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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001172-MR

YAMAHA MOTOR MANUFACTURING
CORPORATION OF AMERICA;
CUNNINGHAM GOLF CAR COMPANY, INC.
AND ROBERT B. NESMITH — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 03-CI-00881

COMMONWEALTH OF KENTUCKY,
FINANCE AND ADMINISTRATION CABINET;
DEPARTMENT OF PARKS;
GORDON C. DUKE, SECRETARY, FINANCE
AND ADMINISTRATION CABINET, IN HIS
OFFICIAL CAPACITY AND HIS INDIVIDUAL
CAPACITY; M. HOLLIDAY HOPKINS,
GENERAL COUNSEL, FINANCE AND
ADMINISTRATION CABINET, IN HER OFFICIAL
CAPACITY AND HER INDIVIDUAL CAPACITY,
AND E-Z-GO TEXTRON, A DIVISION OF
TEXTRON, INC. — APPELLEES

OPINION
REVERSING IN PART;
VACATING IN PART; AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HENRY AND MINTON, JUDGES.

HENRY, JUDGE: Yamaha Motor Manufacturing Corporation of America, Cunningham Golf Car Company, Inc., and Robert B. Nesmith appeal from a March 25, 2004, Opinion and Order of the Franklin Circuit Court granting a motion for summary judgment against them on the ground that they lacked standing for the lawsuit in question. On review, we reverse and remand in part, and vacate and remand in part.

On April 21, 2003, the Commonwealth of Kentucky, Finance and Administration Cabinet (hereinafter "the Cabinet"), issued Solicitation Number S-03109161 pursuant to KRS[1] 45A.080, with bids closing on May 13, 2003. The solicitation was for 290 gas-powered golf carts, a driving range golf cart with a protective cage, and five (5) "ADA compliant" golf carts for use at various state park golf courses. The solicitation listed Yamaha-brand equipment (or its equivalent) as the specification standard and stated that the contract award would be made on a "best value" basis, pursuant to certain stated criteria. Two modifications to the solicitation were issued on April 22nd and April 29th, with the first correcting formatting and clauses, and the second answering vendor requests for clarification. Neither modification changed the specifications set forth in the solicitation.

[1] Kentucky Revised Statutes.

Bids were submitted by Century Equipment of Cincinnati, Ohio; Cunningham Golf Car Company, Inc. (hereinafter "Cunningham"); and Appellee E-Z-Go Division of Textron, Inc. (hereinafter "E-Z-Go"). The contract was awarded to E-Z-Go on May 29, 2003. On June 10, 2003, Cunningham filed a formal protest with the Secretary of the Finance and Administration Cabinet, pursuant to KRS 45A.285. The challenge had two bases: (1) E-Z-Go's proposed "ADA compliant" golf carts did not meet the published bid specifications set forth under the solicitation and, accordingly, the bid was "non-responsive"; and (2) the purchasing agency acted improperly in considering maintenance costs for the carts only for the first year of use, as opposed to the anticipated maintenance costs of the carts over their entire projected useful life. In a June 18, 2003, letter, the Cabinet denied Cunningham's protest.[2]

On July 17, 2003, Appellants filed a Verified Complaint in the Franklin Circuit Court against the Finance and Administration Cabinet; the Department of Parks; Gordon C. Duke, Secretary of the Finance and Administration Cabinet; M. Holliday Hopkins, General Counsel for the Finance and Administration

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[2] This letter gave a number of justifications for the Cabinet's decision to deny Appellants' protest, but as this appeal deals solely with the issue of Appellants' standing to sue, we will not go into further detail about these justifications here.

