BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of	**)**	
Balfour Beatty Constr.,	**)**	
Coakley & Williams Constr.,	**)**	
Hensel Phelps Constr., and	**)**	
Manhattan Constr.	**)**	**Docket No. MSBCA 2803**
	)	
	)	
Under	**)**	
DGS Project No. DC 455 909 001	**)**	

APPEARANCE FOR APPELLANT: **Maurice Baskin**
Washington, D.C.

APPEARANCE FOR RESPONDENT: **Stanley Turk**
David P. Chaisson
Elizabeth S. Morris
Assistant Attorneys General
Baltimore, Maryland

OPINION BY BOARD MEMBER DEMBROW

This bid protest was timely filed prior to the deadline for submitting responses to a Request for Proposal (RFP) for certain construction services sought by the Department of General Services (DGS) in connection with the State's planned improvements to physical facilities operated by the Department of Juvenile Services (DJS) and known as Cheltenham Youth Detention Center. Appellants jointly contend that one of the factors set forth in the RFP for evaluation of proposals is unlawful; namely, the State's announced intention to consider whether a Project Labor Agreement (PLA) is part of a proposer's construction plan. As more fully explained below, the Maryland State Board of Contract Appeals (Board) determines that nothing included by DGS in its RFP for DJS is contrary to lawful authority nor otherwise justifies the cancellation of this solicitation.

Findings of Fact

The parties, through counsel, have stipulated to the following uncontested facts:

1. On or about November 9, 2011, the Maryland Department of General Services ("DGS") issued a Request for Proposals under Md. Code Ann., State Fin. & Proc. §13-103 and COMAR 21.05.03 (Competitive Sealed Proposals) for Construction Manager at Risk services for the construction of a new detention facility to house male juvenile offenders at the Cheltenham Youth Facility in Prince George's County (the "RFP").
2. The RFP is for Construction Management at Risk services both prior to and during construction of the new facility.
3. The proposed project is for the new construction of a 72-bed state of the art detention facility to house juvenile offenders requiring secure care, and is estimated at $48 million.
4. Section 0300 of the RFP includes as a "Technical Evaluation Factor" the commitment by the offeror to the presence of a "Project Labor Agreement," the terms of which are specified in Section 00840.
5. As described in the RFP, the "presence of a Project Labor Agreement" is the sixth of seven evaluation factors, to be evaluated in descending order of importance.
6. Under the terms of the RFP, the ranking of the price proposal will be combined with the ranking of the technical proposal to determine a final ranking for each proposal with price and technical proposal given equal consideration. RFP §00300 Article 5 (C) & (D).
7. This solicitation is the first time DGS has included the presence of a PLA as an evaluation factor in a Construction Project.

8. In total, seven proposals were received in response to the Solicitation, including a proposal submitted by Appellant, Manhattan Construction.
9. DGS brought the Project Contract to the Maryland Board of Public Works for approval on May 23, 2012. The Board unanimously approved the Contract award to Turner Construction Company.

Numerous sworn assertions set forth in dueling Affidavits by prospective witnesses are also part of the record in this proceeding for which oral argument was presented to the Board on September 20, 2012, following which appellants and respondent both requested ruling based upon the claims, responses, Affidavits, and the foregoing stipulations of fact, without the necessity of presentation of additional evidence at further hearing. That joint request was filed along with the parties' final Briefs submitted to the Board on October 23, 2012.

Decision

The central issue presented to the Board in this bid protest is whether the inclusion of a PLA as a factor allowed to be considered during proposal evaluation invalidates an RFP which specifies that factor as one of several points of technical evaluation of proposals. Appellants base their argument against the validity of the terms of this RFP on two complaints: (1) that the inclusion of a PLA as an evaluation factor violates applicable State law and regulation because it is unduly restrictive and without factual foundation, and (2) use of a PLA as a prospective factor in ranking competing proposals constitutes an unprecedented change in State policy which mandates predicate formal rule-making under the State Administrative Procedure Act (APA), Md. Code Ann., State Gov. §10-125.

Statutory directive on the first of these dual arguments is admittedly vague. Md. Code Ann., State Finance & Procurement, §13-205(a)(1) states merely that "a unit [of state government] shall draft [procurement] specifications to encourage maximum practicable competition without modifying the [legitimate] requirements of the State." Nearly identical language is also included in the Code of Maryland Regulations (COMAR) §21.01.02(A). In addition, that section of COMAR also provides, "Specifications may not be drawn in such a manner as to favor a single vendor over other vendors." Further, COMAR 21.04.01.03 provides as follows: "To the extent practicable, functional or performance criteria shall be emphasized while limiting design or other detailed physical descriptions to those necessary to meet the needs of the State." Finally, COMAR 21.04.01.04 states, "The procurement officer...shall be responsible for reviewing the specifications...to insure that the specification is nonrestrictive."

