

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of RANDMARK, INC.)	
)	Docket No. MSBCA 1364
Under Department of Personnel)	
Prepaid Dental Health Services)	
Provider Agreement)	

January 26, 1988

Jurisdiction - The Appeals Board does not have jurisdiction to decide the contract formation issues raised by Appellant since the agreement for employee funded dental services is not a procurement contract within the meaning of Maryland Annotated Code, State Finance and Procurement Article, Division II, General Procurement Law.

Jurisdiction - State action in reaching a written agreement with a dental health care company to provide prepaid dental services to State employees has many of the attributes of a State Procurement action. However, the Legislature clearly did not authorize a procurement of prepaid dental services on behalf of State employees within the meaning of Maryland's General Procurement Law as evidenced by its failure to appropriate State funds for this endeavor, although the Legislature did expressly authorize the Secretary of Personnel to use the Department of Personnel's administrative capabilities and resources to arrange for a voluntary employee dental plan that is 100% funded by contributions of State employees choosing to participate.

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OPINION BY MR. KETCHEN

This appeal arises from a Department of Personnel ("Personnel") procurement officer's final decision denying Appellant's protest of award of the captioned agreement to CGNA, Inc. Appellant maintains that the Department did not award the captioned contract pursuant to Maryland Ann. Code, State Finance and Procurement Article, Division II, General Procurement Law ("General Procurement Law") for a number of reasons including the failure to conduct the procurement in accordance with the statutory procedures for expedited procurements. Personnel maintains that the instant appeal involves neither a procurement nor a contract within the meaning of the General Procurement Law; therefore, this Board does not have jurisdiction to consider the substantive procurement issues raised by Appellant. If this

Board has jurisdiction over the appeal, Personnel maintains that the procurement officer's final decision should be affirmed since Personnel reasonably complied with the General Procurement Law including the expedited procurement procedures.

Findings of Fact

1. As early as 1985 Personnel began discussions regarding provision of a prepaid, employee dental plan, and made proposals on this subject to the Maryland General Assembly. (Appellant Exhs. Nos. 36-38). Fiscal notes submitted in support of legislation (SB 424, 1985) presented to the Legislature indicate that a voluntary prepaid employee dental plan obtained from a dental services provider using existing Personnel resources would not affect State expenditures if 100% of the costs of the plan is borne by employee contributions. The fiscal notes also indicated the estimated costs for coordination with the dental services provider if the State contributed to the plan. (See Appellant Exhs. 37-38).

2. In 1985, the Maryland Legislature authorized Personnel to arrange for an employee dental plan as follows:

§ 48 State budget appropriation for hospital and medical - surgical insurance.

(a) In general.—(1) The Governor shall include a sum of at least one million five hundred thousand dollars (\$1,500,000) in the budget each year as a contribution toward the cost of a program of hospital, medical and surgical insurance for employees of the several departments, boards, bureaus, commissions, and other agencies of the State government.

(2) The Secretary of Personnel may arrange for a dental plan for State employees choosing to participate that shall be funded by contributions of State employees choosing to participate. (Underscoring added).

Md. Ann. Code, Art. 64A §48 (Vol. 6, 1983 Replacement, 1987 Cum. Supp.)

3. In addition, in 1985 the Maryland Legislature created a State Employees' Health Insurance Advisory Council ("Advisory Council") to advise

Personnel as follows:

- (a) In general.—There is a State Employees' Health Insurance Advisory Council to the Secretary of Personnel.
- (b) Membership.—The Council consists of the following members appointed by the Governor:
 - (1) The Secretary of Personnel or a representative of the Secretary of Personnel;
 - (2) A representative of:
 - (i) The Department of Budget and Fiscal Planning;
 - (ii) The Department of Health and Mental Hygiene;
 - (iii) The Insurance Commissioner;
 - (iv) The Comptroller;
 - (v) The Maryland Classified Employees Association;
 - (vi) The American Federation of State, County, and Municipal Employees;
 - (vii) The Maryland Troopers Association; and
 - (viii) The public.

- (e) Duties of Advisory Council.—The Advisory Council shall:
 - (1) Advise the Secretary of Personnel on the establishment of a procedure for soliciting bids from health care providers for a contract for the State Employees' Health Insurance Program; and
 - (2) Advise the Secretary of Personnel on the implementation, maintenance, negotiation, and administration of the State Employees' Health Insurance Program. (Underscoring added).

Md. Ann. Code, Art. 64A §48E (Volume 6, 1983 Replacement, 1987 Cum. Supp.).

4. In December 1986, Personnel entered into a consulting contract with William N. Mercer-Meidinger-Hansen, Inc. ("Mercer") on a not to exceed \$150,000 basis to provide an analysis of employee health benefit plans including a study of a State subsidy of such plans. Mercer was to survey health benefit plan providers regarding group term life insurance, dependent life insurance, long term care, dental services, and catastrophic major medical plans for inclusion in a proposed Maryland flexible benefits plan. Mercer was to prepare drafts of pre-tax premium health expense reimbursement and dependent care plans and was also to arrange for proposals from health care plan providers to underwrite long term health care programs and

prepaid dental care programs. Additionally, it was to gather information necessary to analyze the key provisions of the proposals, prepare a written analysis of submitted proposals, and assist Personnel in selecting providers for the long term health care and prepaid dental programs.

5. During 1987, Personnel made the decision to go forward with arranging for a voluntary Maryland employee prepaid dental plan as part of a full and flexible health benefits plan to be offered to Maryland State employees during the open enrollment period beginning on November 1, 1987. During the one month open enrollment period, State employees needed to know about the benefits and costs of any separate dental care plan the State sanctioned in order to evaluate and select a health care provider of general health care services, since some health maintenance organizations also offered an option of obtaining dental care services in their health care plans. (Affidavit of Catherine K. Austin, December 24, 1987, page 8). Employees had to sign up for any offered prepaid dental plan prior to the end of the 1987 calendar year to take advantage of certain Internal Revenue Service (IRS) approved pre-tax features that could be attained from such a plan.¹

6. By letter of August 26, 1987, Mr. Harold Fairman, Jr. of Mercer reported his efforts regarding Maryland's health insurance flexible benefits program to Personnel's Assistant Secretary for Administration, Catherine K. Austin, who was in charge of developing the overall flexible health benefits package for the open enrollment period. Mr. Fairman reported as follows:

Based on our discussions concerning voluntary (100% employee contribution) programs that are under consideration for Phase I we performed a market survey of major life and health insurance underwriters to determine their preliminary interest in the programs. The responses were based on the limited information

¹Each employee making the election would pay for dental care with dollars withheld from paychecks. Such amounts withheld are not subject to income tax under the U.S. Tax Code, i.e., this is a "pre-tax," prepaid plan. (Appellant's Exhs. Nos. 32 and 40 (Internal Revenue Service Code §125 §1197R) ("Cafeteria Plans") (See Finding of Fact No. 2)).

we were able to provide. The underwriters we contacted are representative of companies with sufficient capacity to underwrite a group the size of the State. The set of companies is not all inclusive and it does not include companies who might specialize in only one of the voluntary programs.