Cabinet; and E-Z-Go, pursuant to KRS 45A.245[3] and KRS 13B.140.[4] The Complaint again alleged that the proposed golf carts offered by E-Z-Go failed to meet a number of certain requirements set forth in the bid solicitation, and that the purchasing agent failed to consider the anticipated maintenance costs of the golf carts over their entire projected useful life. The Complaint then alleged that these actions constituted violations of the Kentucky Model Procurement Code (hereinafter "KMPC"), KRS 45A.005 et seq., and that the Finance and Administration Cabinet's failure to consequently reject E-Z-Go's bid as "non-responsive" was arbitrary, capricious, and contrary to law. The Complaint also asked for taxpayer relief on behalf of Appellant Nesmith because the alleged actions constituted wrongful acts that would result in injury to the Commonwealth and to Nesmith as a taxpayer.

On November 3, 2003, the Cabinet filed a motion for summary judgment contending that Appellants' claims were barred by sovereign immunity and that Appellants lacked standing to pursue their claims. On March 25, 2004, the trial court denied the Cabinet's motion as to sovereign immunity, but granted it on

[3] We note that KRS 45A.245 does not appear to be an appropriate basis for circuit court jurisdiction here, as this provision is only concerned with claims brought by persons with "lawfully authorized written contract[s] with the Commonwealth." KRS 45A.245(1). A disappointed bidder does not fit within this requirement.

[4] Appellants later amended their Complaint to include jurisdiction pursuant to KRS Chapter 418, which deals with declaratory judgments.

the ground that Appellants lacked standing to challenge the contract award. The trial court first noted that the case presented "two fundamental concerns inherent in the concept of judicial review of disappointed bidder protests," with the first being "the enforcement of the Kentucky Model Procurement Code, ("KMPC")," and the second being "to avoid daily judicial review of every contract decision made by the Executive Branch."

As to the first concern, the trial court noted that the "Commonwealth may benefit from lawsuits that seek to ensure that contractors and administrative agencies are following statutory requirements and will work together to achieve the KMPC's basic purpose." The court added:

> Competitive bidder legal challenges may ensure the bidding process is being conducted with integrity and fairness. If standing is denied to all unsuccessful competitive bidders, then it appears that *no other party* will challenge wrongfully awarded contracts. If parties seeking to enforce the KMPC do not have standing, this statute becomes a powerless law. (Italics in original).

The court then turned to its second concern, stating: "Still, an overwhelming flood of administrative appeals could disrupt the operations of both the Executive and Judicial branches of government." It then specifically noted:

> At times the state entity soliciting a procurement contract may fail to follow its own bid solicitation and award the contract to a non-responsive bidder. The question

then becomes, does every failure of a state entity to match its own bid solicitation give rise for disappointed bidders to judicially appeal the state's procurement decision?

The court then answered its own inquiry, stating: "*Pendleton Bros. Vending, Inc. v. Com. Finance and Admin. Cabinet*, Ky., 758 S.W.2d 24 (1988), answered that question in the negative."[5]

After giving its reasons why sovereign immunity protection was inapplicable in this case, the trial court turned its attention to the question of standing. It first stated: "The fundamental question of the instant case becomes: does a Plaintiff have standing to challenge the Cabinet's decision to award a contract to a company that is alleged to have failed to supply 'ADA Compliant' golf carts," and then concluded: "This Court believes that it does not." In support of this conclusion, the trial court first noted:

> Here this Court must find the Plaintiffs/unsuccessful bidders' substantial interest in the instant matter. If the Plaintiffs were to win the lawsuit, the government contract would be rescinded. Afterwards, the Plaintiffs may bid once more in competition for the contractual award. However, the Plaintiffs would not be entitled to any award as a matter of right, but instead the Plaintiffs would be entitled to once again compete for the contract.

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[5] In a footnote, the trial court cited to page 30 of the Pendleton Bros. opinion for the principle that "every purchasing decision or alleged omission is not subject to judicial oversight."

Because of this, the trial court concluded: "The Plaintiffs are entitled to a mere expectancy. As such, this interest is not present or substantial and this Court is unable to confer subject matter jurisdiction. See, *Plaza B.V. v. Stephens*, Ky., 913 S.W.2d 319, 322 (1996)."

