

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of SOLON AUTOMATED)
SERVICES, INC.)
) Docket No. MSBCA 1117
Under UMAB Request For Bids)
No. 94505-Z)

February 29, 1984

Statutory Construction - When construing a statute to determine legislative intent, one should consider not only the literal or usual meaning of words, but their meaning and effect in light of the setting, the objectives and purposes of the statute, with the real intention prevailing over the literal intention.

Statutory Construction - Article 21, Md. Ann. Code, §1-101(k) defines the term procurement in so broad a manner as to cover concession contracts bringing revenue to the State. This broad definition was found to be consistent with the stated principles and policies found elsewhere in Article 21.

Statutory Construction - Legislative History - Legislative history may not be resorted to in construing a statute in the absence of some ambiguity in the statutory language. Here the plain language of Article 21 clearly was determined to encompass the award of concession contracts.

Bid Security - Where a bid price was required to be stated as a percentage rate of gross income derived from a laundry concession, Article 21, Md. Ann. Code, §3-504(b) permitted the procurement officer to determine the amount of the required bid security.

Bid Security - The adequacy of bid security should be determined on the value of the basic term or items to be supplied in a contract without regard to the optional quantities or renewal periods since an option in a contract is a contingency with no certainty of being exercised.

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OPINION BY MR. LEVY

This is an appeal from a University of Maryland at Baltimore (UMAB) procurement officer's final decision denying Appellant's protest of the award of a concession contract to the highest bidder. Appellant maintains that the high bidder failed to submit required bid security and other mandatory information with its bid. UMAB contends that bid security was not required and that the high bidder did supply all required information. In a motion to dismiss, UMAB also claims preliminarily that the State procurement law and regulations do not apply to this revenue generating contract and, further, that this Board does not have jurisdiction to consider this appeal. Both parties have requested that the Board decide this appeal from the record in the event the motion to dismiss is not dispositive of the matter.¹

Findings of Fact

1. On July 15, 1982 UMAB advertised Request For Bids (RFB) No. 94505-Z for the furnishing of clothes washer and dryer services in the residence halls on the UMAB campus. The contract was to be for a three year period with options for UMAB to renew the service for two additional years. The award was to be made to the vendor who agreed to pay UMAB the highest percentage of its gross income from the machines.

2. The specification attached to the RFB apprised bidders that bid security, in the amount of 5% of the contract amount, would be required if the contract was expected to exceed \$25,000.00.

3. Bids were opened on July 30, 1982 and Macke Laundry Services, Inc. (Macke) was identified as the high bidder. Appellant, the second highest bidder, filed a protest on September 1, 1982² requesting that Macke be declared non-responsive and that it be awarded the contract. Appellant maintains that Macke did not submit the required bid security with its bid even though the contract was valued at more than \$25,000³ and that it did not furnish required documents outlining its business history and information as to the brand and type of machines to be used at each facility.

4. Mr. Joseph Drach, the procurement officer, rendered a final decision on October 4, 1982 denying Appellant's protest on the ground that the State procurement law and regulations do not apply to revenue contracts. Notwithstanding this position, he further found that a bid security was not

¹Tr. p. 15, p. 26.

²Appellant maintains that it learned of the basis of its protest on August 30, 1982 and that its protest is therefore timely. UMAB has raised no objection to the timeliness of the protest.

³Appellant bases this on the statement in the RFB that the gross collections in fiscal year 1982 were \$6,299.00. This amount was then multiplied by five years, which was the three year period of the contract plus the two option years. (Appellant's October 20, 1982 letter to MSBCA p. 3, footnote 1)

required for the
\$25,000 over the
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provide the record

5. Appellant
filed a motion
hear this appeal

6. A hearing
raised. Appellant
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I. Motion to

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Article 21, Md. Ann. Code, §1-202⁵ generally states the applicability of Maryland's procurement law. In so doing, it exempts five primary classes of procurements. Absent from this list of exemptions are procurements by a State agency under a contract of services that are to be provided at a State facility for the benefit of State employees, officials, students, etc. that will involve no expenditure of State funds and, to the contrary, will produce revenue. Although UMAB argues that this class of procurements, nevertheless, implicitly was intended to be exempted from the requirements of Article 21, we cannot agree. "Where a statute expressly provides for certain exclusions, others should not be slightly read therein by implication, for if the

⁵This language states that:

(a) In general. — This article applies to:

- (1) Every expenditure by a State agency for supplies, services, and construction under any contract or similar business agreement;
- (2) Procurement by a State agency on behalf of another governmental agency or any other entity; and
- (3) Procurement by the Maryland Automobile Insurance Fund, the University of Maryland, and the Maryland Environmental Trust, all of which are State agencies for the purposes of this article.

(b) Exceptions. — Except as provided in §§ 3-405, 3-501, 8-204, 8-501 through 8-515, 8-701 through 8-705, 9-106, and 9-206, this article does not apply to:

- (1) Contracts or like business agreements between a State agency and another State agency or a political subdivision of the State or other governments;
- (2) Procurement by bistate or multistate governmental agencies;
- (3) Procurement by bicounty or multicounty governmental agencies;
- (4) Procurement by political subdivisions of the State, including counties, municipalities, sanitary districts, drainage districts, soil conservation districts, and water supply districts; and
- (5) Procurement for purposes of direct resale or remanufacture and subsequent resale in support of enterprise activities. (Underscoring added).

Legislature intends other exclusions it is so easy to add them to the already-named explicit ones." State Insurance Commissioner v. Nationwide, 241 Md. 108, 117 (1965).

