BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of RAINBOW INTERIOR LANDSCAPERS	)	
	)	
	)	Docket No. MSBCA 1231
Under MPA Contract No. 15035-S	)	

May 28, 1985

Jurisdiction - Constitutional Questions - This Board's judgmental function does not involve an exercise of judicial power because it lacks the essential power to enforce its decisions. Accordingly, the Board is not prohibited from passing on the constitutionality of a statute where such a determination is incidental to and reasonably necessary for the exercise of the Board's quasi-judicial powers, since the determination will have the same effect as any other decision it renders.

Disadvantaged Business Preference Law - Constitutionality - The Disadvantaged Business Preference law, Article 21, Md. Ann. Code, §8-201, a legislative program which gives preferential treatment to the handicapped in designated State procurements, is a reasonable legislative classification and a legitimate function of the State government and does not violate the equal protection guarantee of the 14th Amendment to the U. S. Constitution.

Disadvantaged Business Preference Law - Antitrust - The Disadvantaged Business Preference Law, Article 21, Md. Ann. Code, §8-201, does not violate the State Antitrust statute since the Legislature has not demonstrated an intent to include the State within the scope of the Commercial Law Article, Md. Ann. Code, §11-204. Article 21, §8-201, likewise does not violate the Federal Antitrust statutes because of the long standing State action exemption.

Disadvantaged Business Preference Law - Rules and Regulations - Since there is no mandatory requirement for the pricing and selection committee to adopt procedural regulations pursuant to the Administrative Procedure Act, and the committee's determinations are statements that concern only internal management that does not affect directly the rights of or the procedures available to the public, the failure of the committee to adopt such regulations does not render a determination of fair market price improper.

Disadvantaged Business Preference Law - Mandatory Preference - The disadvantaged business preference provided by Article 21, Md. Ann. Code, §8-201, is a mandatory requirement and takes precedence over the minority business purchase program, Article 21, §8-601, which does not require a preference to be given to a minority business enterprise in every State procurement.

APPEARANCE FOR APPELLANT: Irving Bowers, Esq.
Kaplan & Kaplan
Baltimore, MD

APPEARANCES FOR RESPONDENT: William A. Kahn
Thomas K. Farley
Assistant Attorneys General
Baltimore, MD

OPINION BY MR. LEVY

This is an appeal from a Maryland Port Administration (MPA) procurement officer's final decision denying Appellant's protest of the proposed award of the captioned contract to the Baltimore Association for Retarded Citizens (BARC). Appellant maintains that MPA is awarding the contract to BARC, the second lowest bidder, pursuant to the provisions of Article 21, Md. Ann. Code §8-201, which Appellant argues is unconstitutional and in violation of State and Federal antitrust statutes. MPA, on the other hand, contends that Appellant's appeal is without merit.

Findings of Fact

1. On November 13, 1984, MPA gave the requisite notice that it was terminating for the State's convenience its existing horticultural services contract with Appellant effective January 31, 1985. This decision was motivated by MPA's determination to redesign the furniture and planting plan in the lobby area of the World Trade Center Baltimore.

2. On December 7, 1984, MPA issued an Invitation For Bids (IFB) for contract no. 15035-S to provide the new horticultural service for the interior and exterior plantings at the World Trade Center. Bids were due January 25, 1985 and a mandatory prebid conference was to be conducted on January 18, 1985. There was no mention in the IFB or the December 12, 1984 Maryland Register notice that this was a service that could be purchased by the State from the handicapped pursuant to the provisions of Article 21, §8-201.

3. Shirley Bowers, one of Appellant's partners, was its representative at the January 18, 1985 prebid conference where she was first apprised that the provisions of Article 21, §8-201 could be applied to this contract. She was given a copy of the statute and was briefed on the pricing and selection committee for sheltered workshops.[1] However, this was not the first time

[1]Article 21, §8-201(b)(2) defines a sheltered workshop as "an agency organized under the laws of the United States and the State of Maryland operated in the interest of handicapped individuals, and the net income of which does not inure in part, or in whole, to the benefit of any shareholder or other individual and is certified as a sheltered workshop by the Wage and Hour Division of the United States Department of Labor."

Appellant was made aware of this program. In the latter part of 1984, Appellant was advised that at the completion of a similar contract with the Office of The Attorney General the contract services would be turned over to BARC. (Tr. 24).

4. Two bids were received at the January 25, 1985 bid opening, each for a two-year contract term, as follows:

Appellant	$34,832.60
BARC	$35,704.70

Appellant's bid was changed by the procurement officer to $34,332.60 because of a mathematical error. The intended correct price apparently was obvious on the face of the bid document.

