

[J-173-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

PENNSYLVANIA ASSOCIATED BUILDERS AND CONTRACTORS, INC.,	:	No. 71 MAP 2006
	:	
Appellee	:	Appeal from the Order of the Commonwealth Court dated May 18, 2006 at No. 526 M.D. 2005
	:	
v.	:	899 A.2d 389 (Pa. Cmwlth. 2006)
	:	
	:	ARGUED: December 4, 2006
COMMONWEALTH DEPARTMENT OF GENERAL SERVICES,	:	
	:	
Appellant	:	

CONCURRING OPINION

MR. JUSTICE EAKIN

DECIDED: October 17, 2007

I agree with the majority that 62 Pa.C.S. § 513 is applicable to construction contracts as much as it is to anything else, see Majority Slip Op., at 12; however, the constitutionality of the statute has not yet been addressed. See Pennsylvania Associated Builders and Contractors, Inc. v. Commonwealth Department of General Services, 899 A.2d 389, 397 n.16 (Pa. Cmwlth. 2006) (declining to address issues raised in summary judgment motion because Commonwealth Court decided § 513 is not applicable to construction contracts). While the majority answers well the singular question presented to us at this time, there are

concerns under Pa. Const. art. III, § 22 that must be answered on remand, and our decision should not be taken as precluding analysis of them.¹

¹ The sealed bid process is only permitted when the normal low bidder process is “not practical or advantageous” to the Commonwealth. There are, at best, vague standards that guide this determination, and nowhere do there appear to be procedures to guide that determination, nor to review or challenge the determination once made. Neither the unsuccessful bidders nor the man on the street knows why the “normal” process was not used. Likewise, none can know why the unsuccessful bidder was unsuccessful. The Commonwealth’s agencies’ choices of process and awarding of contracts cannot be immune from constitutional scrutiny, yet one cannot evaluate, nor mount a challenge, constitutional or otherwise, to the decision on which process to use, nor to the result of the process, when one cannot determine the basis for either decision.