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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000090-MR

GUARDIAN ANGEL STAFFING AGENCY, INC.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 11-CI-01739

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; COMMONWEALTH OF
KENTUCKY, FINANCE AND
ADMINISTRATION CABINET

APPELLEES

AND

NO. 2013-CA-000143-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES

CROSS-APPELLANT

v. CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 11-CI-01739

GUARDIAN ANGEL STAFFING
AGENCY, INC.; COMMONWEALTH
OF KENTUCKY, FINANCE AND
ADMINISTRATION CABINET;
CROWN SERVICES, INC.; GUARDIAN
HEALTHCARE PROVIDERS, INC.

CROSS-APPELLEES

AND

NO. 2013-CA-000150-MR

CROWN SERVICES, INC.

CROSS-APPELLANT

v. CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 11-CI-01739

GUARDIAN ANGEL STAFFING
AGENCY, INC.; COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; COMMONWEALTH
OF KENTUCKY, FINANCE AND
ADMINISTRATION CABINET;
AND GUARDIAN HEALTHCARE
PROVIDERS, INC.

CROSS-APPELLEES

AND

NO. 2013-CA-000348-MR

GUARDIAN ANGEL STAFFING
AGENCY, INC.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 11-CI-01739

COMMONWEALTH OF KENTUCKY,
FINANCE AND ADMINISTRATION
CABINET; COMMONWEALTH OF
KENTUCKY, CABINET FOR HEALTH
AND FAMILY SERVICES; CROWN
SERVICES, INC.; GUARDIAN
HEALTHCARE PROVIDERS, INC.

APPELLEES

OPINION
AFIRMING

BEFORE: ACREE, CHIEF JUDGE; MAZE AND THOMPSON, JUDGES.

ACREE, CHIEF JUDGE: Appellant, Guardian Angel Staffing Agency, Inc.

(Guardian Angel), appeals the December 21, 2012 Order of the Franklin Circuit Court. In the interest of judicial economy, we have consolidated the cases listed above. Finding no error, we affirm.

I. Background

In 2011, the Kentucky Cabinet for Health and Family Services (“The Cabinet”) requested bids from vendors to staff state-run medical facilities throughout the Commonwealth. The Cabinet’s proposal, formally identified as Request for Proposal 729 1200000020 (hereinafter referred to as the “Bid Request”), contained a long list of detailed requirements. Failure to follow those requirements carried a stiff penalty: the Cabinet could deem a noncompliant bid unresponsive and exclude the vendor from consideration. However, this penalty was not automatic; the Bid Request also specified that the Cabinet could waive, in writing, a vendor’s minor mistakes so long as the Cabinet deemed waiver in the Commonwealth’s best interest. Put simply, if the Cabinet considered a vendor’s bid among the best in the field, the Bid Request did not require the Cabinet to reject the bid outright due to minor technical noncompliance.

Several vendors submitted bids to the Cabinet. However, presumably due to the complexity of the Bid Request’s requirements, many bids contained errors ranging in severity from minor, technical mistakes (such as the failure to properly

format their bids), to severe errors (such as the omission of crucial affidavits or data). Faced with numerous noncompliant bids, the Cabinet exercised its authority to waive minor errors. In a written report issued on May 14, 2012, the Cabinet identified the various mistakes in each vendor's bid, and stated its decision to waive the errors or strike the bid as nonresponsive.

After culling the bids, the Cabinet scored them based on a point system of factors to determine objectively which vendors would provide the "best" service. Three vendors distinguished themselves from the field: Guardian Healthcare, which scored highest; Crown Services, which came in at a close second; and Guardian Angel, which finished third, lagging behind the two top bids. Based on their respective scores, the Cabinet awarded contracts to the top two bidders, Guardian Healthcare and Crown Services.

Discontent with the Cabinet's decision not to award it a contract, Guardian Angel reviewed its rivals' winning bids and discovered that one of them contained a technical mistake: Crown had failed to sign its bid and addenda, a requirement under the rules of the Bid Request. Notably, the Cabinet failed to waive Crown's mistake in its written report.

Armed with that information, Guardian Angel filed a written protest on June 12, 2012, with the Secretary of the Finance Cabinet challenging the award of a contract to Crown. Guardian Angel argued that, in light of Crown's failure to include the necessary signatures, the Cabinet should have either excluded Crown's bid as nonresponsive or waived Crown's mistake in writing. The Cabinet had done

neither; instead, the Cabinet awarded the contract to Crown. Guardian Angel complained that the Cabinet's failure to comply with its own rules – the rules set forth in its Bid Request – constituted arbitrary action prohibited by the Kentucky Model Procurement Code (KMPC). *See generally* KRS¹ Chapter 45A.