5. In an October 1983 Memorandum from J. F. Mann (Mann), Chief of the Department of General Services Purchasing Bureau, all State agencies were advised of the then new law, Chap. 490 of the Laws of Md 1983, effective July 1, 1983, which dealt with procurements from sheltered workshops. It was codified as Article 21, §8-201 and generally provides that State agencies shall procure from certified sheltered workshops those appropriate supplies and services selected from the State procurement list by a pricing and selection committee for sheltered workshops. The committee was also charged with establishing the fair market price for the goods and services. Attached to the memo was a list of approved sheltered workshops, which included BARC, and a list of those commodities and services which could be supplied. The list indicated that BARC could supply landscaping services.

6. On January 28, 1985, after the bids were opened, and based on the October 1983 memo, Thomas M. Dunne, the MPA contract officer, forwarded the bids to Mann who was the designee of the Secretary of General Services on the five member pricing and selection committee[2] as well as the committee's chairman.

The Committee has not promulgated formal rules or regulations for its operation and specifically has not adopted a formal procedure for the establishment of the fair market price for the goods and services offered for sale to the State by eligible sheltered workshops. However, the Committee had met on several occasions and had given Mann the approval to use an averaging technique to establish the fair market price. (Tr. 63). Based on this method, Mann averaged the two bids received and established a fair market price of $35,018.65 for BARC to perform the contract work.

---

[2] Article 21, §8-201(C)(2) provides that the committee is composed of two members of the Maryland Association of Workshops, Inc., the Secretary of General Services, or his designee, the Secretary of Public Safety and Correctional Services, or his designee and the Executive Vice President of Blind Industries of Maryland or his designee.

7. Mann advised Carroll Stein the MPA procurement officer, on January 30, 1985, of the fair market price determined and that BARC had agreed to perform the work at that price. Appellant was advised by the procurement officer on February 1, 1985 that the contract would be awarded to BARC.

8. Appellant filed a timely protest first with the Department of General Services on February 6, 1985 and then with the MPA procurement officer on February 8, 1985 alleging that it should be awarded the contract since it was the lowest responsive and responsible bidder; that Article 21, §8-201 is unconstitutional since it operates in violation of both Maryland and Federal antitrust statutes; and that it was not given a small business preference.

9. The procurement officer issued his final determination on February 21, 1985 denying Appellant's protest. Appellant entered a timely appeal with this Board on March 11, 1985.[3]

Decision

One of the issues for our consideration in this appeal deals with the constitutionality of Article 21, §8-201. However, MPA has raised a preliminary matter which we will address initially. It maintains that this Board does not possess authority to pass on the constitutionality of a statute because that is a judicial function and the State's judicial power rests only in the courts enumerated in Article IV, §1 of the Maryland Constitution.[4] MPA argues that the Legislature may not create additional courts to exercise judicial power and the judicial function may not be exercised by entities other than courts. Since this Board is an executive branch agency which exists pursuant to Article 21, Md. Ann. Code, §7-202, with jurisdiction to hear and decide appeals from final agency decisions regarding the formation of State contracts and disputes arising from them, it can perform only quasi-judicial functions in proceedings governed by the Administrative Procedure Act. State Government Article, Md. Ann. Code, §10-201, et seq. The Board's function is to make determinations of fact and apply the appropriate legal principles to those facts but not to say what the law is or to declare a statute unconstitutional since that is the function of the courts.

---

[3]Since the record does not reveal the exact date Appellant received the February 21, 1985 procurement officer's decision, we will assume that it was within the 15 day appeal period prior to March 11, 1985 since MPA has not raised the jurisdictional issue.

[4]Article IV, §1 of the Maryland Constitution provides:

> The Judicial power of this State is vested in a Court of Appeals, such intermediate courts of appeal as the General Assembly may create by law, Circuit Courts, Orphans' Courts, and a District Court. These Courts shall be Courts of Record, and each shall have a seal to be used in the authentication of all process issuing from it.

We disagree with MPA and decide that this Board can consider the constitutionality of a statute for the following reasons. MPA's position acknowledges the separation of powers doctrine found in Article 8 of the Maryland Declaration of Rights:

> That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

The Maryland courts have consistently interpreted this to mean that under Art. IV, §1 of the Maryland Constitution, the judicial function may not be exercised by entities other than those courts described in the Maryland Constitution. As stated in Dal Maso v. County Commrs., 182 Md. 200, 205, 34 A.2d 464 (1943):

> This forbids any power in the Legislature to clothe administrative boards with any judicial authority. There may be states in which it can be done, but Maryland is not one of them.

