

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002698-MR

RAM ENGINEERING  
& CONSTRUCTION, INC.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM GRAHAM, JUDGE  
ACTION NO. 97-CI-01452

UNIVERSITY OF LOUISVILLE

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: CHIEF JUDGE, GUDGEL; BARBER, AND COMBS, JUDGES.

BARBER, JUDGE: Appellant RAM Engineering (RAM) was awarded a bid by the University of Louisville to build a portion of the University's new football stadium. This award was made on September 23, 1996 following private negotiations between the University and the three low bidders for the construction project. The three low bidders included RAM and MAC Construction. Appellee University of Louisville (University) issued a "Notice to Proceed" to RAM on September 26, 1996. After the Notice to Proceed was sent to RAM, one of the other firms involved in the bidding process, MAC Construction, filed a

protest with the University on September 26, 1996. This protest was denied by the University. MAC Construction then filed a civil suit against the University of Louisville challenging the award to RAM on September 30, 1996. RAM was not made a party to this action. At the hearing on injunctive relief in that action, the trial court announced that it would issue a temporary restraining order ("TRO"), preventing RAM from proceeding with construction. The terms of the temporary restraining order prohibited the University from issuing a notice to proceed to RAM, and from allowing any work to commence or continue under the award of the bid to RAM. The trial court indicated that it would issue the TRO on September 30, 1996. The TRO was never signed or entered into the record. MAC and University of Louisville then entered into an agreed order terminating the MAC litigation and declaring the contract with RAM on October 2, 1996. RAM was not notified of MAC's suit, or given the opportunity to argue that the award of the bid was fair and should not be voided.

In accordance with the Notice to Proceed and prior to being notified of the nullification of the original bid, RAM procured a Surety Payment and Performance Bond, Insurance Certificates and other information required by the University. These documents were submitted to the University on October 2, 1996 along with a letter from counsel for RAM indicating that RAM intended to proceed with construction pursuant to the Notice to Proceed. Following entry of the Agreed Order in the MAC litigation, the University rebid the project. RAM was again the low bidder, and was awarded the contract for a sum substantially

less than that accepted in its original bid. RAM filed a protest with the University on October 7, 1996. The University denied the protest, and stated that no contract existed between the parties following the initial bid.

RAM argues that the original award of the bid and issuance of the notice to proceed constituted a valid and binding contract, which should not have been canceled by the University, and alleges that it is due the sum of \$599,425.00, which is the difference between the two contract amounts. RAM asserts that the voiding of a contract, following an award and a notice to proceed, violates public policy, and should not be permitted by the courts.

RAM filed a civil action requesting money damages for the breach of the original contract. The circuit court held that there was a valid contract between RAM and the University based on the acceptance of RAM's original bid. The University's bid procedure was in accordance with the provisions of the Kentucky Model Procurement Code, codified at KRS Chapter 45A. RAM claims that an award to a successful bidder constitutes a binding contract. KRS 45A.030(5) defines "contract" as being:

[A]ll types of state agreements, including grants and orders, for the purchase or disposal of supplies, service, construction or any other item. It shall include awards, contracts of a fixed price, cost, cost-plus-a-fixed-fee, or incentive type, contracts providing for the issuance of job or task orders; leases; letter contracts, purchase orders; and insurance contracts . . . .

Id. RAM asserted that the state's acceptance of a competitive bid formed a binding contract. Wallace v. City of Louisa, Ky.,

273 S.W. 720 (1920). A Notice to Proceed is evidence that there has been acceptance of a bid. Paducah Junior College v. Secretary of Health, Educ. & Welfare, 255 F. Supp. 147 (E.D. Ky. 1966).

RAM asserts that KRS 45A.030 includes a bid award such as it received from University of Louisville as a binding contract. In Commonwealth Dept. of Educ. V. Gravitt, Ky. App., 673 S.W.2d 428 (1984), the Court found that a receipt form signed by the state which authorized a project constituted a binding contract. Id. at 430. We agree with the trial court's determination that a contract existed between RAM and University of Louisville following the University's acceptance of the initial bid, and issuance of the Notice to Proceed.