If the State, as a result of this information, decides to continue to explore the feasibility of offering the below listed voluntary plans we will prepare a specific description of the plans and provide an outline of the conditions under which the plans would be offered. In addition to major underwriters, we would also query specialty underwriters regarding their interest.

In consideration of time constraints, we conducted a phone survey and generally described the State's intentions. Many of the underwriters provided conditional replies since they wanted more detailed information (plan design, demographic information).

The plans under consideration are:

- Voluntary Group Term Life Insurance
- Dependents Life Insurance
- Long Term Care
- Dental Insurance
- Catastrophic Coverage for PPO Participants

All of these plans would not have a state subsidy.

We contacted the following companies:

- Prudential
- Travelers
- CIGNA
- Aetna
- Provident Life & Accident
- Mutual of Omaha
- Metropolitan
- Great West
- CNA

The results of our discussions are summarized on the attached chart. As you can see and as we discussed, the interest in the two life insurance plans is greater than it is in the three health plans. Long term care is a relatively new product and only a few underwriters have a product — these are generally the larger companies. The potential for adverse selection in employee paid dental insurance² limits this market and the catastrophic coverage

²Adverse selection refers to the greater possibility that those needing dental work will elect to participate in a dental plan while those who do not need dental work will likely elect not to participate. This process tends to limit the dental plan population to high risk individuals in terms of need for dental work with attendant potential for higher costs.

needs more development with the underwriters. With more time and information on the PPO the responses on the catastrophic coverage could improve.

Let me know the next step.

(Underscoring added).

7. The Mercer survey attached to Mr. Fairman's August 26, 1987 letter in part indicated the following with regard to interest in prepaid dental plans:

	<u>Dental Insurance</u>
Prudential	No
Travelers	Doubtful
CIGNA	Yes
Aetna	Doubtful
Provident	No
Mutual of Omaha	No
Metroplitan	No
Great West	Checking
CNA	Checking

8. Mercer's market survey, as was noted by Mr. Fairman's letter, did not include companies who might specialize in only one of the voluntary types of health insurance benefits programs being considered. It is clear that Mercer did not contact Appellant, Denticare of Maryland, or Dental Care Plan, all of which specialize in offering prepaid dental plans to employees through public and private employers in Maryland.

9. Appellant presently provides a prepaid, but not pre-tax, dental plan to those Maryland State employees, retirees, and their dependents, who are members of the Maryland Classified Employees Association (MCEA). Appellant's dental plan is a prepaid HMO-type plan providing for scheduled routine dental care with some services provided at no cost (no out-of-pocket expenses). Other procedures are offered on the basis of a discount from usual and customary charges. (Affidavit of Mark D. Doctors, December 28, 1987).

10. In 1980, Appellant was licensed to operate in Maryland as a nonprofit health service plan. In 1981, it entered into its contractual relationship with MCEA to provide dental services to MCEA members. Prior to the November 1987 open enrollment period Appellant had enrolled approximately 8000 State employees and 12,000 dependents under its MCEA dental services plan. Under Appellant's MCEA plan, Personnel deducts premiums directly from employees' pay checks on an after tax basis, i.e., Appellant's MCEA plan is a post tax basis plan.

Appellant maintains that its current MCEA, post tax basis dental plan is less expensive for equivalent services than CIGNA's dental plan which has an advantage as a pretax plan through the State's sponsorship. In addition to its dental plan offered through MCEA, Appellant also provides dental service plans to both public and private employees in Maryland covering approximately 50,000 persons. Appellant has a number of agreements with health maintenance organizations (HMO) under which it provides dental services to State employees who are members of those HMO plans.

Appellant maintains that it is the largest prepaid dental services provider in the State of Maryland in terms of total enrollees. However, Appellant was not made aware by any notice during August, September and October of 1987 that Personnel was soliciting offers for a voluntary, 100% prepaid, employee dental services plan to be offered to Maryland State employees during the November 1987 open enrollment period. Appellant contends in its complaint that as a result of Personnel's failure to solicit Appellant and to permit it to participate in competition with other dental services providers, and the consequent offering of CIGNA as the State

sanctioned prepaid dental plan provider, it lost approximately 500 enrollees from its MCEA plan during the November 1987 open enrollment period. (Affidavit of Randy Widen, December 28, 1987).

Appellant contends that had it been given the opportunity to do so it could have offered State employees a pretax dental plan at rates and services competitive with that offered by the CIGNA plan. (Affidavit of Marc D. Doctors, December 28, 1987; Affidavit of Randy Widen, December 28, 1987).

11. Denticare of Maryland also provides a prepaid dental plan through a contract with Council 92 of the American Federation of State, County and Municipal Employees (AFSCME). Denticare alleges that since 1980 it has provided prepaid dental plan services in Maryland to State employees through AFSCME. Appellant and Denticare have been competitors in Maryland for a number of years in the prepaid dental services plan business. (Affidavit of Mitch McGlynn, December 24, 1987).

12. During September and October of 1987 Denticare was unaware that the State of Maryland was attempting to obtain a voluntary, 100% employee funded dental services plan. It was not solicited by anyone from Personnel or from Mercer. Denticare, however, on two occasions in the last six years submitted proposals for a State employee dental services plan to Personnel for evaluation. Approximately six years ago Denticare made an oral presentation to the Advisory Council and in 1985 it also participated in a State survey of dental plans. Denticare indicates that during the 1987 open enrollment period it lost a substantial number of enrollees in its prepaid dental plan which it attributes to the State sponsored CIGNA plan. (Affidavit of Mitch McGlynn).

13. Up until 1987, the major providers of dental service plans in Maryland have been Appellant and Denticare. There are other plans available which are listed with the Maryland Insurance Commission's Office. This includes the dental care plan of the Troopers' Association offered to the Maryland State Police. The company offering a dental services plan through the Troopers' Association was not contacted either by Mercer or by Personnel regarding provision of a prepaid, pretax dental plan. (Affidavit of Mark D. Doctors, December 28, 1987).

14. In 1986 the Advisory Council had met and considered the dental health care services plans then being offered to State employees through union organizations. The Advisory Council's record of its consideration of these dental services plans contains the following material:

- a. An analysis of current dental plans offered to State employees through union organizations;
- b. An analysis of dental plans submitted in response to a Personnel questionnaire; and
- c. A recommendation of guidelines for State employees dental plan (RFP criteria).