The trial court then turned its attention to the Kentucky Supreme Court's decision in HealthAmerica Corp. of Ky. v. Humana Health Plan, Inc., 697 S.W.2d 946 (Ky. 1985), which holds that "absent a showing of fraud, collusion or dishonesty, a disappointed bidder has no standing to judicially challenge the award of a public contract to another bidder." Id. at 498. The trial court noted, however, that this rule applies "[w]hen the KMPC is not implicated," and that "the KMPC may provide for some exceptions to the general rule." The trial court then specifically cited KRS 45A.280 for the proposition that "[t]he public officials carrying out the code 'shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official ... do not support the position.'" The court concluded that Appellants did not allege facts that met these exceptions and ultimately held:

> Although the *Pendleton Brothers* Court conferred standing upon other unsuccessful bidders, the allegations of political patronage were so egregious, offensive to justice and analogous to fraud that conferring standing was ultimately within the standard adopted in *HealthAmerica*. In

> comparison, the instant Complaint does not allege similar facts that meet the level of serious official or state sponsored misconduct or impropriety that the *Pendleton Brothers* Court excepted for standing purposes. Under *Pendleton Brothers* and *HealthAmerica* the Plaintiffs lack standing to pursue this action."

Appellants subsequently filed a motion to alter, amend, or vacate that was denied in a May 21, 2004, Opinion and Order. In that Opinion and Order, the trial court again acknowledged that Pendleton Bros. expanded the scope of HealthAmerica, but it concluded that the expansion pertained only to "egregious and offensive political patronage on the part of the Commonwealth" and that Appellants were not aided by this expansion. The court then noted:

> The Plaintiffs' allegations do not rise to the level of fraud, collusion, dishonesty or political patronage on behalf of the Commonwealth. Therefore standing is not afforded the Plaintiffs and this action must be dismissed for a lack of jurisdiction.

The trial court also found that Nesmith had no standing to sue as a taxpayer because the cases upon which he relied as grounds for standing were distinguishable from the case at hand.[6] This appeal followed.

The standard of review for a summary judgment pursuant to CR 56.03 is set forth in Steelvest, Inc. v. Scansteel Service

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[6] Specifically, Appellants relied upon Gay v. Haggard, 133 Ky. 425, 118 S.W. 299 (1909); Board of Education of Floyd County v. Hall, 353 S.W.2d 194 (Ky. 1962); and Price v. Commonwealth, Transportation Cabinet, 945 S.W.2d 429 (Ky.App. 1996).

Center, Inc., 807 S.W.2d 476 (Ky. 1991). Steelvest holds that it is the function of the appellate court to determine whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996). "Since the issue is wholly one of law, our review is de novo." Fourroux v. City of Shepherdsville, 148 S.W.3d 303, 306 (Ky.App. 2004).

"In order to have standing in a lawsuit, 'a party must have a judicially recognizable interest in the subject matter of the suit.'" City of Ashland v. Ashland F.O.P. No. 3, Inc., 888 S.W.2d 667, 668 (Ky. 1994), citing HealthAmerica, supra; see also Deters v. Kenton County Public Library, 168 S.W.3d 62, 63 (Ky.App. 2005) (Citations omitted). "The interest of a plaintiff must be a present or substantial interest as distinguished from a mere expectancy." City of Ashland, 888 S.W.2d at 668, citing Winn v. First Bank of Irvington, 581 S.W.2d 21 (Ky.App. 1979); see also Deters, 168 S.W.3d at 63. "The issue of standing must be decided on the facts of each case." City of Ashland, 888 S.W.2d at 668, citing Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989); City of Louisville v. Stock Yards Bank & Trust Co., 843 S.W.2d 327 (Ky. 1992). "Simply because a plaintiff may be a citizen and a taxpayer is not in and of itself sufficient basis to

assert standing. There must be a showing of a direct interest resulting from the ordinance." Id., citing Carrico v. City of Owensboro, 511 S.W.2d 677 (Ky. 1974); York v. Chesapeake & Ohio Railroad Co., 240 Ky. 114, 41 S.W.2d 668 (1931).

