

RENDERED: DECEMBER 11, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001387-MR

GUARDIAN ANGEL STAFFING
AGENCY, INC.

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 14-CI-00684

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

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KRAMER, JUDGES.

KRAMER, JUDGE: Guardian Angel Staffing Agency, Inc., appeals an order of the Franklin Circuit Court dismissing its administrative appeal. Finding no error, we affirm.

By way of background, the Cabinet for Health and Family Services (CHFS) awarded Crown Services, Inc., (Crown) an interim contract to staff state-run medical facilities throughout the Commonwealth. Sometime thereafter, on May 9, 2014, CHFS distributed an email to Crown and one of Crown's rival staffing agencies, appellant Guardian Angel, which provided in relevant part:

1. The new RFP [request for proposal] for Facility Nursing Services is available on the eProcurement Website.
2. The Cabinet will be extending the interim nursing contracts from July 1, 2014 through September 30, 2014 to allow for continued nurse staffing services to the DBHDID [Department for Behavioral Health, Developmental and Intellectual Disabilities] facilities while the RFP is processed and new awards created.

We will review all current contracts to ensure the availability of a sufficient number of hours to provide coverage through the time period, if needed, based on current and estimated need. These will be new contracts but will include current terms and rates for the interim period. Commodity lines for Bingham will not be included.

Please let me know if this extension is acceptable to your agency, or if you have questions.

According to the complaint Guardian Angel ultimately filed in circuit court on June 6, 2014, "Upon notice of the new contracts as set out in the May 9,

2014, [sic] email . . . Guardian Angel prepared and filed a protest pursuant to the Secretary of the Finance Cabinet.”

The record before this Court totals 45 pages and does not include the protest that Guardian Angel apparently submitted to the Secretary of the Finance and Administration Cabinet (Secretary). It does, however, include the Secretary’s May 22, 2014 response to Guardian Angel’s protest. In relevant part, it provided:

RE: Protest to Extension of Contract: Crown Services, Inc.

Dear [counsel for Guardian Angel],

The Finance & Administration Cabinet is in receipt of your letter of protest dated May 14, 2014 on behalf of Guardian Angel Staffing Agency, Inc. (“Guardian Angel”). Your letter of protest is directed at the extensions of an interim contract to Crown Services, Inc.

The Secretary of the Finance Cabinet has jurisdiction to determine a protest either *to a solicitation* or *to an award* of contract. KRS [Kentucky Revised Statutes] 45A.285(2). In this case, you raise issues about the propriety of an existing contract extension. The Secretary does not have jurisdiction under KRS 45A.285 to determine this issue. Pursuant to 200 KAR [Kentucky Administrative Regulations] 5:380, Sec. 3(3), the protest of Guardian Angel has failed to establish jurisdiction and is DENIED. Pursuant to KRS 45A.280:

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.

In accordance with KRS 45A.285(4), the decision shall
be final and conclusive.

On June 6, 2014, pursuant to KRS 13B.140, Guardian Angel then
filed suit in Franklin Circuit Court and initiated the proceedings underlying this
appeal. Guardian Angel's nebulous complaint included two separate counts: (1) in
what it styled as an "appeal of agency action," Guardian Angel asked the circuit
court to reverse the Secretary's jurisdictional determination and consequent denial
of its protest; and (2) Guardian Angel also contended that, due to the Secretary's
denial of its protest, its rights under Kentucky's Model Procurement Code (KRS
Chapter 45A, or "KMPC") had been violated. Guardian Angel concluded its
complaint as follows:

WHEREFOR, Guardian Angel hereby prays for relief as
follows:

1. For judgment in its favor on all counts;
2. For an order enforcing the rescission of Crown's
contract and the award of Guardian Angel's contract;
3. Compensatory and special damages; and
4. All other relief to which it may be entitled.

On July 7, 2014, the Secretary and CHFS respectively moved the
circuit court to dismiss Guardian Angel's action with prejudice. As to why, both
the Secretary and CHFS argued Guardian Angel had failed to join an indispensable
party to its action, *i.e.*, Crown.

