BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Spruell Development Corporation	)	
	)	
	)	Docket No. MSBCA 1203
Under DGS RFP #LA-25-84	)	

December 17, 1984

Attorneys' Fees - Appellant, a small business, was not entitled to recover those attorneys' fees incurred in its bid protest appeal since Md. Ann. Code, State Government Article, §10-217 permits such recovery only when the State initiates a contested case or civil action. Appeals to this Board may be initiated ony by a disappointed bidder or offeror and hence there is no basis upon which to award either attorneys' fees or other litigation expenses.

Statutory Interpretation- Where the Board found the language of Md. Ann. Code, State Government Article, §10-217 clearly and unambiguously to permit recovery of litigation expenses only where the State initiates a contested case or civil action against a small business, there was no need to look beyond the statutory language to ascertain legislative intent.

Statutory Interpretation - Where a statute relaxes a common law prohibition, it must be construed strictly. Here the Board strictly construed the term "initiate" to mean the commencement of litigation.

Statutory Interpretation - Even if the term "initiate" reasonably was subject to more than one interpretation, the legislative history of Md. Ann. Code, State Government Article, §10-217 establishes that the Legislature intended for litigation expenses to be recovered by small businesses only where the State has commenced litigation by filing an appropriate pleading either in the courts or administratively.

Proposal Preparation Costs - The defense of sovereign immunity is available to the State to preclude the award of proposal preparation costs under an implied contract theory.

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OPINION BY CHAIRMAN BAKER

This appeal, as originally taken, questioned the propriety of a proposed lease award to Beltway Plaza Developers for office space in the Dodge Park Professional Building. Prior to a hearing on the appeal, the Maryland Department of General Services (DGS) rejected all proposals which it had received and decided to solicit new proposals. This mooted the procurement issues raised by Appellant and resulted in a partial dismissal of the captioned appeal. However, Appellant reserved whatever right it had to recover attorneys' fees and proposal preparation costs. These quantum issues are all that remain for the Board to consider.

I. Attorneys' Fees

It is well settled in Maryland that attorneys' fees are not recoverable in litigation in the absence of a contractual agreement to pay, a statutory

requirement, or a rule of court.[1] Empire Realty Co., Inc. v. Fleisher, 269 Md. 278, 286 (1973); Colonial Carpets, Inc. v. Carpet Fair, Inc., 36 Md. App. 583, 590 (1977). Here Appellant finds its right to recover under Md. Ann. Code, State Government Article, §10-217.[2] This statute permits an agency to

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[1]Attorneys' fees are recoverable under certain circumstances in Maryland courts pursuant to Rule 1-341 (formerly Rule 604(b)). The Maryland Rules of Procedure have the force and effect of law until rescinded, changed or modified by the Court of Appeals, or otherwise by law and hence are equivalent to a statutory requirement to pay attorneys' fees. Md. Const., Art. IV, §18A; Hill v. State, 218 Md. 120, 127 (1958); Ginnavan v. Silverstone, 246 Md. 500, 504-505 (1967).

[2]§10-217. Litigation expenses for small business.

(a) "Business" defined. — In this section, "business" means a trade, professional activity, or other business that is conducted for profit.

(b) Scope of section. — This section applied only to:

(1) an agency operating Statewide; and

(2) a business that, on the date when the contested case or civil action is initiated:

(i) is independently owned and operated; and

(ii) has less than 50 employees, including, if a corporation owns 50% or more of the stock of the business, each employee of the corporation.

(c) Reimbursement authorized. — Subject to the limitations in this section, an agency or court may award to a business reimbursement for expenses that the business reasonably incurs in connection with a contested case or civil action that:

(1) is initiated against the business by an agency as part of an administrative or regulatory function;

(2) is initiated without substantial justification or in bad faith; and

(3) does not result in:

(i) an adjudication, stipulation, or acceptance of liability of the business;

(ii) a determination of noncompliance, violation, infringement, deficiency, or breach on the part of the business; or

(iii) a settlement agreement under which the business agrees to take corrective action or to pay a monetary sum.

(d) Claim required in contested case. — (1) To qualify for an award under this section when the agency has initiated a contested case, the business must make a claim to the agency before taking any appeal.

(2) The agency shall act on the claim.

(e) Amount. — (1) An award under this section may include:

(i) the expenses incurred in the contested case;

(ii) court costs;

(iii) counsel fees; and

(iv) the fees of necessary witnesses.

(2) An award under this section may not exceed $10,000.

(3) The court may reduce or deny an award to the extent that the conduct of the business during the proceedings unreasonably delayed the resolution of the matter in controversy.

(f) Source of award. — An award under this section shall be paid as provided in the State budget.

(g) Appeals. — (1) If the agency denies an award under this section, the

award, among other things, those attorneys' fees incurred by a small business in a contested case initiated by a State agency. The conditions precedent to an award of attorneys' fees under the foregoing statute may be summarized as follows:

1. The party seeking to recover must be a "small business" as that term is defined in §§10-217 (a) and (b) of the statute.