However, our courts have approved the Legislature's clothing of certain administrative agencies with what appears to be judicial functions when these agencies have been challenged on the basis of an improper delegation of judicial power.

How then have our courts interpreted what is and is not judicial power? In Dal Maso, supra, at p. 205, the court allowed as to how some administrative boards are characterized as quasi-judicial and do hear facts and based on them make decisions. The Court of Appeals in County Council v. Investors Funding Corp., 270 Md. 403, 429-32, 312 A.2d 225 (1973) reviewed how that court's recognition of the proper exercise of quasi-judicial power by administrative agencies has been largely justified by the reservation of ultimate authority in the courts. In Attorney General of Maryland v. Johnson, 282 Md. 274, 385 A.2d 57 (1978), appeal dismissed, 437 U.S. 117, the court after noting that adjudicatory determinations by administrative agencies are not judgments or decrees and that the fact finding and application of law functions of these agencies do not alone vest them with judicial power in the constitutional sense, states at p. 286:

> While we have not, until today, explicitly stated the proposition, we agree with those courts which have said that the essence of judicial power is the final authority to render and enforce a judgment. (citations omitted). . . . and we think that conclusion is implicit from our own case law. (citations omitted).

The court goes on to note the rule cited in Shell Oil Co. v. Supervisor, 276 Md. 36, 45-46, 343 A.2d 521 (1975) (quoting from Solvuca v. Ryan & Reilly Co., 131 Md. 265, 282, 101 A. 710 (1917):

> It is not enough to make a function judicial that it requires discretion, deliberation, thought, and judgment. It must be the exercise of discretion and judgment within the subdivision of the sovereign power which belongs to the judiciary. . . .

The Court in Attorney General v. Johnson, supra, at p. 286, then interprets this rule to mean that a decision constitutes an exercise of judicial power only when it is binding and enforceable by the entity that rendered it.

> It is elementary that an entity does not exercise the sovereign power of the State constitutionally assigned to the judiciary if its decision is in no sense final, binding or enforceable; no power of any meaningful kind — to say nothing of sovereign power — inheres in a decision which, as in the Act before us, need not be accepted and which, if accepted, cannot be enforced by the entity which made it.

This Board was in agreement with this reasoning when it rendered its opinion in Solon Automated Services, Inc., MSBCA 1046 (January 20, 1982) where we recognized the inherent limits of our jurisdiction as an administrative board. While we held that we had the authority to hear and decide appeals of bid protests, we stated, at p. 13, that we lacked the power to grant certain relief.

> 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. (Maryland Administrative Procedure Act (APA), Art. 41, Md. Ann. Code, §250). 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 the 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.

Because this Board lacks the essential power to enforce its decisions, its function, although judgmental, does not involve an exercise of judicial power. But while we lack judicial power, we are not prohibited from passing on the constitutionality of a statute since our determination will have the same effect as any other decision we render. Thus, it is appropriate for this Board to determine the constitutionality of a statute particularly where it is incidental to, and reasonably necessary, to the Board's constitutional, quasi-judicial powers of hearing and deciding disputes relating to the formation of a State contract.

We turn then to Appellant's attack of that portion of the Disadvantaged Business Preference law, codified at Article 21, Md. Ann. Code §8-201, which provides, in pertinent part, as follows:

> (a) Notwithstanding other provisions of this article, supplies and services of the handicapped shall be purchased by the State in accordance with the provisions of this section.

(b) (1) The term "handicapped" refers to an individual or class of individuals under a physical disability (including blindness) or mental disability, which constitutes a substantial handicap to employment and is of such a nature as to prevent the individual under such disability from currently engaging in normal competitive employment.

(2) The term "sheltered workshop" means an agency organized under the laws of the United States and the State of Maryland operated in the interest of handicapped individuals, and the net income of which does not inure in part, or in whole, to the benefit of any shareholder or other individual and is certified as a sheltered workshop by the Wage and Hour Division of the United States Department of Labor.

(3) "Pricing and selection committee" means the committee established under this subtitle responsible for procedures governing the procurement of goods and services from certified sheltered workshops.