With these general rules of standing in mind, we turn specifically to the issue of the standing of a disappointed bidder to challenge the decision of a purchasing agency such as the Finance and Administration Cabinet. As recognized by the trial court and the parties, it is well-established that

> [t]he general rule in Kentucky if the KMPC is not involved, as stated in HealthAmerica, 697 S.W.2d at 948, is that "absent a showing of fraud, collusion or dishonesty, a disappointed bidder [as such] has no standing to judicially challenge the award of a public contract to another bidder."

Pendleton Bros., 758 S.W.2d at 24; see also PIE Mut. Ins. Co. v. Kentucky Med. Ins. Co., 782 S.W.2d 51, 54 (Ky.App. 1990) ("The common law rule in Kentucky is that absent allegations of fraud, bad faith, or collusion, a competitor qua competitor has no standing to challenge the granting of a license or permit to another competitor by an administrative agency.") (Citations omitted).

With this said, in Pendleton Bros., the Supreme Court, while acknowledging the common law rule, concluded that "the purpose of the procurement code is to elevate state purchasing to a higher level of conduct. To accomplish this, the KMPC

imposes rules with objective criteria in purchasing, criteria previously lacking, and provides enforcement for these standards." Id. at 27. Consequently, the Supreme Court determined that the KMPC "has changed the rules of the game, providing access not previously available to challenge and investigate the propriety of government purchasing contracts." Id. at 24. Specifically—and of particular importance here—the Supreme Court asked whether the KMPC had effected a statutory change so that procurement is now a regulated administrative procedure subject to court challenge if the decision is contrary to law, or arbitrary and capricious. It answered this question in the affirmative, allowing the appellants' suit to proceed. See id. at 25, 28-29. To aid in the application of this holding, however, the Court cautioned that "every purchasing decision or alleged omission is not subject to judicial oversight." Id. at 30.

However, despite the conclusions reached in Pendleton Bros. that the KMPC "has changed the rules of the game," and that procurement is now a regulated administrative procedure subject to court challenge if the decision is contrary to law, or arbitrary and capricious, the trial court here concluded that the decision in Pendleton Bros. fit within the common law standard set forth in HealthAmerica because the issues of political patronage present in Pendleton Bros. were tantamount

to fraud. Moreover, as previously noted, the trial court here concluded that the expansion set forth in Pendleton Bros. pertained only to "egregious and offensive political patronage on the part of the Commonwealth" and that in order for standing to exist, the Appellants must make allegations of "fraud, collusion, dishonesty or political patronage on behalf of the Commonwealth."

We simply cannot conclude that this is a reasonable interpretation of the Pendleton Bros. decision given what we believe to be the Supreme Court's clear conclusion that the KMPC had made procurement a regulated administrative procedure subject to judicial challenge. As the Supreme Court noted, the "supremacy of law demands that here shall be opportunity to have some court decide" whether an agency administering a statutory regulatory scheme has applied "an erroneous rule of law . . . and whether the proceedings in which the facts were adjudicated was [sic} conducted regularly." Pendleton Bros., 758 S.W.2d at 28, quoting Humana of Ky., Inc., et al. v. NKC Hospitals, Inc., et al., 751 S.W.2d 369, 374 (Ky. 1988). The Court added:

> As in *Humana*, here it is the regulatory scheme which both establishes the rules which must be followed and provides standing to the aggrieved competitor to challenge the decision of the administrative agency in court if he can prove that the decision or award was made in violation of the statute.

Id. Because the administrative remedies in the case had been exhausted, the Court concluded that it was "ripe for judicial review. The appellants are entitled to a forum and an opportunity to prove their case." Id. at 28-29. Given this language, we are compelled to find that the Supreme Court intended its decision to reach beyond the scope of alleged political patronage.