In response, Guardian Angel urged that Crown was not an indispensable party. Alternatively, on July 11, 2014, Guardian Angel moved to amend its complaint to add Crown as a defendant. Nevertheless, the circuit court granted the Secretary's and CHFS's motions and dismissed the entirety of Guardian Angel's action with prejudice.

This appeal followed.

On appeal, Guardian Angel first argues the circuit court misperceived that Crown was an indispensable party and therefore erred in dismissing its action. In that vein, it represents that the protest it filed with the Secretary regarding the May 9, 2014 email was not actually "directed at the extensions of an interim contract to Crown Services, Inc.," as the Secretary's response to its protest interpreted it. Rather, Guardian Angel represents it regarded CHFS's email as an improper solicitation of bids—which could have affected anyone and not necessarily Crown—and that it was actually just protesting that. Guardian Angel further points out that the Secretary does have jurisdiction determine a protest to a procurement solicitation. Guardian Angel therefore concludes that the circuit court should not have accepted the Secretary's characterization of its protest and used it as a basis for dismissal.

This argument has no merit. As noted above, Guardian Angel never presented the contents of its protest to the circuit court or otherwise added its protest to the record. Thus, Guardian Angel essentially asked the circuit court (and is now asking this court) to simply take its word that the Secretary misinterpreted

the nature of its protest and consequently rendered an erroneous decision. But, the Secretary's decision in this matter is presumptively correct. KRS 45A.280. That presumption certainly includes the Secretary's characterization of Guardian Angel's claim, which was the basis of the Secretary's decision. Guardian Angel cannot rebut that presumption with bare allegations and assertions. Moreover, the very complaint Guardian Angel filed in this matter undermines the notion that Guardian Angel's protest was directed at anything other than rescinding—and apparently usurping—Crown's existing contract with CHFS: Guardian Angel specifically asked for “the rescission of Crown's contract and the award of Guardian Angel's contract.”¹

Moreover, a party in Crown's position is an indispensable party to the type of administrative action that Guardian Angel filed in this matter. In *RAM Engineering & Const., Inc. v. University of Louisville*, 127 S.W.3d 579 (Ky. 2003), for example,² the University of Louisville awarded an excavation contract for the site of Papa John's Cardinal stadium to a successful bidder—RAM Engineering.

¹ “Any part of a judgment appealed from that is not briefed is affirmed as being confessed.” *Osborne v. Payne*, 31 S.W.3d 911, 916 (Ky. 2000). With this in mind, Guardian Angel has failed to brief—and has indeed *specifically* abandoned—any of the claims or contentions it put forth in its complaint to the effect that CHFS or the secretary owed it monetary damages for an alleged violation of the KMPC, or that it was entitled to “an order enforcing the rescission of Crown's contract and the award of Guardian Angel's contract.” Instead, Guardian Angel now insists, on no fewer than three occasions over the course of its appellate and reply briefs, that the only relief it ever desired from the circuit court was a remand to the Secretary for a determination of its “solicitation” protest on the merits.

² In *RAM*, the Secretary denied a protest to an award of a contract on the merits; whereas here, the Secretary denied Guardian Angel's protest on jurisdictional grounds. In either circumstance, however, the denial of the protest was favorable to the party whose contract was the subject of the protest; a reversal of that denial would certainly affect that party's interests; thus, in either circumstance, the party whose contract was the subject of the protest would be considered indispensable to an appeal. See *Browning v. Preece*, 392 S.W.3d 388, 391 (Ky. 2013).

Id. 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.* Subsequently, and in a completely separate lawsuit, RAM collaterally attacked the agreed judgment between the University and MAC arguing that "the agreed order voiding [its] initial contract could have no effect because RAM had not been joined in the MAC litigation[.]" *Id.* at 582. The Supreme Court agreed and 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.*

Next, Guardian Angel argues that if Crown was an indispensable party to its action, the circuit court should have either allowed it to amend its complaint to add Crown as a party or, alternatively, the circuit court should have joined Crown on its own motion pursuant to Kentucky Rules of Civil Procedure (CR) 19. However, this argument misunderstands the posture of the action that was before the circuit court and oversimplifies why the circuit court entered an order of dismissal.

