

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of McGREGOR
PRINTING CORPORATION

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Docket No. MSBCA 1082

Under University of Maryland
Request To Bid No. 36109-G

September 28, 1982

Small Business Set-Asides — Maryland Annotated Code, Article 21, Section 8-101(d) expressly provides that where a purchase is designated as a small business set-aside, the invitation for bids shall so designate. This statutory language requires that a clear indication be given to bidders that a 5% bid preference will be afforded to qualified small business vendors.

Small Business Set-Asides — The President of the University of Maryland is authorized to determine which procurements shall be designated as small business set-asides. He further is authorized to establish small business vendor lists pursuant to criteria promulgated in accordance with Maryland's Small Business Act.

Small Business Set-Asides — A University of Maryland procurement officer reasonably determined that a distributor was eligible to receive the 5% bid preference provided for under Maryland's Small Business Act.

Appearance for Appellant:

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Appearances for Respondent:

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OPINION BY CHAIRMAN BAKER

This appeal is from a final decision issued by a University of Maryland College Park (UMCP) procurement officer denying Appellant's protest of the award of a contract for computer paper to its competitor. Although Appellant submitted the lowest bid under the captioned procurement, the second low bidder received the contract award on the basis of a 5% bid preference provided for under Maryland Annotated Code, Article 21, Section 8-101 (Maryland Small Business Act). Appellant contends that the application of this 5% bid preference was inappropriate under the present facts and that it should have received the contract award as the lowest responsive and responsible bidder.

Findings of Fact

1. Vendors who wish to be notified of UMCP procurements are required to submit a "Bidder's Application" wherein the following information must be provided and certified to: (1) organization type, i.e. distributor, manufacturer, broker, retail dealer, or factory representative, (2) whether the business is independently owned, (3) the number of employees on payroll in Maryland facilities and in total, (4) gross sales for the most recently completed fiscal year, (5) whether majority ownership is by a "minority" person or group, and (6) the locations within the State a bidder desires to serve. From this information, vendors are placed on a UMCP vendor's list for the item or class of items it wishes to supply, regionally or statewide, together with a code designation as to its qualifications as a minority or small business entity. Recertification of each vendor for all of the above purposes is required annually.

2. Prior to this procurement, Toucan Business Forms (Toucan) submitted a "Bidder's Application" to the UMCP Purchasing Department. This application indicated that: (1) Toucan was a distributor of business forms, (2) it was independently owned, (3) it employed only 3 persons, and (4) its gross sales for the most recently completed fiscal year totalled \$180,000. On this basis, Toucan was placed on UMCP's vendor's list for the supply of "continuous forms, snap out sets, and office forms" and was qualified as a small business for purposes of Maryland's Small Business Act.

3. Appellant, McGregor Printing Corporation, likewise submitted its "Bidder's Application" prior to the instant procurement. On the basis of this application, Appellant also was placed on the UMCP bidder's list for the supply of "continuous forms, snap out sets and office forms" but was designated as a large business, non-minority. Appellant does not dispute its classification in these proceedings.

4. On or about April 2, 1982, UMCP issued Request To Bid No. 36109-6 (solicitation) on a contract for substantial quantities of computer paper. This solicitation was transmitted to those firms appearing on UMCP's list of vendors for "continuous forms, snap out sets, and office forms."

5. The UMCP solicitation incorporated a number of standard terms and conditions. Paragraph 28 of these standard provisions stated as follows:

SMALL BUSINESS SET-ASIDE

In accordance with Article 41, Section 231G-2 of the Annotated Code of Maryland, the University shall give a 5% bid preference for a small business set-aside.

6. In response to the UMCP solicitation, bids were received and opened on May 6, 1982. Of the twelve bids tendered, the two lowest were:

Appellant	\$154,806.71
Toucan	\$160,143.60

7. The UMCP procurement officer determined that Toucan, as a small business, was entitled to the 5% bid preference provided for under Maryland Annotated Code, Article 21, Section 8-101(f) and COMAR 21.11.01.01 B.(3). Pursuant to the foregoing statute and regulation, since Toucan's bid did not exceed Appellant's low bid by more than 5%, the procurement officer accepted Toucan's bid and subsequently issued it a purchase order for the desired computer paper.

8. Appellant filed a timely protest with the procurement officer alleging that: (1) the solicitation did not indicate that the procurement had been designated as a small business set-aside, and (2) Toucan was not a qualified small business.

9. The UMCP procurement officer, by final decision dated June 15, 1982, denied Appellant's protest on the grounds that paragraph 28 of the UMCP standard terms and conditions stated that the instant procurement was a small business set-aside and that Toucan was a small business under applicable guidelines and regulations.

