

**STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
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**SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

Docket No. 2353	Date of Decision: 08/08/03
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under DGS Solicitation Nos. 001IT814368 et. al.	
Appellant/Respondent: Sody Enterprises, Inc. Department of General Services	

Decision Summary:

Responsibility - Poor performance of prior state contracts provides a rational basis for the Procurement Officer to reject a bid on the ground that the bidder is not responsible.

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**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of Sody)
Enterprises, Inc.)
)
Under DGS Solicitations Nos.) Docket No. MSBCA 2353
001IT814368, 001IT814370,)
001IT814375, 001IT814376,)
001IT814383, 001IT814386, and)
001IT814387)

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: John H. Thornton
Assistant Attorney General
Baltimore, Maryland

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals from a final agency decision that Appellant was deemed not responsible respecting the above captioned solicitations.

Findings of Fact

1. On April 10, 11, and 16, 2003, the Department of General Services (DGS) issued the seven (7) captioned Invitations to Bid (ITB) soliciting bids for meat, dairy, and poultry products for various State agencies for the period July 1, 2003 through September 30, 2003. These contracts are put out for bid quarterly. Each solicitation requested prices for a number of products identified as separate line items in each ITB. Bids were submitted on eMaryland Marketplace, the State's Internet-based procurement system, by a number of bidders, including Appellant.
2. Each ITB provided that the basis of award was the lowest responsive and responsible bid for each line item, and if a bidder submitted the lowest responsive and responsible bid for multiple line items, awards to that bidder for all line items

awarded would be consolidated into one contract (Blanket Purchase Order). Appellant was the low bidder on one or more line items in each of the seven (7) solicitations.

3. The Procurement Officer, Ms. Catherine Seiler, rejected Appellant's bids on the ground that Appellant was not a responsible bidder based on unacceptable performance of past contracts on which Appellant performed either as the prime contractor or as the subcontractor of Karetas Foods, Inc. (Karetas).
4. On June 9, 2003 Appellant filed a timely protest against the rejection of its bids.
5. On June 17, 2003 the Procurement Officer denied the protest, and from that denial Appellant appealed to this Board on June 30, 2003.
6. As of the time of the filing of the Agency Report on July 11, 2003 all contracts involved in the captioned solicitations have been awarded pursuant to COMAR 21.10.02.11B.
7. Appellant did not comment on the Agency Report and neither party requested a hearing.

Decision

After checking references provided by Appellant and obtaining or reviewing information concerning Appellant's performance as prime contractor or subcontractor under other State contracts for supplying similar goods, the Procurement Officer rejected Appellant's low bids on the ground that Appellant was not a responsible bidder.

DGS had previously awarded a number of contracts for meat, dairy, and poultry products to Karetas. Three of those contracts were terminated for default on January 23, 2003. A fourth contract with Karetas was terminated for default on February 20, 2003, and a fifth was terminated for default on February 27, 2003. Appellant is owned and operated by Wayne Sody. Mr. Sody was listed as the "Contact" for Karetas on Karetas's bids for all five of the terminated contracts.

Mr. Sody represented himself as being a subcontractor of Karetas

for performance of the contracts awarded to Karetas as did John Friedmann, President of Karetas. It was Mr. Sody who responded to letters sent by the DGS Procurement Officer to Karetas complaining about Karetas's performance.

The record reflects that in the past three (3) years DGS has received complaints from several facilities or institutions about the performance of Karetas, Wayne Sody, or Sody Enterprises. On the other hand, several facilities or institutions in May of 2003 gave the Procurement Officer favorable reports of Sody's (Mr. Sody, Appellant, or Karetas) performance.

Nevertheless, the record reflects that on February 21, 2003, DGS rejected Appellant's bids for ITB No. 001IT814145, Meat, Dairy and Poultry for MCI-H and ITB No. 001IT814154, Meat, Dairy and Poultry for Western Maryland Center and Maryland School for the Deaf - Frederick, on the ground that Appellant was not a responsible bidder. On February 20, 2003, DGS also rejected bids of Karetas for ITB No. 001IT814200, Juices for Maryland School for the Deaf - Frederick and Columbia, and for ITB No. 001IT814144, Meat, Dairy and Poultry Products for RICA-Rockville and the Waxter Children's Center, on the ground that Karetas was not a responsible bidder.

Poor performance of prior State contracts provides a rational basis for the Procurement Officer to reject a bid on the ground that the bidder is not responsible. Data Systems Supply Co., MSBCA 1399, 2 MSBCA ¶ 192 (1998); Customer Engineer Services, Inc., MSBCA 1332, 2 MSBCA ¶ 156 (1987).

Even if reasonable people might disagree as to whether or not the past performance of a contractor was such as to warrant a finding that the contractor is not responsible, the decision is left to the discretion and judgment of the procurement officer. Asplundh Tree Expert Company, MSBCA 2087, 5 MSBCA ¶ 449 (1998); Covington Machine and Welding Co., MSBCA 2051, 5 MSBCA ¶ 436 (1998); Data Systems, *supra*; Customer Engineer, *supra*. This Board recognized the rationale for this basic rule in Aquatel Industries, Inc., MSBCA 1192, 1 MSBCA

¶ 82 (1984):

[A]ny question concerning . . . a bidder's qualifications and responsibility is solely for determination by the contracting agency with which this [Board] will not interfere in the absence of a showing of bad faith or lack of a reasonable basis thereof. 38 Comp. Gen. 572, 578; KECO Industries, Inc., 203 Ct. Cl. 566, 576 (1974). In 39 Comp. Gen. 705 at p. 711 this basic rule is explained as follows:

. . . The projection of a bidder's ability to perform if awarded a contract is of necessity a matter of judgment. While such judgment should be based on fact and should be arrived at in good faith, it must properly be left largely to the sound administrative discretion of the contracting offices involved, since they are in the best position to assess responsibility, they must bear the major brunt of any difficulties experienced by reason of the contractor's lack of ability, and they must maintain the day to day relations with the contractor on behalf of the Government. For these reasons, it would be unreasonable to superimpose the judgment of our Office or any [other] agency or group on that of the contracting officials

Aquatel, *supra* at p. 4.

As long as there is a rational basis for the procurement officer's determination that a bidder is not responsible, even if reasonable people might disagree, this Board will not substitute its judgment for that of the procurement officer.

Attachments to the Agency Report reflect many instances of the failure of Appellant, either as prime contractor or as a subcontractor to Karetas, to meet the requirements of similar State contracts, including: late delivery, failure to deliver, and delivery of less than ordered; substitution of unacceptable, non-

conforming products; delivery of unfrozen food; delivery of discolored food; food labeled "experimental" or "test" products; delivery of outdated products; and food without proper grading certificate or US Grade A shield.

While a few facilities and institutions have expressed satisfaction with Appellant, the documents reflecting unsatisfactory performance from other facilities and institutions provide the rational basis required to support the Procurement Officer's determination herein that Appellant is not responsible. Therefore, based on the record, the Board will uphold the Procurement Officer's rejection of Appellant's bids and deny the appeal.

Wherefore it is Ordered this day of August, 2003 that the appeal is denied.

Dated:

Robert B. Harrison III
Board Member

I Concur:

Michael J. Collins
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 2353, appeal of Sody Enterprises, Inc. under DGS Solicitations Nos. 001IT814368, 001IT814370, 001IT814375, 001IT814376, 001IT814383, 001IT814386, and 001IT814387.

Dated:

Michael L. Carnahan
Deputy Recorder