Additionally, we note that the Supreme Court framed its inquiry in Pendleton Bros. as follows:

> We must decide whether the KMPC has effected a statutory change so that procurement is now a regulated administrative procedure subject to a court challenge if the decision was contrary to law, or arbitrary and capricious. This includes challenge on grounds that statutory procedures were disregarded for reasons of political patronage.

Id. at 25 (Emphasis added). We believe that this language serves as an indication that the Court considered the specific allegations of political patronage in that case to be an issue that was encompassed by the more general inquiry being undertaken as to the availability of judicial relief under the KMPC for disappointed bidders.

We also believe that KRS 45A.280 supports the principle that judicial review is available to disappointed bidders under the KMPC. That statute provides:

> The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

The latter part of the statute specifically supports the conclusion that a decision of the Finance and Administration Cabinet, while presumed correct, is subject to "disturbance" by a court in the event that the Cabinet's findings of fact do not support its decision. This standard does not differ in any significant way from the general rule that decisions of administrative agencies are reviewed by courts with the question of arbitrariness in mind. See American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n, 379 S.W.2d 450, 456 (Ky. 1964). Consequently, we hold that the trial court erred in concluding that Appellant Cunningham Golf Car Company, Inc., as a disappointed bid contractor, did not have standing to challenge the decision of the Finance and Administration Cabinet on the grounds that it was arbitrary and capricious, and we must therefore reverse and remand for further proceedings.[7]

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[7] We include Cunningham, but not Yamaha, in this particular holding for reasons that will be set forth later in this opinion.

Appellants next argue that the trial court erred in dismissing Appellant Robert Nesmith's claim for lack of standing. They specifically contend that "Kentucky law provides that when governmental bodies violate statutes pertaining to competitive bidding for public contracts, such failure renders any resulting contracts void and taxpayers have standing to bring suit to recover monies paid pursuant to such void contracts." We agree with the Appellants that the trial court erred in concluding that Appellant Nesmith could not have grounds for standing in this case, but we disagree that any taxpayer would have standing to bring suit here.

Along with the more general rules for standing set forth above, our courts have held that, in order for a taxpayer to have standing to challenge an administrative decision, there must be "an allegation and proof that the plaintiff would suffer some injury distinct from that of the general public before he could have standing to enjoin an official act." Deters, 168 S.W.3d at 63, quoting Fish v. Elliott, 554 S.W.2d 94, 96 (Ky.App. 1977) (Additional citations omitted); see also City of Ashland, 888 S.W.2d at 668 (Citations omitted); Wegener v. Wehrman, 312 Ky. 445, 446, 227 S.W.2d 997, 998 (1950) (Citation omitted). Accordingly, in order for a taxpayer to have standing to challenge the Finance and Administration Cabinet here, one would have to establish that the claimed injury that he would

suffer is distinct from that of the general public. Simply being a taxpayer is not enough.

While neither party cited Pendleton Bros. for this principle, the Supreme Court there also recognized that

> taxpayers, as such, may have a judicially recognizable interest in the award of a public contract where a disappointed competitor does not, at least where there is proof "that there was an abuse of discretion on the agency's part amounting to ... arbitrariness or capriciousness in awarding the contract."

Pendleton Bros., 758 S.W.2d at 25, quoting Handy v. Warren Co. Fiscal Court, 570 S.W.2d 663, 664 (Ky.App. 1978). The Court made this statement in the context of the Finance and Administration Cabinet's acknowledgement that the four (4) taxpayers who had joined in the suit may have standing in the above-referenced situation, and it did nothing to take issue with this acknowledgement. It is important to note, however, that these taxpayers were apparently principals of Pendleton Bros., which–in accordance with the requirements for taxpayer standing set forth above–suggests that they were alleging an injury distinct from one that could be claimed by the general public.