In a letter dated February 14, 1986 to the Executive Director of MCEA, who is an Advisory Council member, the Chairman of the Advisory Council noted that "the guidelines are presented as criteria for a possible recommendation to [the Secretary of Personnel] on the issuance of a Request for Proposal for a State dental plan." The enclosures to the Advisory Council Chairman's letter contained an extensive analysis of various dental services plans then in existence including the Denticare plan, the Randmark (Appellant) plan and the Dental Care plan. (Appellant Exh. 15). CIGNA Dental Health Plan of Maryland, Inc., did not offer a dental services plan in Maryland at that time and only was registered to do business in Maryland on November 13, 1986 and

received its certificate of authority to operate a prepaid dental plan in Maryland in April 1987 (see Finding of Fact No. 37). (Affidavit of Sandra J. Boyd, December 24, 1987).

15. In early August 1987, the Office of the Attorney General advised Personnel that special legislation was not necessary to implement a flexible benefits package for offering to Maryland State employees which would include an employee dental services plan. In this regard, on August 20, 1987, the Attorney General's Office advised Personnel that the procurement process should be utilized to obtain hospital and medical coverage for employees under HMO contracts. (Affidavit of Catherine K. Austin, page 5).

16. While Mercer was surveying dental care providers and long term health care providers in August 1987 to determine if it was feasible to obtain these services for State employees in 1987, Personnel solicited proposals for contracts under the General Procurement Law for health maintenance plans, a vision care plan, and a prescription drug plan to be offered to employees during the November 1987 open enrollment period. These latter contracts involve a State financial contribution toward premiums and were awarded after the use of competitive negotiation procedures. (Affidavit of Catherine K. Austin, pages 5-6).

17. In September 1987 Personnel pursued its efforts to offer a dental care plan as part of the State's flexible health benefits package to be offered to State employees during the November 1987 open enrollment season.

18. In this regard, Personnel further determined in September 1987 to solicit an agreement for employee dental care services from a dental services provider pursuant to the expedited procurement procedures set forth in the General Procurement Law §11-113(b), which provides as follows:

(b) Procurement on expedited basis.—Notwithstanding any other provision of this subtitle, a procurement agency may, with the prior approval of the agency head and the Board, make a procure-

ment on an expedited basis if the procurement agency head and the Board find that urgent circumstances require prompt action, that an expedited procurement best serves the public interest, and that the need for the expedited procurement outweighs the benefits of making the procurement under §11-110 or §11-111 of this article. The procurement officer shall attempt to obtain as much competition as is possible and practicable.

There were no solicitation documents as such regarding the State's efforts to obtain an agreement with a dental services provider. There was no published notice of a solicitation or written request for proposals, and there were no specifications, instructions to offerors, or formal evaluation criteria.

19. Personnel maintains that the determinations and findings required by the General Procurement Law to support use of expedited procurement procedures are set forth in a letter of October 7, 1987 from the Secretary of Personnel to the Secretary of the Board of Public Works. (Appellant Exh. 6). This letter provides in full as follows:

The Department of Personnel requests authorization to utilize the expedited procurement process to identify health care carriers in each of the following areas: dental insurance and long term care insurance. Neither of these programs would involve a State subsidy, i.e., the employee would pay the full premium. We wish to include these options in the Flexible Benefits Program scheduled to be offered during the November open enrollment. Given the time requirements of the procurement law, we would not be able to meet this objective.

Inasmuch as offering either program would not involve the use of State funds, and given the time constraints noted above, we respectfully request your favorable consideration to our request to use the expedited procurement process for identifying potential vendors.

20. During this same period, Personnel was in contact with Blue Cross and Blue Shield [of Maryland, Inc.] and CIGNA Corporation through Mercer regarding proposals for a prepaid dental plan. CIGNA, as pointed out above, had been contacted by Mercer in August 1987 during its initial survey of major life and health insurance underwriters. (Appellant Exh. 10). Although not contacted by Mercer during its survey in August 1987, Blue Cross-Blue

Shield at some point in September 1987 contacted Mercer or Personnel and became involved in negotiations regarding an agreement for a prepaid employee dental plan.

21. At one point in mid-September 1987, the Assistant Secretary of Personnel for Administration (Assistant Secretary Austin) realized that Appellant had not been contacted regarding the voluntary, employee prepaid dental plan. Assistant Secretary Austin directed the Mercer representative to contact Appellant and solicit it for a dental services plan proposal. (Affidavit of Catherine K. Austin, page 7).

22. The Mercer representative's attempts to contact Appellant speak for themselves, as described in his letter of October 28, 1987 to Assistant Secretary Austin, as follows:

The purpose of this letter is to review our efforts to contact Randmark, Inc. to determine their interest in submitting a dental proposal for State employees.

At your suggestion, I initially contacted Randmark and asked to speak with Marilyn Moskowitz. When I was informed that she was no longer employed by Randmark, I then asked to speak with the marketing manager, Michele Deverick. Upon learning that Ms. Deverick was out of the office, I left my name and number so that she could return the call. According to my telephone log, Ms. Deverick returned my call on September 25th. I returned her call the week of September 28th and was told that Ms. Deverick was out of town until Thursday, October 8th. She was attending a MCEA Conference in Ocean City.

My recollection is that when you and I met on October 5th, (on another matter), I advised you of my contact activities. I also asked that since you were going to be at the MCEA Conference in Ocean City, you attempt to speak with Ms. Deverick while there. I recall that you subsequently informed me, upon my inquiry, that you were unable to find Ms. Deverick.

Besides the September 25th call, the only other recorded contact that I had from Ms. Deverick occurred on Friday, October 9. I was out of town on that day and don't recall ever receiving a telephone message of Ms. Deverick's call. Thus, it was not returned. However, the way I recently found out that she attempted to contact me on October 9 was that our telephone log shows such an entry. I have since checked our telephone log carefully and can attest that the only calls received from Ms.

Deverick were the September 25 call, which I returned, and the October 9 call, which doesn't seem to have been brought to my attention.

One last point: I do not recall whether in any of my two attempts to contact Randmark I mentioned the State of Maryland. However, it's likely that I did since the State's name recognition would prompt a quicker return call (because my name would be unfamiliar to Ms. Deverick). I also feel certain I would have mentioned the State's name since I knew that Randmark was involved with the MCEA dental program and they were undoubtedly aware of the State's interest in the dental area.

(Appellant Exh. 5, see Appellant Exh. 9; Agency Report, Exh. F, page 4; Affidavit of Catherine K. Austin, page 7).

23. Since Mercer's initial telephone attempt and one attempt at returning Appellant's telephone response to its inquiries were unsuccessful, the attempted contact with Appellant never occurred regarding solicitation of a proposal from Appellant. It is clear that Mercer made no further attempts to contact Appellant after October 9, 1987 and there were no attempts specifically to contact Denticare or the Troopers' Association Dental Plan providers or to give general notice that Maryland was seeking proposals for a dental plan agreement from dental plan providers operating in Maryland.

24. The record does not reflect any effort at all to contact the Denticare plan providers (AFSCME) or the Dental Care Plan providers, i.e., the Troopers Associations dental services plan.