10. Appellant filed a timely appeal with the Board on June 22, 1982.

DECISION

Maryland Annotated Code, Article 21, Section 8-101(d) expressly provides that where a purchase is designated as a small business set-aside, the invitation for bid shall so indicate.¹ The initial issue raised by Appellant, therefore, concerns whether the UMCP procurement officer properly designated the instant procurement as a small business set-aside.²

UMCP contends that paragraph 28 of the standard terms and conditions adequately apprised potential bidders that a 5% bid preference would be given to small businesses. Appellant, however, argues that this paragraph referred to the wrong statutory language and otherwise failed to indicate that this particular procurement had been designated as a small business set-aside. We conclude that the language of paragraph 28, while not ideal, was at least adequate both to convey UMCP's intent concerning the application of the 5% bid preference and to satisfy the requirements of Maryland law.

Paragraph 28 of the standard provisions begins by referencing "Article 41, Section 231G-2 of the Annotated Code of Maryland...." While Appellant is correct in stating that this statutory reference is erroneous, it nevertheless is not misleading. Until July 1, 1981, Article 41, Section 231G-2 of the Code contained Maryland's Small Business Act. This language thereafter was recodified, with minor amendments, as Article 21, Section 8-101 of the Code.³ Reference to the 1981 Cumulative Supplement to Volume 4A of the Code would have apprised bidders of this fact and alerted them to the current substantive provisions of the law concerning small business set-asides.

With regard to Appellant's second contention concerning the general sufficiency of paragraph 28, we initially note that vendors expressly were apprised by this language "...that UMCP would give a 5% preference for a small business set-aside."

¹See also COMAR 21.11.01.01 B(2).

²As UMCP correctly noted in its agency report Maryland does not have a true set-aside program in that procurements are not reserved for small businesses. Instead, in designated procurements, small businesses are given a 5% preference to permit them an opportunity to compete with larger, established firms.

³See Section 10, Chapter 775, Acts of 1980.

Since a "small business set-aside" statutorily is defined as a purchase request for which bids are invited from a list of qualified bidders including small businesses,⁴ paragraph 28 thus effectively states that a 5% bid preference would be given to any qualified small business solicited for this procurement. The issue to be resolved, therefore, is whether it further was essential, under Maryland law, for UMCP to instruct all bidders that small businesses were being solicited for this particular procurement.

In Maryland, where a procurement is made by competitive sealed bid procedures, a contract may be awarded only as follows:

The contract is to be awarded to the responsible and responsive bidder whose bid meets the requirements and evaluation criteria set forth in the invitation for bids, and is either the lowest bid price or lowest evaluated bid price. A bid may not be evaluated for any requirement or criterion that is not disclosed in the invitation for bids. (underscoring added)

COMAR 21.05.02.13 A.⁵ Where award is to be made to the lowest evaluated bidder, the evaluation criteria further must be objectively measurable. See COMAR 21.05.02.13 B. Maryland's Small Business Act is consistent with these requirements. The 5% bid preference is an objective measure which is utilized when evaluating the low bid submitted by a qualified small business. As long as bidders are apprised in the solicitation that this 5% bid preference will be utilized in evaluating the lowest responsive and responsible small business bid, the bare requirements of Maryland's procurement law are met. To construe the notice requirements any more strictly, we believe, would not be essential to assure the fairness of the State's procurement system and unnecessarily would subvert the public policy which underpins Maryland's Small Business Act. Accordingly, we conclude that as long as there is a clear indication in a solicitation that a 5% bid preference will be given to a qualified small business bidder, such notice is sufficient under Maryland law.

We now turn to Appellant's next contention concerning the authority of UMCP to maintain its own small business vendor's list. In this regard, it is alleged that UMCP was required to utilize the small business vendor's list maintained by the Maryland Department of General Services (DGS). Since Toucan allegedly has not been qualified as a small business on the DGS compilation of small businesses, they are said to be precluded from receiving the 5% bid preference in this procurement.

The President of the University of Maryland has been delegated authority by the Board of Public Works to procure, among other things, all supplies and commodities required by the University system.⁶ Consistent with this delegation, the President statutorily has been authorized and required to specify criteria for small business qualification and to determine which purchases should be designated as small business set-asides. See MD Ann. Code, Art. 21, Sections 8-101 (a)(2), (b) and (d). Clearly, therefore, the University of Maryland, in procuring its supplies and services, is permitted

⁴See MD Ann. Code, Art. 21, Section 8-101 (a)(4).

⁵See also MD Ann. Code, Art. 21, Section 3-202(g).

⁶See COMAR 21.02.01.03 B.(4), 21.02.01.04 D. and 21.02.06.

by law to maintain its own vendor's lists⁷ and determine which businesses and procurements should be included under Maryland's Small Business Act.

Appellant's confusion in this instance perhaps is based on the failure of the University of Maryland to promulgate regulations specifying how it would implement Maryland's Small Business Act.⁸ While this omission is unfortunate, it is not fatal to the instant procurement so long as it appears that the UMCP procurement officer, acting as the authorized representative of the University President, reasonably determined that Toucan was a small business under applicable law and regulations. Compare Appeal of Suburban Uniform Company, MSBCA 1053, p. 8 (March 19, 1982).

