



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 30, 2011

FILE NO. 11-006

STATE MATTERS:
Beverage Vending and
Pouring Rights Contract

Ms. E. Jane Stricklin
Executive Director
Legislative Audit Commission
622 William G. Stratton Building
Springfield, Illinois 62706

Dear Ms. Stricklin:

You have inquired, at the direction of the Legislative Audit Commission, whether a contract is properly awarded when a protest is filed but not resolved prior to the contract's award. The specific basis for your inquiry is the Beverage Vending and Pouring Rights Contract (contract)¹ that the Illinois Department of Revenue (IDOR) awarded to PepsiAmericas, Inc. on July 27, 2007, prior to resolving a protest challenging the legality of the pricing specifications in the initial request for proposals (RFP). For the reasons discussed below, assuming that the

¹See Illinois Department of Revenue, Beverage Vending and Pouring Program Request for Proposals No. 22011731 (December 6, 2006).

protest was properly filed,² it is my opinion that the contract was not awarded in accordance with Illinois law because IDOR did not resolve the pending protest prior to awarding the contract. Although the General Assembly has made a number of changes to the Illinois Procurement Code (the Code) since the award of this contract,³ including transferring the exercise of all procurement authority to the chief procurement officers (30 ILCS 500/10-5 (West 2010)), the issue concerning the timing of the protest's resolution is unchanged by the amendments to the law and continues to be significant.

BACKGROUND

Beverage Vending and Pouring Rights Procurement

Based on information that you provided,⁴ it is our understanding that on December 6, 2006, IDOR posted a Beverage Vending and Pouring Program RFP seeking a qualified vendor to provide comprehensive beverage vending services to State facilities, employees, visitors, participating universities, and special events locations.⁵ The RFP provided

²A protest must be filed in accordance with section 1.5550 of the Standard Procurement Rules (the Rules) (44 Ill. Adm. Code §1.5550, as amended by 30 Ill. Reg. 17305, 17381 (effective October 20, 2006)), the administrative rules that implement the Code (30 ILCS 500/1-1 *et seq.* (West 2010)).

³*See, e.g.*, Public Acts 96-795, effective July 1, 2010; 96-920, effective July 1, 2010; 96-1444, effective August 20, 2010.

⁴*See* Auditor General, Management Audit, State's Multi-Year Beverage Vending and Pouring Contract, March 2009 (Auditor General Management Audit); Legislative Audit Commission, Management Audit, State's Multi-Year Beverage Vending and Pouring Contract, March 2009; 96th Ill. Gen. Assem., Legislative Audit Commission Meeting, August 5, 2009, Minutes and Transcript of Minutes, Tape 1, Side 1.

⁵Auditor General Management Audit, Appendix E, 69.

that the vendor will be responsible for managing vending machines on both State and university properties and will be the exclusive beverage provider for organizations that resell beverage vending on behalf of the State or participating universities.⁶ The Nedlog Company (Nedlog) filed a protest challenging the RFP's compliance with the Code on December 13, 2006. The Nedlog protest, which is described in detail below, asserted that the pricing specifications in the RFP were prohibited by the Code. IDOR did not respond to Nedlog's protest before awarding the contract. IDOR's timing in awarding the contract and then resolving the Nedlog protest forms the basis of your inquiry.

On December 18, 2006, IDOR held a vendor conference attended by six potential vendors. Ultimately, two of those vendors, Coca-Cola Enterprises Bottling Companies (Coke) and PepsiAmericas, Inc. (Pepsi), timely submitted the technical and pricing proposals required by the RFP. Both Coke and Pepsi made vendor presentations on March 22, 2007. A nine-person committee evaluated the responses to the RFP. The committee members individually scored the technical proposals from Coke and Pepsi, and completed the scoring process on April 16, 2007. Reference checks were conducted in late March/early April 2007 by two evaluation committee members representing IDOR. Pricing proposals from Coke and Pepsi were opened on April 19, 2007. Separate vendor conference calls with Coke and Pepsi were conducted on April 30, 2007. After opening the pricing proposals and conducting vendor conferences, IDOR officials realized

⁶Auditor General Management Audit, Appendix E, 70.

that Coke had failed to receive the minimum number of points required on the technical proposal evaluation to proceed to the pricing phase. On July 27, 2007, IDOR awarded the 10-year contract to Pepsi;⁷ the contract was executed and was effective June 6, 2008.⁸

Audit Findings

Based on questions raised by Coke regarding the propriety of the contract award process, the Illinois House of Representatives adopted a resolution⁹ directing the Auditor General to conduct an audit of the procurement practices related to the contract to determine whether the chief procurement officer's actions and decisions in connection with the contract were in the State's best interests. The Auditor General conducted a management audit of the procurement practices in connection with the award of the contract.¹⁰ As part of this audit, the Auditor General identified numerous deficiencies in the contract's procurement process, including noncompliance with the Rules and the Department of Central Management Services' (CMS) Evaluation Guidelines.¹¹ Because of these deficiencies, the Auditor General was unable to determine whether the award of the contract to Pepsi was in the State's best interest.¹²

⁷Section 1.1 of the contract states that "[u]nless otherwise specified, this contract shall commence upon the last dated signature of the Parties and expire on the tenth (10th) anniversary of the signature date." Auditor General Management Audit, Introduction and Background, 10.

