) providing goods or services to passengers, patrons, or tenants; or,
    (c) for advertising or promotional purposes.

This RFP is clearly: a procurement, seeking services involving the food service, retail, and services concession at Baltimore/Washington International Airport (BWI), *See*, State Finance and Procurement Article §11-101(m), Annotated Code of Maryland (definition of "procurement"); by a "State agency" B the Maryland Aviation Administration. *See*, COMAR 21.01.02.01B.(84) (definition of "State agency"); for food and retail "services". *See*, State Finance and Procurement Article §11-101(t), Annotated Code of Maryland (definition of

"services"); provided for the benefit of the public B those persons using the airline services provided by, or otherwise in attendance at, BWI; at a State transportation facility B Baltimore/Washington International Airport is an airport owned by the State of Maryland.

This RFP is a revenue-producing contract for the State. *See, e.g.*, RFP at § IV B.(1) and B.(2), at pp.30-32. The RFP involves a license, permit, or similar permission to use State facilities B BWI Airport B for activities related to providing goods or services to passengers, patrons, or tenants of BWI. *See,* RFP.

Appellant argues that this RFP is not a contract for goods or services. First, Appellant argues that this is a contract solely for management services. Appellant argues that the structure of this RFP prohibits the contractor/developer from "providing goods or services" to passengers and others because the RFP specifically excludes the contractor/developer from operating any concessions. RFP at § III.M., p. 27. Appellant argues that "[N]o aspect of the proposals (i.e. the offer) will be for the actual provision of services to passengers or others at BWI." Appellant's Reply in Opposition to MAA's Motion to Dismiss, at p.8.

As Appellant points out, however, the nature of a contract is determined by the terms upon which the parties clearly and mutually agree. Appellant's Reply in Opposition to MAA's Motion to Dismiss, at p.8. As the cover page of the RFP points out, this is an RFP **"FOR A CONTRACTOR/DEVELOPER TO LEASE, DEVELOP AND MANAGE THE FOOD SERVICE, RETAIL, AND SERVICES CONCESSION PROGRAM AT BALTIMORE/WASHINGTON INTERNATIONAL AIRPORT"**(emphasis in original). The RFP repeatedly refers to providing goods and services to the passengers and patrons of BWI. Appellant believes that because these goods and services are to be provided by sub-contractor/developers as opposed to the main contractor/developer this is not a contract for goods and services.

Such a reading of the RFP is at odds with the stated purpose of the RFP. This is an RFP to provide goods and services to passengers and patrons of BWI. Whether those goods or services are provided directly by the contractor/developer or by sub-contractors does not, in our view, impact on the applicability of COMAR 21.01.03.03B.(1)(d)(i). This is a revenue-producing contract, involving permission to use state facilities (BWI) for activities related to providing goods or services to passengers, patrons or tenants at BWI.

There is no language in (d)(i) that limits the application of that subsection in the manner suggested by the Appellant. The oft stated, cardinal rule of statutory construction is to construe a statute to give effect to the intent of the Legislature. *E.g.*, Chesapeake Charter v. AA Co. Board of Education, 358 Md. 129, 135(2000); Melgar v. State, 355 Md. 339,347 (1999). "If the language of the statute is clear and unambiguous and expresses a meaning consistent with the statute's goals and apparent purpose, our inquiry normally ends with that language." *Id.* Holdings involving the interpretation of statutes are equally applicable to the interpretation of rules. *See*, Maryland Port Administration v. Brawner Contracting Co., Inc., 303 Md. 44, 60 (1985).

Even if the language of COMAR 21.01.03.03B.(d)(i) were to be found ambiguous B which is not the case here — we would still adopt the construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense. Chesapeake Charter v. AA Co. Board of Education, *supra*; Tucker v. Fireman's Fund Ins. Co., 308 Md. 69, 75 (1986).

To view this RFP as not involving a contract to provide goods or services to passengers and others at BWI is illogical and inconsistent with common sense. The MAA's goals for this program include providing a broad variety of quality products and services to travelers and airport users. RFP Section II.B., at p.5. The contractor/developer must meet goals including providing a wide variety of concessions, achieving a balance of local, national, and international products, brands and vendors, and showcasing Maryland and Washington, D.C. regional products, images, and businesses.