The University argued that KRS 45A.245 requires a lawfully authorized written contract to bind the Commonwealth before an action may be brought against the state. The University claimed that any agreement between RAM and the University was not lawful, and thus cannot be considered a binding contract under All American Movers Inc. v. Commonwealth, Ky. App., 552 S.W.2d 679 (1977). The University also asserts that the bid packages specified that the Agreement would be binding upon the parties only upon the issuance of an Award of Purchase Contract, which was never issued to RAM under the initial bid.

The circuit court held that the Notice to Proceed constituted a lawfully authorized written contract between RAM and the University, pursuant to KRS 45A.245. The circuit court

stated that the Notice to Proceed "indicates RAM's offer and that the offer was accepted, conforming with the basic requirements of contract formation. Most importantly. . . it evidences the parties' intent to be bound and is manifestly contractual in form and effect." The Invitation to Bid itself states that "[i]n submitting this bid, it is expressly agreed that, upon proper acceptance by the Department of Purchasing of any or all items bid above, a contract shall thereby be created with respect to the items accepted." Issuance of the Notice to Proceed constitutes formation of a binding contract as it evidences the intent of the parties. See: Commonwealth v. Gravitt, Ky. App., 673 S.W.2d 428 (1984). We affirm the circuit court's finding that a valid and binding contract existed between the University and RAM based on the issuance of a Notice to Proceed.

The circuit court then held that the University could revoke the contract with RAM, based on a substantial change in circumstances. The "General Conditions" of the Bid Package contain a "Termination of Contract for Convenience of Owner" provision, permitting termination of the contract by the University "when it is determined by the contracting authority that such termination will be in the best interest of the University of Louisville." 200 KAR Section 5:312(2) allows a state university to terminate a contract for its convenience when it is in the best interests of the university. Following such a termination for convenience, the contractor may make a claim for compensation based upon "expenses paid or incurred in performance of the contract from the date of award through the date of

termination for convenience." The University has agreed to pay a nominal sum to RAM for any expenses incurred between September 26, 1996 and October 2, 1996. The federal termination for convenience clause has recently been upheld as a valid contractual term, absent a showing of bad faith or abuse of discretion. Kygowski Construction Co. v. United States, 94 F.3d 1537 (Fed. Cir. 1996).

The University argues that it was not required to show a change in circumstances, but could cancel the contract based on the general terms of the bid package at any time. The circuit court stated that: "[T]he substantial change standard is the most sound for cases involving termination for convenience clauses. This analysis prevents the government from simply invoking the termination for convenience clause in order to shield it from the results of its decisions." The revocation of a contract based on the "substantial change in circumstances clause" requires a showing that the "circumstances of the bargain or the expectations of the parties" have changed significantly. Torncello v. United States, 681 F.2d 756, 770 (Cl. Ct. 1982).

The University asserted that the "General Conditions" in the Bid Package permitted the University to "terminate the contract for its own convenience when it is determined by the contracting authority that such termination will be in the best interests" of the University. The University cites to KRS 45A.210 and 200 KAR 5:312 as showing that it does not have to satisfy the "substantial change in circumstances" test prior to voiding or terminating a contract. The University argues that

Kentucky law requires statutes and regulations to be construed according to their common usage. Green v. Moore, 281 Ky. 305, 135 S.W.2d 682 (1939). The University asserts that it is entitled to terminate any contract at its convenience, without making any additional showing of need. The bid terms and conditions, and the law governing such bids requires the University to pay damages when a contract is canceled. We hold that the applicable laws and regulations require a showing that termination is in the best interests of the University is commensurate with a showing of changed circumstances. For this reason, we affirm the trial court's requirement that the University show a substantial change in circumstances prior to terminating the contract.

RAM argues that the "termination for convenience" clause can only be used where there is a substantial change in circumstances shown. See: Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988) holding that a substantial change in circumstances is required to prevent entities canceling contracts on a whim. The University argues that even if it were required to show a substantial change in circumstances, the temporary restraining order proposed by the trial court in the MAC litigation in 1996 forbidding construction until the lawsuit was over was sufficient to meet that standard.