25. Personnel's determination on which it based its decision to use the expedited procurement process to obtain a prepaid dental plan is further described in Personnel's agency report as follows:

1. The open enrollment period could not be postponed because:
 - a. Existing State contracts with health maintenance organizations had already been extended six months and were due to expire December 31, 1987 (Austin Aff., ¶8(b));
 - b. Pursuant to COMAR 06.01.07.04B, the State is to conduct an open enrollment annually and the previous open enrollment period had been conducted in the fall of 1986;

- c. Pre-tax spending accounts, deemed an essential element of the flexible benefits package, could not be utilized if the open enrollment period was conducted after November 1987. (Austin Aff., ¶15).
2. It was Secretary Ford's judgment that it was absolutely essential to offer long term care and dental care as part of the flexible benefits package during the November, 1987 open enrollment (Ford Aff., ¶6).
3. The November open enrollment included dental care coverage through some of the HMO offerings. In order to intelligently select a complete health care package, including medical, hospital, and surgical coverage, vision coverage, prescription coverage and dental coverage, employees would need to know of each separate offering at the same time. Therefore, it would have been unfair and unreasonable to delay the dental offering for some months while continuing the November, 1987 enrollment for all other offerings. (See Austin Aff., ¶21; Agency Report, Exhibit F).

(See Agency Report at 8, Affidavit of Catherine K. Austin, pages 8-9).

26. The record indicates that consideration of award of an agreement to CIGNA Dental Health of Maryland, Inc was scheduled on the Board of Public Works action agenda for October 14, 1987, but it was in fact not considered by the Board until October 21, 1987. The action agenda indicates that nine firms, not including Appellant, Denticare, or Dental Care Plan had been solicited regarding proposals for dental care plans and that two proposals were considered; i.e., the CIGNA proposal and the Blue Cross-Blue Shield proposal. (Appellant Exh. 11).

The Board of Public Works action agenda item indicates the fund source for an employee dental plan as being 100% employee paid premiums. (Appellant Exhs. 29, 30; Agency Report, Exh. I). The Board of Public Works was requested to consider an agreement for the CIGNA prepaid dental plan or the Blue Cross-Blue Shield plan and to approve their solicitation on an expedited procurement basis pursuant to COMAR 21.05.06.03. (Appellant Exh. 18).

27. The Board of Public Works approved Personnel's request to secure a prepaid dental plan on October 21, 1987 although it did not discuss the expedited procurement procedures and criteria pursuant to the General Procurement Law, §11-113(b); COMAR 21.05.06.03 and COMAR 21.01.02.29. (Agency Report, Exh. J, pages 60-69, as supplemented by BPW Transcript pages 37-59). According to Assistant Secretary Austin, the Board of Public Works also approved award of an agreement for a dental services plan to CIGNA on October 21, 1987. (Affidavit of Catherine K. Austin, page 9; BPW Transcript page 68). The Blue Cross-Blue Shield dental plan proposal was not selected under the competition that was conducted. (Affidavit of Catherine K. Austin, page 9; Agency Report, Exh. F, page 4; Agency Report, Exh. A (Appellant Bid Protest, page 4)).

28. On October 28, 1987, Appellant filed a protest with Personnel's procurement officer alleging that it had not been permitted to compete regarding the dental plan to be offered to State employees during the open enrollment period.

In this regard, Appellant maintains that Personnel did not follow required competitive procurement procedures including appropriate notice of the State's procurement needs as required by expedited procurement procedures pursuant to Maryland's General Procurement Law. It contends on the one hand that expedited procurement procedures were neither required nor justified for the instant solicitation under the General Procurement Law. On the other hand, it contends that expedited source selection procedures were not properly followed even if their use is permitted under the General Procurement Law. (Agency Report, Exh. A).

29. The open enrollment period began on November 1, 1987. Personnel

included the CIGNA prepaid, pretax dental plan in its flexible benefits package presented for voluntary selection by Maryland State employees on a 100% employee contribution basis.

30. By letter dated November 4, 1987, Appellant supplemented its initial protest underscoring its allegation that the proposed procurement of a dental plan from CIGNA is fatally flawed if Maryland's procurement law is properly applied. It asserts that two haphazard telephone calls from Mercer did not comport with the requirement for minimal public notice of the solicitation as required by §11-113 of the General Procurement Law regarding expedited procedures. It asserts that telephone notice of the State's needs is not a permitted method of obtaining competition under the expedited procurement procedures of §11-113 of the General Procurement Law and implementing regulations. (Agency Report, Exh. B).

31. On Friday, November 6, 1987 the Maryland Register contained a notice indicating that the State had awarded a contract to CIGNA for a dental services plan for State employees, retirees, and their dependents. The notice indicated that those employees selecting the CIGNA dental plan option would pay 100% of the premiums. (Agency Report, Exh. E).

32. In a further supplement to its protest on November 18, 1987, Appellant noted Personnel's reservation of a right to assert that the procuring of dental health care services to be offered to State employees on a voluntary, 100% employee funded basis as part of the flexible benefits package is not covered by the General Procurement Law, since public funds are not being used directly to pay CIGNA. In this regard, Appellant noted that Personnel had attempted, nevertheless, to follow the requirements of Maryland's General Procurement Law and the implementing procurement regulations. (Agency Report, Exh. C).

33. Again, on November 25, 1987, Appellant raised issues concerning Personnel's actions taken to obtain a voluntary employee dental plan on the grounds that Personnel failed to comply with the requirements of Maryland Annotated Code, Art. 64A §48E. Appellant asserted that Personnel did not obtain advice regarding a dental services plan pursuant to the statutory requirement providing that the Advisory Council shall "(1) Advise the Secretary of Personnel on the establishment of a procedure for soliciting bids from health care providers for a contract for the State Employees' Health Insurance Program;" (Agency Report, Exh. D).

34. On December 4, 1987, the procurement officer issued his final decision denying Appellant's protest. The procurement officer determined that the procurement was properly conducted pursuant to Maryland procurement law. He determined that there was an exigency warranting Personnel to resort to expedited procurement procedures and that Personnel took reasonable steps to obtain competition to the extent possible even though Appellant was not contacted and thus did not participate in the solicitation process.

In his final decision, the procurement officer noted Personnel's desire to provide Maryland employees a complete health care package which maximized employee benefits, maximized employee tax advantages and minimized employee costs. He pointed out the importance of providing flexible health benefit plans or cafeteria plans through which employees could select from a range of options some of which are made available to an employee on a pretax basis while others are made available on a post-tax basis, all pursuant to Section 125 of the Internal Revenue Code. In this regard, in order to provide State employees with a fully developed range of health options, the procurement officer determined that it was important to provide an employee

dental services plan on a pretax basis during the November 1987 open enrollment period. The procurement officer thus asserted that the selection of the CIGNA dental services plan through the use of expedited procurement procedures was permissible. (Agency Report, Exh. F; Appellant Exh. 19 as supplemented by Appellant's letter dated December 29, 1987 enclosing Commerce Clearing House (CCH) reprint of the IRC Section 125 and IRS proposed regulations 1.125-1 on cafeteria plans; Appellant Exh. 40).