The contractor/developer is intimately involved in the provision of goods and services under the RFP. The contractor/developer-lessee is responsible for providing "a variety of first-class and innovative retail merchandise, services, and food service concepts" at BWI. Lease and Concession Contract, Section VIII.A., at p. 53.[1]

The contractor/developer is also responsible for developing and implementing a marketing and promotions program with the purpose of enhancing sales and customer satisfaction. RFP Section V.7, at p.43.

This is clearly not a contract in which the contractor/developer has been retained to simply manage a State project. The food and retail services provided under the contract are, ultimately, the responsibility of the contractor/developer. *See, e.g.*, Lease and Concession Contract, Article IV. The contractor/developer is responsible for the minimum guaranteed payments to the State. Indeed, the contractor/developer's profit or loss under this contract is directly dependent on the success of the sales of the sub-contractors it selects.

The definition of '"contractor" or "developer"' from the RFP itself illustrates the ultimate purpose of the RFP in stating that the contractor/developer is the entity that develops, leases and manages operations that sell goods or services at BWI. RFP Section II, J., at p. 11.

To construe this RFP and the Lease and Concession Contract as being a revenue-producing contract that does not involve the provision of goods or services to passengers, patrons, or tenants at BWI is simply illogical, unreasonable, and inconsistent with common sense. This is a contract for the provision of goods and services. Whether those goods and services are provided directly by the contractor/developer-lessee or by the contractor/developer-lessee's chosen sub-lessee(s) is immaterial for purposes of the requirements of COMAR 21.01.03.03B.(1)(d)(i).

[1] The Lease and Concession Contract was issued in connection with the RFP and should be considered a part of the RFP. *See, e.g.*, RFP, Section II J., p.11, definition of "Contract" ("'Contract' means the written agreement, MAA-LC-04-001, awarded as a result of RFP MAA-RFP-03-001, between Administration and Contractor leasing the premises and setting forth the parties rights and responsibilities."); RFP, Section VII B. 1., at p.67, ("T]he intended contract is provided for your review and questions during the RFP process and prior to submittal of Proposals, as Attachment 13 to this RFP.").

Appellant's reliance on Hill's Capitol Security, Inc., *supra*, is misplaced. In Hill's, the Board also dealt with it's jurisdiction under COMAR 21.01.03.03B.(1)(d)(i) in a RFP B in this case involving the operation of parking facilities at BWI. The Board found in Hill's, as we find in the instant appeal, that the contract at issue satisfied each and every requirement of the regulatory exception under COMAR 21.01.03.03B.(1)(d)(i). Hill's, *supra*, at p.14. The contract was not, therefore, subject to the General Procurement Law, and the Board did not have jurisdiction over the dispute. *Id. See, also*, APCOA, Inc. and AMPCO Parking Systems, Inc., MSBCA 1993 and 1995, 5 MSBCA & 416 (1997).

Appellant relies on language in Hill's that indicates that a high degree of state involvement B higher than the extensive amount involved in the Hill's contract B could result in a finding by the Board that a contract was for "management services", and, as a result, that such a contract lacked the required elements of COMAR 21.01.03.03B.(1)(d)(i) and would be, therefore, subject to the General Procurement Law.

We note, and find as a matter of fact, that whatever that "high degree of state involvement" may be, it is not present in this contract. A reasonable amount of State involvement and oversight in the development and operation of concession activities by private entities at a State transportation facility such as BWI is rational and does not raise a contract, such as the one at issue here, to the level of the provision of mere "management services" by a contractor/developer. In fact, a certain degree of State involvement is mandated by law. *See, e.g.*, Transportation Article, §5-408, Annotated Code of Maryland.

In the post-September 11, 2001 world of air travel, airports have become a frontline in the war against terrorism. A reasonable amount of State involvement in a contract involving privately managed activities at a State-owned airport is a fact of life — especially in today's circumstances — and does not elevate a contract B and, specifically, the contract at issue here — to the level of the providing of mere "management services" by a contractor/developer, which would remove a contract from the coverage of COMAR 21.01.03.03B.(1)(d)(i). A review of the RFP and the Lease and Concession Contract reveals reasonable State involvement in the development and management of this project at BWI.

