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III. THE PROCUREMENT CODE

Through its recent amendments to the Pennsylvania Procurement Code, the General Assembly appears to have, again, forged an administrative process which does not (at least expressly) provide a bidder or offeror a right to an administrative agency hearing prior to receiving a final denial in relation to bid protests and solicitations or awards. In 1998, the Pennsylvania Procurement Code substantially overhauled existing law with regard to the procurement of services for public agencies, including the Commonwealth. And, in attempting to deal with pre-litigation resolution of controversies, the General Assembly, by the Act of May 15, 1998, P.L. 358, No. 57, 62 P.C.S. § 1711, set forth a process by which actual or prospective bidders or offerors or contractors could challenge agency decisions relating to the public bidding process or award process. Under the 1998 legislation, any bidder or contractor was required to protest any decision or tentative decision "within seven days after the protestant knows or should have known of the facts giving rise to the protest". In response, the head of the purchasing agency was given the authority to settle and resolve the protest. In doing so, the agency was directed to resolve, at the latest, any such protests within 120 days from the filing of the protest and to issue a decision in writing which sets forth the reasons for the decision and further required that the Protestant be informed of his right to file "an action in Commonwealth Court". Subsection (e) of old § 1711 provided that the agency decision will become "final and conclusive unless a person adversely affected" appealed to Commonwealth Court within 14 (not 30) days of his receipt of the decision. Finally, the statute provided that the purchasing agency was not to proceed further with the solicitation or award pending Commonwealth Court's review.

In July of 2001, Commonwealth Court entered a decision in Direnzo Coal Company v. Department of General Services, 779 A.2d 614 (Pa. Cmwlth. 2001) which may have provided the impetus for the December, 2002 amendments to the Procurement Act (at least as relates to § 1711). In Direnzo, DGS rejected a protest filed by this coal manufacturer concluding that a particular specification was not unduly restrictive. The rejection of the protest by DGS appeared to parallel the language of old § 1711 and the final decision of DGS was rendered without ever having held an administrative agency hearing prior to the issuance of the final denial. On appeal, Commonwealth Court raised, *sua sponte*, whether its jurisdiction was original or appellate. The Court concluded that its jurisdiction should be appellate only and that its review of the decision of DGS should be in an appellate capacity as a court reviewing an adjudication under § 702 of the Administrative Agency Law, 2 Pa. C.S. § 702. However, the Court went on to conclude that, because DGS did not issue an adjudication and did not provide a hearing pursuant to 2 Pa. C.S. § 504, the denial was ineffective and was thus vacated, the matter being remanded for the purpose of conducting "an administrative hearing in accordance with the terms of the administrative agency law". See, Id. at 618.

The December, 2002 amendments to The Procurement Code expressly repeal old § 1711 and replace it with a detailed process now identified in Purdons as § 1711.1. Noteworthy to this presentation, the General Assembly now makes abundantly clear that, in evaluating any protests, the head of the purchasing agency or his designee need not "conduct a hearing". Specifically, at subsection (e) of § 1711.1, the legislation now provides the following:

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> (e) Evaluation of Protests – The head of the purchasing agency or his designee shall review the protest and any response or reply and he may request and review such additional documents or information he deems necessary to render a decision, and may, at his sole discretion, conduct a hearing. The head of the purchasing agency or his designee shall provide to the protestant and the contracting officer a reasonable opportunity to review and address any additional documents or information deemed necessary by the head of the purchasing agency or his designee to render a decision.

Subsection (g) now qualifies the status of Commonwealth Court as a reviewing tribunal. First, the subsection is under the heading "Appeal", thus clarifying that Commonwealth Court is reviewing the matter in an appellate rather than original jurisdiction capacity. Second, subsection (h) makes clear that "the record of determination for review by the court shall consist of the solicitation or award; the contract, if any; the protest; any response or reply; any additional documents or information considered by the head of the purchasing agency or his designee; the hearing transcript and exhibits, if any; and the final determination. Finally, subsection (i), entitled Standard of Review, makes clear that the decision of the purchasing agency is to be affirmed unless the Commonwealth Court finds "from the record that the determination is arbitrary and capricious, an abuse of discretion or is contrary to law". (In other words, the standard appellate review.)

Thus, we now have a second example where the General Assembly has expressly declared that administrative finality can be achieved without the applicable administrative agency ever providing the "aggrieved" party any opportunity for an administrative agency hearing as that term and concept is generally understood. Furthermore, the statutes make clear that Commonwealth Court is now acting in an appellate capacity in that its review is limited to the record compiled below – there is no evidence to be taken at the Commonwealth Court level.

