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A T T O R N E Y S A T L A W

CONSTRUCTION NEWS

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This Issue:
DGS Prohibited from Considering
Competitive Proposals for
Construction Projects

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MAIELLO BRUNGO & MAIELLO, LLP
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DGS PROHIBITED FROM CONSIDERING COMPETITIVE PROPOSALS FOR CONSTRUCTION PROJECTS.

The Commonwealth Court has sided with the Associated Builders and Contractors, Inc. ruling that the Department of General Service's policy of soliciting for competitive sealed proposals is illegal under the Commonwealth Procurement Code.

In April of 2005 DGS adopted a policy authorizing the use of proposals for awarding construction contracts for projects in excess of \$5,000,000. The proposals were to be reviewed by an internal committee with the award going to the contractor with the highest overall score. 60% of the score was based on cost, 30% based on competency to perform the work and 10% based on disadvantage business participation. While unsuccessful proposers would be debriefed on their own proposal, DGS would not disclose any information regarding the content of the awardee's proposal.

In response to ABC's challenge, DGS took the position that Section 513 of the Procurement Code allowed it to pursue this method of award. §513 provides:

When the contracting officer determines in writing that the use of competitive sealed bidding is either not practicable or advantageous to the Commonwealth, a contract may be entered into by competitive sealed proposals.

DGS argued that the word contract in the above section included construction contracts and that this section, taken in context of the whole Procurement Code, was intended to provide alternative methods of Procurement which did not need to comply with the Separations Act.

ABC argued that given the legislative history of the enactment of the Procurement Code prior proposed amendments showed that it was not the intent of the legislature to allow construction contracts to be procured through alternative means other than competitive bidding and further that the Procurement Code did not repeal the Separations Act.

After reviewing the legislative history of the enactment of the Procurement Code, the Commonwealth Court agreed that the intent of the Procurement Code was not to allow construction contracts to be let by a proposal process. The Commonwealth Court also found that the specific language in the Procurement Code did not repeal the Separations Act thereby still requiring DGS to enter into separate contracts for construction.

ABC raised other challenges to DGS' procurement methods, however, based on its ruling that the proposals were not authorized for construction contracts the Court did not need to address these issues which included a constitutional challenge and the inability of an unsuccessful bidder to challenge the award.

DGS has filed a petition for appeal with the Supreme Court and requested expedited review alleging that \$260 million worth of construction work throughout the State has been suspended as a result of the Commonwealth Court's decision.

This case is another in a continuing series of cases which will undoubtedly continue to define the scope and limitations of the Pennsylvania Commonwealth Procurement Code. Stay in contact with MBM for further developments regarding the Procurement Code and other construction related matters.

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