



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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October 28, 2019

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Re: Biscayne Contractors, Inc. v. Board of Supervisors of Fairfax County, VA
CL 2018-14893

Dear Ms. McCay and Mr. Cameron:

This matter is before the court on Defendant's motion to reconsider the denial of Defendant's motion to dismiss for lack of jurisdiction. For the reasons set forth below, the motion is DENIED.

Analysis

As the Board correctly observes, the issue is whether the purchasing agent's decision is a "final decision" of the "public body" under the Virginia Public Procurement Act (hereinafter "the Act")? The Board argues that the answer is "Yes," but the court concludes that the shorter and more accurate answer is "No."

To resolve that issue, an underlying question must first be resolved: what is the controlling law, the Act or the Board's Purchasing Resolution (since the Board relies on both)?

The Board argues that Code § 2.2-4343, in effect, authorizes a locality to

"adopt its own purchasing practices through regulation, ordinance or resolution and it can establish its own contractual disputes provision" because it exempts localities from the Act. Board Memorandum at 2.

The applicable portion of Code § 2.2-4343 is subdivision (A)(10), which provides in pertinent part:

A. The provisions of [Chapter 43, the Act] shall not apply to: . . .

10. Any county . . . whose governing body has adopted, by ordinance or resolution, alternative policies and procedures which are (i) based on competitive principles and (ii) generally applicable to procurement of goods and services by such governing body and its agencies, except as stipulated in subdivision 12.

Subdivision 12 provides in pertinent part:

Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of subsections B, C, and D of § 2.2-4303, §§ 2.2-4305, 2.2-4311, 2.2-4315, 2.2-4317, 2.2-4330, 2.2-4333 through 2.2-4338, 2.2-4342, 2.2-4343.1, and 2.2-4367 through 2.2-4377, and Chapter 43.1 (§ 2.2-4378 et seq.) shall apply to all counties . . .

The method for procurement of professional services through competitive negotiation set forth in §§ 2.2-4302.2, 2.2-4303.1, and 2.2-4303.2 shall also apply to all counties . . ., where the cost of the professional service is expected to exceed \$80,000 in the aggregate or for the sum of all phases of a contract or project.

By its plain language, therefore, the Act does not apply to a county which has adopted, by resolution, alternative policies and procedures related to the procurement of goods and services by the county. This conclusion is confirmed by the fact that Subdivision 12 creates specific and express exceptions to the blanket exemption of Code § 2.2-4343(A)(10). "The maxim *expressio unius est exclusio alterius* applies when mention of a specific item in a statute implies that omitted items were not intended to be included." *Virginian-Pilot Media Companies, LLC v. Dow Jones & Co.*, 280 Va. 464, 468-69 (2010). If Code § 2.2-4343(A)(10) was not a broad exemption from the Act for counties, there would be no need for the specific exceptions which "shall apply to all counties"

In view of the fact that the Board has adopted, by resolution, alternative policies and procedures related to the procurement of goods and services by the county pursuant to Code § 2.2-4343(A)(10), it follows that, unless a statutory requirement is set forth in Subdivision 12, the county is not bound by any provision of the Act. The Board's argument, *i.e.*, that it is governed by Code § 2.2-4363¹ and Code § 2.2-4302 (authorizes a "public body" to "act by and

¹ "B. Each public body shall include in its contracts a procedure for consideration of contractual claims. Such procedure, which may be contained in the contract or may be specifically incorporated into the contract by reference and made available to the contractor, shall establish a time limit for a final decision in writing by the public body. . . ."

through its duly designated or authorized officers or employees"), is thus inconsistent with its argument that it is exempt from the Act by virtue of Code § 2.2-4343(A)(10).

The Board cannot have it both ways and cannot pick and choose which provisions of the Act with which to comply depending on how those provisions benefit it. Rather, the parties and the court are "bound by the plain meaning" of statutory language "[w]hen the language of a statute is unambiguous" and "must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity." *Conyers v. Martial Arts World*, 273 Va. 96, 104 (2007). The court finds that the language of Code § 2.2-4343(A)(10) is unambiguous and giving it effect would not result in a manifest absurdity.