Appellant next alleges that the UMCP procurement officer erred in concluding that Toucan, as a distributor, was entitled to a small business preference. In this regard, it is argued that the Legislature could not have intended to grant a 5% preference to a firm that may do nothing more than pass the goods of a large manufacturer on to the State. UMCP, however, contends that the law does not preclude distributors or brokers from qualifying as small businesses and that UMCP traditionally has treated such firms as wholesalers for purposes of applying Maryland's Small Business Act.

When enacting Maryland's Small Business Act, the Legislature did not attempt precisely to define the type of organization which may qualify as a small business. Instead, the Legislature expressly provided in MD Ann. Code, Art. 21, Section 8-101 (a)(3) that the qualification criteria for small businesses should be "...established by the Secretary⁹ in rules and regulations, subject to the criteria set forth in subsection

⁷COMAR 21.05.02.06 expressly provides that each procurement agency may compile its own vendor's lists prepared from a bidder's application submitted to that agency. A procurement agency is any State agency which is authorized by law or regulation to procure a contract. See COMAR 21.01.02.49, MD Ann. Code, Art. 21, Section 1-101(1).

⁸COMAR 21.11.01.01 purports to contain regulations pertaining to the establishment of small business vendor's lists by DGS and the University of Maryland. Instead, however, it relates solely to the establishment of small business vendor's lists by DGS. The regulations are silent as to University of Maryland procedures.

⁹The term "Secretary" means the Secretary of the Department of General Services, the Secretary of the Department of Transportation, or the President of the University of Maryland. MD Ann. Code, Art. 21, Section 8-101 (2).

(b)¹⁰ of this section." Pursuant to this legislative mandate, the Secretaries of General Services, Transportation, and the President of the University of Maryland together promulgated the following definition and criteria for small businesses:

"Small business" means a firm which meets the following criteria:

- A. It is independently owned and operated;
- B. It is not a subsidiary of another firm;
- C. It is not dominant in its field of operation;
- D. Its wholesale operations did not employ more than 50 persons, and its gross sales did not exceed \$1,000,000 in its [sic] most recently completed fiscal year;
- E. Its retail operation did not employ more than 25 persons, and its gross sales did not exceed \$500,000 in its most recently completed fiscal year;
- F. Its manufacturing operations did not employ more than 100 persons, and its gross sales did not exceed \$500,000 in its most recently completed fiscal year;
- G. Its service operations did not employ more than 100 persons, and its gross sales did not exceed \$500,000 in its most recently completed fiscal year; and
- H. Its construction operations did not employ more than 50 persons, and its gross sales did not exceed \$2,000,000 in its most recently completed fiscal year."

See COMAR 21.01.02.62. Additionally, the term wholesale operations further was defined by UMCP and the Department of General Services, in a set of internal guidelines,

¹⁰Subsection (b) of MD Ann. Code, Section 8-101 appears as follows:

(b) Rules and regulations specifying criteria for qualification as small business. — (1) The Secretary shall adopt rules and regulations specifying the criteria for qualification as a small business. (2) The criteria shall include a maximum number for employees and a maximum dollar volume computed on annual sales and receipts of a bidder and all its affiliates. The maximum number of employees and maximum dollar volume may vary from industry to industry to the extent necessary to reflect different characteristics. However, with respect to maximum number of employees, a manufacturing business may not employ more than 250 individuals. With respect to maximum dollar volume, a wholesale business may not have annual sales in excess of \$2,500,000 for its most recent fiscal year and a retail business or business selling services may not have annual sales and receipts in excess of \$5,000,000.

as including the operations of brokers and distributors. In accordance with these definitions, therefore, Toucan was considered eligible for qualification as a small business.

It is well settled that that construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. Hart and Miller Islands Area Environmental Group, Inc. v. Corps of Engineers, et al, 621 F.2d 1281, 1290 (4th Cir., 1980). Further, when interpreting an administrative regulation, similar deference is given to the interpretation of the regulation by the agency charged with its administration. Mountain States Telephone and Telegraph Co. v United States, 204 Ct. Cl. 521, 499 F.2d (1974). Here the President of the University of Maryland and his authorized procurement officers clearly were responsible for effectuating the legislative intent expressed in Maryland's Small Business Act. In construing this Act and adopting guidelines, the UMCP procurement officer concluded that the granting of a 5% bid preference to a distributor who otherwise qualified as an independently owned small business was consistent with the purpose of the law in that it would aid in expanding available supply outlets, increase competition on State procurements and promote economy. We are satisfied that his interpretation was not inconsistent with the plain language and purpose of Maryland's Small Business Act and that it was reasonable.

For all of the foregoing reasons, therefore, the appeal is denied.