In point of fact, to some extent, this involvement by the State must be considered, in the current environment of the war being waged against terrorism, to be not only reasonable but also necessary to guard the safety of BWI and to protect the users of that facility.

In summary, this revenue-producing contract involves a license, permit, or similar permission to use State facilities for the providing of goods and/or services to passengers, patrons, or tenants at a transportation facility. It is, therefore, exempt from the General Procurement Law, and it is outside of this Board's jurisdiction.

Appellant also argues that no permission is granted to use a State facility herein "because the contractor/developer can't operate any concessions with it's own employees."

Clearly, this RFP and the Lease and Concession Contract grant the use of BWI to the contractor/developer for purposes of providing concession and retail goods and services to the public. Any rights of sub-lessees to the use of BWI are granted to sub-lessees solely as a result of their contracts with the contract/developer. The contractor/developer is the entity granted the right to manage and develop the food service, retail, and service concessions under this contract. Lease and Concession Contract Article XXXII, at p. 101.

Whether or not the contractor/developer can or cannot operate concessions with it's own employees is not relevant for purposes of COMAR 21.01.03.03B.(1)(d)(i). Appellant's argument is not relevant and not applicable, and it does not impact on the sub-section (d)(i) exception found in this matter in the General Procurement Law.

Appellant also argues that the contract at issue is not a lease. In the alternative, Appellant argues that COMAR 21.01.03.03B.(1)(d)(ii) applies only "to contracts that are for the lease of state property, not merely contracts that might include a lease as a matter that is only incidental, ancillary, or even unnecessary to the contract's essential purpose." Appellant's Reply in Opposition to MAA's Motion to Dismiss, at p. 12.

Appellant argues that the contract at issue is not a lease, merely a contract to develop and manage concession facilities. Appellant argues that the MAA itself has admitted that a license or other permission to use BWI facilities, rather than a lease, is all that is needed for the contractor to fulfill its obligations to develop and manage BWI concessions under this contract and that no lease is present here.

Whatever the MAA may or may not have admitted is immaterial B this RFP includes a lease and is covered by COMAR 21.01.03.03B.(1)(d)(ii).

Whether a contract is a lease or a license depends upon the intention of the parties. Delauter v. Shafer, 374 Md. 317, 325 (2003); Norman v. Century Athletic Club, Inc., 193 MD. 584, 594 (1949). The intention of the parties is determined by an "objective interpretation" of the writings and surrounding circumstances. Delauter v. Shafer, *Id.*; Calomiris v. Woods, 353 Md. 425, 435-436 (1999). "Maryland courts should examine the character of the contract, its purpose, and the facts and circumstances of the parties at the time of the execution." Delauter v. Shafer, *Id.*, *quoting* Pacific Indemnity v. Interstate Fire & Casualty Co., 302 Md. 383, 388 (1985).

Examining the writings and surrounding circumstances of this RFP and the contract, the evidence for the creation of a lease is overwhelming. For example, the RFP itself on its cover page states that it is a Request for Proposals **"FOR A CONTRACTOR TO LEASE, DEVELOP AND MANAGE THE FOOD SERVICE, RETAIL, AND SERVICES CONCESSION PROGRAM"** at BWI. (bold emphasis in original, underline emphasis added). The introductory page of the RFP notes that the "[L]eased premises" in the RFP consist of 100 locations consisting of approximately 140,000 square feet. The definitions of "contractor" and "developer" state that those terms have the same meaning as "Lessee" in the contract. RFP Section II J., at p. 11 and p. 12. A definition of "[L]eased [P]remises" is included in the RFP and defines that term as meaning "areas in the Terminal leased to the Contractor under the Contract." *Id.*, at p. 16. "Contract" is defined as meaning the written agreement, awarded as a result of the

RFP, leasing the premises and setting forth the parties rights and responsibilities. (underlining added). *Id.* at p. 11.