With its administrative protest pending, Guardian Angel also sought injunctive relief in Franklin Circuit Court. However, the circuit court denied each of Guardian Angel's attempts to secure injunctive relief. Eventually after protracted litigation, the circuit court held Guardian Angel's claims in abeyance pending the Secretary's decision on Guardian Angel's administrative protest.

On October 25, 2012, the Secretary issued a Determination of Protest, agreeing with Guardian Angel that the Cabinet had arbitrarily awarded the contract to Crown. The Secretary concluded that because Guardian Angel was the next highest scoring vendor, it suffered prejudice from the Cabinet's arbitrary award. The Secretary then ordered the Cabinet to cancel its contract with Crown Services. Importantly, the Secretary's order did not require the Cabinet to award a contract to Guardian Angel or any other vendor.

When the parties informed the Franklin Circuit Court of the Secretary's decision, it ended the abatement and issued its own order on November 19, 2012. The circuit court's order required the Cabinet to award the contract to Guardian Angel, believing the Secretary, by implication, intended that the Cabinet award the contract to Guardian Angel.

¹ Kentucky Revised Statutes.

In a timely motion to alter, amend, or vacate the order pursuant to CR² 59.05, the Cabinet contended that while the Secretary ordered the Cabinet to rescind its contract with Crown Services, it did not *necessarily* require the Cabinet to contract with Guardian Angel. To support its contention, the Cabinet filed a written statement from the Secretary explaining that the Secretary only ordered the Cabinet to rescind its contract, not that the Cabinet must then award the contract to the next highest-scoring bidder.

Meanwhile, due to the immediate need to staff the hospitals, the Cabinet issued new interim contracts to Crown Services, Guardian Angel, and Guardian Healthcare. Guardian Angel also objects to the award of these interim contracts.

Having had an opportunity to reconsider the Secretary's order in light of the Secretary's subsequent interpretation, the circuit court reversed course. On December 21, 2012, the circuit court amended its previous order. The new order only required that the Cabinet rescind its contract with Crown.

Guardian Angel appeals that December 21, 2012 order.

II. Standard of Review

This court's role in reviewing decisions under the KMPC is limited to determining whether the award or decision was arbitrary and capricious or contrary to law. *See, e.g., Commonwealth v. Yamaha Motor Mfg. Corp.*, 237 S.W.3d 203, 206 (Ky. 2007); *Laboratory Corporation of America Holdings v. Rudolph*, 184 S.W.3d 68, 73 (Ky. 2006). Moreover, the statute provides that courts indulge a

² Kentucky Rules of Civil Procedure

“presumption of correctness” when reviewing awards under the KMPC. KRS 45A.280.

III. Analysis

While the history of this litigation has been lengthy and confusing, Guardian Angel’s arguments on appeal are relatively straightforward. Guardian Angel reads Kentucky case law to say disappointed bidders who successfully challenge the award of contracts under the KMPC are necessarily entitled to the contract as spoils of their challenges. Guardian Angel reads too much into the KMPC.

The Cabinet’s award of contracts in this case involved more than one decision. There was the decision to award a contract to Guardian Healthcare. In a separate decision, there was the decision to award a contract to Crown Services. In yet another decision, the Cabinet elected not to offer a contract to Guardian Angel.

Guardian Angel protested the decision to award a contract to Guardian Healthcare, but was not successful. (R. 935-41; Secretary’s Determination of Protest No. P-12-17, Second Supplemental Protest). However, it successfully protested the decision to award a contract to Crown Services, arguing that Crown did not provide a signed addendum cover sheet as required by the Bid Request. (R. 941-45; First Supplemental Protest).

Because of that successful challenge to Crown Services’s bid, Guardian Angel asserts it is entitled to move up in the order of finish, taking Crown Services’s place as the second highest bidder and being awarded the second

contract. While this is how disqualifications work in thoroughbred racing,³ it is not how the competitive bid process works. We have a strong indicator that Guardian Angel knew these processes were not the same when, in addition to its challenge of the awards to Guardian Healthcare and Crown Services, it independently challenged the Cabinet's decision not to award a contract to Guardian Angel. (R. 941; 946-48; Initial and Third Supplemental Protests).