Accordingly, the court finds that the Board is wholly exempt from the Act (other than from the requirements set forth in Subdivision 12, none of which are applicable here) as it has adopted by resolution alternative policies and procedures which meet the requirements of Code § 2.2-4343(A)(10), and that neither Code § 2.2-4363 nor Code § 2.2-4302 applies directly to the County.² That being the case, the court must look to the Board's Purchasing Resolution to determine the judicial review rights of Plaintiff.

The key provisions of the Purchasing Resolution are in Article 4, Sections 5(A) ("Contractual Disputes") and 6(A) ("Legal Action").

Section 5(A) provides in part:

The decision of the County Purchasing Agent shall be final and conclusive unless the contractor appeals within six (6) months of the date of the final written decision *by instituting legal action as provided in the Code of Virginia*. (Emphasis added).

Section 6(A) states: "No . . . contractor shall institute any legal action until all *statutory requirements* have been met." (Emphasis added).

Turning first to Section 6(A) - entitled "Legal Action" - the plain language makes as evident as language can that a contractor may not institute any legal action "until all *statutory requirements* have been met." (Emphasis added). The statutory requirements for "legal action" are found in Code § 2.2-4364(E) and Code § 2.2-4363(D) and (E). Indeed, since "legal action"

² In *Viking Enter., Inc. v. Cty. of Chesterfield*, 277 Va. 104 (2009), the Court expressly declined to address this issue:

For purposes of this opinion, we assume the Procurement Act applies to the contract between Viking and the County. The County, however, argues that it enacted an ordinance opting out of the Procurement Act in accordance with Code § 2.2-4343(A)(10), and therefore the Procurement Act does not apply. Because we will affirm the judgment of the circuit court on other grounds, we will not address this argument nor decide whether the County properly preserved it for appeal.

plainly contemplates litigation in the courts, and "subject matter jurisdiction exists in the courts only when it has been granted by a constitution or statute," *Virginian-Pilot Media Companies, LLC v. Dow Jones & Co.*, 280 Va. 464, 467-68 (2010), the Board perforce needs to ground "legal action" on compliance with statutory requirements. That is what the Board has done here.

Code § 2.2-4364(E) provides: "A contractor may bring an action involving a contract dispute with a public body in the appropriate circuit court." Thus, this court only has subject matter jurisdiction to entertain an action involving a "contract dispute with a public body"

Code § 2.2-4363(D) establishes a limit on this court's subject matter jurisdiction by providing in applicable part:

D. A contractor may not . . . institute legal action as provided in § 2.2-4364, prior to receipt of the public body's decision on the claim

Accordingly, until a "public body" decides a contractor's claim, this court lacks subject matter jurisdiction.

Finally, Code § 2.2-4363(E) provides:

E. The decision of the public body shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the public body by . . . instituting legal action as provided in § 2.2-4364.

All three of the above provisions concern a "public body," a term which is defined for purposes of the Act at Code § 2.2-4301 as follows:

"Public body" means any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter. "Public body" shall include (i) any independent agency of the Commonwealth, and (ii) any metropolitan planning organization or planning district commission which operates exclusively within the Commonwealth of Virginia.

The Board is thus a "public body" because it is a "legislative . . . body . . . [or] board . . . created by law to exercise some sovereign power . . . , and empowered by law to undertake the activities described in this chapter."³ Moreover, on the face of Code § 2.2-4301, by its plain language, a designated or authorized officer or employee of the County cannot be a "public body"

³ Consistent with being a "public body" under Code § 2.2-4301, the Board is also a "governing body" within the meaning of Code § 15.2-102 because it is "the board of supervisors of a county" The definition of "public body" is also consistent with Code § 15.2-1401, which provides: "Unless otherwise clearly indicated by the context in which the provisions relating thereto are set forth, all powers granted to localities shall be vested in their respective governing bodies."

because he/she is merely an agent through which the public body acts⁴ and not a "legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision" Further, no provision of the Act concerning "legal action" authorizes the County to substitute an officer or employee for the "public body."