Keeping in mind that Crown was an indispensable party to Guardian Angel's suit before the circuit court, it now becomes necessary to explain why,

irrespective of CR 19, Guardian Angel’s failure to add Crown as a party to its suit within 30 days of the Secretary’s decision mandated dismissal.

As indicated earlier in this opinion, KRS 45A.285 provides the following in pertinent part:

(1) The secretary of the finance and administration cabinet, or his designee shall have authority to determine protests and other controversies of actual or prospective bidders or offerors in connection with the solicitation or selection for award of a contract.

(2) Any actual or prospective bidder, offeror or contractor who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest. . . .

This Section further provides in (4) that the “decision by the secretary of the finance and administration cabinet shall be final and conclusive.” But, as explained in *Pendleton Brothers Vending, Inc. v. Commonwealth of Kentucky Finance and Administration Cabinet*, 758 S.W.2d 24, 28 (Ky. 1988),

This proviso must be construed to mean “final and conclusive” for administrative purposes, not as a barrier against judicial review. To construe it otherwise would be to grant the Secretary plenary power. . . . the supremacy of law demands that there 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 conducted regularly.

(Internal citations and quotations omitted.)

In short, when Guardian Angel filed suit in circuit court regarding the Secretary’s denial of its protest, its suit was, as Guardian Angel acknowledged in

its complaint, an administrative appeal. Moreover, as Guardian Angel's complaint further acknowledged, its administrative appeal was subject to KRS 13B.140(1), which provides:

All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. *Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.*^{3]}

(Emphasis added.)

Where an appeal is filed in the circuit court by grant of a statute, as it was in this case, the parties must strictly comply with the dictates of the statute. This is because “[a]n appeal from an administrative decision is a matter of legislative grace and not a right, and thus the failure to strictly follow statutory guidelines for the appeal is fatal.” *Spencer County Preservation, Inc. v. Beacon Hill, LLC*, 214 S.W.3d 327, 329 (Ky. App. 2007).

³ Guardian Angel did not attach a copy of the Secretary's decision to its petition and did not add it to the record until well after the 30-day period specified in KRS 13B.140(1) had expired. The appellees assert this failure qualified as an alternative basis for the circuit court to dismiss Guardian Angel's action. In light of how we have resolved this appeal, however, it is unnecessary to address this issue.

With this in mind, administrative appeals subject to KRS 13B.140(1) are commenced by the filing of the petition and the issuance of summons to *all* parties.⁴ “If the action is commenced by the filing of the petition and the issuance of summons, and only one time period is specified, it must follow that both actions must be taken within the period of time provided in the statute.” *Metro Medical Imaging, LLC v. Commonwealth*, 173 S.W.3d 916, 918 (Ky. App. 2005). Otherwise, the circuit court is deprived of jurisdiction and the action must be dismissed. *Id.*

Crown was an indispensable party to Guardian Angel’s suit. Guardian Angel did not issue summons to Crown at all; nor, for that matter, did it attempt to do so until long after the 30-day window had already elapsed. Its failure to do so effectively deprived the circuit court of jurisdiction. Accordingly, the circuit court committed no error in dismissing this matter. We therefore AFFIRM.

ALL CONCUR.

⁴ KRS 13B.140(1) does not contain language requiring issuance of summons to initiate an appeal. However, CR 1(2) states that the Kentucky Rules of Civil Procedure govern “procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules.” As noted above, KRS 13B.140(1) states that a petitioner shall serve all parties with a copy of the petition. CR 3.01 requires issuance of summons to commence an action. These are not inconsistent provisions. In fact, they address two different procedural issues. One, KRS 13B.140(1), addresses who must be served, and the other, CR 3.01, addresses how an action is commenced. Because these provisions are not inconsistent, a party who wants to appeal from an agency order under KRS 13B.140(1) must file a complaint and cause summons to be issued to all parties within 30 days after the agency’s final order. For identical reasoning, *see Dixon v. Board of Educ. of Harlan County*, No. 2009-CA-000942-MR, 2011 WL 43230 at *5 (Ky. App. Jan. 7, 2011). We find *Dixon* persuasive and proper to cite per CR 76.28(4).

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