⁸Auditor General Management Audit, Introduction and Background, 9-10.

⁹95th Ill. Gen. Assem., House Resolution 862, 2008 Sess.

¹⁰See Auditor General Management Audit.

¹¹See Auditor General Management Audit, Report Conclusions, iii, v, xi, xii, Introduction and Background, 10, Evaluation Process, 13-14, 20, 23, 25-27, Appendix H, 116.

¹²See Auditor General Management Audit, Report Conclusions, iii.

Nedlog Protest

The Nedlog protest, filed in December 2006, claimed that the RFP was in direct conflict with section 20-50 of the Code (30 ILCS 500/20-50 (West 2006)), which prohibits a State agency from issuing solicitations or specifications that "require, stipulate, suggest, or encourage a monetary or other financial contribution or donation as an explicit or implied term or condition for awarding or completing [a] contract." Nedlog expressed concerns regarding, among other things, the pricing specifications in the RFP with respect to: (1) a license fee the selected vendor was expected to pay at the initiation of the contract for exclusively managing the beverage operations; (2) an annual vending commitment fee the selected vendor was expected to pay as an annual guarantee of vending commissions; (3) the vending percentage commission the selected vendor was expected to pay for vending sales; and (4) the marketing commitment fee the vendor was expected to pay on an annual basis for marketing benefits.¹³ In a follow-up letter dated April 10, 2007, attorneys for Nedlog set out in greater detail the payment concerns raised in the protest letter and also noted that Nedlog had yet to receive a response to its protest. Upon learning that IDOR had awarded the contract in late July, attorneys for Nedlog contacted CMS on August 1, 2007, noting that Nedlog had not received a response to its December 2006 protest. Later that day, IDOR formally denied Nedlog's protest.¹⁴ Against this background, you have asked whether the contract was properly awarded if the Nedlog protest was still pending at the time of the contract's award.

¹³Auditor General Management Audit, Protests, 38.

¹⁴IDOR's denial letter states that Nedlog made two claims in support of its protest and addresses those claims. First, the denial letter states that "[w]e disagree with your interpretation of" section 20-50 of the Code and "we further disagree that the structure we proposed is violative of the statute." The Auditor General noted that, contrary to the language in IDOR's denial letter, Nedlog did not make two claims in support of its protest. Rather, Nedlog made one claim-that the RFP was in direct violation of the Code. See Auditor General Management Audit, Nedlog Protest, 40.

ANALYSIS

Procurement Code and Standard Procurement Rules

It has long been the State's policy that "principles of competitive bidding and economical procurement practices * * * be applicable to all purchases and contracts by or for any State agency." 30 ILCS 500/1-5 (West 2010). To this end, at the time that IDOR posted the RFP and awarded the contract, the Code generally required that all State contracts, including contracts for supplies and services, be awarded by competitive sealed bidding in accordance with section 20-10 of the Code (30 ILCS 500/20-10 (West 2006)), except as otherwise provided. 30 ILCS 500/20-5, 20-10, 25-15 (West 2006). Further, the "chief procurement officer," a term that was defined to refer to the Director of CMS in this context (30 ILCS 500/1-15.15 (West 2006)),¹⁵ was authorized to establish "by rule procedures to be followed by purchasing agencies in resolving protested solicitations and awards and contract controversies * * * and for resolving other procurement-related disputes." 30 ILCS 500/20-75 (West 2006). CMS adopted the Rules to implement the Code's provisions. *See generally* 44 Ill. Adm. Code §1.1 *et seq.*, as amended by

¹⁵At the time the Pepsi contract was effective, the term "purchasing agency" was defined to refer to "a State agency that is authorized by this Code, by its implementing rules, or by authorized delegation of a chief procurement officer to enter into contracts." 30 ILCS 500/1-15.70 (West 2006). Since then, the General Assembly has passed Public Act 96-795 and amended section 1-15.70 of the Code (30 ILCS 500/1-15.70 (West 2010)) to provide that the term "purchasing agency" refers to "a State agency that enters into a contract at the direction of a State purchasing officer authorized by a chief procurement officer or a chief procurement officer." The term "chief procurement officer" in this context means the appropriate independent chief procurement officer appointed by the Executive Ethics Commission, rather than the Director of CMS. *See* 30 ILCS 500/1-15.15 (West 2010).