(c) (1) The pricing and selection committee for sheltered workshops shall:

(i) Select appropriate goods and services from the State procurement list and provide that the State procure the selected goods and services from eligible sheltered workshops;

(ii) Determine the fair market price of any goods and services offered for sale to the State by eligible sheltered workshops;

(iii) Adjust, in accordance with market conditions, the prices of goods and services offered for sale to the State by eligible sheltered workshops; and

(iv) At the request of a sheltered workshop, review or change the price of a good or service.

* * *

(d) (1) If suitable supplies or services are available for procurement from any department or agency of the State, and procurement therefrom is required by the provisions of any other section of this article or of any other law of this State, procurement of the supplies shall be made in accordance with the other provisions of law.

(2) If suitable supplies or services are not available for procurement from any department or agency of the State under the provisions of paragraph (1) of this subsection, the pricing and selection committee shall determine whether the supplies or services are available for procurement from an eligible sheltered workshop.

The Appellant assails this statute on two distinct grounds. It maintains that Article 21, §8-201 is a violation of both State and Federal antitrust laws (Appellant's Brief p. 2-3a) while also arguing that "[t] he rights of Appellant that have been violated is its right [sic] under the 14th Amendment to the U.S. Constitution to have the State grant it equal protection of the law" (Appellant's Brief p. 4). The latter statement is the only constitutional argument Appellant makes and it provides no supporting material or authority for this position.

We will consider first the constitutional argument. While Appellant has been less than clear in its position we must assume it is concerned with the State, through Article 21, §8-201, giving preferential treatment to a certain class of businesses, thereby, allegedly, denying equal protection to those, including Appellant, who are not included in the designated class. However, the prohibition against denial of equal protection of the laws, as prescribed in

the 14th Amendment to the U.S. Constitution,[5] does not preclude a State from resorting to a legislative classification, provided it is reasonable and rests on a substantial difference or distinction which bears a rational relation to the object of the legislation. McGowan v. State of Md., 81 S.Ct. 1101, 366 U.S. 420 (1961); Bowie Inn, Inc. v. City of Bowie, 274 Md. 230, 335 A.2d 679 (1975). A legislative classification must be founded on pertinent and real differences in order to comply with the equal protection guarantee and such classification will be presumed reasonable in the absence of clear and convincing indications to the contrary. A person who assails it has the burden of showing that it does not rest upon any reasonable basis, but is arbitrary. Tatlebaum, et al, Trustees v. Pantex Manufacturing Corp., 204 Md. 360, 370, 104 A.2d 813 (1954). While the 14th Amendment grants to all persons equality, only equality within a class is essential, and equality between different classes is not required. John W. Wheeler v. State of Maryland, 35 Md. App. 372, 370 A.2d 602 (1977).

We believe that programs, such as that provided for in Article 21, §8-201, which assist or favor handicapped or minority groups are legitimate functions of government. The procurement from sheltered workshops creates a legislative classification that is reasonable and whose distinction bears a rational relation to the object of the legislation which is to assist a group which is discriminated against in the work place and is otherwise unable to compete in the real business world due to reasons it has no control over. Appellant, who has the burden of showing that the classification does not rest upon any reasonable basis and is arbitrary, has failed to establish any discrimination in the application of the statute.[6] We, accordingly, determine that §8-201 is constitutional.

Appellant's alternate attack on Article 21, §8-201 is that it violates the provisions of both State and Federal antitrust statutes. It specifically argues that §8-201 violates the Commercial Law Article, Md. Ann. Code, §§11-201 to 11-213, and the Sherman and Clayton Acts, both found at 15 U.S.C.

With regard to the State Antitrust Act, §11-204 provides that "[a] person may not: . . ." followed by a long list of prohibitive acts. All the other sections that follow deal with the enforcement of the prohibitive acts. Section 11-201(f) defines "Person" as:

> "Person" includes an individual, corporation, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.

It is clear that the State is not included within this definition. The courts have consistently held that "person" in a statute does not include the State, its agencies or subdivisions unless an intention to include them is made

---

[5]The Maryland Constitution contains no express equal protection clause but it is embodied in the due process requirement of the Md. Declaration of Rights.

[6]We note with interest that Appellant, while objecting to the handicapped classification on the one hand, on the other hand, argues that it should have been granted a small business preference pursuant to Article 21, Md. Ann. Code §8-101 and a minority business enterprise preference under §8-601 (Appellant's Brief p. 7).

manifest by the Legislature. Unnamed Physican v. Commission on Medical Discipline of Maryland, 285 Md. 1, 12, 400 A.2d 396 (1979), cert. den. 100 S.Ct. 142, 444 U.S. 868. We find no such intention to include the State here and hold that Article 21, §8-201 is not in violation of the State antitrust statute.