The contract itself is entitled a **LEASE AND CONCESSION CONTRACT**. (Underlining added). Article V of the contract is entitled "**LEASED PREMISES**" and states that:

> For and during the three individual phases of the Term, the Administration does hereby lease and demise to the Lessee, and Lessee does hereby lease and rent from the Administration, the Leased Premises, and all herein described rights incident thereto, for the purposes herein described, and upon and subject to the terms, provisions, and conditions set forth herein.

Lease and Concession Contract, Article V, at p. 38.

The 102-page Lease and Concession Contract contains numerous provisions relating to the leasing of the property by the contractor/developer, including provisions discussing: concession area site and square footage descriptions; changes to leased premises; common area maintenance; construction and capital improvements; leasehold mortgages; and insurance requirements.

Also, in spite of Appellant's contentions to the contrary, the RFP and the Lease and Concession Contract clearly illustrate the contractor/developer's possessory interest in the BWI facilities discussed in the RFP and the Lease and Development Contract. Appellant argues that the contractor is not granted any real right of possession here. For the reasons discussed above we disagree.

Appellant argues that the omission of certain rights and remedies sometimes conferred upon the parties to a lease from the instant contract render it invalid as a lease. We do not agree.

Under the Real Property Article, §4-101(a)(1), Annotated Code of Maryland, "any deed containing the names of the grantor and grantee, a description of the property sufficient to identify it with reasonable certainty, and the interest or estate intended to be granted, is sufficient, if executed, acknowledged, and, where required, recorded." Any lease is sufficient even though it is not acknowledged if it otherwise complies with subsection (a)(1). *Id.* at (a)(2).

The lease provisions contained within the Lease and Concession Contract herein clearly comply with these requirements. The successful offeror must execute the Lease and Concession Contract. A reading of the RFP and the Lease and Concession Contract clearly illustrates that a lease arrangement is intended and is, in fact, a necessary aspect of the RFP as issued by the State. The fact that the parties have chosen this form for the lease agreement and have chosen to add or delete provisions to the lease agreement does not destroy the validity of the lease. *Cf.*, Gilbert v. Banis, 255 Md. 179 (1969) (case involving a deed of trust to secure debts).

Appellant argues that, even if a lease has been created herein, this lease must be more than only incidental to the contract for the COMAR 21.01.03.03B.(1)(d)(ii) exemption from the

General Procurement Law to apply. Appellant argues that the lease here does not pass that test. Respondent argues that a contract must merely have a lease as a "part" of, or a "participant" in, the contract for the COMAR 21.01.03.03B.(1)(d)(ii) exemption to apply. Memorandum of Points and Authorities in Support of Maryland Aviation Administration's Motion to Dismiss, at pp. 15-16.

We agree to some extent with the Appellant on this issue. Under COMAR 21.01.03.03B.(1)(d)(ii), a revenue-producing contract for the benefit of the public at a State transportation facility is exempted from the General Procurement Law if it "involves" a lease of State property under State Finance and Procurement Article, Title 10, Subtitle 3, Annotated Code of Maryland (underlining added).

According to Webster's New World Dictionary of the American Language, 2nd College Edition (1980), the definition of "involve" can encompass "include" and "to relate to or affect". This would seem to lend support to the Respondent's contention that all that COMAR 21.01.03.03B.(1)(d)(ii) envisions is a situation where a contract simply has a lease associated with the contract.

A further reading of the definition of "involve", however, indicates that something more may well be required than the mere inclusion of a lease within a procurement contract for the exclusion to apply. The Webster's definition for "involve" also references words and phrases such as "to enfold", "to make intricate", "implicate", "entail", and "require" in addition to the previously noted definitions. These other definitions lend support to Appellant's claim that more is required than the mere associated existence of any lease with a procurement contract for purposes of the exemption provisions of COMAR 21.01.03.03B.(1)(d)(ii).

As with the General Procurement Law, procurement regulations are generally applicable to all State procurements and any exceptions are to be narrowly and strictly construed in accordance with Maryland Law. APCOA, Inc. and AMPCO Parking Systems, Inc., *supra*, at p. 4; Hill's, *supra*, at p. 8

The Board, therefore, will narrowly and strictly apply COMAR 21.01.03.03B.(1)(d)(ii) and specifically rejects the broad application suggested by the Respondent for this exception from the General Procurement Law.[2]

That being the case, the Board does find that the lease connected to the contract in this matter is sufficiently "implicated" with the procurement contract and is such an "intricate" part of the contract that the lease fulfills the COMAR 21.01.03.03B.(1)(d)(ii) requirements.