Although the amendments to the Code transferred the authority for procurement to an independent chief procurement officer and those State purchasing officers acting at the direction of the chief procurement officer, these changes do not impact the legal issue concerning whether a contract may properly be awarded prior to the resolution of a pending protest.

30 Ill. Reg. 17305 (effective October 20, 2006).¹⁶ Section 1.5550 of the Rules addresses protests and provides, in pertinent part:

- a) Protest Resolution by the Protest Review Office
An actual or prospective bidder, offeror, or vendor that may be aggrieved in connection with a procurement action may file a protest provided the aggrieved party has evidence of a violation of the Illinois Procurement Code or other law, any associated rules, or the solicitation itself, including evaluation or award.

* * *

- d) Stay of Procurements During Protest
When a protest has been timely filed and before an award has been made, the Procurement Officer shall make no award of the contract until the protest has been resolved. If timely received but after award, the award shall be stayed without penalty to the State or the award may be honored or revoked in whole or in part depending on the outcome of the protest review. Whether or not a protest has been received, the Procurement Officer may, with the approval of the Protest Review Office,^[17] make the award or reinstate the award upon a determination that the needs of the State require an immediate award and performance under the contract.
(Emphasis added.)

Administrative regulations have the force and effect of law and are to be construed according to the same standards that govern the construction of statutes. *People v. Bonutti*, 212 Ill. 2d 182, 188 (2004). The primary purpose of statutory construction is to

¹⁶Following the amendments made by Public Act 96-795, the Secretary of State transferred the Rules from CMS to the Chief Procurement Officer for General Services and changed the title of the Rules from "Standard Procurement" to "Chief Procurement Officer for General Services Standard Procurement." 35 Ill. Reg. 10143, 10150 (recodified June 24, 2011). In its July 2011 Regulatory Agenda (35 Ill. Reg. 10990 (published July 8, 2011)), the Chief Procurement Officer for General Services indicates that the Rules may be amended as necessary to reflect revisions to the Code made by Public Acts 96-795, 96-920, and other relevant enactments. To date, no amendments have been proposed or adopted. Thus, the Rules addressing protests are unchanged and continue to apply and will be referred to as the Standard Procurement Rules.

¹⁷Section 1.15 of the Rules define "Protest Review Office" to mean "[t]he office address of the person designated in the solicitation document to whom protests must be directed. This person will respond to or coordinate the response to the protest." 44 Ill. Adm. Code §1.15, as amended by 30 Ill. Reg. 17305, 17317 (effective October 20, 2006).

ascertain and give effect to the intent of the General Assembly. *Illinois Department of Healthcare & Family Services v. Warner*, 227 Ill. 2d 223, 229 (2008). Likewise, the touchstone of construction of an administrative rule or regulation is administrative intent. *Sartwell v. Board of Trustees of the Teachers' Retirement System of the State of Illinois*, 403 Ill. App. 3d 719, 725 (2010). The surest and most reliable indicator of intent is the language of the rule or regulation itself. *People ex rel. Madigan v. Illinois Commerce Comm'n*, 231 Ill. 2d 370, 380 (2008). Accordingly, where the language of an administrative rule is clear and unambiguous, it must be given effect as written. *Madigan*, 231 Ill. 2d at 380.

Under the plain and unambiguous language of subsection 1.5550(a), a prospective bidder that is aggrieved with a procurement action is authorized to file a protest, provided that the prospective bidder "has evidence of a violation of the * * * Code or * * * any associated rules[.]"¹⁸ Further, under subsection 1.5550(d) it is clear that if a protest is timely filed and an

¹⁸The Rule directs protests to be submitted in writing to the protest review office designated in the solicitation and include specified, minimum information. 44 Ill. Adm. Code §§1.5550(b)(1), 1.5550(b)(2), as amended by 30 Ill. Reg. 17305, 17381-82 (effective October 20, 2006). A protest of specifications or other terms and conditions of the solicitation document is to be received within 7 calendar days after the date the solicitation was posted in the Illinois Procurement Bulletin. 44 Ill. Adm. Code §1.5550(b)(1), as amended by 30 Ill. Reg. 17305, 17381 (effective October 20, 2006). Further, the protest is to include the following information:

- A) the name and address of the protester;
- B) appropriate identification of the procurement, and, if a contract has been awarded, its number;
- C) a statement of reasons for the protest specifically identifying any alleged violation of the Illinois Procurement Code or other law, any associated rules, or the solicitation itself, including the evaluation or award; and
- D) supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time, in which case the expected availability date shall be indicated. 44 Ill. Adm. Code §1.5550(b)(2), as amended by 30 Ill. Reg. 17305, 17382 (effective October 20, 2006).

award of the contract has not been made, then "the Procurement Officer shall make no award of the contract until the protest has been resolved." Subsection 1.5550(d), however, also indicates that "[w]hether or not a protest has been received, the Procurement Officer may, with the approval of the Protest Review Office, make the award * * * upon a determination that the needs of the State require an immediate award and performance under the contract."