Accordingly, given the language in Pendleton Bros. suggesting that taxpayers can have standing to challenge a bid contract award where there is proof of arbitrariness or capriciousness, and the general rule that taxpayers may have

standing to sue where they have suffered a distinct injury, we conclude that the trial court erred in determining that Appellant Nesmith lacked standing as a taxpayer without considering in further detail his relationship to the parties and his direct interest in the bid contract in question. We must therefore vacate this particular ruling and remand for further consideration.

We next turn briefly sua sponte to an issue not addressed by the parties or the trial court; that is, the question of the presence of Yamaha Motor Manufacturing Corporation of America as a party plaintiff in this lawsuit. In the complaint Yamaha is described only as a Georgia corporation licensed to do business in Kentucky and in good standing with the Kentucky Secretary of State. For all of the discussion of standing in the briefs and in the circuit court's Opinion and Order, there is no mention of Yamaha's standing, and we confess a degree of puzzlement as to why this is the case. The disappointed bidder is Cunningham. Nesmith, as discussed above, is a taxpayer. It is not difficult to deduce that Yamaha hopes to furnish the golf carts at issue if Cunningham eventually prevails in its bid, but we find nothing in our case law or statutes that confers standing upon prospective suppliers of disappointed bidders. We urge the circuit court to delve

further into this aspect of the case on remand and enter any appropriate orders.

We also note for clarification that we have concerned ourselves solely with the issue of standing and not with the strength of the underlying allegations in the case. With this said, we conclude that the holding of Pendleton Bros. is broad enough to confer standing upon a disappointed bidder who alleges that a bid contract was awarded based upon a bid that was not responsive to the specifications published by the state agency to such an extent that the award was arbitrary, capricious, and contrary to law.[8] This case is reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

MINTON, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, DISSENTING: Both the opinions of the trial court and of the majority of this Court have articulated carefully reasoned and legally persuasive statements (albeit reaching opposite conclusions) as to the law governing the standing of disappointed bidders for state contracts under the Kentucky Model Procurement Code (the KMPC). After studying

[8] This holding is consistent with that of a different panel of our Court in the recent case of Laboratory Corporation of America Holdings v. Rudolph, ____S.W.3d____ (Ky.App. 2005), 2004-CA-001025-MR, 2005 WL 1792146, Petition for Rehearing pending, opinion designated "To Be Published".

the pertinent case law on this subject, I am compelled to dissent from our majority opinion and to vote to affirm the opinion of the Franklin Circuit Court, which emphasized the critical need for an allegation of egregiously fraudulent conduct as a basis for a judicial challenge to a competitive bidding situation.

It is the purpose of the KMPC to assure integrity of the bidding process by opening the entire process to public scrutiny in order to assure probity and fairness. However, the statute itself carefully provides the language that impliedly serves as a basis for Pendleton Bros., supra:

> The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall **be entitled to a presumption of correctness and shall not be disturbed** unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision. KRS 45A.280 (Emphasis added).

That statutory language imposing a presumption of propriety is the crux of the reasoning of the trial court, compelling it to search for the presence of fraud or for at least some intimation of impropriety in the bidding process at issue. Absent such allegations, the lawsuit simply cannot be maintained--regardless of the “distinct interest” of any of the parties from

that of the general taxpaying population or the mere expectancy interest entailed in the ultimate outcome of the case.

A court simply has no legitimate basis to intervene under the very language of the KMPC and pursuant to the cases constraining it. As properly noted by the trial court, the court system would become a constant referee in the bidding process of state contracts unless such a threshold finding of fraudulent conduct would justify its involvement.

As this issue was a question of law, summary judgment was correctly entered by the Franklin Circuit Court. I would affirm that judgment.

BRIEF FOR APPELLANT:

F. Chris Gorman
Kenneth A. Bohnert

Edward L. Lasley
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Raymond F. DeBolt, Jr.
Frankfort, Kentucky

Larry C. Deener, Esq.
Lexington, Kentucky