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[2] Respondent's reliance on Monkton Preservation Ass'n. v. Gaylord Brooks Realty Company, 107 Md. App. 573 (1996), is misplaced. In that case, the Court of Special Appeals examined the dictionary definition of "involves" and agreed that the development plan at issue did not "involve" nearby buildings. *Id.* at 583. Like the Board here, the Court in Monkton examined numerous definitions of "involve" in order to gain a clear understanding of the meaning of the word. These definitions included "to envelop", "to draw in as a participant", "to have within or part of itself", and "to engross or fully occupy". *Id.* Monkton does not support Respondent's contention that "[F]or a lease or permission to be involved in a contract, it need only be a 'participant' in or a 'part' of the contract or be 'within' it or directly connected to it." Respondent Maryland Aviation Administration's Memorandum in Support of Motion to Dismiss, Footnote No. 10, at p. 16.

A reading of the RFP and the Lease and Concession Contract illustrates that the terms of the lease are intimately involved with the RFP and with the concession aspects of the contract. The lease herein is not unrelated to and unnecessary to the contract's purposes and implementation. The lease is an intricate part of the RFP and the contract.

Having so found, the Board will point out that this was a "near run thing." Appellant has raised a legitimate concern involving the possibilities that the mere existence of a lease of State property within a procurement contract could be construed broadly so as to result in the application of the COMAR 21.01.03.03B.(1)(d)(ii) exception to the General Procurement Law. As noted, the Board will strictly construe this regulation and only apply it in situations when the evidence is substantial that a lease associated with a procurement is intricately implicated within the procurement contract.

Finally, Appellant argues that the Board has jurisdiction to consider this protest because the decision to restrict this procurement to a "developer" model is arbitrary and capricious and is reviewable under Board precedent.

Appellant argues that the "jurisdiction issue, the arbitrary and capricious issue, is inextricably intertwined with the merits" of Appellant's appeal. HMSHost, Inc., MSBCA 2377, Transcript of Motion Hearing, December 19, 2003, at p. 35.

The Board disagrees. Whatever the merits of the Appellant's argument as to the wisdom, or lack thereof, in the State's decisions involving this procurement, those merits are a matter for an entity with proper jurisdiction over this matter. The Board has found that under COMAR 21.01.03.03B.(1)(d)(i) and (d)(ii) the Board lacks jurisdiction over this matter. Whatever the merits of the procurement, they cannot be considered by the Board because the Board lacks jurisdiction to consider the matter.

The Board only has such jurisdiction as is specifically conveyed upon it by the Legislature. Under State and Finance and Procurement Article, §11-202, Annotated Code of Maryland, the General Assembly has granted authority to the Board of Public Works, in certain circumstances already discussed, to further implement that jurisdiction. As previously explained, the Board of Public Works has limited the jurisdiction of this Board in certain situations covered by COMAR 21.01.03.03B.(1)(d)(i) and (d)(ii). Those COMAR exemptions are applicable in this matter. Consequently, this Board is without jurisdiction to hear Appellant's appeal of the procurement at issue.

Appellant has venues in which to pursue its claims, but this Board is not one of them.

For the foregoing reasons, the Maryland Aviation Administration's Motion to Dismiss is granted.

Wherefore, it is Ordered this 27th day of January, 2004 that the Maryland Aviation Administration's Motion to Dismiss is hereby GRANTED, and the appeal is hereby DISMISSED.

Dated: January 27, 2004

Michael W. Burns
Board Member

We Concur:

Robert B. Harrison III
Chairman

Michael J. Collins
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:

(a) the date of the order or action of which review is sought;
(b) 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
(c) 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 on Motion to Dismiss in MSBCA 2377, appeal of HMSHost, Inc. under Maryland Aviation Administration RFP No. MAA-RFP-03-001.

Dated: January 27, 2004

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Michael L. Carnahan
Deputy Recorder