IV. HOW THE PRACTITIONER REPRESENTING THE RESIDENT OR BIDDER DEALS WITH THE ABSENCE OF A HEARING

In the next several months, Commonwealth Court will probably be asked to address whether either or both of these statutes suffers from a constitutional infirmity. Indeed, in Direnzo and later cases, the Court made clear that, regardless of the absence of language in The Procurement Code requiring the holding of an administrative hearing, nevertheless, the Court concluded that Direnzo was entitled to such a hearing. The General Assembly's response could not have been clearer as its December, 2002 enactment clearly and unequivocally now provides that a hearing need only be held at the "sole discretion" of the agency head. Similar language, of course, exists under Act 100 which is the Amended Right-to-Know Law.

The guidance to the administrative agency practitioner is simple – contact the administrative agency; secure confirmation as to whether the agency has in place a process (which is recommended in the statute) under which requests for documents or protests for bid awards may be challenged. Ascertain whether there is a hearing which is generally provided for by these agencies. Notably, for those agencies under the Government's jurisdiction a

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comprehensive Management Directive was issued effective November 27, 2002, No. 205.36. Despite its detail, however, the Directive leaves to each agency whether hearings will be held. If there is no procedure in place, whether formally or informally, request a hearing pursuant to 1 Pa. Code and the Administrative Agency Law appearing at 2 Pa. C.S. Identify as a basis and entitlement for the hearing Commonwealth Court's decision in Direnzo. Consider demanding a hearing as a matter of due process under the long line of cases deriving from Matthews v. Eldridge, 424 U.S. 319 (1976) which essentially provides that the quantum of process to which an individual is entitled depends upon, *inter alia*, the seriousness of the deprivation. Most recently, Commonwealth Court concluded that a summary suspension of a medical doctor's license violated his constitutional rights, despite the statutory existence of an "automatic suspension", because, as the Court concluded, due process and 2 Pa. C.S. require that an agency give notice and an opportunity to be heard before rights are affected by agency action. See, Bhattacharjee v. State Board of Medicine, 808 A.2d 280 (Pa. Cmmw. 2002).

There is little doubt that the recent amendments to the Pennsylvania Procurement Code, and to a lesser extent, the recent amendments to the Right-to-Know Law, were enacted by our General Assembly in response to urgings by those agencies who are saddled constantly with bid protests and demands for documents. However, in our tripartite system of government, it is far from clear that Commonwealth Court will agree that the process provided for under these two enactments is adequate.

In terms of some guidelines and suggestions, the enactment of these two statutes should compel the counsel for either the Right-To-Know requestor or The Procurement Code protestor to prepare and file a most comprehensive document in support of either the request or the protest. This is not a time or place for notice pleading. There will not be a subsequent opportunity to supplement the reasons for the request, the reasons for the protest, or the reasons why any denial would be inappropriate. Assume the predictable reasons why an agency may deny certain documents or may deny a protest and, essentially, assert a "Reply" to New Matter before it is ever filed.

Additionally, as relates to The Procurement Code, consider the filing of a precautionary "taxpayer" suit directly in Commonwealth Court. Indeed, in footnote four (4) of the Direnzo decision, Commonwealth Court reasons that the enactment of The Procurement Code did not take "away the right of taxpayers to bring an action in equity...to enjoin the award of a contract when the bidder requirements were not followed". See, 779 A.2d at 617. See also, Balsbaugh v. D.G.S., 815 A.2d 36 (Pa. Cmmw. 2003) which reinforces this taxpayer alternative. However, the "taxpayer" must be someone different than the "disappointed bidder" as said bidder must follow Procurement Code procedures. See, PennHurst Med. v. DPW, 796 A.2d 423 (Pa. Cmmw. 2002). Obviously, the timing of the taxpayer suit in relation to the protest by the bidder is a matter of trial, and other, strategies for the practitioner. However, before jumping to the quick conclusion that the taxpayer suit should not be filed until the protest is denied, bear in mind how strongly Commonwealth agencies advocate laches in this area of litigation. One of the most difficult areas for a protestor under this December, 2002 statute is that he or she is left with, essentially, no right of discovery and no right to cross-examine those who were the decision-makers in the bid review, analysis, specification drafting, or issuance of tentative award.

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At the same time, if you are before an agency which does have regulations or Statements of Policy providing for the opportunity for a hearing, much of this concern is eliminated because the hearing before the agency at least provides an opportunity to confront witnesses and examine documents (to the extent permitted under 1 Pa. Code). However, for those of you who have previously handled taxpayer bid protest cases in the Commonwealth Court, there is no substitute for full-fledged discovery prior to a hearing on the merits.

Lastly, be sure that your request for documents or protest contains every conceivable legal theory in support of your entitlement and it further contains affirmative arguments which would otherwise be characterized as defenses. For example, assert you are entitled to a hearing and set forth the reasons why – do not run the risk of an appellate court concluding that you waived constitutional arguments such as this by reason of your failure to make them part of the administrative proceeding below. Again, include in your "papers" every ounce of information, data, and law you can conceive of because after the exceptions are asserted, you do not get another bite at the apple (and the appellate court will not consider additional evidence)!