2. A contested case or civil action must have been initiated by a State agency against the business as part of that agency's administrative or regulatory function.

3. The action must have been initiated without substantial justification or in bad faith.

4. The action must not have resulted in:

a) an adjudication, stipulation, or acceptance of liability of the business;

b) a determination of noncompliance, violation, infringement, deficiency, or breach on the part of the business; or

c) a settlement agreement under which the business agrees to take corrective action or to pay a monetary sum.

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business may appeal, as provided in this subtitle.

(2) An agency may appeal an award that a court makes under this section. (An. Code 1957, art. 41, §§ 244, 255A; 1984, ch. 284, § 1.)

5. The business must claim attorneys' fees at some point during the contested case proceeding and prior to any court appeal.

The parties have stipulated that factors 1, 4 and 5 all have been established. DGS, however, contends that it is not liable for Appellant's attorneys' fees since it did not initiate the contested case before the Board or act in bad faith and/or without substantial justification. For purposes of administrative efficiency, the Board ordered that the bad faith and substantial justification issues be deferred pending a consideration of the less complex question concerning who initiated the action now before us.

The mandatory procedure established for the administrative resolution of bid protests has two tiers. The first tier involves consideration of the protest by the responsible procurement officer of the using agency. Md. Ann. Code, Art. 21, §7-201(a). Resolution of disputes at this level does not require adherence to the provisions of Maryland's Administrative Procedure Act (APA) and hence such disputes are not contested cases.[3] See Md. Ann. Code, Art. 21, §7-201(b). Upon denial of the protest by the procurement officer, a disappointed bidder or offeror ". . . may appeal the action to the State Board of Contract Appeals." Md. Ann. Code, Art. 21, §7-201(d). Proceedings before the Board constitute the second tier of the administrative process and are required by law to be conducted pursuant to the contested case provisions of the APA. Md. Ann. Code, Art. 21, §7-202(c). An appeal to the Board is initiated by the filing of a notice of appeal. COMAR 21.10.07.02. Pursuant to the foregoing statutory and regulatory framework, only a disappointed offeror or bidder may initiate a Board appeal.

Appellant contends that the language of State Government Article, §10-217 should be construed liberally so as to effectuate the policy objective which underlies it. In this regard, we are told that the purpose of the law is to provide a means of recompense which otherwise would not be available to small businesses who have been forced to bear the expense of litigating against the State when the State's position substantially is unjustified or is advanced in bad faith. Regardless of the procedural framework established for the resolution of bid protests at the Board, Appellant submits that an appeal is taken only when a bidder or offeror perceives that its rights have

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[3] A "contested case" means a proceeding before an agency to determine:

"(1) a right, duty, statutory entitlement, or privilege of a person required by law to be determined only after an opportunity for an agency hearing; or

(2) the grant, denial, renewal, revocation, suspension; or

(3) amendment of a license that is required by law to be determined only after an opportunity for an agency hearing."

Md. Ann. Code, State Government Article, §10-201(c).

been abridged by the action of a State agency. Under such circumstances, Appellant argues that the State has precipitated the dispute and, hence, in actuality, has initiated the contested case proceeding.

It is the cardinal rule of statutory interpretation in Maryland that the intent of the Legislature be ascertained and carried out. The primary source a court or board has for ascertaining the intent of the Legislature is the language of the statute itself. If there is no ambiguity or obscurity in the language of a statute, there is usually no need to look elsewhere to ascertain legislative intent. In re Special Investigation No. 236, 295 Md. 573, 576 (1983); Md. - National Capital Park and Planning Commission v. Mayor and Council of Rockville, 272 Md. 550, 325 A.2d 748 (1974).

Notwithstanding Appellant's argument, §10-217 of the State Government Article (statute) must be construed strictly. The statute relaxes the common law prohibition against the award of attorneys' fees and cannot be extended, by construction or implication, to situations not fairly or clearly within its provisions. Dillon v. Great Atlantic and Pacific Tea Company, Inc., 43 Md. App. 161, 166 (1979). The provisions of the statute, as we read them, modify the common law to permit the award of attorneys' fees only in situations where a contested case or civil action is initiated by a State agency against a small business. The term initiate commonly is taken to mean the filing of a complaint or similar document having the effect of commencing litigation. Had the Legislature intended a broader modification of the common law, it easily could have worded the statute so as to permit recovery in any contested case or civil action wherein the State advances a position against a small business which is without substantial justification or is pursued in bad faith. Compare Opinion No. 83-028 (July 1, 1983), (to be published at 68 Opinions of the Attorney General ___ (1983)).