35. On December 8, 1987, Appellant filed a second³ protest objecting to award of a contract to CIGNA for a two-year period, i.e. a multi-year contract, as not being permissible under expedited procurement procedures. Appellant maintains that urgent circumstances in the fall of 1987 that arguably might support an expedited procurement to meet the deadline of the November 1987 open enrollment period do not carry over so as to justify the award of a two year contract to CIGNA on an "urgent circumstances" basis.

36. On December 17, 1987, the Secretary of Personnel and a representative of CIGNA executed a dental plan agreement to continue in effect for two years entitled, "CIGNA Dental Health of Maryland, Inc., and State of Maryland Department of Personnel Voluntary Group Contract."

37. CIGNA, as of December 28, 1987, had expended approximately \$32,000 for printed enrollment and similar materials and \$21,000 for advertising. As of that date, approximately 13,000 Maryland State employee subscribers and 17,000 dependents had been covered by enrollment. Although CIGNA did not receive its certificate of authority to operate a prepaid dental plan from the State until April 1987 (Finding of Fact No. 14), certain CIGNA companies have been in the group dental health benefits business for 25 years in Maryland. CIGNA Dental Health, Inc.'s parent company has 14

³The issues raised by both protests are resolved by this decision.

years of experience in the administration and management of prepaid dental plans, like the one that was offered to Maryland employees. (Affidavit of William V. Heaphy, III, December 28, 1987).

38. Appellant noted a timely appeal to this Board on December 18, 1987. Appellant requested an expedited hearing which was held on December 28, 1987 following the receipt of briefs of the issues by the parties supplemented by documents proffered by the parties pursuant to a stipulation that the decision would be issued based on the written record, including documents submitted, and oral argument.

Decision

The threshold question for our consideration is whether this Board has jurisdiction over the substantive issues raised by this appeal where the activity under review involves a prepaid dental services plan with State employees paying 100% of the premiums and there are no State appropriations involved. In short, is the formation of the proposed agreement a procurement contract subject to the requirements of the General Procurement Law and thus our jurisdiction?

We conclude that the proposed agreement is not a procurement contract and thus not subject to our jurisdiction.⁴ It does not involve the State's entry into the marketplace to obtain services for the State within the meaning of the General Procurement Law; thus we do not have jurisdiction over the issues Appellant raises about the procedures used to arrange for the

⁴This Board's decision was issued orally to the parties on December 30, 1987, following a hearing on December 28, 1987 on the merits of the appeal. This written decision reflects the Board's decision stated on the record and when received starts the running of the appeal period, pursuant to the notice requirements of the Maryland Administrative Procedure Act, Md. Ann. Code, State Government Article §10-214. See generally: *Nuger v. State Ins. Comm'r*, 231 Md. 543, 191 A.2d 222 (1963).

agreement. Our decision generally rests on our view that Personnel's actions did not involve the process of obtaining a "procurement contract"⁵ over which we have jurisdiction pursuant to §11-138(c) of the General Procurement Law.⁶

Initially, it is important to understand that Maryland has waived sovereign immunity as a defense in a contract action.⁷ Q C Corp. v. Maryland Port Administration,⁸ 68 Md. App. 181, 510 A.2d 1101 (1986); aff'd in part, rev'd in part, Maryland Port Administration v. QC Corp., 310 Md. 379, 529 A.2d 829 (1987). The impact of this waiver is that the State of Maryland may be sued on all of its written contracts, even those not covered by the General Procurement Law.

However, for most State contracts, the Legislature has established an administrative remedy in the General Procurement Law which must be followed to resolve disputes concerning the formation of State contracts and disputes arising during contract performance. See: McLean Contracting Co. v. MTA, 70 Md. App. 514, 521 A.2d 1251 (1986). The Legislature has given this Board authority pursuant to §11-138(c) of the General Procurement Law⁹ to decide contract formation disputes for those contracts coming within the ambit of the General Procurement Law. And the General Procurement Law gives this Board subject matter jurisdiction, pursuant to §§11-137(f) and 11-138(c), to determine whether prescribed procurement procedures for

⁵We use "procurement contract" in this decision to distinguish a contract within the General Procurement Law from other State contracts not covered.

⁶We have set out in an Appendix to this Decision in pertinent part the Maryland statutory provisions on which our decision here is based and which we discuss.

⁷Appendix to Decision.

⁸The litigation involved a suit brought by a lessee against the lessor, the Maryland Port Administration, a State agency.

⁹Appendix to Decision.

contract formation (i.e. required bidding procedures) are complied with and result in valid contracts. Compare: James Julian, Inc., MSBCA 1222, May 14, 1985, 1 MICPEL ¶100 at 6.

As a general proposition, the General Procurement Law provides that a State agency is engaging in a procurement action when the agency acts in its proprietary or enterprise capacity by going into the marketplace to bargain and obtain goods or services that generally benefit the State. Compare Solon Automated Services, Inc., MSBCA 1046, January 20, 1982 1 MICPEL ¶10; Solon Automated Services, Inc., MSBCA 1117, February 29, 1984, 1 MICPEL ¶71; Baltimore Motor Coach Co., MSBCA 1216, January 8, 1985, 1 MICPEL ¶94 (1985); Ackerley-BWI Airport Advertisers, MSBCA 1318, February 13, 1987, 2 MICPEL ____ (1987). However, whether such an activity under a particular set of circumstances is a procurement action subject to this Board's jurisdiction is necessarily defined and delimited by the General Procurement Law.

Turning then to the specific jurisdictional issue, Personnel argues that the activity under review did not involve a "procurement" activity within the meaning of the General Procurement Law and thus the agreement executed on December 17, 1987 did not result in a "procurement contract." Appellant disagrees. Both base their respective arguments on their particular interpretation of §§11-101 and 11-103 of the General Procurement Law.¹⁰ In addition to specifying the types of contract actions that are covered, these provisions also name those State agencies that are exempt from the General Procurement Law and the types of procurement activities or agreements that are not covered.¹¹ With respect to the subject agreement, the applicability of

¹⁰Id.

¹¹Id.

the General Procurement Law rests on our interpretation of the legislative intent under the circumstances before us. See Solon Automated Services, supra, ¶171; QC Corporation v. MPA, supra.