As a consequence of the foregoing statute and regulations, it is firmly established that a procurement specification may not unduly restrict competition. See Xerox Corp., MSBCA 1111, 1 MSBCA ¶48 (1983). But clear and definitive identification of what specifications may violate that principle is much more challenging to delineate. State procurement precedent refining the disallowance of unduly restrictive bid specifications is slight; but combined with federal authority the Board is afforded some guidance on questions related to the government's obligation not to incorporate specification requirements that render solicitation obligations unreasonably restrictive. Although every procurement spec may be fairly deemed to impose upon offerors some level of obligation, limitation, or restriction, it has been generally held in such disputes merely that there must be at least a minimal rational basis behind the imposition of the restrictions selected by the government. Alco Power, B-207252.2, 82-2 Comp.Gen.Proc.Dec. ¶433 (1982).

Of course, it is for the government as procuring entity, and not the function of private vendors, to determine what restrictions may reasonably be imposed to achieve the State's procurement goals. So the State enjoys great latitude in its determination of what work it seeks to accomplish and how to go about obtaining the goods and services it desires. At the same time, the State is prohibited from steering contracts to a particular vendor when the identical or substantially comparable objectives sought in a procurement solicitation may be obtained from another vendor on more favorable terms.

According to procurement precedent in Maryland as well as the federal level, to defend its specifications the government must simply assert reasonable cause for a restrictive bid requirement in order to achieve a *prima facie* case that the restriction it selects is appropriate to meet its determined needs. (Xerox, *op cit.*; Alco, *Id.*) Once this minimal showing is made, the burden shifts to the party challenging a specification to establish by a preponderance of the evidence that a bid or proposal restriction is unreasonable. This is a heavy burden for appellant to satisfy. As characterized by counsel to respondent, "there is a modest burden placed upon an agency, but a considerable burden upon the protestor." (State's Supplemental Memorandum of Law, pg. 9; see also The Trane Co., MSBCA 1264, 2 MSBCA ¶118 (1985).)

Although the government's burden is never high in order to defend the bid specifications it is empowered to select, logic demands that two separate points of consideration underlie the analysis that must be undertaken by the Board in reviewing a complaint over an evaluation factor set forth in solicition. First, what is the degree of restriction imposed? Second, is the restriction rational, or by contrast, is it arbitrary or capricious? Logic dictates that these two prongs of review are related, and thus the Board is compelled to conclude that its analysis must be similarly dependent upon the answer to both questions. This is to say that the more restrictive a

specification may be, the greater the justification that the State may be fairly required to assert.

It is important to note at the outset, therefore, that the RFP specification here challenged is not highly restrictive. The RFP at issue does not even impose the requirement of a PLA. Any qualified offeror was free to submit a proposal in response to this RFP with or without a PLA. Furthermore, a proposal without a PLA could be offered to the State with or without an explanation of why the inclusion of a PLA may be favorable or unfavorable to the State. Nothing in the RFP required a PLA. The contested specification in this RFP simply allows the State to consider the potential benefit to the State of selecting a proposal with a PLA in place. In addition, the option of including a PLA in a proposal was assured by the State to be afforded the weight of only the sixth most important of a total of seven evaluation factors. To sum, the alleged restriction is slight, even giving appellant the benefit of classifying the allowance of consideration of a PLA as a restriction at all. Moreover, while the burden which must be borne by the State to justify its solicitation specifications is never high, in this particular bid protest, that burden is especially slight.

The small degree of restrictiveness here imposed is proven by the actual number of proposals received by the State from offerors seeking award of this contract. Had only a single proposal been received in response to the solicitation, for example, that phenomenon would certainly serve to evidence appellant's argument that something about the State's specifications may have been unduly restrictive. But in this instance, seven separate proposals were received, all of which offered to the State use of a PLA. This is evidence to the contrary, namely, that the specs at issue are not unduly restrictive. Had they been so, fewer offerors would have been available and interested to receive contract award.