Assuming, arguendo, that the word "initiated" may be construed to have a broader meaning than we find possible, it becomes appropriate to review the history of the statute in search of legislative intent. Welsh v. Kuntz, 196 Md. 86, 93, 75 A.2d 343 (1950). The statute was introduced during the 1983 legislative session as Senate Bill 72. The original draft of the bill proposed new language for the Courts and Judicial Proceedings Article of the Code permitting a small business to recover litigation expenses:

> In any administrative proceeding before an administrative law judge and the agency resulting from a complaint issued by a state agency against a small business pursuant to the administrative or regulatory functions of the agency . . . if:
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> (1) The small business prevails in that action; and
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> (2) Either the State agency was without substantial justification in initiating the complaint or that [sic] the State brought the action in bad faith.

The statute as enacted was codified under Code Article 41, §255A as part of the APA. Section 255A(b) modified the original language of Senate Bill 72 as follows:

> In any administrative adjudicatory proceeding or civil action resulting from a complaint issued by an agency against a small business pursuant to the administrative or regulatory functions of the agency, the small business may be awarded reasonable litigation expense if: . . .

Thus, the statutory language was broadened to include civil actions brought in the courts and concomitantly tightened presumably to restrict administrative recovery to contested cases brought under the APA. In each instance, however, the Legislature clearly specified that recovery of litigation expenses was dependent upon a complaint first having been issued by a State agency against a small business.

On October 1, 1984, the State Government Article of the Code became effective pursuant to Chapter 284 of the Laws of 1984. The Act transferred the APA to the State Government Article with certain revisions. The revisor's note to §10-217 of the APA states that the section was ". . . derived without substantive change from former Art. 41, §§244(b) and 255A (a)(2) through (f)." Although the revisor's note was not enacted as part of the recodification, it is well settled that because "the principal function of a Code is to reorganize the statutes and state them in simpler form, changes are presumed to be for the purpose of clarity rather than for a change in meaning." Welsh v. Kuntz, supra, 196 Md. at p.97. The Court of Appeals further has stated that "[e]ven a change in phraseology of a statute in a codification will not as a general rule modify the law, unless the change is so radical or material that the intention of the Legislature to modify the law appears unmistakably from the language of the Code. Bureau of Mines of Maryland v. George's Creek Coal and Land Co., 272 Md. 143, 155 (1974); Della Ratta v. Dixon, 47 Md. App. 270, 283 (1980). We cannot say here that the change in phraseology appearing in the Code Revision's final draft of §10-217 of the APA was intended to broaden the right of a small business to recover attorneys' fees. A requirement that a contested case or civil action be initiated by a State agency, in our view, is equivalent to one which mandates that an agency file a complaint against a small business. In all probability, since the term "complaint" is not used uniformly and is not the form of pleading required to commence litigation in every administrative forum and court, the phraseology was changed to make clear that the initiation of litigation by the State, by whatever pleading is appropriate, is the critical prerequisite to recovery.

In conclusion, since the appeal to this Board was not initiated by DGS, there can be no award of attorneys' fees even assuming that bad faith or lack of substantial justification for the rejection of all bids could be proven.

II. Proposal Preparation Costs

Appellant additionally requests the sum of $400 which it incurred in preparing a proposal under the captioned solicitation. This cost is said to be recoverable under Federal law and, hence, should be recoverable in Maryland as well.

In 1956, the U.S. Court of Claims concluded that the Federal government impliedly warrants that it will give fair and honest consideration to all bids received pursuant to a solicitation and that it will not reject any of them in an arbitrary or capricious manner. Heyer Products Company, Inc. v. United States, 135 Ct.Cl. 63, 140 F. Supp. 409 (1956). A breach of this

warranty further was said to permit an injured party to come into court, prove his cause of action, and if successful, recover its bid or proposal preparation costs. Heyer Products Company, Inc. v. United States, 147 Ct.Cl. 256, 177 F. Supp. 251 (1959); Keco Industries, Inc. v. United States, 192 Ct.Cl. 773, 428 F.2d 1233 (1970). The Comptroller General likewise has considered the award of bid or proposal preparation costs under the same implied contract theory. University Research Corporation, B-186311, 77-2 CPD ¶118 (1977); T & H Company, B-181261, 75-1 CPD ¶345 (1975).

While the State of Maryland similarly may warrant impliedly that it will consider submitted bids and proposals fairly and honestly, a breach of this warranty is not actionable. In waiving sovereign immunity in contract actions, the Legislature has done so only with regard to " . . . an action in contract based upon a written contract executed on behalf of the State. . . ." Md. Ann. Code (1981 Repl. Vol.), Art. 21, §7-101. As recently stated by the Court of Special Appeals:

> However meritorious a claim based upon an implied contract may be, if that claim is against the State or any of its agencies, it is barred because it is not based upon a written contract.

Mass Transit Administration v. Granite Construction Company, 57 Md. App. 766, 780, 471 A.2d 1121 (1984). Since Appellant's request for proposal preparation costs is based on an implied contract theory, it therefore must be denied.

III. Conclusion

For all of the preceding reasons, Appellant's claim for attorneys' fees and proposal preparation costs is denied.

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