The Legislature has expressly exempted classes of agreements and entire agencies from the General Procurement Law's coverage and thus our jurisdiction. For example, the General Procurement Law §11-103(g)(1)(i)¹² exempts Blind Industries and Services of Maryland from its coverage. Compare this exclusion with the more limited exclusion of the Maryland Environmental Service, found at §11-103(g)(1)(v)¹³ when it is engaged in enterprise activities funded exclusively on a user charge or contract basis with nonstate funds. And compare the last referenced provision with the provision that procurements by a State agency from another State agency, which are not covered by the General Procurement Law, §11-103(b)(1)(i), with procurements by a State agency on behalf of another State agency, which are covered by the General Procurement Law, §11-103(a)(3).¹⁴

A difficult issue arises where the General Procurement Law does not expressly exempt a type of agreement from its provisions but the nature of the State activity suggests that the activity may reasonably appear to fall outside what is generally understood to be a procurement by the State acting in its proprietary capacity, as distinguished from its regulatory capacity. In other words, some State activities and resulting agreements similar to the procurement and agreement under review have the attributes of a procurement contract. They provide for an offer, acceptance and consideration exchanged between the parties, but may not be procurement contracts covered by the General Procurement Law. Since this Board's jurisdiction covers only

¹²Id.

¹³Id.

¹⁴Id.

those "procurement contracts" covered by the General Procurement Law, the issue joined is whether the agreement under review is a "procurement contract" subject to the Board's authority to decide the substantive issues raised by Appellant.

Applicable to the instant appeal is the following definition for procurement:

"Procurement" means . . . the process of buying, leasing as lessee, purchasing, or otherwise obtaining any supplies, services, construction, construction related services, architectural services, or engineering services. General Procurement Law. §11-101(z).¹⁵

This definition must be read together with General Procurement Law §11-103(a)(1)-(3)¹⁶ which states that it is applicable in general (1) to every expenditure by a State agency under any contract (2) to every procurement by a State agency and (3) to procurement by a State agency on behalf of another governmental agency or any other entity.

As to every procurement by a State agency, the General Procurement Law applies, pursuant to §11-103(a)(2), even if any resulting contract will involve no State expenditures, and even if it will produce revenues for the State for services provided at certain described State facilities. Section 11-103(a)(3) states that the General Procurement Law applies to a procurement by a State agency on behalf of another governmental agency or any other entity.

We note that §11-103(a)(1) and (2) speak broadly in terms of all contracts whether they involve expenditures or receipt of monies by the State. They speak in terms of outflow and inflow of State monies affecting the State Treasury.

¹⁵Id.
¹⁶Id.

However, §11-103(a)(3) is stated in different contextual terms. It names a type of agency that may enter procurement contracts on behalf of other agencies or entities.¹⁷ To qualify as a procurement under §11-103(a)(3) the Legislature intended that the State action must in the first instance qualify as a procurement under §11-103(a)(1) or §11-103(a)(2). Procurement agencies then may procure on behalf of other agencies or entities.¹⁸

Whether the instant Personnel action was a procurement resulting in a procurement contract within the meaning of the General Procurement Law thus comes down to the appropriate classification of the agreement under review which involved the State entry into the marketplace to secure services, i.e., benefits, for its employees but does not directly involve the use of State funds to obtain those services.

We believe the agreement was not the type the Legislature intended to include within the meaning of a procurement contract. It does not involve the State acting in a proprietary capacity to obtain prepaid dental services for State employees. We are persuaded on this point by the language of Md. Ann. Code, Art. 64A, §48¹⁹ that authorized Personnel to "arrange", as distinguished from "procure" as set forth above in §11-101(z) of the General Procurement Law, for an employee dental services plan coupled with language that any dental services plan was to be "funded by contributions of State employees. . . ." Clearly this was not authority for Personnel to act in a proprietary capacity to obtain dental services on behalf of State employees in

¹⁷Our decision rests on the narrow ground that Personnel's action was not a procurement pursuant to §11-101(z) as applied by §11-103(a) of the General Procurement Law. It need not and does not rest on whether a State employee is included within the term "entity" set forth in §11-103(a)(3).

¹⁸Importantly, the General Procurement Law specifies only particular named agencies as "procurement agencies." General Procurement Law §11-105. This must mean that the procurement authority of other agencies is limited. See generally: COMAR 21.02.01.03.

¹⁹Appendix to Decision.

the generally understood procurement sense. The Legislature chose its words carefully and meant only to permit Personnel to use its administrative machinery to provide for a dental health plan for State employees to take advantage of at their own election and with their own funds.

A review of the fiscal notes for Senate Bill 424 (1985) which is the genesis of Md. Ann. Code, Art. 64A, §48(a)(2) indicates that State funds would not be involved in arranging for an employee funded dental plan. (App. Exhs. 37 and 38).²⁰ Had the Legislature meant for Personnel to obtain a dental services plan directly on behalf of State employees, it necessarily would have funded the project through budget appropriations. The above described factors taken together lead us to the conclusion that Personnel's action was not a procurement within the meaning of the General Procurement Law.

It is unfortunate that when Personnel went into the marketplace to arrange for an employee dental service benefits plan for some reason it overlooked those companies who have specialized in providing prepaid dental plan services in Maryland for some time now. This circumstance, however, cannot create a procurement contract subject to the jurisdiction of this Board where the State was not acting in its proprietary capacity, albeit the State's activity in going into the marketplace had many of the attributes of a State procurement.

For the foregoing reasons, therefore, the appeal is dismissed.

²⁰SB 424 (1985) fiscal note, Appellant's Exhibit 37, states that "[a]s long as costs of the plan were borne 100% by employee contributions, State expenditures would not be affected." Appellant's Exhibit 38, the fiscal note for SB 424 (1985) replacing the fiscal note set forth in Appellant's Exhibit 37, states that "[i]f all administrative arrangements of the plan were contracted with a provider and 100% of the costs of the plan were borne 100% by employee contributions, State expenditures should not be affected."

Appendix to Decision

Md. Ann. Code, State Government Article (1987 Cumulative Supplement) provides as follows:

§ 12-201. Sovereign immunity defense barred.

(a) In general.—Except as otherwise expressly provided by a law of the State, the State, its officers, and its units may not raise the defense of sovereign immunity in a contract action, in a court of the State, based on a written contract that an official or employee executed for the State or 1 of its units while the official or employee was acting within the scope of the authority of the official or employee.

(b) Exclusions.—In an action under this subtitle, the State and its officers and units are not liable for punitive damages. (An. Code 1957, art. 21, §§ 7-101, 7-102; 1984, ch. 284, §1; 1986, ch. 265.)

§ 12-202. Limitation on claims.

A claim under this subtitle is barred unless the claimant files suit within 1 year after the later of:

- (1) the date on which the claim arose; or
 - (2) the completion of the contract that gives rise to the claim.
- (An. Code 1957, art. 21, § 7-103; 1984, ch. 284, §1; 1986, ch. 265.)

§ 12-203. Budget request to satisfy judgments.