As indicated, the original decisions to award a contract to Crown Services and not to award a contract to Guardian Angel were separate and distinct. While related, they stood alone and independent. Each carried a presumption of correctness. Guardian Angel successfully overcame that presumption when it challenged the award to Crown Services; it failed to overcome it with regard to the Cabinet's decision not to award a contract to Guardian Angel. That is to say, Guardian Angel failed to convince the Secretary that not awarding a contract to Guardian Angel was arbitrary, capricious or contrary to law. *Yamaha*, 237 S.W.3d at 206. We agree with the Secretary.

Refusing to award the contract to Guardian Angel is not contrary to any statute in that there is no part of the KMPC, or other Kentucky statute, that compels it. Guardian Angel does not make that claim. But Guardian Angel does argue that the Secretary's finding that the Cabinet's award to Crown Services prejudiced Guardian Angel is incongruous with its refusal to award the contract to Guardian Angel when Crown Services's contract was rescinded. We do not agree.

³ See Kentucky Administrative Regulations (KAR), 810 KAR 1:016 Section 4.

Guardian Angel claims in its brief that its successful protest of the award to Crown Services yielded from the Secretary “a finding that it had been prejudiced and should have been awarded a contract that went illegally to a non-responsive bidder.” (Appellant’s brief, p. 6). That is not what the Secretary’s ruling says. Rather, it clearly states only that the prejudice Guardian Angel suffered was “a *reasonable likelihood* that . . . it would have been awarded the contract.” A “reasonable likelihood” is neither certainty nor guarantee. Again, that determination, being a part of the determination of the protest of the contract award to Crown Services, stands on its own, separate and apart from Guardian Angel’s challenge that it was arbitrary and capricious to refuse to award a contract to Guardian Angel.

To be entitled to judicial relief in the form of an injunction to award a contract, or for any relief, Guardian Angel is required to establish that the Cabinet’s refusal to award it a contract was arbitrary and capricious. Guardian Angel failed to convince the Secretary and fails to convince this Court.

Guardian directs us to follow *Pendleton Brothers Vending, Inc. v. Commonwealth, Finance and Admin. Cabinet*, 758 S.W.2d 24, 25 (Ky. 1988), as “uph[olding] a rescission of award to one contractor with the contract award going to the next contractor as well as damages.” (Appellant’s brief, p. 6). We decline because that is not what *Pendleton* held.

Pendleton is the first case to recognize that the KMPC marked a change in Kentucky law; the KMPC now allowed an unsuccessful bidder on a state contract

to challenge the award on grounds that statutory procedures were disregarded, even absent any allegation of specific acts of fraud, collusion, or dishonesty as was formerly so. *Pendleton*, 758 S.W.2d at 24-25. The state was letting “a contract for health care coverage for state employees [and o]nly two firms bid on the project: Pendleton Brothers . . . and Quatros, Inc.” *Id.* at 25. Pendleton’s complaint “inartfully” alleged violations of the KMPC before demanding “that the court should set aside the award as in violation of the statute, direct that the contract be awarded to Pendleton Brothers, and provide other monetary relief.” *Id.* The circuit court entered a judgment that “was in practical effect a dismissal on grounds that the Complaint failed to state a cause of action.” *Id.* at 26. When the Supreme Court reversed the judgment dismissing, it merely said:

We have decided only that here the allegations of the complaint, although inartfully drawn, are sufficient to state a cause of action for declaratory and/or injunctive relief, assuming they can be proved by competent evidence. The movants must develop and prove their case. Movants are no more entitled to summary judgment than are the respondents.

Id. at 30.

Similarly, Guardian Angel cites *RAM Engineering & Const., Inc. v. University of Louisville*, 127 S.W.3d 579 (Ky. 2003), for the principle that “the Kentucky Supreme Court has held that allowing a rebid after a successful bid protest violates the KMPC.” (Appellant’s brief, p. 6). That is not the principle enunciated in *RAM*.