The State's justification for its desire to be allowed to consider the prospective benefit of a PLA is asserted in this

matter in principal part by Affidavit of Bart Thomas, Assistant Secretary for DGS, who avers under oath as follows:

> 14. In order to further minimize risks during construction of this project, DGS included a Project Labor Agreement ("PLA") as an evaluation factor within the Request for Proposals ("RFP"). The use of a PLA was not a requirement of the RFP, but was the sixth of seven evaluation factors listed in order of importance.
>
> 15. The use of a PLA was chosen as an evaluation factor because it gives owners and building contractors a unique opportunity to anticipate and avoid potential problems that might arise and possibly impede progress.
>
> 16. Based upon research and communications with various union and non-union contractors and representatives, as well as organizations representing minority contractors and the Maryland Department of Labor, Licensing and Regulation, I concluded that the use of PLAs on large and complex projects can provide the following benefits:
>
> a. The use of a PLA will provide a dedicated, trained, and professional work force and provide a boost to the local economy through using the local (union and non-union) work force hired through local union hiring halls
> b. The use of a PLA will provide for a professional trained workforce with apprenticeship programs that will provide future gainful employment for local community members.
> c. The use of a PLA will maximize project stability, efficiency and productivity.
> d. The use of a PLA will provide safety training for all trades on the project creating a safer work environment.
> e. The use of a PLA will minimize risks and assure completion of the project in a timely manner and avoid any possible strikes, work stoppages or delays.
> f. The use of a PLA will promote a planned approach to labor relations, allow contractors to more accurately predict labor costs, schedule production timetables and encourage greater efficiency and productivity.

The foregoing excerpt is included in this Opinion not to imply that Mr. Thomas is correct in the conclusions and opinions he asserts, but merely that the State deliberately reached and holds those conclusions and opinions.

By stark comparison, the Board fully respects that a divergent set of conclusions and opinions may also exist with respect to the true utility of a PLA to facilitate timely cost-effective specialized construction projects like the reconstruction of Cheltenham. Turning to the competing Affidavit of Anirban Basu, proffered expert to support appellants' point of view, plainly, there are two diametrically opposing perspectives on whether PLA's may be beneficial or harmful to the accomplishment of the State's construction objectives sought by the subject RFP. Quite unlike Mr. Thomas, Mr. Basu claims under oath as follows:

> my research regarding the impact of PLAs on the DC-Maryland construction industry led me to the following conclusions:
>
> - Due to work rules restrictions, PLAs are likely to generate particularly large inefficiencies and adverse impacts on local contractors and workers.
> - PLAs produce outsized opportunities for the fewer than one in eight workers who are union members at the expense of the vast majority of workers, who are not union members.
> - Disadvantaged contractors/business owners are overwhelmingly nonunion.
> - Because of the paucity of unionized contraction capacity in the local area, government and government-assisted work under PLA mandates would be more expensive per square foot constructed; possibly 20 percent or more expensive based on the experience of other communities.
> - Because the construction industry remains in recession or near-recession, the loss of opportunities to merit shop contractors due to PLAs could be very harmful to competition and to the industry as a whole.

- Evidence and data demonstrate that a capable and skilled nonunion labor force exists locally.
- There is no statistical or anecdotal link between the absence of PLAs and the presence of labor strife.
- There is a connection between PLAs and poor construction outcomes, including a lack of local contractor participation and cost inflation.
- Past experience with PLAs indicates that promised benefits to the local construction industry and the taxpayers were not met; instead, taxpayers were adversely affected.

Mr. Basu further expounds his application of the foregoing conclusions to be true in Maryland as well as the subject construction project in particular.

It is not for the Board to determine which view is correct. The Board does not substitute its judgment for that of the state agency that identifies its procurement methods and desires and must later live with the consequences of its settled procurements. Lottery Enterprises, Inc., MSBCA 1680, 4 MSBCA ¶314 (1992). The seminal function of the Board is merely to decide whether the State's determination to give consideration to an offeror's proposal to use a PLA is rationally or reasonably related to the State's identification of its construction needs. Even if it wished to do so, the Board therefore would and will not supplant its opinions for the determination made by the State on the value of PLAs. Rightly or wrongly, DGS decided as a pilot project to give itself the latitude to evaluate a particular aspect of proposals as the sixth most important of seven technical evaluation factors allowed and required to be considered, namely, whether the proposer offers a PLA and if so, whether that aspect of the offer may be advantageous to the State. The Board cannot conclude that DGS was irrational, arbitrary, or capricious in selecting this aspect of the procurement strategy and path that it chose. Whether the decision made by DGS was wise or foolhardy may well be reviewed

in the future, but in neither the present nor the future may the Board rather than the procuring agency make the determination that Mr. Thomas is right and Mr. Basu is wrong, nor that Mr. Basu is right and Mr. Thomas is wrong. That decision is for DGS and DGS alone. No abuse of discretion is proven by appellants by the evidence adduced, so the exercise of discretion by DGS in this regard will not be disturbed.