To carry out this subtitle, the Governor shall include in the budget bill money that is adequate to satisfy a final judgment that, after the exhaustion of the rights of appeal, is rendered against the State or any of its officers or units. (An. Code 1957, art. 21, § 7-104; 1984, ch. 284, § 1; 1986, ch. 265.)

Md. Ann. Code, State Finance and Procurement Article, Division II. General Procurement Law, Title 11, State Procurement ("General Procurement Law") provides in pertinent part, as follows:

Subtitle 1. State Procurement Code

Part I. Definitions; General Provisions

§ 11-101. Definitions.

(a) In general.—In this subtitle, the following words have the meanings indicated unless:

- (1) the context clearly requires a different meaning; or
- (2) a different definition is adopted for a particular title or provision.

* * *

(k) Contract.—(1) "Contract" means an agreement in whatever form entered into by a State agency for the lease as lessee of real or personal property or the acquisition of supplies, services, construction, construction related services, architectural services, or engineering services.

(2) "Contract" does not include:

(i) a collective bargaining agreement with an employee organization or an agreement creating an employer-employee relationship, as defined in § 15A (a) (3) of Article 64A of the Code; or

(ii) a Medicaid, judicare, or similar reimbursement contract for which user or recipient eligibility and price payable by the State are set by law or regulations.

* * *

(w) Multiyear contract.—"Multiyear contract" means a contract that requires appropriations for more than 1 fiscal year.

* * *

(y) Person.—"Person" means any individual or a corporation, partnership, sole proprietorship, joint stock company, joint venture, union, committee, club, or other organization or legal entity, including a nonprofit organization.

(z) Procurement.—(1) "Procurement" means the process of leasing real property as a lessee and the process of buying, leasing as lessee, purchasing, or otherwise obtaining any supplies, services, construction, construction related services, architectural services, or engineering services.

(2) "Procurement" includes the description of requirements, solicitation and selection of sources, preparation and award of contract, and all phases of contract administration.

(aa) Procurement agency.—"Procurement agency" means a State agency that is authorized by law or regulations to procure or contract.

(bb) Procurement agency head.—"Procurement agency head" means the head of a procurement agency.

(cc) Procurement officer.—"Procurement officer" means a person authorized by a State agency to enter into or administer contracts or make written determinations and findings with respect to them.

* * *

(3) "Services" includes services provided by attorneys, accountants, physicians, consultants, and other professional persons who are independent contractors, as opposed to State employees.

* * *

(Underscoring added).

Section 11-102, of the General Procurement Law provides:

§ 11-102. Construction; purposes and policies.

(a) Liberal construction.—Unless otherwise indicated, this Division II shall be liberally construed and applied to promote in State procurement the underlying purposes and policies specifically enumerated in subsection (b).

(b) Purposes and policies.—The underlying purposes and policies of this Division II include to:

- (1) provide for increased public confidence in the procedures followed in public procurement;
- (2) insure the fair and equitable treatment of all persons who deal with the procurement system of this State;
- (3) simplify, clarify, and modernize the law governing procurement by this State;
- (4) permit the continued development of procurement regulations, policies, and practices;
- (5) provide increased economy in State procurement activities and to maximize to the fullest extent the purchasing power of the State;
- (6) provide safeguards for the maintenance of a procurement system of quality and integrity;
- (7) foster effective broad-based competition through support of the free enterprise system; and
- (8) promote development of uniform procurement procedures to the extent possible. (1980, ch. 775, § 1; 1985, ch. 12; 1986, ch. 840, § 1).

In addition to the definitions in §11-101 of the General Procurement Law, §11-103 of the General Procurement Law specifies the applicability of the General Procurement Law by subject matter and agency designation as follows:

§ 11-103. Applicability; notice by procurement agency; modification or waiver of requirements.

(a) In general.—This Division II applies to:

- (1) every expenditure by a State agency under any contract except to the extent that:
 - (i) the State agency or procurement is expressly exempted under this subtitle; or
 - (ii) the State agency was expressly exempted, as of June 30, 1986, from some or all provisions of this article in accordance with a statutory provision that is not in this article;
- (2) every procurement by a State agency, even if any resulting contract will involve no State expenditure and will produce revenue for the State for services that are to be provided:
 - (i) at a State facility, including a State school, hospital, institution, or recreational facility, for the benefit of State officials, State employees, or students;

(ii) at a State hospital or institution, for the benefit of clients or patients;

(iii) at a State recreational facility, for the benefit of the public; or

(iv) at a State transportation or State higher education facility, for the benefit of the public, to the extent required by the Board; and

(3) procurement by a State agency on behalf of another governmental agency or any other entity.

(b) Exceptions.—Except as provided in subsection (e) of this section and §§ 11-154 and 11-172, this subtitle does not apply to:

(1) procurement by a State agency from:

(i) State agencies;

(ii) political subdivisions of this State or their agencies;

(iii) governments, including other states, the federal government, and other countries;

(iv) agencies or political subdivisions of other governments; or

(v) bistate, multistate, bicounty, or multicounty governmental agencies; and

(2) procurement for purposes of direct resale or remanufacture and subsequent resale in support of enterprise activities.

(c) University College overseas programs.—This subtitle does not apply to procurement by the University of Maryland for University College overseas programs if the University adopts regulations that:

(1) establish policies and procedures governing procurement for University College overseas programs; and

(2) promote the purposes stated in § 11-102 of this subtitle.

(d) Maryland Stadium Authority.—Except to the extent provided by §13-718(2) of the Financial Institutions Article, this Division II of this article does not apply to the Maryland Stadium Authority.

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(g) Certain State organizations.—(1) This subtitle does not apply to procurement by:

(i) Blind Industries and Services of Maryland;

(ii) Maryland State Arts Council for the promotion or support of the arts;

(iii) Maryland State Planning Council on Developmental Disabilities for services to support demonstration, pilot, and training programs;

(iv) the Maryland Automobile Insurance Fund for services related to its claims operations, for reinsurance, and for services related to its investment and banking activities;

(v) the Maryland Environmental Service when engaged in enterprise activities financed exclusively on a user charge or contract basis with nonstate funds;

(vi) the Maryland Health and Higher Educational Facilities Authority to the extent that no moneys of the State are to be expended on a contract;

(vii) the Maryland Historical Trust for the purpose of surveying and evaluating architecturally, archeologically, historically, or culturally significant properties, and, other than as to architectural services, for preparing historic preservation planning documents and educational material;

(viii) the Maryland Higher Education Supplemental Loan Authority, to the extent that no moneys of the State are to be expended on a contract;

(ix) the Maryland Industrial Training Program of the Department of Economic and Community Development for training programs for new or expanding businesses or industries;

(x) the Board of Trustees of the Maryland State Retirement and Pension Systems and the State Investment Agency for services related to the external management of the investment of assets of the retirement systems;

(xi) the Maryland Food Center Authority, to the extent the Authority is exempt under Title 6 of Article 41A of the Code;

(xii) Maryland Public Broadcasting Commission for artists' services for all education and cultural television productions; and

(xiii) public institutions of higher education for cultural, entertainment, and intercollegiate athletic contracts.