In sum, from the plain language of Section 6(A), "legal action" can only be taken by a contractor in this court within 6 months of receipt of the final decision of the Board.⁵

Turning to Section 5(A), there is no provision of the Code of Virginia which authorizes legal action based upon a final written decision of a County Purchasing Agent. Thus, because "the plaintiffs are entitled to have the doubt resolved in their favor and against the defendant [Commonwealth], the author of the instrument," *Graham v. Commonwealth*, 206 Va. 431, 435 (1965), the only reasonable construction of Section 5(A), particularly in view of the plain and unambiguous language of Section 6(A), is that, by incorporating "legal action as provided in the Code of Virginia," Section 5(A) refers to the provisions of the Code which govern "legal action" on contractual disputes, i.e., Code § 2.2-4364(E) and Code § 2.2-4363(D) and (E), as discussed above.

In view of the above analysis of Sections 5(A) and 6(A), it is evident that it was the Board's action in disallowing Plaintiff's claim by letter from the clerk of the Board (dated June 6, 2018) and Plaintiff's filing this action on October 16, 2018 (within 6 months of June 6, 2018) which, in part, gave this court subject matter jurisdiction under Act. Further, because *Viking Enter., Inc., supra*, held that a plaintiff must not only comply with the 6 month filing deadline under the Act, but must also comply with the requirements of Code § 15.2-1246⁶ (service of a notice of appeal on the clerk of the Board and execution of a bond to the County) for the court to have subject matter jurisdiction, Plaintiff's service of a notice of appeal on the clerk of the

⁴ Code § 15.2-1501 provides: "Whenever it is not designated by general law or special act which officer or employee of the locality shall exercise any power or perform any duty conferred upon or required of the locality, then any such power shall be exercised or duty performed by the officer or employee of the locality so designated by the governing body."

⁵ Code § 2.2-4302, which, *inter alia*, authorizes a "public body" to "act by and through its duly designated or authorized officers or employees," has no applicability here since it is not one of the statutes made applicable by Subdivision 12 of Code § 2.2-4343(A).

⁶ "When a claim of any person against a county is disallowed in whole or in part by the governing body, if such person is . . . not present, the clerk of the governing body shall serve a written notice of the disallowance on him or his agent, and he may appeal from the decision within 30 days after service of such notice. In no case shall the appeal be taken after the lapse of six months from the date of the decision. The appeal shall be filed with the circuit court for the county. . . . The disallowance may be appealed by serving written notice on the clerk of the governing body and executing a cash or surety bond or irrevocable letter of credit to the county in the amount of \$250, with condition for the faithful prosecution of such appeal, and the payment of all costs imposed on the appellant by the court."

Board and execution of a bond to the County on July 3, 2018 (27 days after service of the written notice of the disallowance upon Plaintiff), gave this court subject matter jurisdiction under Code § 15.2-1246.

The Board asserts that *Mid-Atl. Bus. Commc'ns, Inc. v. Virginia Dep't of Motor Vehicles*, 269 Va. 51 (2005) supports its position. But, unlike the instant case, where the Purchasing Resolution expressly incorporated "instituting legal action as provided in the Code of Virginia" and compliance with "all statutory requirements" and the Purchasing Agent is not a "public body," the Vendors Manual at issue in *Mid-Atl. Bus. Commc'ns, Inc.* ("which was promulgated pursuant to the VPPA and incorporated into the contract between the Department and MABC") "recites that a claim denial is final if issued by an agency's 'purchasing office.'" 269 Va. at 56 (emphasis added). Notably, the definition of "public body" in Code § 2.2-4301 includes both "agency" and "department" such that the inclusion of a particular officer of an "agency" or "department" authorized to act for the "agency" or "department" would be the act of a "public body."

Moreover, in *Viking Enter., Inc., supra*, which, like the case at bar, involved a county, the Supreme Court made short work of the Board's argument: "Unlike the case before us, the issue in *Mid-Atlantic* did not involve an appeal from the disallowance of a claim by the governing body of a county." *Viking Enter., Inc.*, 277 Va. at 113.

For all the above reasons, the Board's motion for reconsideration is DENIED.

Sincerely yours,

A handwritten signature in blue ink that reads "Richard E. Gardiner". The signature is written in a cursive style with a large initial 'R'.

Richard E. Gardiner
Judge