Appellants' second broad argument to invalidate this procurement bears on the question of whether the RFP establishes new State policy which is permitted only after formal rule making as required by the APA, namely, public promulgation of proposed new regulations followed by review through the legislature's Administrative, Executive, and Legislative Review Committee (AELR) for approval and adoption prior to implementation and application. In response to this point, the State argues first that the Board lacks jurisdiction to consider this question because the statutorily prescribed method of contesting administrative regulations is set forth in Md. Code Ann., State Gov. §10-125, namely, by seeking a declaratory judgment in the Circuit Court. However, the Board can easily imagine that if appellants had sought relief directly from the Circuit Court, the State would be arguing just as strenuously that any Complaint for Declaratory Relief would not be ripe for adjudication prior to exhaustion of administrative remedy before the Board.

The jurisdiction of the Board is set forth in Md. Code Ann., State Finance & Procurement, §15-211, which provides, "The Appeals Board shall have jurisdiction to hear and decide all appeals arising from the final action of a unit on a protest relating to the formation of a procurement contract." When it is possible to do so, statutes must be construed to be harmonious with one another and not in conflict. It is true that the APA generally prescribes resort to the Circuit Court as the appropriate recourse to challenge a regulation. But it is also clear that the legislature intended for litigation arising from the State's procurement practices to be subject to exclusive

initial recourse by Appeal to the Board. It is not necessary for the two statutes to be read as being in conflict with another and therefore the Board is compelled by firmly established principles of statutory construction to reject the State's jurisdictional argument and address this aspect of appellant's complaint on the merits.

The APA defines "Regulation" as follows:

> (g) Regulation. --
> (1) "Regulation" means a statement or an amendment or repeal of a statement that:
> (i) has general application;
> (ii) has future effect;
> (iii) is adopted by a unit to:
> 1. detail or carry out a law that the unit administers;
> 2. govern organization of the unit;
> 3. govern the procedure of the unit; or
> 4. govern practice before the unit; and
> (iv) is in any form, including:
> 1. a guideline;
> 2. a rule;
> 3. a standard;
> 4. a statement of interpretation; or
> 5. a statement of policy.
> (2) "Regulation" does not include:
> (i) a statement that:
> 1. concerns only internal management of the unit; and
> 2. does not affect directly the rights of the public or the procedures available to the public;
> (ii) a response of the unit to a petition for adoption of a regulation, under § 10-123 of this subtitle; or
> (iii) a declaratory ruling of the unit as to a regulation, order, or statute, under Subtitle 3 of this title.

The essence of a regulation, therefore, is that it must have general application and future effect. The State's reservation of the ability to consider the potential benefit of contracting with a construction manager (CM) using a pre-negotiated PLA at Cheltenham on a project which imposes performance risks upon the contractor is neither of general application nor future effect.

Is a third party prospective contractor also to be endowed with legal authority to challenge whether the State may decide that it wishes preconstruction services for this particular job? Can the same contractor claim through its experts that juvenile detention centers should be built using a different construction approach in other respects, or perhaps not built at all? The answer is of course not. These are decisions within the sole province of the State, not its contractors. While it certainly is conceivable that a long term imposition of new procurement policy favoring PLAs could give rise to the necessity of adoption of regulations establishing such a policy through formal rule making process, the State's simple reservation of the right to consider certain factors in a single given set of procurement specifications is not tantamount to such enormity of policy change as to necessitate promulgation of new administrative regulations.

For all of the foregoing reasons, and as more fully set forth in the pleadings filed here, this appeal must be denied.

Wherefore it is Ordered this _____ day of November, 2012 that this appeal be and hereby is DENIED.

Dated:

_____
Dana Lee Dembrow
Board Member

I Concur:

_____
Michael J. Collins
Chairman

_____
Ann Marie Doory
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2803, appeal of Balfour Beatty Constr., Coakley & Williams Constr., Hensel Phelps Constr., and Manhattan Constr. under DGS Project No. DC 455 909 001.

Dated:

Michael L. Carnahan
Deputy Clerk