With regard to the Federal antitrust statutes, it has been a long standing proposition that they do not affect actions by the State. In Parker, Director of Agriculture, et al v. Brown, 317 U.S. 341, 350, 63 S.Ct. 307 (1943) the state exemption was clearly stated as follows:

> . . . We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . .
>
> * * *
>
> There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." . . . That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history.

This has become known as the Parker state action exemption and has been upheld continuously by the courts. See: Community Communications Co., Inc. V. City of Boulder, Colorado, et al, 455 U.S. 40, 102 S.Ct. 835 (1982). The handicapped program established pursuant to Article 21, §8-201 is clearly a state action taken pursuant to a legislative policy and is therefore exempt from the prohibitions of the Federal antitrust statutes.

Appellant next argues that the failure of the pricing and selection committee to adopt procedural regulations pursuant to the Administrative Procedure Act renders its determination of fair market price improper and without foundation. However, we disagree with this position for the following reasons. Article 21, Md. Ann. Code §2-101 subsection (a) provides that the Board of Public Works "has authority to set policy and to adopt regulations which are consistent with this article." Subsection (b) provides:

> The Board shall adopt regulations, consistent with this article, governing procedures for the review and approval of procurement contracts including multiyear contracts, conditions and procedures for delegating procurement authority including designation of control authorities, procedures for review of determinations, and procedures for certification of adequacy of appropriations and availability of funds. The Board shall ensure that the regulations of the procurement

agencies provide for procedures which are consistent with this article and which are substantially the same among the agencies. (Underscoring added).

Subsection (c) provides for 15 specific areas for which each department shall adopt regulations. The list does not include procurements from those groups covered by the Disadvantaged Business Preference. Subsection (d) then provides:

> The Board or a department may adopt any other regulations, consistent with this article, it may consider advisable to carry out the purposes of this article. (Underscoring added).

There are throughout Article 21 several references to specific areas where adoption of regulations is mandatory. See: §§3-601, 3-705, 5-101, 6-101, 7-202, 8-101, 9-105, and 9-205. The Legislature appears to have established in Article 21 a scheme whereby adoption of regulations were mandatory in certain areas and discretionary in other areas. Since Article 21, §8-201 does not provide for mandatory regulations and this area is not a mandatory requirement provided for in §2-101 we must assume that the Legislature intended this to be a discretionary program for which regulations may be promulgated. Section 8-201(b)(3) only provides that the pricing and selection committee is "responsible for procedures governing the procurement of goods and services from certified sheltered workshops." Section 8-201(a) provides that "notwithstanding other provisions of this article, supplies and services of the handicapped shall be purchased by the State in accordance with the provisions of this section." Since there is no mandatory requirement for the adoption of regulations and §8-201(c) sets out in general terms the procedures which the pricing and selection committee is to follow, we determine that Article 21, §8-201 is operative in the absence of procedural regulations.

We also concur in MPA's argument that the procedures of the pricing and selection committee do not require Administrative Procedure Act approval. State Government Article §10-101(e) defines "regulation" as follows:

> (1) "Regulation" means a statement or an amendment or repeal of a statement that:
>
> (i) has general application;
>
> (ii) has future effect;
>
> (iii) is adopted by a unit to:
>
> 1. detail or carry out a law that the unit administers;
> 2. govern organization of the unit;
> 3. govern the procedure of the unit; or
> 4. govern practice before the unit; and
>
> (iv) is in any form, including:
>
> 1. a guideline;
> 2. a rule;
> 3. a standard;
> 4. a statement of interpretation; or
> 5. a statement of policy.

(2) "Regulation" does not include:
(i) a statement that:
1. concerns only internal management of the unit; and
2. does not affect directly the rights of the public or the procedures available to the public;
(ii) a response of the unit to a petition for adoption of a regulation, under §10-123 of this subtitle; or
(iii) a declaratory ruling of the unit as to a regulation, order, or statute, under Subtitle 3 of this title. (Underscoring added).

The procedures provided for in §8-201 require the pricing and selection committee to select which goods and services will be procured from the eligible sheltered workshops; determine the fair market price of these goods and services; and adjust these prices in accordance with market conditions. What goods or services are to be covered by a contract and the price they will be sold to the State really constitute provisions of the contract. There is no regulatory authority exercised here. The committee's determinations have no general application or future effect since they are limited to and are incoporated into one contract. The committee only determines the price the State will pay this time for the goods or services. These determinations appear to be statements that concern only internal management that do not affect directly the rights of the public or the procedures available to the public. The decisions made are administrative acts applicable to one contract as it arises. It is then clear that statements of the committee's procedures do not come within the definition of "regulation" in the Administrative Procedure Act and do not require the statutory approval.