The general purpose and language of Maryland's procurement law likewise is contrary to UMAB's position here. In this regard, Art. 21, Md. Ann. Code, §1-201 provides that ". . . this article shall be liberally construed and applied to promote . . ." the following underlying purposes and policies:

- (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. (Underscoring added).

Article 21, Md. Ann. Code, §1-101(k) further defines the term "procure" to mean the:

. . . buying, renting, leasing, purchasing, or otherwise obtaining any supplies, services, or construction. "Procure" includes all functions that pertain to the obtaining of any public procurement, including description of requirements, selection, and solicitation of sources, preparation and award of contract, and all phases of contract administration. (Underscoring added).

The term procurement and the principles and policies essential to generate effective broad based competition⁶ thus have not been limited by the foregoing language to contracts involving the expenditure of State funds and we so find.

UMAB next contends that the legislative history of Maryland's procurement law demonstrates that the award of concession contracts was not intended to be guided by Code Article 21.⁷ Legislative history, of course, may

⁶Competition is important for concession contracts just as it is for procurements involving the expenditure of State funds. Where competition is maximized, the State is likely to receive higher revenues than it otherwise would in a less open atmosphere.

⁷UMAB submits that House Bill 694 (1980) and Senate Bill 372 (1980), both introduced during the same legislative session wherein Maryland's procurement law was enacted, provided for separate treatment of concession contracts under Code Article 78A. This allegedly demonstrated the Legislature's belief that separate statutory treatment of concession contracts was required. These bills, however, were not enacted.

not be resorted to in construing a statute in the absence of some ambiguity in the statutory language. Department of Motor Vehicles v. Greyhound Corp., 247 Md. 662, 234 A.2d 255 (1967). Since we construe the plain language of Article 21 clearly to encompass concession contracts of the type involved here, we decline to consider the legislative history.

For the foregoing reasons, therefore, UMAB's motion to dismiss is denied.

II. Substantive Aspects of Bid Protest

Appellant states that projected collections by the successful contractor under the captioned contract were expected to exceed \$31,000 over its five year term. Since Maryland law, regulations and the instant RFB all require procurements over \$25,000 to be accompanied by a bid bond in an amount equal to at least 5% of the amount bid, a bid bond was said to be required. Macke's failure to include a bid bond with its bid thus is said to have rendered its bid non-responsive.

Article 21, Md. Ann. Code §3-504 provides, in pertinent part, that:

(a) Each bidder or offeror for a construction contract shall give a bid bond if the bid or offer exceeds \$25,000. Bid bonds may be required for any other procurement over \$25,000, as determined by the procurement officer. The bid bond shall be provided by a surety company authorized to do business in this State, or the equivalent in cash, or in a form satisfactory to the procurement officer.

(b) The bid bond shall be in an amount equal to at least 5 percent of the amount of the bid or price proposal except that, for bids stating a rate but not a total cost, the bid bond shall be in an amount as determined by the procurement officer.

(c) If the invitation for bids or request for proposals require that a bid bond be provided, a bidder or offeror that does not comply shall be rejected. (Underscoring added).

The initial question raised by this language, therefore, is what was the amount bid by Macke.

A "bid" is ". . . a statement of price, terms of sale, and a description of the supplies, services, or construction offered by a vendor to the State." (Underscoring added). COMAR 21.01.02.07. Here bidders were competing for the right to install laundry equipment on UMAB property to service residing students. In consideration for obtaining this right and the revenue accruing from such a concession, bidders were to compensate UMAB based upon a percentage of gross receipts. The responsive and responsible bidder who offered to pay the highest percentage rate to UMAB was to receive the award. This percentage rate is considered the bid amount.

Obviously, in this type of contract, it is difficult to determine what amount actually will be realized by the State over the life of the contract. Using Appellant's projections as to machine revenues, however, it is clear that an amount well under \$25,000 would be received by UMAB under the contract. Assuming this to be a reasonable projection of revenues, a bid bond expressly was not required by law.

Recognizing the difficulty in ascertaining contract amounts in these types of contracts, however, Maryland law provides that where a rate is to be bid rather than a total amount, the procurement officer is authorized to determine the amount of the bid bond. Here the procurement officer apprised prospective bidders at the pre-bid conference that a bid bond would not be required. Under the circumstances present here, we cannot say that the procurement officer's waiver of the bid bond was contrary to law, constituted an abuse of discretion or otherwise affected Appellant's opportunity to compete fairly for the award of the captioned contract.

Even if we were to assume, as did Appellant, that gross collections were to be used in determining the value of the bids, a bid security still would not have been required. Here the contract was for a three year term with a two year option to renew. An option in a contract unilaterally permits a party to purchase additional supplies or services or to extend contract performance. 41 Comp. Gen. 758 (1962). The exercise of an option is contingent on several factors such as whether there is a continuing need for the product or service; whether there are funds available to pay for the option period or whether it would be more advantageous to competitively bid again for the goods or services rather than exercise the option. Since there is no certainty that an option will be elected, the adequacy of a bid bond customarily is determined on the sole basis of the price for the basic items or term without regard to the optional quantities or renewal periods. Comp. Gen. Dec. B-187843, January 25, 1977, 77-1 CPD ¶55, reconsidered February 23, 1977, 77-1 CPD ¶131; Comp. Gen. Dec. B-209003.2, January 20, 1983, 83-1 CPD ¶73.

Using Appellant's projected gross collections approach, the bid security for this procurement should have been calculated on the basic three year period, not the contingent five year period. The value of the bid therefore would be less than \$25,000 and the bid security would not be required.

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