(2) Procurements by the entities listed in paragraph (1) of this subsection shall be made under procedures that promote the purposes stated in § 11-102 of this subtitle.

(Underscoring added).

* * *

State agencies conducting procurements are cautioned as follows:

§ 11-107. Compliance with State procurement laws and regulations.

(a) Compliance by State agencies.—A State agency may not enter into a contract except in accordance with this Division II and the regulations adopted under this Division II (referred to, collectively, in this section as "this Division").

(b) Contracts in violation of article void; voidable contracts.—
(1) Except as otherwise provided in this subsection (b) or elsewhere in this Division, a contract which is entered into in violation of this Division is void unless it is determined to be voidable under the provisions of paragraph (2).

* * *

(Underscoring added).

Bid protest and appeal procedures and the Appeals Board's jurisdiction are set forth in the following General Procurement Law provisions:

§ 11-137. Resolution of complaints.

(a) "Appeals Board" defined.—In this Part XII, the term "Appeals Board" means the Maryland State Board of Contract Appeals.

(b) Initiation of complaint.—(1) A prospective bidder or offeror, a bidder or offeror, or a contractor may, by the filing of a timely demand as defined in regulations adopted by the appropriate department, initiate a complaint relating to the formation of a contract or relating to a contract that has been entered into.

(2) Complaints relating to the formation of a contract include those concerning the qualifications of a bidder or offeror and the determination of the successful bidder or offeror.

(3) Complaints relating to a contract that has been entered into include those concerning the performance, breach, modification, or termination of the contract.

* * *

(d) Review of officer's decision.—(1) Unless otherwise provided by regulation, the procurement officer's decision shall be reviewed promptly by the procurement agency head and the head of any principal department listed in §8-201 of the State Government Article of the Code (or equivalent unit of State government) of which the procurement agency is a part.

(2) The reviewing authority may approve, disapprove, or modify the decision, or may resubmit the complaint, with appropriate instructions, to the procurement officer who shall proceed under the provisions of paragraph (c) (1) of this section. A decision of the reviewing authority approving, disapproving, or modifying the decision of a procurement officer is the final action of the procurement agency.

(e) Enforcement of determination.—The determination of a complaint under subsections (b) through (d) is judicially enforceable in the appropriate court when it has become final and is no longer subject to judicial review.

(f) Appeals to Board.—(1) A bidder or offeror, a prospective bidder or offeror, or a contractor may appeal the final action of a procurement agency to the Appeals Board:

(i) within 10 days after notice of a final action as to a protest regarding the formation of a contract and, in which case, the Appeals Board shall decide the case expeditiously giving it precedence over other matters before the Appeals Board; and

(ii) within 30 days after receiving notice of a final action relating to a contract that has been entered into.

* * *

(h) Exhaustion of administrative remedies.—A prospective bidder or offeror, a bidder or offeror, or a contractor shall exhaust the administrative remedies provided in this section and § 11-138 before seeking judicial relief.

* * *

§ 11-138. State Board of Contract Appeals.

* * *

(c) Jurisdiction, application of Administrative Procedure Act; regulations.—(1) The Appeals Board shall have jurisdiction to hear and decide all appeals arising under the provisions of §11-137 (f) of this subtitle.

* * *

§ 11-139. Judicial review.

(a) Judicial review of decisions of Appeals Board.—The decisions of the Appeals Board are subject to judicial review in accordance with the provisions of Title 10, Subtitle 2 of the State Government Article (Administrative Procedure Act — Contested Cases).

(b) Right of aggrieved party to appeal final decision.—Notwithstanding the Administrative Procedure Act, any aggrieved party, including a State agency, may appeal all or part of a final decision of the Appeals Board to a court of competent jurisdiction. (Underscoring added).

Personnel's substantive statutory provisions set forth in Md. Ann. Code, Art. 64A §48 (Vol. 6, 1983 Replacement, 1987 Cum. Supp.) state in pertinent part as follows:

§ 48. State Budget appropriation for hospital and medical surgical insurance.

(a) In general. — (1) The Governor shall include a sum of at least one million five hundred thousand dollars (\$1,500,000) in the budget each year as a contribution toward the cost of a program of hospital, medical, and surgical insurance for employees of the several departments, boards, bureaus, commissions, and other agencies of the State government.

(2) The Secretary of Personnel may arrange for a dental plan for State employees choosing to participate that shall be funded by contributions of State employees choosing to participate. (1985, ch. 198).

(Underscoring added).

Along with this statutory authority given the Secretary of Personnel, the Legislature also created a "State Employees' Health Insurance Advisory Council To the Secretary of Personnel." Thus, Md. Ann. Code, Art. 64A, §48E (Vol. 6, 1983 Replacement, 1987 Cum. Supp.) provides as follows:

§ 48E. State Employees' Health Insurance Advisory Council.

(a) In general. — There is a State Employees' Health Insurance Advisory Council to the Secretary of Personnel.

(b) Membership. — The Council consists of the following members appointed by the Governor.

(1) The Secretary of Personnel or a representative of the Secretary of Personnel;

(2) A representative of:

(i) The Department of Budget and Fiscal Planning;

(ii) The Department of Health and Mental Hygiene;

(iii) The Insurance Commissioner;

(iv) The Comptroller;

(v) The Maryland Classified Employees Association;

(vi) The American Federation of State, County, and Municipal Employees;

(vii) The Maryland Troopers Association; and

(viii) The public.

(c) Chairman. — The Governor shall designate 1 member as chairman.

(d) Term of members. — (1) The Secretary of Personnel shall serve as a continuing member of the Advisory Council.

(2) Other members of the Advisory Council shall serve for a 2-year term on a staggered basis.

(e) Duties of Advisory Council. — The Advisory Council shall:

(1) Advise the Secretary of Personnel on their establishment of a procedure for soliciting bids from health care providers for a contract for the State Employees' Health Insurance Program; and

(2) Advise the Secretary of Personnel on the implementation, maintenance, negotiation, and administration of the State Employees' Health Insurance Program.

(f) Duties of Secretary of Personnel. — The Secretary of Personnel shall accord due consideration to the concerns expressed by the representatives of employee organizations.

(g) Duties of Advisory Council. — The Advisory Council shall:

(1) Meet at least quarterly;

(2) Submit an annual report to the Governor and, subject to § 2-1312 of the State Government Article, to the General Assembly;

(3) Maintain a record of transactions; and

(4) Maintain transcripts of meetings and proceedings.

(h) Department of Personnel to provide administrative support.

—The Department of Personnel shall provide administrative support to the Advisory Council. (1985, ch. 217; 1986, ch. 5, § 1; 1987, ch. 11, § 1.)