Appellant next appears to claim that it should have been awarded this contract because of its minority ownership and the minority business purchase program provided by Article 21, §8-601. Without reviewing the entire statute, it is sufficient to state that §8-601 does not require a preference to be given to a minority business enterprise in every procurement the State makes. Section 8-601(b)(1) provides:

> (b) (1) Each department, except the Department of Transportation as to construction contracts, shall structure its procedures for procuring supplies, services, and construction to attempt to achieve, consistent with the purposes of this subtitle, the result that a minimum of 10 percent of the total dollar value of such procurements are made directly or indirectly from certified minority business enterprises. (Underscoring added).

and §8-601(b)(3) provides:

> (3) Each procurement agency shall structure its procedures for procuring supplies, services, and construction to encourage participation in the process by minority business enterprises and to attempt to provide to minority business enterprises a fair share of State contracts. (Underscoring added).

On the other hand Article 21, §8-201(a) provides that "Notwithstanding other provisions of this article, supplies and services of the handicapped shall be purchased by the State in accordance with the provisions of this section." (Underscoring added). This mandatory language makes it clear that procurements from the handicapped takes precedence over the minority participation

program provided by §8-601 and the preference for competitive sealed bidding provided by §3-201(b). Even if there was a preference available to Appellant in this procurement as a minority business enterprise it would not prevail over the Disadvantaged Business Preference.

The final argument[7] advanced by the Appellant is that the pricing formula utilized by the pricing and selection committee is "incorrect and violates the requirements of good accounting practices." Appellant advances no substantive support for its argument. It only illustrates how the contract price could be increased, by driving up the average, if a sheltered workshop inflates its bid price. However, Appellant advances no evidence to show that is what occurred in this particular procurement or that the BARC contract price was not a fair market price. A contract price with a sheltered workshop that is higher than the lowest bid price does not in itself mean that it is not a fair market price. In fact there is no requirement under §8-201 that competitive sealed bidding be utilized, therefore, there is no requirement that can even be inferred under the statute that the pricing and selection committee must utilize the averaging technique to establish a fair market price. Any method that the committee deems appropriate may be utilized with the sheltered workshop determining if it wishes to perform the work at the established price.

For all of the above reasons, the Appellant's appeal is denied.

CONCURRING OPINION BY MR. KETCHEN

I concur in the result reached by the Board under the facts of the instant case since the Disadvantaged Business Preference law, Article 21, Md. Ann. Code, §8-201 clearly overrides the other provisions of Article 21. Appellant was aware prior to bid opening that the Disadvantaged Business Preference law might be applicable to this procurement and thus was not

---

[7] Appellant also argues, on pp. 8-9 of its brief, that §8-201 requires the sheltered workshops to actually manufacture the goods sought. However, the reference to "manufactured goods" was deleted from §8-201 in 1983 (Chapter 490, Laws of 1983), therefore, the argument made is without merit.

prejudiced by MPA's failure to make an award to Appellant as the low bidder. However, in my view, the Disadvantaged Business Preference law establishes a method of procurement separate and distinct from the competitive sealed bidding procedures prescribed by Art. 21, Md. Ann. Code, §3-201 which requires that a contract be awarded to that responsive and responsible bidder whose bid is either the lowest bid price or lowest evaluated bid price. While the legal justification for the manner in which the competitive sealed bid process used here is murky at best, I cannot support its use as an appropriate method of establishing the fair market price required by §8-201(c)(1)(ii). I find it patently unfair for the State to require vendors to go through a futile exercise of preparing bids when it has complete knowledge that no award will be made and the bid prices only used to establish the fair market price.

purchased by [illegible] to make up [illegible] as the [illegible] Houses. However, in any case, the Mississippi Highway Department has established a method of [illegible] and [illegible] from the competitive sealed bidding procedures [illegible] by Art. [illegible] which requires that a contract be awarded to that competitive and responsible bidder whose bid is [illegible] the lowest bid price or [illegible] market bid price. While the legal justification for the manner in which the competitive sealed bid [illegible] it was to an [illegible] method of establishing the fair market price [illegible]. I find it [illegible] for the State to continue to go through a [illegible] exercise of [illegible] knowledge that no [illegible] can be [illegible] and the way to [illegible] to establish the fair market price.