The University of Louisville awarded an excavation contract for the site of Papa John's Cardinal stadium to a successful bidder – RAM Engineering. *RAM*, 127 S.W.3d at 581. MAC Construction, a competing but unsuccessful bidder, protested the award and brought an action in Franklin Circuit Court for declaratory and injunctive relief without naming RAM as a party. *Id.* To settle MAC's lawsuit, the University entered into a judgment agreeing to declare RAM's contract null and void and to rebid the project. *Id.* The Supreme Court ruled both that RAM was an indispensable party to MAC's litigation and that no grounds existed upon which the University could terminate its contract with RAM for convenience of the state. *Id.* at 587. The rebid was prohibited and the contract that already existed with RAM was enforced. *Id.*

The facts of *RAM* are manifestly different than those presented by the case now before us. The sweeping concepts for which Guardian Angel cites *RAM* and *Pendleton*, as well, do not apply to these facts.

While the KMPC prohibits arbitrary contract awards, it does not divest the authorized state actors of their considerable discretion in making procurement decisions. Nor did the Act provide disappointed bidders the power to compel an award of a contract to them. Unlike RAM, Guardian Angel did not have a previously awarded contract arbitrarily taken away from it. The Bid Request “does not constitute an offer but merely a solicitation of offers, which does not impose any contractual obligations.” *Ohio River Conversions, Inc. v. City of Owensboro*, 663 S.W.2d 759, 761 (Ky. App. 1984). The Commonwealth will

only be bound to a particular contract with a particular vendor when the parties actually form a contract – not merely when the Commonwealth solicits bids.

If Guardian Angel’s argument were valid – that a contract *must* be let to the highest bidder (or in this case the next highest bidder) regardless of the quality of the bid, it would actually run contrary to the KMPC which permits the Commonwealth to reject “all bids or proposals . . . if it is determined in writing that such action is taken in the best interest of the Commonwealth and approved by the purchasing officer.” KRS 45A.105. We see no error in the Secretary’s determination that the Cabinet was not acting arbitrarily or capriciously when it declined to accept Guardian Angel’s bid and award it a contract.

The Cabinet’s choice not to award to Guardian Angel the contract it had previously awarded to Crown Services was not arbitrary, but reasonable. The Cabinet had already determined Guardian Angel’s bid inferior to others in the field. As noted, Guardian Angel’s bid fell behind the two superior bids in quality. By comparison, the Crown Services bid, though rejected by the Secretary on technical grounds (an unsigned bid), remained substantively superior to Guardian Angel’s bid. The Cabinet’s decision to award interim contracts to Crown Services and Guardian Angel instead of awarding the more permanent contract to Guardian Angel alone was certainly not an arbitrary one that would be prohibited by the KMPC. These circumstances are quite unlike those in *RAM*.

“Although the procurement code [KMPC] provides [the] most laudatory policies and purposes, it must be kept in mind that its primary function is to benefit

the citizens, as is the real purpose of government itself and the laws pertinent thereto.” *Ohio River Conversions*, 663 S.W.2d at 760 (citation omitted). Our highest court has noted:

[I]n a discussion of the remedies of unsuccessful bidders, there are expressed the two views as to whether such a person or entity has standing to request the judicial award of the contract or seek damages from the [government]. This jurisdiction has adopted the view that there is no such standing and it was so expressed in *R.G. Wilmott Coal Co. v. State Purchasing Commission*, 246 Ky. 115, 54 S.W.2d 634, 636 (1932), to the effect:

Counsel for appellees argue that since this statute was enacted in the public interest and not for the benefit of the unsuccessful bidder, appellant cannot maintain this action [to compel the state to award a contract to the unsuccessful bidder].

Nothing contained in Chapter 45A modifies this principle, and it remains the law.

Id. at 760-61. As in *Ohio River Conversions*, standing has not been raised. And this Court cannot raise it *sua sponte*. *Harrison v. Leach*, 323 S.W.3d 702, 704-05 (Ky. 2010). However, we also said in *Ohio River Conversions*, despite being “cognizant of the fact that the trial court made no reference to the question of standing and appellees only incidentally alluded to it by way of brief [that] we deem it essential to the consideration of this cause.” *Ohio River Conversions*, 663 S.W.2d at 761. Perhaps it is not essential, but certainly it is illuminating that, when asked to decide whether an unsuccessful bidder could “request the judicial award of the contract[,]” we answered in the negative.

Finally, because we have decided that Guardian Angel is not entitled to the contract under the KMPC, we need not consider its other claims, all of which were dependent upon succeeding on the argument addressed hereinabove. Our rejection of Guardian Angel's fundamental claim that it is entitled to the contract under the KMPC has rendered those other claims moot.

IV. Conclusion

For the reasons stated above, we affirm the December 21, 2012 Order of the Franklin Circuit Court.

MAZE, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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