According to the audit report, Nedlog's protest was still pending at the time the contract was awarded. Assuming that the Nedlog protest was properly filed in accordance with subsection 1.5550(b) of the Rules, IDOR did not resolve the protest prior to awarding the contract as generally required by subsection 1.5550(d). Further, nothing in the information that you have provided indicates that IDOR determined "that the needs of the State require[d] an immediate award and performance under the contract"¹⁹ or that IDOR sought approval from the protest review office to make an immediate award of the contract. Consequently, based on the information that you have provided to us, IDOR did not comply with section 1.5550 of the Rules by either resolving the Nedlog protest prior to awarding the contract or making the award with the approval of the protest review office.

¹⁹In fact, although IDOR awarded the contract to Pepsi on July 27, 2007, the parties did not execute the contract until over a year later. Pepsi signed the contract on May 14, 2008, the IDOR Chief Legal Counsel signed the contract on June 6, 2008, and the IDOR Director signed but did not date the contract. A handwritten note attached to the contract said that August 15, 2008, was being used as the start date because that was when the IDOR Procurement Officer received the contract. IDOR sent a copy of the fully-executed contract to Pepsi on that date. In the Management Audit, the Auditor General concluded that based on the signature dates in the contract, the contract should have commenced on June 6, 2008, not August 15, 2008. Auditor General Management Audit, Introduction and Background, 9-10. As a result, it does not appear that the immediate award and performance of the contract was necessary.

CONCLUSION

Subsection 1.5550(a) of the Standard Procurement Rules generally authorizes a prospective bidder that is aggrieved by a procurement action to file a protest provided that the prospective bidder has evidence of a violation of the Illinois Procurement Code or any associated rules. Under the plain and unambiguous language of subsection 1.5550(d) of the Rules, if a protest is timely filed before a contract is awarded, then the procurement officer is to refrain from making an award of the contract until the protest is resolved. Based on the information provided to us, the Illinois Department of Revenue did not resolve the Nedlog protest until after the contract was awarded. Accordingly, assuming that the protest was properly filed, it is my opinion that IDOR improperly awarded the contract under section 1.5550 of the Rules.

In determining the effect of this conclusion, I would direct your attention to section 1.5540 of the Rules (44 Ill. Adm. Code §1.5540 (Conway Greene CD-Rom June 2003)), which addresses, among other things, contracts based on awards that were made improperly:

- b) Determination that Contract Violates the Code or this Part
Contracts based on awards or solicitations that were in violation of law shall be terminated at no cost to the State unless statute or rule allows the State to modify, ratify or take other corrective action. (Emphasis added.)

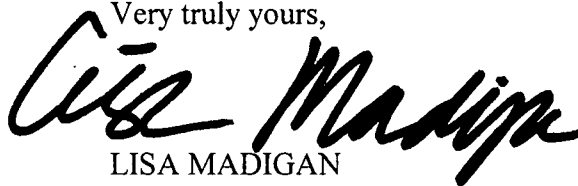
In this regard, subsection 50-60(a) of the Code (30 ILCS 500/50-60(a) (West 2010)) provides:

- (a) *If any contract or amendment thereto is entered into or purchase or expenditure of funds is made at any time in violation of this Code or any other law, the contract or amendment thereto may be declared void by the chief procurement officer or may be ratified and affirmed, provided the chief procurement officer determines that ratification is in the best interests of the State. If the contract is ratified and affirmed, it shall be without prejudice to the State's rights to any appropriate damages. (Emphasis added.)*

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Based on the foregoing, it is clear that a contract that was entered into in violation of the Code is not void as a matter of law. Rather, the contract is voidable. Further, under the plain and unambiguous language of the statute, the contract may also be ratified and affirmed, if the chief procurement officer determines that ratification is in the State's best interests. Therefore, it will be necessary for the independent chief procurement officer appointed by the Executive Ethics Commission (*see* 30 ILCS 500/1-15.15 (West 2010)) to review the contract and determine whether it is in the State's best interest to ratify the contract or to declare it void.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Madigan". The signature is written in a cursive, flowing style with a large initial "L".

LISA MADIGAN
ATTORNEY GENERAL