

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of THE OWL CORPORATION)
)
) Docket No. MSBCA 1885
)
Under Northeast Maryland)
Disposal Authority RFP)
for the purchase of)
Recyclable Paper)

June 9, 1995

Board of Contract Appeals/Jurisdiction/Statutory Prohibition

Board does not have Jurisdiction to hear bid protest where respondent is Northeast Maryland Waste Disposal Authority, which was established to coordinate Waste Disposal activities for several Counties, and is specifically exempted from application of the General Procurement Law by §3-921 of the Natural Resources Article.

APPEARANCE FOR APPELLANT:

Maureen E. Murphy, Esq.
John V. Murphy, Esq.
Catonsville, MD

APPEARANCE FOR RESPONDENT:

Leigh S. Halstad
Assistant Attorney General
Baltimore, MD

OPINION BY BOARD MEMBER STEEL

This matter comes before the Board on Respondent's Motion to Dismiss for Lack of Jurisdiction the timely Appeal of Appellant, The Owl Corporation (Owl).

Findings of Fact

1. Respondent Northeast Maryland Waste Disposal Authority (Authority), was established by the by the Northeast Maryland Waste Disposal Authority Act (Acts 1980, ch. 871) for the purpose of assisting certain participating political subdivisions of the State to provide adequate waste disposal facilities on a regional basis, and is a "public instrumentality of the State of Maryland." Md. Nat. Res. code Ann. §3-901 et seq.

2. Pursuant to the 1988 Maryland Recycling Act, Md En. Code Ann., (§§9-505 and 9-1703, the Authority, on behalf of the City of Baltimore, Baltimore County, and Harford County, Maryland, prepared and issued a Request for Proposals (RFP) on processing and marketing Recyclable Paper from Baltimore City, Baltimore County and Harford County, with proposals due to be filed by June 15, 1994.
3. The Authority was never intended to be a party to any contract entered into as a result of the RFP. The RFP states at page 1:

Once Proposals are received, final negotiations will be handled by Baltimore City, Baltimore County and Harford County, and will result in agreements between these subdivisions and selected Proposer(s) for the processing/marketing of recyclable paper collected in their respective residential recycling programs.

and at page 9:

The Authority will assist the Counties in making decisions on successful proposers, but will not be a party to the final contracts.

4. Appellant submitted a proposal for services under the RFP to Harford County. The Appellant was apparently the only bidder.
5. Harford County determined to reject all bids, and extend the contract with the current provider, BFI.
6. Appellant protested this determination, and on April 19, 1995, the Authority's Acting Executive Director, Robin D. Depot, denied the protest. This timely appeal followed, and the Authority filed a motion to dismiss the appeal for lack of subject matter jurisdiction.

Decision

The Authority argues in its motion that this Board does not have jurisdiction to hear this appeal and that it should therefore be dismissed. Appellant argues that the Authority, a State agency created by the Maryland General Assembly, has an interest in the handling of waste, prepared the bid documents pursuant to COMAR 14.13.01, conducted the bid opening, and reserved for itself the right to reject any and all bids and/or terminate a contract. Therefore, Appellant argues, this Board has jurisdiction to review the bidding process and to force Harford County to enter into a contract with Appellant since it was the low bidder.

Respondent counters that although the Authority may be a State-created entity, the enabling statute for the Authority specifically exempted the entity from application of the General Procurement law, and therefore, this Board's jurisdiction.

Under Maryland Rule 2-322(c), a Motion to Dismiss is treated by the Circuit Courts as a Motion for Summary Judgment. Hrehorovich v. Harbor Hosp. Ctr., 93 Md. App. 722, 614 A.2d 1021 (1992), cert. denied, 330 Md. 319, 624 A.2d 490 (1993). It is the Board's responsibility to determine whether any real dispute exists as to any material fact, Robertson v. Shell Oil Co., 34 Md. App. 399, 367 A.2d 962 (1971). In determining whether a factual dispute exists, all inferences must be resolved against the moving party and in the light most favorable to the party opposing the motion, here, Owl. Honaker v. WC&AN Miller Development Co., 285 Md. 216, 401 A.2d 1013 (1979); Delia v. Berkey, 41 Md. App. 47, 395 A.2d 1189 (1978), aff'd 287 Md. 302, 413 A.2d 10 (1980).

Solely for the purposes of the Motion, and viewing the facts in light most favorable to the Appellant, we will treat the Authority as a "State agency" which might normally be the subject of the Board's jurisdiction pursuant to the General Procurement Article, and which intends to be a party to the proposed contract.¹

The finding of these facts in favor of the Appellant, however, is not sufficient for the Board to find that it has jurisdiction to hear this bid protest appeal for the following reason. In 1988, the General Assembly in its enabling legislation for the Authority, specifically stated that the State Finance and Procurement Article which defines this Board's jurisdiction does not apply to the Authority:

§3-921 Award of contracts for purchases.

...The Authority's rules and regulations providing for competitive bidding or public design competition may include competitive sealed bidding, competitive negotiation, and revised bids after competitive sealed bidding where all bids are rejected as methods for source selection and contract formation. These methods are enumerated in §13-201 of the State Finance and Pro-

¹ This Board has held that it does not have jurisdiction where the State is not a party to the contract. Appeal of F.E. Gregory & Sons, Inc., Docket No. MSBCA 1269 (1987) (unreported). See also, James Julian, Inc. v. State Highway Administration, 63 Md. App. 74, 492 A.2d 308, 319 (1985).

curement Article, which article does not apply to the Authority. (1980, ch. 871; 1982, ch. 148, 1986, ch. 396, §1)²

Appellant argues that the General Assembly could not have meant that the Board of Contract Appeals was not the proper forum for settlement of a bid protest dispute. In determining the legislature's intent, a statute should be interpreted according to its plain language with words presumed to be used in their ordinary and popularly understood meaning unless there is reason to believe from the face of the statute that its words were intended to have some other meaning. Hunt v. Montgomery County, 248 Md. 403, 414 (1967). Drews v. State, 224 Md. 186, 167 A.2d 341 (1961); Pressman v. Barnes, 209 Md. 544, 121 A.2d 816 (1956).

We find the language of §3-921 to be clear and unambiguous that the General Procurement Law, including the jurisdiction of this Board, does not apply to the Authority. The Legislature indicates that while the Authority may draw upon the bid processes set forth in Article 21 (now codified in Division II, State Finance and Procurement Article) as illustrative, that Article's provisions do not extend to the Authority. Since the Board's jurisdiction is statutorily defined and circumscribed by Article 21, this Board lacks subject matter jurisdiction with regard to procurement activities undertaken by the Authority as a matter of law, and the appeal must be dismissed.

Accordingly, it is this 9th day of June, 1995 Ordered that the appeal is dismissed.

Dated: 6/9/95

Candida Steel
Candida S. Steel
Board Member

²The language stating that the General Procurement Law (formerly Article 21) does not apply to the Authority has appeared in the Statute since 1982.

I concur:


Robert B. Harrison III
Chairman

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA Docket No. 1885, the appeal of Northeast Maryland Disposal Authority RFP for the Purchase of Recyclable Paper.

Dated: 6/12/95


Mary F. Priscilla
Recorder

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