Absent any Kentucky cases on point, the circuit court determined that the "substantial change in circumstances" standard should be applied in the present case. Public policy will best be served by requiring state entities to show a need

for termination of a contract due to a change in circumstances, rather than being permitted to terminate contracts for any reason, or no reason at all. In the present case, the circuit court's entry of the Agreed Order voided the contract with RAM, and constituted a substantial change in circumstances permitting termination. We affirm the trial court's decision and find that the University was required to show a substantial change in circumstances prior to terminating its contract with RAM and that the entry of the circuit court order constituted such a substantial change in circumstances.

RAM filed a motion to alter, amend or vacate the entry of summary judgment in favor of the University based on the fact that the record shows that the TRO was drawn up by the circuit court in the 1996 MAC litigation, but never formally entered or filed. The circuit court stated, following a hearing between the University and MAC on September 30, 1996, that it would enter the TRO. The trial court granted the TRO on the record. Bond was posted by MAC in the sum of \$10,000 in accordance with the TRO. The Agreed Order entered between the University and MAC and signed by the circuit court stated that the TRO had been entered.

The University argues that the failure to formally enter the TRO was a mere clerical error, which could properly be corrected by the circuit court. The University cites Potter v. Eli Lilly & Co., Ky., 926 S.W.2d 449 (1996), which permits a trial court to correct clerical errors in the record. The Agreed Order terminating the MAC litigation specified that the



bid had been awarded in an arbitrary and capricious manner, and that the bid award would therefore be canceled.

RAM asserts that the TRO was invalid as it was never properly filed, and therefore argues that the TRO cannot be relied upon as a change in circumstances permitting termination of the contract between the University and RAM. The circuit court, in reviewing RAM's motion to alter, amend or vacate, stated that whether or not the TRO was properly entered, the entry of the Agreed Order constituted a substantial change in circumstances sufficient to permit the University to cancel its contract with RAM. We agree.

RAM claims that the TRO was intended only to delay performance of the contract during the pendency of the litigation, rather than to terminate the contract between the University and RAM. RAM alleges that for this reason the TRO does not constitute a substantial change in circumstances sufficient to permit revocation or termination of the construction contract. The Bid Package contains a clause in Article 24 which prohibits termination of the contract by RAM where there is a court ordered delay of up to ninety days. RAM claims that this clause shows that a TRO of less than ninety days duration should not constitute a substantial change in circumstances sufficient to permit termination of the contract by the University. This clause, by its terms, relates to termination of the contract by the contractor, not the University, and is therefore inapplicable under the present circumstances.

The circuit court found that while the effect of the TRO may have been to merely delay construction, the effect of the Agreed Order was to terminate the contract. We agree, and hold that entry of the Agreed Order requiring rebidding of the package constitutes a substantial change in circumstances justifying termination of the contract with RAM.

RAM also claims that it was denied fundamental due process as RAM was not a party to the lawsuit. RAM argues that the circuit court had no subject matter jurisdiction in the MAC litigation as RAM was an indispensable party to the action, and was not joined in the action. Kentucky Unemployment Insurance Commission v. Providian Insurance Group, Ky., 981 S.W.2d 138 (1998), holds that there is no subject matter jurisdiction where indispensable parties are not made part of the action.

CR 19.01 defines an entity as an indispensable party as one who shall be joined if:

- (a) In his absence complete relief cannot be accorded among those already parties; or (b) he claims an interest relating to the subject of the action and is so situated that disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest.

While the MAC action did affect the contract between the University and RAM, the circuit court's decision was that the bidding procedure had been unlawful or improper, and that as a result, the contract must be declared void. RAM was not a necessary party to that action, as RAM had no involvement in the

actions complained of as being improper or unlawful. RAM's presence or absence had no effect on the findings of the parties, and thus RAM was not an indispensable party. RAM had no right or ability to affect the outcome of the litigation, and no right to a contract issued in violation of law. Where a prospective litigant has no right to the property which is the subject of the action, then he cannot be considered an indispensable party. Field v. Evans, Ky. App., 675 S.W.2d 3, 4 (1983).

We hold that RAM was not denied due process, and was not an indispensable party to the MAC litigation. For this reason, the orders of the Franklin Circuit Court are affirmed.

ALL CONCUR.

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